

**PROJECT AGREEMENT
NEXT GENERATION KENTUCKY INFORMATION HIGHWAY PROJECT**

**The Commonwealth of Kentucky
(the “Authority”)
and
KentuckyWired Infrastructure Company, Inc.
 (“Project Co”)**

Dated: September 3, 2015

TABLE OF CONTENTS

		Page
1.	INTERPRETATION	1
	1.1 Definitions	1
	1.2 Interpretation.....	2
	1.3 Schedules	2
2.	GENERAL PROJECT TERMS	2
	2.1 Term and Termination.....	2
	2.2 Document Deliveries.....	3
	2.3 Assumption of Risk	3
	2.4 Opportunities	3
	2.5 General Duty of Project Co to Mitigate.....	3
	2.6 General Duty of Authority to Mitigate.....	3
	2.7 Representatives	4
	2.8 Key Individuals.....	4
	2.9 Naming	4
	2.10 Signs.....	4
	2.11 Early Works	5
	2.12 Performance Security	5
3.	AUTHORITY'S GENERAL OBLIGATIONS.....	5
	3.1 Payments.....	5
	3.2 Limitation on Payments.....	5
	3.3 Provision of Lands	6
	3.4 Permitting Assistance	6
	3.5 Authority's Representations and Warranties	6
	3.6 Purchase of Designated Equipment.....	7
	3.7 Authority Common Carrier Covenant	7
	3.8 Authority Tax Monitoring and Compliance Covenant.....	8
	3.9 Pole Attachment Agreements.....	8
	3.10 Procurement Protest or Challenge	9
4.	PROJECT CO'S GENERAL OBLIGATIONS	10
	4.1 General Obligations Re: Project.....	10
	4.2 Records and Reports	10
	4.3 No Other Business.....	10
	4.4 Project Co Persons	10
	4.5 Use of Sub-Contractors.....	10
	4.6 Project Implementation Agreement and Project Contracts	11
	4.7 Costs of Request for Consent	12
	4.8 Replacement Project Implementation Agreement or Project Contract	12
	4.9 Delivery of Amended Project Implementation Agreement or Project Contracts	12
	4.10 Permits	13
	4.11 Project Co's Representations and Warranties	13
	4.12 Responses to Authority Inquiries.....	14
	4.13 Project Co Common Carrier Covenant.....	14
	4.14 Project Co Tax Compliance Covenant	14
	4.15 Project Co's Obligations re Third Party Infrastructure Agreements.....	15

TABLE OF CONTENTS

(continued)

	Page
5. FINANCING OF THE PROJECT	16
5.1 Compliance with Senior Financing Agreements	16
5.2 Changes to Senior Financing Agreements	16
5.3 Restrictions on Refinancing	16
5.4 Refinancing Process	16
5.5 Authority Share of Refinancing Gain	17
5.6 Payment to the Authority	17
5.7 Calculation of Refinancing Gain	17
5.8 Audit Rights	17
6. INSURANCE, DAMAGE AND DESTRUCTION	18
6.1 Insurance Coverage	18
6.2 Project Co's Obligations - Damage or Destruction During Construction Period	18
6.3 Insufficient Insurance	18
6.4 Uncollectible Insurance Receivables	19
6.5 Application of Insurance Proceeds If No Termination	19
6.6 Application of Insurance Proceeds In Case of Termination	19
6.7 Standards of Repair, Replacement or Restoration	20
6.8 Mitigation	20
6.9 Risks Becoming Uninsurable	20
6.10 Consequences of Risks Becoming Uninsurable	20
6.11 Subrogation	21
6.12 Continuing Attempts to Insure Uninsurable Risks	21
6.13 Uninsurable Risks Becoming Insurable	22
7. CHANGES, MINOR WORKS AND INNOVATION PROPOSALS	22
7.1 Changes Required by the Authority	22
7.2 Innovation and Value Engineering	22
7.3 Minor Works	22
8. SUPERVENING EVENTS	22
8.1 Supervening Events	22
8.2 Procedures Upon the Occurrence of a Supervening Event	22
8.3 Project Co's Entitlements Upon Occurrence of a Compensation Event	24
8.4 Project Co's Entitlements Upon Occurrence of a Relief Event	25
8.5 Project Co's Entitlements Upon Occurrence of an Excusing Event	27
8.6 Parties' Entitlements Upon Occurrence of a Force Majeure Event	27
8.7 Parties' Entitlements Upon Occurrence of an Eligible Change in Law Event	28
8.8 Parties' Entitlements Upon Occurrence of a Change in Law	29
8.9 Labor Disputes	30
8.10 Payments in Respect of Supervening Events	30
8.11 Supervening Events Mitigated by Change	30
8.12 Delay in Notification	30
8.13 Equivalent Project Relief	30
9. INDEMNITIES AND LIMITS ON LIABILITIES AND REMEDIES	31

TABLE OF CONTENTS

(continued)

	Page
9.1	Project Co's Obligation to Indemnify31
9.2	Conduct of Third Person Claims32
9.3	General Obligation to Pursue Third Person Recovery.....33
9.4	Waiver of Remedies.....34
9.5	Remedies Cumulative.....34
9.6	Limitation on Authority's Remedies34
9.7	Limitation on Project Co's Remedies.....35
9.8	Limits on Monetary Compensation35
9.9	No Liability for Indirect Losses36
9.10	No Liability for Governmental Activities36
9.11	Authority's Right of Set Off.....36
9.12	Project Co's Right of Set Off36
9.13	Undisputed Amounts and Interest on Disputed Amounts36
9.14	Interest on Overdue Amounts36
10.	LUMP SUM PAYMENTS AND AVAILABILITY PAYMENT ADJUSTMENTS37
10.1	Lump Sum Payments.....37
10.2	Financing of Lump Sum Payment Amounts37
10.3	Adjustments to Availability Payments.....38
10.4	Audit of Financial Model.....39
11.	AUTHORITY'S STEP-IN RIGHTS39
11.1	Authority's Step-in Rights.....39
11.2	Authority's Rectification Rights.....40
11.3	Notice of NG-KIH System Change41
11.4	No Effect on Project Co's Design and Construction Responsibility.....41
11.5	Allocation of Costs for Authority Actions.....41
12.	PROJECT CO EVENTS OF DEFAULT41
12.1	Project Co Events of Default41
12.2	Notification42
12.3	Project Co Material Breach Cure and Remedial Program43
12.4	Authority Termination Right.....43
12.5	Replacement of Non-Performing Service Provider44
12.6	The Authority's Costs.....45
13.	AUTHORITY EVENTS OF DEFAULT.....45
13.1	Authority Events of Default.....45
13.2	Notification46
13.3	Project Co's Options46
13.4	Project Co's Costs47
14.	PROCEDURE ON TERMINATION.....47
14.1	Compensation on Termination47
14.2	Transfer to the Authority of Assets, Contracts, etc.48
14.3	Transition Out Arrangements50
14.4	Project Co to Cooperate.....51
14.5	Project Co Materials.....51
14.6	Continued Performance52

TABLE OF CONTENTS

(continued)

	Page
15. DISPUTE RESOLUTION.....	52
15.1 Procedure	52
16. ASSIGNMENT/CHANGE IN CONTROL.....	52
16.1 Limitations on Assignment of Project by Project Co	52
16.2 Limitations on Change in Control	53
16.3 Factors Authority May Consider	53
16.4 Limitations on Assignment of Project by Authority.....	53
16.5 Costs of Request for Consent	54
17. GENERAL	54
17.1 Confidentiality	54
17.2 Public Communications.....	55
17.3 Law of Agreement.....	56
17.4 Venue	56
17.5 Entire Agreement, Waivers and Consents in Writing.....	56
17.6 Notices.....	57
17.7 Further Assurances.....	58
17.8 Counterparts	58
17.9 No Partnership.....	59
17.10 Survival.....	59

SCHEDULES

SCHEDULE 1	DEFINITIONS AND INTERPRETATION
SCHEDULE 2	DESIGN AND CONSTRUCTION PROTOCOLS
APPENDIX 2A	INDEPENDENT CERTIFIER AGREEMENT
APPENDIX 2B	DESIGN REVIEW
APPENDIX 2C	INITIAL PROJECT SCHEDULE
APPENDIX 2D	INITIAL SITE ACCESS PLAN
APPENDIX 2E	EXPECTED PERMIT TIMING
APPENDIX 2F	REVIEW PROCESS FLOW DIAGRAM
SCHEDULE 3	DESIGN AND CONSTRUCTION SPECIFICATIONS
APPENDIX 3A	PRODUCT SERVICE CATALOG
APPENDIX 3B	MIGRATION ROLES AND RESPONSIBILITIES
APPENDIX 3C	DESIGNATED EQUIPMENT
APPENDIX 3D	DESIGNATED EQUIPMENT PROTOCOL

TABLE OF CONTENTS
(continued)

Page

APPENDIX 3E	DESIGN MAP
SCHEDULE 4	SERVICES PROTOCOLS AND SPECIFICATIONS
APPENDIX 4A	SERVICES SPECIFICATIONS
APPENDIX 4B	HANDBACK REQUIREMENTS
SCHEDULE 5	INSURANCE REQUIREMENTS
APPENDIX 5A	LENDER ENDORSEMENTS
SCHEDULE 6	CHANGES, MINOR WORKS AND INNOVATION PROPOSALS
SCHEDULE 7	LANDS
APPENDIX 7A	DESCRIPTION OF SITE LOCATIONS
SCHEDULE 8	PAYMENTS
APPENDIX 8A	BASELINE POLE ATTACHMENT COSTS
SCHEDULE 9	COMPENSATION ON TERMINATION
SCHEDULE 10	LENDERS' REMEDIES AGREEMENT
SCHEDULE 11	PROJECT CONTRACTOR COLLATERAL AGREEMENT
SCHEDULE 12	PROJECT CO'S OWNERSHIP INFORMATION
SCHEDULE 13	DISPUTE RESOLUTION PROCEDURE
APPENDIX 13A	REFEREE AGREEMENT
SCHEDULE 14	RECORDS AND REPORTS
SCHEDULE 15	FINANCIAL MODEL
SCHEDULE 16	COMMUNICATION ROLES
SCHEDULE 17	KEY INDIVIDUALS
SCHEDULE 18	COMPLETION DOCUMENTS
SCHEDULE 19	MARKET TESTING PROCEDURE
SCHEDULE 20	THIRD PARTY INFRASTRUCTURE TERM SHEETS
SCHEDULE 21	MASTER AGREEMENT

PROJECT AGREEMENT

THIS PROJECT AGREEMENT dated as of September 3, 2015 is entered into:

BETWEEN:

The Commonwealth of Kentucky
(the “**Authority**”)

AND:

KentuckyWired Infrastructure Company, Inc.
(“**Project Co**”)

WHEREAS:

- A. Pursuant to RFP 758 1500000003-5 issued July 11, 2014 (as amended from time to time, the “**RFP**”), the Authority selected Macquarie Infrastructure Developments LLC to design, build, finance, operate and maintain the NG-KIH System.
- B. On December 22, 2014, the Authority and Macquarie Infrastructure Developments LLC entered into a master agreement (as amended from time to time, the “**Master Agreement**”) in respect of the Project, a copy of which is attached as Schedule 21 [Master Agreement].
- C. Macquarie Infrastructure Developments LLC assigned its rights and obligations under the Master Agreement to Project Co.
- D. The Authority and Project Co have agreed to enter into this Project Agreement whereby Project Co will design, build, finance, operate and maintain the NG-KIH System, all as more particularly described in this Project Agreement.
- E. Project Co will, in turn, enter into the Project Implementation Agreement with Operations Co whereby Operations Co will design, build, operate and maintain the NG-KIH System, all as more particularly described in the Project Implementation Agreement.
- F. The rights and obligations of the parties will be governed by the terms and conditions set out in this Project Agreement.

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

1. INTERPRETATION

1.1 Definitions

In this Project Agreement, unless the context otherwise requires, capitalized terms will have the meanings set out in Schedule 1 [Definitions and Interpretation]. Certain words and expressions

are defined within the schedules hereto and such definitions will apply, unless the context otherwise requires, in all other parts of this Project Agreement whether or not Schedule 1 [Definitions and Interpretation] contains a cross-reference to such definitions.

1.2 Interpretation

Unless the context otherwise requires, this Project Agreement will be interpreted and construed in accordance with the provisions set out in Schedule 1 [Definitions and Interpretation].

1.3 Schedules

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

2. GENERAL PROJECT TERMS

2.1 Term and Termination

The term of this Project Agreement (the “**Term**”) will commence on the Effective Date and will continue to the Expiration Date unless earlier terminated:

- (a) by the Authority at any time in its discretion, and at the convenience of the Authority, by notice stating that termination is for convenience pursuant to this Section 2.1(a);
- (b) by either party pursuant to Section 6.3 in connection with insufficient insurance;
- (c) by either party pursuant to Section 6.4 in connection with uncollectible Insurance Receivables;
- (d) by the Authority pursuant to Section 6.10 in connection with a Principal Insured Risk becoming Uninsurable;
- (e) by either party pursuant to Section 8.4(c) or 8.4(e) in connection with a Relief Event;
- (f) by either party pursuant to Section 8.6(c) or 8.6(d) in connection with a Force Majeure Event;
- (g) by the Authority pursuant to Section 12.4 in connection with a Project Co Event of Default; or
- (h) by Project Co pursuant to Section 13.3 in connection with an Authority Event of Default.

Unless otherwise specified, the Termination Date for such earlier terminations will be the date notice of termination is given by one party to the other party in accordance with this Project Agreement. Except as referred to in this Section 2.1, neither party will have the right to terminate this Project Agreement.

2.2 Document Deliveries

Concurrently with the execution and delivery of this Project Agreement:

- (a) Project Co will deliver to the Authority the documents described in Section 2 of Schedule 18 [Completion Documents]; and
- (b) the Authority will deliver to Project Co the documents described in Section 3 of Schedule 18 [Completion Documents].

2.3 Assumption of Risk

Except to the extent expressly allocated to the Authority or otherwise provided for under this Project Agreement, all risks, costs and expenses in relation to the performance by Project Co of its obligations under this Project Agreement are allocated to, and accepted by, Project Co as its entire and exclusive responsibility.

2.4 Opportunities

Except as expressly provided in this Project Agreement, or as may be specifically agreed in writing between the Authority and Project Co during the Term, the Authority reserves the right to all commercial and other opportunities for, or related to, the Project and the Lands.

2.5 General Duty of Project Co to Mitigate

In all cases where Project Co is entitled to receive from the Authority any compensation in addition to the payments described in Sections 3.1(a) and 3.1(b), costs, damages or extensions of time, Project Co will use all commercially reasonable efforts to mitigate such amount required to be paid by the Authority to Project Co under this Project Agreement, or the length of the extension of time. Upon request from the Authority, Project Co will promptly submit a detailed description, supported by all such documentation as the Authority may reasonably require, of the measures and steps taken by Project Co to mitigate and meet its obligations under this Section 2.5.

2.6 General Duty of Authority to Mitigate

In all cases where the Authority is entitled to receive from Project Co any compensation, costs or damages, but not in any other case, the Authority will use all commercially reasonable efforts to mitigate such amount required to be paid by Project Co to the Authority under this Project Agreement, provided that such obligation will not require the Authority to:

- (a) take any action which is contrary to the public interest, as determined by the Authority in its discretion, or applicable Law; or
- (b) alter the amount of any Deductions it is entitled to make in accordance with Schedule 8 [Payments].

The Authority will have no obligation to mitigate, implied or otherwise, except as set out in this Section 2.6 or as otherwise expressly set out in this Project Agreement. Upon request from Project Co, the Authority will promptly submit a detailed description, supported by all such

documentation as Project Co may reasonably require, of the measures and steps taken by the Authority to mitigate and meet its obligations under this Section 2.6.

2.7 Representatives

Project Co and the Authority will each have a Design and Construction Representative, appointed in accordance with and with the rights and responsibilities set out in Schedule 2 [Design and Construction Protocols], and an Operating Period Representative, appointed in accordance with and with the rights and responsibilities set out in Schedule 4 [Services Protocols and Specifications]. Project Co's Design and Construction Representative and Operating Period Representative may be the same person. The Authority may, in its discretion, appoint the same person to any or all of its Representative positions. From time to time, the Authority may by notice in writing to Project Co and Operations Co change the signing authority of any or all of the Authority Representatives and appoint or remove one or more other persons having signing authority.

2.8 Key Individuals

Attached as Schedule 17 [Key Individuals] is a list of persons (the "**Key Individuals**") that Project Co will utilize in undertaking the Design and the Construction. With respect to each of the Key Individuals:

- (a) Project Co will use commercially reasonable efforts to retain the Key Individuals to perform the duties for the period described in Schedule 17 [Key Individuals]; and
- (b) if for any reason a Key Individual resigns or is otherwise unavailable to perform the duties described in Schedule 17 [Key Individuals], Project Co will use commercially reasonable efforts to retain a replacement with similar expertise and experience to the unavailable Key Individual, satisfactory to the Authority, acting reasonably, and Project Co will not replace such Key Individual without the Authority's consent, acting reasonably.

No later than 6 months prior to the start of the Operating Period, Project Co will notify the Authority of the name and qualifications of the person designated by Project Co to be the "General Manager" or equivalent as of the start of the Operating Period, and such person will, from the date of such notice, be a Key Individual for the purposes of Section 2.8(b) above.

2.9 Naming

The Authority will have the exclusive right to name the NG-KIH System and any parts thereof.

2.10 Signs

Subject to Section 7.14 of Schedule 2 [Design and Construction Protocols], Project Co will not erect or maintain any signs on the Lands or the NG-KIH System, other than warning, safety and instructional signs or signs required by applicable Laws, without the written consent of the Authority.

2.11 Early Works

The parties acknowledge and agree that the early works undertaken pursuant to the Master Agreement (the “**Early Works**”) terminated on the Effective Date and that the Early Works performed prior to the Effective Date are deemed to have been undertaken by Project Co pursuant to this Project Agreement. Project Co accepts and assumes the risk, responsibility and liability for and in respect of the performance of the Early Works in accordance with the provisions of this Project Agreement.

2.12 Performance Security

The parties acknowledge and agree that the performance security required to be delivered by or on behalf of Project Co in connection with the Project is the performance security to be provided by the Design-Builder pursuant to the Design-Build Agreement and the Service Provider pursuant to the Services Contract.

3. AUTHORITY’S GENERAL OBLIGATIONS

3.1 Payments

Subject to Project Co meeting the requirements for payment set out in this Project Agreement, the Authority will pay Project Co amounts expressly provided for herein, including:

- (a) the Milestone Payment as set out in Schedule 8 [Payments];
- (b) the Availability Payments as set out in Schedule 8 [Payments];
- (c) the Termination Payments as set out in Schedule 9 [Compensation on Termination];
- (d) amounts owing under Section 3.6 (Purchase of Designated Equipment);
- (e) amounts owing under Section 6 (Insurance, Damage and Destruction);
- (f) amounts owing under Section 7 (Changes, Minor Works and Innovation Proposals);
- (g) amounts owing under Section 8 (Supervening Events);
- (h) amounts owing under Section 9 (Indemnities and Limits on Liabilities and Remedies); and
- (i) amounts owing pursuant to the final resolution of a Dispute in accordance with the Dispute Resolution Procedure set out in Schedule 13 [Dispute Resolution Procedure],

in accordance with the provisions of this Project Agreement and all applicable Laws.

3.2 Limitation on Payments

Other than the payments expressly provided for herein, Project Co will have no right to any further payment from the Authority in connection with the Design, Construction, Services or

System Refresh or otherwise in connection with the Project. The parties acknowledge and agree that, other than as expressly provided for herein, this Project Agreement is a fixed price contract pursuant to which Project Co takes the risk of cost overruns and is entitled to the benefit of cost saving. As such, the costs incurred by Project Co in connection with the Project, and the allocation of such costs, are within Project Co's sole discretion.

3.3 Provision of Lands

The Authority will make the Lands available for the Project in accordance with Schedule 7 [Lands] and the parties' rights and obligations in respect of the Lands are set out in such Schedule 7.

3.4 Permitting Assistance

The Authority shall, at its own cost, provide or cause to be provided such information, documentation and administrative assistance as Project Co may request and as the Authority may reasonably be able to provide, and shall execute such applications as are required to be in its name, to enable Project Co to obtain, maintain or renew any Permit or to demonstrate compliance with any Permit. The Authority shall provide or cause to be provided such information, documentation and assistance and/or execute such applications pursuant to this Section 3.4 within 10 Business Days of receipt of Project Co's request or such shorter period as is reasonable in the circumstances.

Subject to Section 8 (Supervening Events) and Section 2.1 of Schedule 7 [Lands], the Authority shall not be responsible for obtaining or for any delay in obtaining or for the failure of Project Co to obtain any Permit, unless such delay or failure is caused by any act or omission of the Authority. For greater certainty, the Authority shall not be obligated to:

- (a) exercise any other of its legal rights in order to avoid or eliminate the requirement to obtain any Permit; or
- (b) automatically grant to Project Co any Permit for which it is the authorizing entity.

The Authority will apply its usual procedures and criteria in considering applications from Project Co for any Permit. For greater certainty, nothing in this Project Agreement shall fetter the Authority's discretion in considering any application by Project Co for a Permit for which the Authority is the authorizing entity.

3.5 Authority's Representations and Warranties

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

- (a) the Authority has full power and capacity to enter into, carry out the transactions contemplated by and duly perform all its obligations contained in this Project Agreement and all other documents, instruments and agreements required to be executed and delivered by the Authority pursuant to this Project Agreement;
- (b) the execution and delivery of this Project Agreement and all other documents, instruments and agreements required to be executed and delivered by the Authority pursuant to this Project Agreement, and the completion of the transactions contemplated by this Project Agreement, have been duly authorized

by all necessary action on the part of the Authority, and this Project Agreement has been duly executed and delivered by the Authority and constitutes a legal, valid and binding obligation of the Authority enforceable in accordance with its terms, except to the extent that its enforceability may be limited by bankruptcy, insolvency or other similar laws affecting creditors' rights from time to time in effect and equitable principles of general application;

- (c) all required third party consents to the execution by the Authority of, and performance of its obligations under, this Project Agreement have been received;
- (d) to the extent that the chief officer selected by the Authority for the Project Has Knowledge, there are no facts or information relating to the Project which the Authority has not disclosed to Project Co and which, if learned by Project Co, would reasonably be expected to materially affect Project Co's evaluation of the risks Project Co is assuming pursuant to this Project Agreement, Operations Co's evaluation of the risks Operations Co is assuming pursuant to the Project Implementation Agreement or any Project Contractor's evaluation of the risks such Project Contractor is assuming pursuant to its Project Contract; and
- (e) the procurement process pursuant to which Project Co was selected to enter into this Project Agreement was conducted in accordance with the RFP and all applicable Laws, including KRS Chapter 45A of the Kentucky Model Procurement Code.

3.6 Purchase of Designated Equipment

The Authority will purchase the Designated Equipment and arrange for delivery of the Designated Equipment to Project Co (or as Project Co may direct) in accordance with the Designated Equipment Protocol. The Authority will, on the System Completion Date, make a payment to Project Co in the amount of \$1,354,000, which reflects the difference between the original budget for the Designated Equipment and \$28,646,000. In addition, to the extent that the amount actually paid by the Authority in respect of Designated Equipment is less than \$28,646,000 as a result of a change in the type or quantity of Designated Equipment required by Project Co, the Authority will, on the System Completion Date, make a further payment to Project Co in the amount of the difference between \$28,646,000 and the amount actually paid by the Authority in respect of Designated Equipment (taking into account changes in the type or quantity of Designated Equipment only).

3.7 Authority Common Carrier Covenant

The Authority covenants not to take or fail to take any action that would result in the designation of Project Co or any Project Co Person as a Common Carrier or in the application of the Common Carrier Regulations to Project Co, any Project Co Person or the NG-KIH System or any part thereof. The Authority acknowledges and agrees that the performance by Project Co or any Project Co Person of obligations under this Project Agreement, the Project Implementation Agreement or any Project Contract does not require any Person, including Project Co or any Project Co Person, to be regulated as a Common Carrier and such obligations are not intended to constitute common carriage under applicable Laws.

3.8 Authority Tax Monitoring and Compliance Covenant

The Authority understands that Project Co is causing the Kentucky Economic Development Finance Authority (“**KEDFA**”) to issue certain bonds (the “**Bonds**”), the interest on which is intended to be excluded from the gross income of the holders thereof, and loan the proceeds of the Bonds to Project Co in order to provide funds to design and construct the NG-KIH System.

The Authority covenants that it shall not take any action or inaction, nor fail to take any action or permit any action to be taken, if any such action or inaction would adversely affect the exclusion from gross income for federal income tax purposes of the interest on the Bonds. Without limiting the generality of the foregoing, the Authority covenants that it will comply with the instructions and requirements of the Commonwealth Tax Certificate, which is attached as Exhibit B to the Tax Certificate and Agreement dated September 3, 2015, between Project Co and KEDFA and incorporated herein as if set forth fully herein. The Authority will, on a timely basis, provide Project Co and Operations Co with all necessary information with respect to the Authority’s Private Payment Monitoring Obligation (as defined in the Commonwealth Tax Certificate).

The Authority will provide funding to Project Co to cover any incremental costs of redeeming, defeasing or refinancing Bonds in connection with a Private Payment Remedial Action (as defined in the Commonwealth Tax Certificate).

Notwithstanding any other provision of this Project Agreement to the contrary, the covenants contained in this Section 3.8 shall survive the defeasance or payment in full of any and all the Bonds. As used in this Section 3.8, the term Bonds includes all obligations issued by KEDFA from time to time to finance or refinance the NG-KIH System.

3.9 Pole Attachment Agreements

The Authority will enter into each Pole Attachment Agreement required for the Project. During the Term, the Authority will, if applicable, renew each Pole Attachment Agreement no later than the expiration date set out in such Pole Attachment Agreement to ensure the continuous operation of the NG-KIH System. Subject to Project Co’s obligation to pay Pole Attachment Fees as set out in Section 3.5 of Appendix 4A [Services Specifications], the Authority will fulfill, or cause to be fulfilled, any of the other obligations under the Pole Attachment Agreements. The Authority will appoint Operations Co as its agent or designee pursuant to each Pole Attachment Agreement.

Since Pole Attachment Agreements had not been entered into with all Pole Providers as at the Effective Date, the parties acknowledge that there may be an increase or decrease in the Baseline Pole Attachment Costs.

Subject to the remaining provisions of this Section 3.9, Project Co will finalize a Simple Pole Attachment Agreement with each Pole Provider (other than a Material Telecommunications Company) in accordance with the Project Schedule and subject to the Authority’s right to review each Simple Pole Attachment Agreement before it is finalized in accordance with the agreed review procedure.

For clarity, Project Co will not be entitled to claim a Compensation Event in respect of any delay in obtaining a fully executed Simple Pole Attachment Agreement from each Pole Provider (other than a Material Telecommunications Company) during the Construction Period unless:

- (a) the Authority does not execute the finalized Simple Pole Attachment Agreement provided to the Authority by Project Co within 3 Business Days of receipt thereof; or
- (b) a Pole Provider refuses to enter into a Simple Pole Attachment Agreement.

For the five Pole Providers identified with a double asterisk in Appendix 8A [Baseline Pole Attachment Costs], Project Co will use commercially reasonable efforts to negotiate alternate (i) payment structures, including upfront payment of pole attachment rates, (ii) contract duration, including multi-year pole attachment agreements and/or (iii) other contractual terms and conditions that may result in a Complex Pole Attachment Agreement.

The Authority shall, at its own cost, provide or cause to be provided such information, documentation and assistance as Project Co may request and as the Authority may reasonably be able to provide to support the negotiation of any Complex Pole Attachment Agreement.

The parties agree to discuss certain of the Simple Pole Attachment Agreements that have been entered into by the Authority in order to determine whether approaching the relevant Pole Provider (each, a “**Targeted Pole Provider**”) could result in an amended commercial agreement with that Targeted Pole Provider (each, an “**Amended Pole Attachment Agreement**”) that would benefit the Project. The discussion between the parties will determine the list of Targeted Pole Providers to approach, if any, and the elements of the Complex Pole Attachment Agreement that would be presented to such Targeted Pole Provider (such as connections, trades, swaps). The parties will take into account any relevant factors in determining whether to approach a Targeted Pole Provider, including the impact or effect on the quality or delivery of the NG-KIH System or the Services, the relationship between the Authority and the Targeted Pole Provider and any negative impact or increased risk to Project Co, Operations Co, any Project Contractor or the Authority.

The parties acknowledge that the discussions between the parties referenced in the preceding paragraph and any negotiations with a Targeted Pole Provider resulting in an executed Amended Pole Attachment Agreement must occur during the Construction Period and in advance of any make-ready design work in respect of the Targeted Pole Provider’s poles (the “**Simple Pole Attachment Agreement Amendment Period**”).

If Project Co and the Targeted Pole Provider have negotiated an Amended Pole Attachment Agreement, Project Co will submit a Pole Attachment Proposal in accordance with Section 5 of Schedule 6 [Changes, Minor Works and Innovation Proposals]. The Authority agrees that it will not enter into an Amended Pole Attachment Agreement until it has completed the process set out in Section 5 of Schedule 6.

3.10 Procurement Protest or Challenge

The Authority will defend any protest or other challenge to the procurement process pursuant to which Project Co was selected to enter into this Project Agreement or to the Authority’s or Project Co’s right to proceed with the Project or any aspect thereof in connection with the procurement, to the extent that such protest or other challenge was denied following an initial review by the Secretary of the Finance and Administration Cabinet and the protester or challenger is seeking an injunction or other order of a court of competent jurisdiction resulting therefrom. The Authority will pay any costs incurred in defending the actions of the Authority related to the procurement process and the determination of the Secretary of the Finance and

Administration Cabinet. Project Co agrees to assist in the defense of the protest or challenge to the procurement process and will pay any costs incurred in defending the actions of Project Co related to the procurement process or to its interests in this Project Agreement. In connection with any legal proceedings related to a protest or other challenge to the procurement process as contemplated hereby, the parties, acting reasonably and in the best interests of the Project, will consider requesting that the protester or challenger be required to post an injunction bond.

4. PROJECT CO'S GENERAL OBLIGATIONS

4.1 General Obligations Re: Project

Subject to and in accordance with the provisions of this Project Agreement and all applicable Laws and Permits, Project Co will carry out the Design and Construction and perform the Services.

4.2 Records and Reports

Project Co will, at its own cost and expense, retain and maintain the records and reports referred to in Schedule 14 [Records and Reports] in accordance with such Schedule and in a form that is capable of audit by the Authority.

4.3 No Other Business

Project Co will not engage in any business or activity other than the business or activities conducted for the purpose of the Project or otherwise expressly permitted hereunder.

4.4 Project Co Persons

Project Co will, as between itself and the Authority, be responsible for, and not relieved of its obligations hereunder by, the acts, omissions, breaches, defaults, non-compliance, negligence and/or willful misconduct of any Project Co Person and all references in this Project Agreement to any act, omission, breach, default, non-compliance, negligence or willful misconduct of Project Co will be construed accordingly to include any act, omission, breach, default, non-compliance, negligence or willful misconduct committed by a Project Co Person.

4.5 Use of Sub-Contractors

Without limiting Section 4.4, the Authority acknowledges that Project Co may carry out the Design, Construction, Services and/or System Refresh by contracting such obligations to Operations Co, who will, in turn, contract all or part of its obligations under the Project Implementation Agreement to the Project Contractors, who may, in turn, contract all or part of their obligations under any Project Contract to one or more Sub-Contractors.

In respect of the Project:

- (a) Project Co will not contract with, or allow Operations Co or any of its Project Contractors or any Sub-Contractors to contract with, any Person that is a Restricted Person; and

- (b) Project Co will not utilize, and will not allow Operations Co or any of its Project Contractors or any Sub-Contractors to utilize, any materials from any Restricted State other than unprocessed raw materials and Non-Operative Components.

Notwithstanding the use of Operations Co, Project Contractors or Sub-Contractors, Project Co:

- (c) will not be relieved or excused from any of its obligations or liabilities under this Project Agreement; and
- (d) will remain liable to the Authority for the performance of all the covenants, obligations, agreements and conditions of this Project Agreement that are to be performed by Project Co.

4.6 Project Implementation Agreement and Project Contracts

Project Co will not:

- (a) terminate, or agree to or permit the termination of, all or any material part of the Project Implementation Agreement or any Project Contract except:
 - (1) as required to do so by the Authority pursuant to the provisions of this Project Agreement; or
 - (2) if there is an event of default under the Project Implementation Agreement or a Project Contract and Project Co terminates it in order to prevent or cure a Project Co Event of Default;
- (b) make, or agree to or permit the making of:
 - (1) any material amendment to the Project Implementation Agreement or any Project Contract, other than amendments (whether made by Change Certificate or otherwise) that are the direct and reasonable consequence of a Change; or
 - (2) any departure by any party from any material provision of the Project Implementation Agreement or any Project Contract;
- (c) permit Operations Co to assign or transfer to any Person any of Operations Co's rights or obligations under the Project Implementation Agreement, other than in accordance with the terms of the Project Implementation Agreement;
- (d) permit any Project Contractor to assign or transfer to any Person any of such Project Contractor's rights or obligations under a Project Contract, other than in accordance with the terms of such Project Contract; or
- (e) enter into, or permit the entering into of, any Project Contract other than those entered into on or before the Effective Date,

unless Project Co has, at its earliest practicable opportunity, submitted to the Authority notice of the proposed course of action (and any relevant documentation) and the Authority has consented to such course of action, such consent not to be unreasonably withheld or delayed.

The Authority will give or deny such consent within: (i) 15 Business Days of receipt of such notice and all relevant documentation, if Project Co is seeking to terminate the Project Implementation Agreement or a Project Contract and the Project Implementation Agreement or such Project Contract may, in accordance with its terms, be terminated immediately; and (ii) 30 Business Days of receipt of such notice and all relevant documentation in all other cases, and, if the Authority fails to give or deny its consent within such time periods, it will be deemed not to have given its consent. In determining whether to provide such consent and without limiting the Authority's discretion, it will be reasonable for the Authority to refuse its consent to the proposed course of action if:

- (f) the proposed assignee, transferee or party entering into the Project Implementation Agreement or any Project Contract is a Restricted Person; or
- (g) the proposed course of action could, in the reasonable opinion of the Authority, have a material adverse effect on the Authority or the Project.

4.7 Costs of Request for Consent

If Project Co requests consent to a proposed course of action pursuant to Section 4.6, Project Co will pay, without duplication, the Authority's reasonable internal administrative and personnel costs and all reasonable out-of-pocket costs in connection with considering any such request. At the time of such request, Project Co will make a payment to the Authority in the amount of \$5,000 (Index Linked) against its obligations under this Section 4.7. After the Authority renders its decision, the Authority will either refund any overpayment or invoice Project Co for any additional amounts owing under this Section 4.7 and Project Co will promptly pay such amount to the Authority.

4.8 Replacement Project Implementation Agreement or Project Contract

If the Project Implementation Agreement or any Project Contract at any time lapses, terminates, or otherwise ceases to be in full force and effect (whether by reason of expiration or otherwise), unless the goods, services or rights which were the subject matter of the Project Implementation Agreement or such Project Contract are no longer reasonably required for the Project or the Project Implementation Agreement or such Project Contract has been fully performed and all liabilities and obligations thereunder have been fully discharged:

- (a) Project Co will forthwith enter into, or cause to be entered into, a replacement contract or contracts upon the same or substantially similar terms as the contract so replaced (to the extent reasonably practicable); and
- (b) if the Authority and the relevant Project Contractor had entered into a Project Contractor Collateral Agreement with respect to the replaced Project Contract, Project Co will forthwith enter into, or cause the replacement Project Contractor to enter into, a Project Contractor Collateral Agreement.

4.9 Delivery of Amended Project Implementation Agreement or Project Contracts

If at any time any amendment is made to the Project Implementation Agreement or any Project Contract, or a replacement Project Implementation Agreement or Project Contract (or any agreement which materially affects the interpretation or application of the Project Implementation Agreement or any Project Contract) is entered into, Project Co will deliver to the

Authority a copy of each such amendment or agreement within 10 Business Days of the date of its execution or creation, certified as a true copy by an officer of Project Co.

4.10 Permits

- (a) Subject to Section 3.9, Section 8 (Supervening Events) and Section 2.1 of Schedule 7 [Lands], Project Co shall, at its own cost and risk and in accordance with the Project Schedule obtain, maintain and, as applicable, renew all Permits in accordance with Schedule 2 [Design and Construction Protocols] and comply with all Permits in accordance with their terms.
- (b) Where a Permit has requirements that may impose any conditions, liabilities or obligations on the Authority or any Authority Person, Project Co shall not obtain, amend or renew (other than upon the same terms and conditions) such Permit without the prior written consent of the Authority, not to be unreasonably withheld or delayed, provided that the Authority shall not be responsible for obtaining or for the failure of Project Co to obtain any Permit. The Authority shall comply, or shall require compliance, with any conditions, liabilities or obligations as are imposed on the Authority or any Authority Person by the requirements of any Permit obtained with the Authority's consent under this Section 4.10(b).
- (c) Project Co shall, at its own cost, provide or cause to be provided such information, documentation, and administrative assistance as the Authority may request and as Project Co may reasonably be able to provide to enable the Authority to demonstrate compliance with any Permit. Project Co shall provide or cause to be provided such information, documentation and assistance pursuant to this Section 4.10(c) within 10 Business Days of receipt of the Authority's request.

4.11 Project Co's Representations and Warranties

Project Co represents and warrants to the Authority that:

- (a) Project Co is a non-profit corporation duly created and validly existing under the laws of Kentucky and has full power and capacity to enter into, carry out the transactions contemplated by and duly perform all its obligations contained in this Project Agreement and all other documents, instruments and agreements required to be executed and delivered by Project Co pursuant to this Project Agreement;
- (b) the information set out in Schedule 12 [Project Co's Ownership Information] is true and correct and, except as set out in Schedule 12 [Project Co's Ownership Information], there is, as at the date of this Project Agreement, no outstanding offer, agreement or other arrangement pursuant to which:
 - (1) any Person is obligated to subscribe for or take by means of transfer or by conversion any form of investment, security or voting rights in Project Co; or
 - (2) Project Co's formation documents will be amended or otherwise altered;

- (c) to Project Co's knowledge, none of Project Co, Persons who control Project Co, Operations Co, Persons who control Operations Co, the Project Contractors or the Sub-Contractors are Restricted Persons;
- (d) the execution and delivery of this Project Agreement and all other documents, instruments and agreements required to be executed and delivered by Project Co pursuant to this Project Agreement, and the completion of the transactions contemplated by this Project Agreement, have been duly authorized by all necessary action on the part of Project Co, and this Project Agreement has been duly executed and delivered by Project Co and constitutes a legal, valid and binding obligation of Project Co enforceable in accordance with its terms, except to the extent that its enforceability may be limited by bankruptcy, insolvency or other similar laws affecting creditors' rights from time to time in effect and equitable principles of general application; and
- (e) all required third party consents to the execution by Project Co of, and performance of its obligations under, this Project Agreement have been received, other than any Permits and other approvals contemplated herein to be obtained after the Effective Date in connection with the Project.

4.12 Responses to Authority Inquiries

Unless otherwise specified in this Project Agreement, Project Co will respond in writing to all written inquiries received from the Authority as soon as reasonably practicable and in any event within 10 Business Days of receipt of such inquiry or such longer period as the circumstances and content of the inquiry may reasonably require.

4.13 Project Co Common Carrier Covenant

Project Co covenants not to take or fail to take any action that would result in the designation of Project Co or any Project Co Person as a Common Carrier or in the application of the Common Carrier Regulations to Project Co, any Project Co Person or the NG-KIH System or any part thereof. Project Co acknowledges and agrees that the performance by Project Co or any Project Co Person of obligations under this Project Agreement, the Project Implementation Agreement or any Project Contract is not intended to require any Person, including Project Co or any Project Co Person, to be regulated as a Common Carrier and such obligations are not intended to constitute common carriage under applicable Laws.

4.14 Project Co Tax Compliance Covenant

Project Co covenants that it shall not take any action or inaction, nor fail to take any action or permit any action to be taken, if any such action or inaction would adversely affect the exclusion from gross income for federal income tax purposes of the interest on the Bonds. Without limiting the generality of the foregoing, Project Co covenants that it will comply with the instructions and requirements of the Tax Certificate and Agreement dated September 3, 2015, between Project Co and KEDFA and incorporated herein as if set forth fully herein. Project Co will, on a timely basis, provide KEDFA with all necessary information and, with respect to the Borrower's Rebate Requirement or Yield Reduction Payments (both as defined in the Borrower Tax Certificate) required to be paid, all necessary funds, in addition to any funds that are then available for such purpose in the Rebate Fund, to enable KEDFA to comply with all arbitrage and rebate requirements for federal income tax purposes.

Notwithstanding any other provision of this Project Agreement to the contrary, the covenants contained in this Section 4.14 shall survive the defeasance or payment in full of any and all the Bonds. As used in this Section 4.14, the term Bonds includes all obligations issued by KEDFA from time to time to finance or refinance the NG-KIH System.

4.15 Project Co's Obligations re Third Party Infrastructure Agreements

The Authority and Project Co acknowledge and agree that, as of the Effective Date, Project Co has negotiated non-binding term sheets (each, a **"Third Party Infrastructure Term Sheet"**) with the Third Party Infrastructure Providers, copies of which are attached as Schedule 20 [Third Party Infrastructure Term Sheets].

If, following the Effective Date, there is any change to a Third Party Infrastructure Term Sheet (including, for greater certainty, expiration thereof in accordance with its terms) or a Third Party Infrastructure Agreement that results in any change to Project Co's obligations under this Project Agreement, the scope or manner of carrying out the Project or Project Co's costs of carrying out the Project, the Authority shall issue a Change Directive in accordance with Section 2.17 of Schedule 6 [Changes, Minor Works and Innovation Proposals] in respect of such Change based on a description of the Change provided by Project Co to the Authority.

Project Co will use commercially reasonable efforts to manage the Third Party Infrastructure Providers in accordance with the terms of the Third Party Infrastructure Agreements and enforce its rights under the Third Party Infrastructure Agreements so as to mitigate the impact of any failure by a Third Party Infrastructure Provider to comply with the relevant Third Party Infrastructure Agreement or any breach by a Third Party Infrastructure Provider of any of its obligations under the relevant Third Party Infrastructure Agreement. Upon request from the Authority, Project Co will promptly submit a detailed description, supported by all such documentation as the Authority may reasonably require, of the measures and steps taken by Project Co to enforce its rights under each of the Third Party Infrastructure Agreements. The Authority acknowledges that the Maximum Availability Payment does not include any costs associated with any legal action required to enforce rights under the Third Party Infrastructure Agreements against the Third Party Infrastructure Providers.

In the event a Third Party Infrastructure Agreement involves any engineering, procurement or construction to be provided by a Third Party Infrastructure Provider, the term "manage" above shall not be construed as requiring Project Co to (a) provide any warranty as to that portion of the work, (b) exercise control over the quality of any engineering performed, (c) exercise control over the means and methods of construction or (d) exercise control over the safety of such Third Party Infrastructure Provider or such Third Party Infrastructure Provider's safety program.

The Authority shall provide or cause to be provided such information, documentation and assistance as Project Co may request and as the Authority may reasonably be able to provide to enable Project Co to enforce its rights under the Third Party Infrastructure Agreements.

In accordance with Section 8.2(h), if the Compensation Event described in (x) of the definition of Compensation Event occurs, the parties will consult and seek to agree on the steps to be taken by Project Co in enforcing its rights under the relevant Third Party Infrastructure Agreement. The parties acknowledge and agree that the compensation to which Project Co will be entitled in respect of any such Compensation Event will include, as a component of Project Co's Direct Losses, the reasonable cost of legal or professional services incurred by Project Co in connection with the enforcement of its rights. Project Co will not pursue any legal action to

enforce its rights under a Third Party Infrastructure Agreement without the prior written consent of the Authority.

5. FINANCING OF THE PROJECT

5.1 Compliance with Senior Financing Agreements

Project Co will keep the Senior Financing Agreements in good standing and will ensure that none of the terms and conditions of the Senior Financing Agreements will prevent Project Co from performing its obligations under this Project Agreement. If at any time Project Co receives a notice that an “event of default”, any event entitling the Senior Secured Creditors to enforce any security or any other similar event has occurred under the Senior Financing Agreements, Project Co will promptly and in any event within 5 Business Days of receipt of such notice, deliver to the Authority a copy of such notice.

5.2 Changes to Senior Financing Agreements

Project Co will not without the written consent of the Authority, not to be unreasonably withheld or delayed, terminate, amend, assign or otherwise modify the Senior Financing Agreements, or waive or exercise any of its rights under the Senior Financing Agreements or enter into any replacement Senior Financing Agreement or any agreement which affects the interpretation or application of any Senior Financing Agreements if such action would:

- (a) materially adversely affect Project Co’s ability to perform its obligations under this Project Agreement; or
- (b) have the effect of increasing any liability or potential liability of the Authority other than as contemplated in the Financial Model.

If at any time any amendment is made to any Senior Financing Agreement or Project Co enters into any replacement Senior Financing Agreement (or any agreement which affects the interpretation or application of any Senior Financing Agreement), Project Co will deliver to the Authority a copy of each such amendment or agreement within 5 Business Days of the date of its execution or creation, certified as a true copy by an officer of Project Co.

5.3 Restrictions on Refinancing

The Authority acknowledges and agrees that Project Co may enter into any Refinancing subject to compliance with the provisions of the Project Implementation Agreement and the Junior Loan Agreement.

5.4 Refinancing Process

If Project Co intends to undertake a Refinancing, Project Co will notify the Authority of such intention before the anticipated completion date of such Refinancing and will include with such notice all applicable information then available to Project Co in connection therewith. Project Co will promptly provide all other documents and information related to the proposed Refinancing as the Authority may reasonably request.

5.5 Authority Share of Refinancing Gain

The Authority will be entitled to receive 100% of any Refinancing Gain arising from a Qualifying Refinancing, calculated as at the time of such Qualifying Refinancing.

5.6 Payment to the Authority

The Authority may elect to receive any Refinancing Gain as:

- (a) a single payment to the NG-KIH Account;
- (b) a reduction, in accordance with Section 10.3, in the Availability Payments over the remainder of the Term; or
- (c) a combination of (a) and (b).

5.7 Calculation of Refinancing Gain

The Authority and Project Co will negotiate in good faith the basis and method of calculation of the Refinancing Gain, taking into account how the Authority has elected to receive the Refinancing Gain pursuant to Section 5.6 and the profile of the Refinancing Gain.

The Refinancing Gain will be calculated after taking into account:

- (a) the reasonable and proper costs that Project Co directly incurs in relation to the Refinancing (including, without limitation, any amounts required to be paid by Project Co to Operations Co pursuant to the Project Implementation Agreement or in connection with the Junior Debt);
- (b) any advisory fees; and
- (c) the Authority's reasonable internal administrative and personnel costs and all reasonable out-of-pocket costs incurred by the Authority in connection with any Refinancing,

which, in aggregate, may not exceed an amount equal to 2% of the par amount of the redeemed Bonds. If the Authority and Project Co are unable to agree on the basis and method of calculation of the Refinancing Gain, the Dispute will be determined in accordance with the Dispute Resolution Procedure.

5.8 Audit Rights

The Authority will have unrestricted rights of audit at any time (whether before or after the applicable event) over any proposed Financial Model, books, records and other documentation (including any aspect of the calculation of any Refinancing Gain) used in connection with any Refinancing or any other matter for which Project Co requires consent from the Authority under this Section 5 (Financing of the Project).

6. INSURANCE, DAMAGE AND DESTRUCTION

6.1 Insurance Coverage

Subject to Section 6.10(b), Project Co will take out, maintain in force, pay for and renew, or cause to be taken out, maintained in force, paid for and renewed, insurance for the Project as set out in Schedule 5 [Insurance Requirements].

6.2 Project Co's Obligations - Damage or Destruction During Construction Period

Without prejudice to Section 8 (Supervening Events), if the NG-KIH System is completely or substantially destroyed during the Construction Period, Project Co will repair, replace or restore those components of the NG-KIH System still under construction in accordance with the Design and Construction Specifications, subject only to:

- (a) applicable Laws; and
- (b) the Authority agreeing to pay to Project Co:
 - (1) the amount, if any, by which the cost of such repair, replacement or restoration exceeds the maximum amount of insurance coverage required under this Project Agreement for such risk (which, for greater certainty, is the maximum amount of coverage prior to any deductibles for which Project Co is responsible pursuant to Schedule 5 [Insurance Requirements]); or
 - (2) if no insurance coverage is required under this Project Agreement for such risk, an amount equal to the total costs of such repair, replacement or restoration,

and if the Authority agrees, the Authority will pay such amounts promptly upon receipt of one or more invoices from Project Co indicating that such amounts are due and payable by Project Co in connection with such repair, replacement or restoration.

For the purposes of this Section 6.2, the maximum amount of insurance coverage is in respect of insurance required to be obtained by Project Co, the full amount of coverage required under this Project Agreement for such risk prior to any deductibles for which Project Co is responsible pursuant to Schedule 5 [Insurance Requirements].

6.3 Insufficient Insurance

If:

- (a) the NG-KIH System is completely or substantially destroyed during the Construction Period;
- (b) the cost to repair, replace or restore those components of the NG-KIH System still under construction exceeds the maximum amount of insurance coverage (which, for greater certainty, is the maximum amount of coverage prior to any deductibles for which Project Co is responsible pursuant to Schedule 5

[Insurance Requirements]) required under this Project Agreement for the risk that caused the destruction; and

- (c) neither the Authority nor Project Co has agreed to pay the amount by which the cost to repair, replace or restore those components of the NG-KIH System still under construction exceeds the Insurance Proceeds and Insurance Receivables with respect to such destruction,

either party may, by notice to the other party and Operations Co, terminate this Project Agreement, in which case the Authority will pay compensation to Project Co in accordance with Section 4 of Schedule 9 [Compensation on Termination].

6.4 Uncollectible Insurance Receivables

If at any time while Project Co is relieved of its obligations under Section 6.2 by reason of the Relief Event described in Section (f) of the definition of Relief Event:

- (a) Project Co has complied with its obligations hereunder with respect to such Relief Event; and
- (b) notwithstanding such compliance by Project Co, collection of the applicable Insurance Receivables is not possible using commercially reasonable efforts,

either party may, by notice to the other party and Operations Co, terminate this Project Agreement, in which case the Authority will pay compensation to Project Co in accordance with Section 4 of Schedule 9 [Compensation on Termination].

6.5 Application of Insurance Proceeds If No Termination

Unless a party has terminated this Project Agreement (including pursuant to Section 6.3 or Section 6.4), Project Co will cause all:

- (a) applicable Insurance Proceeds which Project Co has received;
- (b) applicable Insurance Proceeds which Project Co is entitled to receive;
- (c) amounts which the Authority has agreed to pay as contemplated in Section 6.2(b); and
- (d) amounts which Project Co has agreed to pay to cover the amount by which the cost to repair, replace or restore the NG-KIH System exceeds the Insurance Proceeds and Insurance Receivables with respect to complete or substantial destruction,

to be applied to the reinstatement of the NG-KIH System in accordance with the terms of this Project Agreement.

6.6 Application of Insurance Proceeds In Case of Termination

If a party has terminated this Project Agreement pursuant to Section 6.3:

- (a) any Insurance Proceeds received prior to the Termination Payment Date by Project Co in respect of damage to the NG-KIH System and not already applied to the repair of such damage will first be applied towards the Termination Payment and any Insurance Proceeds remaining after such application will be paid to the Authority; and
- (b) on the Termination Payment Date, Project Co will assign to the Authority the benefit of all Insurance Receivables which have been taken into account in calculating the Termination Payment.

6.7 Standards of Repair, Replacement or Restoration

Any repair, replacement or restoration of the NG-KIH System or any part thereof pursuant to the provisions of Section 6.2 will be made or done in compliance with the Design and Construction Protocols and the Design and Construction Specifications, subject to any agreement made between the Authority and Project Co to revise the Design and Construction Protocols or the Design and Construction Specifications as they pertain to any repaired, replaced or restored NG-KIH System.

6.8 Mitigation

Project Co and the Authority will use all commercially reasonable efforts to mitigate the effects of any risks or claims covered by this Section 6 (Insurance, Damage and Destruction), including minimizing the amount of any costs and expenses which might result.

6.9 Risks Becoming Uninsurable

Each party will, forthwith upon Having Knowledge, notify the other if a Principal Insured Risk becomes or is expected to become Uninsurable. If both parties agree or it is determined in accordance with the Dispute Resolution Procedure that the relevant Principal Insured Risk is or is about to become Uninsurable and that the Principal Insured Risk being Uninsurable is not and will not be caused by the actions or omissions of Project Co or any Project Co Person or the Authority or any Authority Person contrary to Section 5.10 of Schedule 5 [Insurance Requirements], then the parties together with their respective insurance advisors will meet to discuss the means by which such Principal Insured Risk should be managed (including considering the feasibility of self-insurance by either party).

6.10 Consequences of Risks Becoming Uninsurable

If the requirements of Section 6.9 are satisfied but the parties cannot agree within 20 Business Days on how to manage a Principal Insured Risk that becomes Uninsurable (the “**Uninsurable Risk**”):

- (a) if the Uninsurable Risk is third party liability, the Authority shall terminate this Project Agreement whereupon Project Co will be entitled to compensation on termination as provided in Section 4 of Schedule 9 [Compensation on Termination]; or
- (b) if the Uninsurable Risk is not third party liability:

- (1) the Authority may, by notice to Project Co and Operations Co, terminate this Project Agreement whereupon Project Co will be entitled to compensation on termination as provided in Section 4 of Schedule 9 [Compensation on Termination]; or
- (2) if and for as long as the Authority has not terminated this Project Agreement under Section 6.10(b)(1):
 - (A) this Project Agreement will continue;
 - (B) neither Project Co nor the Authority will be obligated by this Project Agreement to maintain insurance in respect of the Uninsurable Risk and references in this Project Agreement to the insurance required by this Section 6 (Insurance, Damage and Destruction) or Schedule 5 [Insurance Requirements] will be construed accordingly;
 - (C) the Availability Payments will thereafter be adjusted in accordance with Section 10.3 by agreement of the parties, acting reasonably, or, failing such agreement, by the Dispute Resolution Procedure, from the date upon which the Uninsurable Risk became Uninsurable, to reflect any savings in Project Co's insurance cost as a result of Project Co not having to insure against the Uninsurable Risk; and
 - (D) the occurrence of the Uninsurable Risk will be deemed to be a Compensation Event unless the Authority, by notice to Project Co and Operations Co, terminates this Project Agreement whereupon Project Co will be entitled to compensation on termination as provided in Section 4 of Schedule 9 [Compensation on Termination].

6.11 Subrogation

If the Authority makes any payment to Project Co pursuant to the Compensation Event referred to in Section 6.10(b)(2)(D), then the Authority, to the extent of the amount paid, will be subrogated to Project Co's rights against any third party in respect of the occurrence or claim as a result of which the payment was made, other than any third party that was an insured under the last policy of insurance to cover the Uninsurable Risk before it became Uninsurable, to the extent the insurers did not have a right of subrogation against such third party.

6.12 Continuing Attempts to Insure Uninsurable Risks

When there is an Uninsurable Risk for which Project Co is responsible to obtain insurance under Schedule 5 [Insurance Requirements], Project Co will approach the insurance market on a regular basis and, in any event, at regular intervals of no longer than six months to establish whether the Uninsurable Risks remain Uninsurable. Following each such approach of the insurance market, Project Co will notify the Authority as to whether the Uninsurable Risks remain Uninsurable.

6.13 Uninsurable Risks Becoming Insurable

Where a risk that was previously an Uninsurable Risk ceases to be so and Project Co becomes aware or is informed by the Authority that this is the case, Project Co will forthwith take out, maintain and pay for or cause to be taken out, maintained and paid for insurance in accordance with the requirements of this Project Agreement in respect of the risk, and in any case:

- (a) Sections 6.9, 6.10 and 6.12 will no longer apply to the risk so long as it is not an Uninsurable Risk; and
- (b) the Availability Payments will be adjusted pursuant to Section 10.3 by agreement of the parties acting reasonably or, failing such agreement, by the Dispute Resolution Procedure, from the date upon which the Uninsurable Risk became insurable, to reflect any increase in Project Co's insurance cost as a result of having to insure the risk that ceased to be an Uninsurable Risk.

7. CHANGES, MINOR WORKS AND INNOVATION PROPOSALS

7.1 Changes Required by the Authority

The Authority may require and Project Co may request Changes in accordance with Schedule 6 [Changes, Minor Works and Innovation Proposals].

7.2 Innovation and Value Engineering

Project Co may submit an Innovation Proposal for consideration by the Authority in accordance with Schedule 6 [Changes, Minor Works and Innovation Proposals].

7.3 Minor Works

The Authority may require Minor Works in accordance with Schedule 6 [Changes, Minor Works and Innovation Proposals].

8. SUPERVENING EVENTS

8.1 Supervening Events

If:

- (a) a Compensation Event, Relief Event or Excusing Event occurs, Project Co may;
or
- (b) a Force Majeure Event or Eligible Change in Law Event occurs, either party may,

apply for relief from its obligations, extensions of time, claim compensation or claim a termination right under this Project Agreement to the extent provided in this Section 8 (Supervening Events). The "**Applicant**" means the party making such application.

8.2 Procedures Upon the Occurrence of a Supervening Event

The following procedure will apply if a Supervening Event occurs:

- (a) as soon as practicable, and in any event within 5 Business Days after the Applicant Has Knowledge that the Supervening Event has caused, or is reasonably likely to cause, an entitlement under this Section 8 (Supervening Events), the Applicant will give to the other party and Operations Co a notice (“**Supervening Event Notice**”) identifying the particular Supervening Event and summarizing, to the extent the Applicant Has Knowledge, the consequences and the nature of the Applicant’s claim;
- (b) within 10 Business Days after delivery by the Applicant of a Supervening Event Notice, to the extent the Applicant Has Knowledge, the Applicant will give to the other party and Operations Co:
 - (1) additional details, including available supporting documentation, in support of its claim; and
 - (2) if applicable, a detailed breakdown of all Direct Losses incurred or which will be incurred or other compensation or relief sought by Project Co, if it is the Applicant, as a result of the Supervening Event;
- (c) from time to time thereafter, the Applicant will notify the other party and Operations Co if at any time it receives or becomes aware of any further material information relating to the Supervening Event, giving details of that information to the extent that such information is new or renders information previously submitted materially inaccurate or misleading. In particular, a party claiming relief as a result of a Force Majeure Event will notify the other party and Operations Co as soon as the Force Majeure Event has ceased and of the time when performance of its affected obligations can be resumed;
- (d) a party may make multiple but not duplicative claims in respect of a Supervening Event and both parties may make claims in respect of the same Supervening Event;
- (e) where the Authority is claiming the benefit of an Eligible Change in Law Event, Project Co will provide the Authority information reasonably requested in order to make its claim;
- (f) the Applicant must demonstrate:
 - (1) it could not have avoided such occurrence or the consequences of the Supervening Event by steps which it might reasonably be expected to have taken provided that, in the case of the Authority, the Authority is not required to take any steps that are referred to in Section 2.6;
 - (2) if applicable, the Supervening Event caused or will cause the Applicant to incur a Direct Loss, a delay in the Project Schedule or the need for relief from other obligations under this Project Agreement; and
 - (3) in the case of Project Co, it has complied with its mitigation obligations pursuant to Section 2.5 and in the case of the Authority, it has complied with its mitigation obligations pursuant to Section 2.6,

provided that, with respect to the Compensation Event described in (cc) of the definition of Compensation Event, Project Co's mitigation obligations shall not be interpreted as requiring Project Co to incur any costs associated with obtaining a sufficiently detailed description of any Site Location so as to enable Project Co to carry out its obligations under this Project Agreement by the date reasonably required by Project Co in accordance with the Project Schedule;

- (g) the Applicant will advise whether, in the Applicant's opinion, any amendments should be considered to this Project Agreement, the Project Implementation Agreement, any Project Contract or any Senior Financing Agreement as a result of the Supervening Event; and
- (h) the Authority, Project Co and Operations Co will meet within 15 Business Days of delivery of the Supervening Event Notice to consult and seek to agree to the effect of the Supervening Event and, if the Authority, Project Co and Operations Co, within 10 Business Days following the meeting, have not agreed to the occurrence or the effect of the Supervening Event, either the Authority or Project Co may refer the question of whether a Supervening Event has occurred, whether the conditions in Section 8.2(f) above have been satisfied or the extent of relief or compensation to which the affected party is entitled, for resolution in accordance with the Dispute Resolution Procedure.

8.3 Project Co's Entitlements Upon Occurrence of a Compensation Event

Subject to Section 8.12, if at any time a Compensation Event has occurred and Project Co has given the Authority a Supervening Event Notice related thereto:

- (a) Project Co is relieved from any liability or consequence (including termination by the Authority) under this Project Agreement arising from any delay or failure in performing any of its obligations under or in connection with this Project Agreement to the extent resulting from the Compensation Event;
- (b) the Availability Payments will be calculated as if the Compensation Event had not occurred based on the Reasonably Expected Performance of Project Co, except that any Avoidable Costs and applicable Insurance Proceeds and insurance proceeds which Project Co would have recovered as a result of the Compensation Event if it had complied with the requirements of this Project Agreement or any policy of insurance maintained or required to be maintained under this Project Agreement will be deducted therefrom;
- (c) the Authority will pay to Project Co compensation in respect of a Compensation Event calculated on the basis that Project Co will be placed in no better or worse position than it would have been in had a Compensation Event not occurred and taking into consideration the following (without duplication):
 - (1) any Direct Losses (including the amount of any applicable insurance deductibles calculated without netting out Insurance Receivables) resulting from the Compensation Event;

- (2) any net increase or decrease in the costs of Project Co performing its obligations under this Project Agreement resulting from the Compensation Event; and
- (3) the Availability Payments payable to Project Co, taking into account the adjustments pursuant to Section 8.3(b) above;

except that:

- (4) any Avoidable Costs and applicable Insurance Proceeds and insurance proceeds which Project Co would have recovered as a result of the Compensation Event if it had complied with the requirements of this Project Agreement or any policy of insurance maintained or required to be maintained under this Project Agreement will be deducted therefrom; and
 - (5) no Indirect Losses will be taken into consideration;
- (d) concurrent with the first payment of any compensation by the Authority under Section 8.3(c), Project Co will assign to the Authority its rights to all applicable Insurance Receivables (whether or not Project Co has made a claim); and
 - (e) if the Compensation Event occurs prior to the System Completion Date, the Project Schedule will be amended and the Target Site Completion Dates, Target Ring Completion Dates, Target System Completion Date, Outside Ring Completion Dates and Longstop Date will be postponed by such time as is reasonable in the circumstances to take account of the effect of the delay caused by the Compensation Event, but the Expiration Date will not be extended.

8.4 Project Co's Entitlements Upon Occurrence of a Relief Event

Subject to Section 8.12, if at any time a Relief Event has occurred and Project Co has given the Authority a Supervening Event Notice related thereto:

- (a) Project Co is relieved from any liability or consequence (including termination by the Authority, except as provided for in this Section 8.4) under this Project Agreement arising from any delay or failure in performing any of its obligations under this Project Agreement to the extent resulting from the Relief Event, except that nothing will affect any entitlement of the Authority to make Deductions and the Authority will only be obligated to make Availability Payments to the extent that the performance or other criteria for Availability Payments are met in accordance with the applicable provisions of this Project Agreement notwithstanding the Relief Event;
- (b) if the Relief Event occurs prior to the System Completion Date:
 - (1) the Project Schedule will be amended and the Target Site Completion Dates, Target Ring Completion Dates, Target System Completion Date, Outside Ring Completion Dates and Longstop Date will be postponed by such time as is reasonable in the circumstances to take account of the effect of the delay caused by the Relief Event, but the Expiration Date will not be extended;

- (2) for the period that Site Completion is delayed to a date after a Target Site Completion Date (as it was prior to having been postponed pursuant to Section 8.4(b)(1)) as a result of one or more of the Relief Events described in (c), (d), (e), (g), (h), (i) and (j) of the definition of Relief Event, the Authority will pay to Project Co the net Senior Debt Service Amount for such period, taking into account the total amount of Availability Payments actually being paid to Project Co during such period and the total amount of Availability Payments projected to be paid to Project Co during such period, less applicable Insurance Proceeds and insurance proceeds which Project Co would have recovered as a result of the Relief Event if it had complied with the requirements of this Project Agreement or any policy of insurance maintained or required to be maintained under this Project Agreement; and
 - (3) concurrent with the first payment of any amount by the Authority pursuant to Section 8.4(b)(2), Project Co will assign to the Authority its rights to all applicable Insurance Receivables (whether or not Project Co has made a claim);
- (c) if the Relief Event, or its effects, persists or is likely to persist for more than 180 days after the date a Supervening Event Notice is delivered by the Applicant, either party may at any time so long as such Relief Event is, or such effect is, continuing and subject to Section 14.2, terminate this Project Agreement by notice to the other party and Operations Co;
 - (d) if the Authority gives notice to Project Co and Operations Co under Section 8.4(c) terminating this Project Agreement, Project Co will have the option either to accept such notice or to respond in writing on or before the date falling 10 Business Days after the date of receipt of such notice stating that it requires this Project Agreement to continue, in which case Project Co's rights to relief under this Section 8.4 in respect of the Relief Event will cease and the Authority's termination notice will be deemed null and void;
 - (e) if Project Co gives notice to the Authority under Section 8.4(c) terminating this Project Agreement, the Authority will have the option either to accept such notice or to respond in writing on or before the date falling 15 Business Days after the date of receipt of such notice stating that it requires this Project Agreement to continue, in which case:
 - (1) Project Co's termination notice will be deemed null and void and Project Co, insofar as it is able to do so, will continue to perform its obligations in accordance with the provisions of this Project Agreement;
 - (2) the Relief Event will be deemed to constitute a Compensation Event occurring as of the date on which the Relief Event first occurred;
 - (3) at any time so long as the Supervening Event referred to in Section 8.4(e)(2) is continuing, the Authority may terminate this Project Agreement by notice to Project Co and Operations Co; and

- (4) Project Co may at any time so long as the Supervening Event referred to in Section 8.4(e)(2) is continuing after a further period of 180 days after the date on which Project Co delivered the termination notice pursuant to Section 8.4(c) terminate this Project Agreement by notice to the Authority;
- (f) if this Project Agreement is terminated pursuant to this Section 8.4, Project Co will be entitled to compensation on such termination in accordance with Section 4 of Schedule 9 [Compensation on Termination]; and
- (g) Deductions made while Project Co is entitled to relief under this Section 8.4 will not be counted for the purposes of Section 12.1(g) or Section 6.4 of Schedule 4 [Services Protocols and Specifications].

8.5 Project Co's Entitlements Upon Occurrence of an Excusing Event

Subject to Section 8.12, if during the Operating Period an Excusing Event has occurred and Project Co has given the Authority a Supervening Event Notice related thereto:

- (a) Project Co is relieved from any liability or consequence (including termination by the Authority) under this Project Agreement arising from any delay or failure in performing any of its obligations to the extent resulting from the Excusing Event; and
- (b) the Availability Payments will be calculated as if the Excusing Event had not occurred based on the Reasonably Expected Performance of Project Co, except that any Avoidable Costs and applicable Insurance Proceeds and Insurance Receivables and insurance proceeds which Project Co would have recovered if it had complied with the requirements of this Project Agreement or any policy of insurance maintained or required to be maintained under this Project Agreement will be deducted therefrom.

8.6 Parties' Entitlements Upon Occurrence of a Force Majeure Event

Subject to Section 8.12, if at any time a Force Majeure Event has occurred and the Applicant has given the other party and Operations Co a Supervening Event Notice related thereto:

- (a) the Applicant is relieved from any liability or consequence (including termination by the Authority, except as provided for in this Section 8.6) under this Project Agreement arising from any delay or failure in performing any of its obligations under this Project Agreement to the extent resulting from the Force Majeure Event, except that nothing will affect any entitlement of the Authority to make Deductions and the Authority will only be obligated to make Availability Payments to the extent that the performance or other criteria for Availability Payments are met notwithstanding the Force Majeure Event;
- (b) if the Applicant is Project Co and the Force Majeure Event occurs prior to the System Completion Date, the Project Schedule will be amended and the Target Site Completion Dates, Target Ring Completion Dates, Target System Completion Date, Outside Ring Completion Dates and Longstop Date will be postponed by such time as is reasonable in the circumstances to take account of

the effect of the delay caused by the Force Majeure Event, but the Expiration Date will not be extended;

- (c) if a Force Majeure Event occurs and it, or its effects, persists or is likely to persist for more than 180 days after the date a Supervening Event Notice is delivered by the Applicant, either party may at any time so long as such Force Majeure Event is, or such effect is, continuing, terminate this Project Agreement by notice to the other party and Operations Co;
- (d) if Project Co gives notice to the Authority under Section 8.6(c) terminating this Project Agreement, the Authority will have the option either to accept such notice or to respond in writing on or before the date falling 15 Business Days after the date of receipt of such notice stating that it requires this Project Agreement to continue, in which case:
 - (1) Project Co's termination notice will be deemed null and void and Project Co, insofar as it is able to do so, will continue to perform its obligations in accordance with the provisions of this Project Agreement;
 - (2) the Force Majeure Event will be deemed to constitute a Compensation Event occurring as of the date the Force Majeure Event first occurred;
 - (3) at any time so long as the Supervening Event referred to in Section 8.6(d)(2) is continuing, the Authority may terminate this Project Agreement by notice to Project Co and Operations Co; and
 - (4) Project Co may at any time so long as the Supervening Event referred to in Section 8.6(d)(2) is continuing after a further period of 180 days after the date on which Project Co delivered the termination notice pursuant to Section 8.6(c), terminate this Project Agreement by notice to the Authority;
- (e) if this Project Agreement is terminated pursuant to Section 8.6(c), 8.6(d)(3) or 8.6(d)(4), Project Co will be entitled to compensation on such termination in accordance with Section 4 of Schedule 9 [Compensation on Termination]; and
- (f) Deductions made while Project Co is entitled to relief under this Section 8.6 will not be counted for the purposes of Section 12.1(g) or Section 6.4 of Schedule 4 [Services Protocols and Specifications].

8.7 Parties' Entitlements Upon Occurrence of an Eligible Change in Law Event

Subject to Section 8.12, if at any time an Eligible Change in Law Event has occurred and the Applicant has given the other party and Operations Co a Supervening Event Notice related thereto:

- (a) the Applicant will be entitled to compensation, or an increase or decrease in the Availability Payments, in respect of the Eligible Change in Law Event calculated on the basis that Project Co will be placed in no better or worse position than it would have been in had such Eligible Change in Law Event not occurred and taking into consideration the following (without duplication):

- (1) any Direct Losses (calculated without netting out Insurance Receivables) resulting from the Eligible Change in Law Event;
- (2) any net increase or decrease in the costs of Project Co performing the Design, Construction, Services or System Refresh, as applicable, resulting from the Eligible Change in Law Event; and
- (3) the Availability Payments payable to Project Co,

except that:

- (4) any Avoidable Costs and applicable Insurance Proceeds and insurance proceeds which Project Co would have recovered if it had complied with the requirements of this Project Agreement or any policy of insurance maintained or required to be maintained under this Project Agreement will be deducted therefrom;

and concurrent with the first payment of any compensation by the Authority under this Section 8.7(a), Project Co will assign to the Authority its rights to all applicable Insurance Receivables (whether or not Project Co has made a claim); and

- (b) in the case of a Relevant Works Change in Law, Project Co will be entitled to compensation from the Authority in an amount equal to the Allowable Capital Expenditure in addition to any compensation payable pursuant to Section 8.7(a).

8.8 Parties' Entitlements Upon Occurrence of a Change in Law

Without limiting Section 8.4, Section 8.5 or Section 8.7:

- (a) if compliance by Project Co with a Change in Law is outside the scope of, or inconsistent with, Project Co's obligations under this Project Agreement, or would mean a change in Project Co's obligations under this Project Agreement or a change in the scope or manner of carrying out the Project, such Change in Law will be deemed to constitute a Change having effect from the time that such Change in Law takes effect, except that Project Co will not be entitled to any payment or other compensation other than as set out in Section 8.4, Section 8.5 or Section 8.7;
- (b) except as otherwise provided in this Project Agreement, including in Section 8.4, Section 8.5 or Section 8.7, Project Co will not be entitled to any other payment or compensation or relief in respect of any Change in Law or the consequences thereof; and
- (c) nothing in Section 8.4, Section 8.5 or Section 8.7 will be interpreted as relieving Project Co of its obligation, following any and all Changes in Law, to perform its obligations under this Project Agreement in compliance with all Laws.

8.9 Labor Disputes

If Project Co Has Knowledge of an actual or potential labor dispute that may affect any of the Design, Construction, Services or System Refresh, Project Co will promptly:

- (a) give notice thereof to the Authority, including all relevant information related to the dispute of which Project Co Has Knowledge; and
- (b) use commercially reasonable efforts to mitigate the effects of such labor dispute on the performance of any of the Design, Construction, Services or System Refresh, including by applying for relief to appropriate tribunals or courts if such labor dispute involves workers of Project Co, Operations Co, a Project Contractor and/or a Sub-Contractor.

Project Co acknowledges that if the labor dispute involves workers of Operations Co, a Project Contractor or Sub-Contractor, or of anyone employed by or through them, the Authority will not be required to provide any facilities, space or assistance in the NG-KIH System or on the Lands for the purposes of such workers or any applicable union.

8.10 Payments in Respect of Supervening Events

Payments between the parties and any adjustments to Availability Payments in respect of Supervening Events will be made in accordance with Section 10 (Lump Sum Payments and Availability Payment Adjustments).

8.11 Supervening Events Mitigated by Change

Nothing in this Project Agreement will limit the right of the Authority to perform or mitigate its obligations in respect of Supervening Events or the consequences of a Supervening Event by requiring a Change or Changes.

8.12 Delay in Notification

If a Supervening Event Notice or any required information is provided by an Applicant to the other party after the dates referred to in Section 8.2, then without prejudice to any other rights or remedies of the other party under this Project Agreement:

- (a) the Applicant will not be entitled to any compensation, extension of time or relief from its obligations under this Project Agreement to the extent that the amount thereof was increased or the ability to mitigate was adversely affected as a result of such delay in providing such notice or information; and
- (b) if the period of delay is 12 months or more, the rights of the Applicant with respect to the applicable Supervening Event will be of no further force or effect.

8.13 Equivalent Project Relief

The parties acknowledge that Project Co will share with Operations Co, who will, in turn, share with the Project Contractors, who will, in turn, share with Sub-Contractors, certain benefits to Project Co derived from the rights of Project Co under, and subject to the obligations and limitations under, this Project Agreement, including rights of Project Co under Section 8

(Supervening Events) (such rights, as qualified by such obligations and limitations, are collectively “**Project Co’s Rights**”). Accordingly:

- (a) any circumstance affecting Operations Co, a Project Contractor or a Sub-Contractor which, if such circumstance had affected Project Co directly would have given rise to a claim by Project Co pursuant to Project Co’s Rights, will, for the purpose of this Project Agreement, be deemed to be a circumstance affecting Project Co in respect of which Project Co may claim under and subject to Project Co’s Rights; and
- (b) amounts claimed by Operations Co, the Project Contractor or Sub-Contractor against Project Co in respect of any circumstance referred to in Section 8.13(a) above may be claimed by Project Co against the Authority under and subject to Project Co’s Rights, but whether or not the Authority is liable for such amounts will be determined under this Project Agreement as if the circumstance had affected Project Co directly,

provided that:

- (c) all such claims will be made and administered by Project Co and none of Operations Co, any Project Contractor or any Sub-Contractor will have any rights against the Authority, including under this Section 8.13;
- (d) in no event will the liability of the Authority under this Section 8.13 be greater than it would have been if Project Co had been directly affected by the circumstance referred to in Section 8.13(a) above; and
- (e) in no event will the Authority be liable under this Section 8.13 for any Direct Losses or other compensation that the Authority would not have been liable for if Project Co had been directly affected by the circumstance referred to in Section 8.13(a) above.

9. INDEMNITIES AND LIMITS ON LIABILITIES AND REMEDIES

9.1 Project Co’s Obligation to Indemnify

Project Co will indemnify and keep the Authority and each Authority Indemnified Person indemnified at all times from and against all Direct Losses that any such Person may sustain in connection with any claim made by one or more third parties (including for loss of or physical damage to property or assets), or any claim for, or in respect of, the death, personal injury, disease or illness of any Person, including any Authority Indemnified Person, arising by reason of any negligent act or omission or other tortious conduct of Project Co or any Project Co Person, except to the extent caused, or contributed to, by any negligent act or omission or other tortious conduct of the Authority or any Authority Person. For greater certainty, Section 4.4 applies to this Section 9.1. This Section 9.1 may be relied upon by the Authority Indemnified Persons and may be enforced directly by any of them against Project Co in the same manner and for the same purpose as if pursuant to a contractual indemnity directly between them and Project Co.

9.2 Conduct of Third Person Claims

This Section 9.2 will apply to the conduct of claims made by a third Person against a party having or claiming to have with respect to such third Person claim, the benefit of an indemnity or a right to compensation under this Project Agreement. The party having, or claiming to have, the benefit of the indemnity or right to compensation is referred to as the “**Beneficiary**” and the party from whom the indemnity or compensation is sought is referred to as the “**Indemnifier**”. Accordingly, subject to the requirements of any insurer who may have an obligation to provide an indemnity in respect of any liability arising under this Project Agreement:

- (a) if the Beneficiary receives any notice, demand, letter or other document concerning any claim for which it appears that the Beneficiary is, or may become entitled to, indemnification or compensation under this Project Agreement in respect of the entire claim, the Beneficiary will give notice in writing to the Indemnifier as soon as reasonably practicable and in any event within 10 Business Days of receipt thereof;
- (b) the Indemnifier will be entitled to dispute the claim in the name of the Beneficiary at the Indemnifier’s own expense and take conduct of any defense, dispute, compromise, or appeal of the claim and of any incidental negotiations and the Beneficiary will give the Indemnifier all reasonable co-operation, access and assistance for the purposes of considering and resisting such claim;
- (c) in defending any claim described in Section 9.2(b) in which there is a conflict of interest between the Indemnifier and the Beneficiary, the Beneficiary may appoint independent legal counsel in respect of such claim and, if it is determined that the Beneficiary is entitled to indemnification by or compensation from the Indemnifier, all reasonable costs and expenses incurred by the Beneficiary in so doing will be included in the indemnity or compensation from the Indemnifier;
- (d) with respect to any claim conducted by the Indemnifier pursuant to Section 9.2(b), the Indemnifier will:
 - (1) keep the Beneficiary fully informed and consult with it about material elements of the conduct of the claim;
 - (2) demonstrate to the Beneficiary, at the reasonable request of the Beneficiary, that the Indemnifier has sufficient means to pay all costs and expenses that it may incur by reason of conducting the claim; and
 - (3) not pay or settle such claims without the consent of the Beneficiary, such consent not to be unreasonably withheld or delayed;
- (e) the Beneficiary may take conduct of any defense, dispute, compromise or appeal of the claim and of any incidental negotiations if:
 - (1) the Indemnifier is not entitled to take conduct of the claim in accordance with Section 9.2(b); or
 - (2) the Indemnifier fails to notify the Beneficiary of its intention to take conduct of the relevant claim within 10 Business Days of the notice from

the Beneficiary under Section 9.2(a) or notifies the Beneficiary that it does not intend to take conduct of the claim; or

- (3) the Indemnifier fails to comply in any material respect with Section 9.2(d) above,

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

- (f) the Beneficiary may at any time give notice to the Indemnifier that it is retaining or taking over, as the case may be, the conduct of any defense, dispute, compromise, settlement or appeal of any claim, or of any incidental negotiations, to which Section 9.2(b) above applies. On receipt of such notice, the Indemnifier will promptly take all steps necessary to transfer the conduct of such claim to the Beneficiary, and will provide to the Beneficiary all reasonable co-operation, access and assistance for the purposes of considering and resisting such claim. If the Beneficiary gives any notice pursuant to this Section 9.2(f) (for the sake of clarity, for reasons other than as provided in Sections 9.2(e)(2) or 9.2(e)(3)), then the Indemnifier will be released from any liability under its indemnity under Section 9.1 or its obligation to provide compensation, as the case may be; and
- (g) in response to any claim of infringement or misappropriation or alleged infringement or misappropriation of the Intellectual Property rights of any Person, Project Co may replace such infringing or allegedly infringing item provided that:
 - (1) the replacement is performed without additional cost to the Authority; and
 - (2) the replacement has at least equal quality performance capabilities when used in conjunction with the NG-KIH System.

9.3 General Obligation to Pursue Third Person Recovery

If a party (the “**Paying Party**”) has paid to the other party (the “**Receiving Party**”) an amount in respect of any indemnity, Supervening Event or other liability hereunder (a “**Liability Payment**”), and the Receiving Party has a *bona fide* claim for recovery of any such Liability Payment from a third Person or under any insurance required pursuant to this Project Agreement, the Receiving Party will:

- (a) as directed by the Paying Party either:
 - (1) promptly make commercially reasonable efforts to pursue and recover such claim and provide evidence of such efforts to the Paying Party; or
 - (2) assign to the Paying Party the right to pursue and recover such claim and, at the Paying Party’s cost, provide reasonable cooperation in connection with the pursuit and recovery of such claim; and

(b) if it subsequently recovers, or the Paying Party makes recovery on its behalf, (whether by payment, discount, credit, saving, relief or other benefit or otherwise) an amount which is directly referable to the fact, matter, event or circumstances giving rise to the payment of the Liability Payment, forthwith repay to the Paying Party an amount equal to the lesser of:

- (1) an amount equal to the sum recovered (or of the value of the recovery whether by discount, credit, saving, relief or otherwise) less any out of pocket costs and expenses properly incurred by the Receiving Party in recovering such sum; and
- (2) the Liability Payment,

provided that the Paying Party will be repaid only to the extent that the amount of such recovery plus the Liability Payment exceeds the total loss or liability of the Receiving Party in respect of the fact, matter or circumstance giving rise to the Liability Payment.

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

9.4 Waiver of Remedies

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

9.5 Remedies Cumulative

Subject to Sections 9.6, 9.7 and 9.8:

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

9.6 Limitation on Authority’s Remedies

The Authority’s remedies in respect of any failure by Project Co:

- (a) to achieve Ring Completion of any Ring by the relevant Target Ring Completion Date or the relevant Outside Ring Completion Date will be limited to the Authority's rights pursuant to Section 11.1 of Schedule 2 [Design and Construction Protocols];
- (b) to achieve System Completion by the Target System Completion Date or the Longstop Date will be limited to the Authority's rights pursuant to Section 12.4; and
- (c) to perform the Services in accordance with this Project Agreement will be limited to Deductions in accordance with Schedule 8 [Payments],

provided that nothing in this Section 9.6 will limit the Authority's right to:

- (d) claim, on or after a termination of this Project Agreement, costs, losses, damages and expenses suffered or incurred by the Authority as a result of rectifying or mitigating the effects of any breach of this Project Agreement by Project Co except to the extent recovered by the Authority under this Project Agreement or taken into account to reduce any compensation payable by the Authority pursuant to Schedule 9 [Compensation on Termination];
- (e) make a claim for indemnification pursuant to Section 9.1;
- (f) deliver to Project Co and Operations Co a Dispute Notice or a notice of default or termination pursuant to Section 12 (Project Co Events of Default) and pursue all remedies in respect thereof; or
- (g) pursue any other express remedy available to the Authority under this Project Agreement or any equitable remedy, including injunctive relief and specific performance.

9.7 Limitation on Project Co's Remedies

To the extent Project Co has claimed for relief or compensation for a Supervening Event pursuant to Section 8 (Supervening Events), Project Co may not make any further claim against the Authority for costs, losses, damages or expenses incurred by Project Co, or for any other relief, in respect of such event, provided that nothing in this Section 9.7 will limit Project Co's right to:

- (a) deliver to the Authority a Dispute Notice or a notice of default or termination pursuant to Section 13 (Authority Events of Default) and pursue all remedies in respect thereof; or
- (b) pursue any other express remedy available to Project Co under this Project Agreement or any equitable remedy, including injunctive relief and specific performance.

9.8 Limits on Monetary Compensation

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

recoverable under this Project Agreement. Neither party will be entitled to make any claim against the other party for compensation, indemnification or reimbursement other than as provided under this Project Agreement.

9.9 No Liability for Indirect Losses

Unless specifically allowed in this Project Agreement, neither party to this Project Agreement 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.

9.10 No Liability for Governmental Activities

The Authority will not be liable to Project Co or any Project Co Person for any Direct Losses suffered or incurred as a result of damage to the NG-KIH System, whether arising from or related to Governmental Activities or otherwise, to the extent that such Direct Losses were directly or indirectly caused or contributed to by any willful misconduct, negligent act or omission or non-compliance with the terms of this Project Agreement by Project Co or any Project Co Person, including, for greater certainty but without limitation, the failure of Project Co or any Project Co Person to comply with the terms of the Design and Construction Plan, and, for greater certainty, the same shall not constitute a Compensation Event.

9.11 Authority's Right of Set Off

The Authority may set off any amounts owing by Project Co to the Authority under this Project Agreement against payments due by the Authority to Project Co under this Project Agreement.

9.12 Project Co's Right of Set Off

Project Co may set off any amounts owing by the Authority to Project Co under this Project Agreement against any payments due by Project Co to the Authority under this Project Agreement.

9.13 Undisputed Amounts and Interest on Disputed Amounts

Subject to Sections 9.11 and 9.12, a party will pay any undisputed portion of any disputed amount payable to the other party in accordance with this Project Agreement, but any disputed portion or amount will not be payable until the Dispute is resolved in accordance with the Dispute Resolution Procedure. If payment of any amount payable under this Project Agreement is delayed while the matter is in Dispute, upon resolution of the Dispute, interest will be payable on any amount determined payable pursuant to the Dispute Resolution Procedure at the Default Rate, compounded monthly, from the time such amount became payable under this Project Agreement until paid.

9.14 Interest on Overdue Amounts

If payment of any amount payable under this Project Agreement is not made when due (including Termination Payments payable pursuant to Schedule 9 [Compensation on Termination]), interest will be payable on such amount at the Default Rate, compounded monthly, from the time such amount became payable under this Project Agreement until paid. The party to whom payment is owed and overdue will notify the other party at least monthly of the overdue amount and the accrued interest on that amount.

10. LUMP SUM PAYMENTS AND AVAILABILITY PAYMENT ADJUSTMENTS

10.1 Lump Sum Payments

To the extent a party:

- (a) is entitled to payment from the other party under this Project Agreement, including in respect of a Change under Section 7 (Changes, Minor Works and Innovation Proposals), a Supervening Event under Section 8 (Supervening Events) or an indemnification claim under Section 9 (Indemnities and Limits on Liabilities and Remedies); or
- (b) is entitled to share in a benefit and to receive payment from the other party under this Project Agreement, including in respect of a Refinancing Gain under Section 5 (Financing of the Project), an Innovation Proposal under Section 7 (Changes, Minor Works and Innovation Proposals) or an Eligible Change in Law Event under Section 8 (Supervening Events),

the entitled party may make written demand for such payments from time to time after being entitled to payment and (i) in respect of any Direct Losses, after such Direct Losses have been incurred, and (ii) in respect of any shared benefit, after receipt by the other party of the shared benefit, and payment will be made in accordance with this Section 10 (Lump Sum Payments and Availability Payment Adjustments).

If the Authority is obligated to compensate, reimburse or otherwise pay Project Co, the Authority may, in its discretion, make such payment by lump sum payment or by payments that reasonably match the cash outlays of Project Co. The Authority may also direct Project Co to use any amounts standing to the credit of the NG-KIH Account for purposes of satisfying any such payment obligation.

If Project Co is obligated to compensate, reimburse or otherwise pay the Authority, the Authority may, in its discretion, require Project Co to make such payment:

- (c) by a lump sum payment, up to a maximum lump sum payment of \$500,000 (Index Linked) without the consent of Project Co, and any greater amount with the consent of Project Co, acting reasonably; or
- (d) by payments that reasonably match the cash inflows to Project Co or the averted cash outlays.

Lump sum payments and payments that reasonably match cash inflows, cash outlays or averted cash outlays will be due and payable within 20 Business Days of delivery of written demand supported by all relevant information.

The parties may agree to any other basis for payment.

10.2 Financing of Lump Sum Payment Amounts

If the Authority is obligated to compensate, reimburse or otherwise pay Project Co and exercises its discretion not to do so by a lump sum payment in accordance with Section 10.1, at the Authority's request, Project Co will use commercially reasonable efforts to obtain the

financing required to make such payment on the best terms reasonably available and, to the extent that Project Co is able to obtain such financing, there will be a corresponding increase made to the Availability Payments in accordance with Section 10.3.

The Authority will:

- (a) promptly pay to Project Co an amount equal to the reasonable out-of-pocket expenses incurred by Project Co in seeking such financing provided that the Authority approved such expenses prior to Project Co incurring them; and
- (b) provide concurrent interim financing of any expenditures and costs to be incurred by Project Co until the earlier of the date on which such financing is obtained or payment is made pursuant to Section 10.1.

The Authority acknowledges that the Senior Secured Creditors have no obligation to provide the financing referred to in this Section 10.2 or to subordinate or share their security.

10.3 Adjustments to Availability Payments

Subject to the Authority's discretion for the basis of payment under Section 10.1 or the parties' agreement to another basis for payment under Section 10.1, if either party gives notice to the other party that it wishes the parties to consider whether an entitlement to payment under this Project Agreement is more efficiently effected by adjustments (both increases and decreases) to Availability Payments, or if this Project Agreement requires that an entitlement be effected by such adjustments:

- (a) within 10 Business Days after such notice or after the determination that Availability Payments are required to be adjusted, Project Co will give notice to the Authority of the proposed adjustments to be made to the Availability Payments to achieve the objectives and outputs set out in Section 10.3(b). Such proposed adjustments will be ascertained by entering the relevant cost adjustments and losses into the Financial Model with effect from the relevant date determined in accordance with Section 10.3(c);
- (b) the adjustments to the calculation of the Availability Payments will be determined so that upon comparing the output of the Financial Model as at the adjustment date (after updating the Financial Model to reflect actual performance to date) before and after the proposed adjustments to Availability Payments, and taking into account the impact of such adjustments on the economics of the Project as reflected in the Financial Model, the timing of liability for taxation and the time when the adjustments to the Availability Payments will take effect, such comparison of the output from such Financial Model shows that:
 - (1) the rate of return in respect of equity subscribed in Operations Co and Junior Debt advanced to Project Co in accordance with the Financial Model prior to the Availability Payment adjustment will be unchanged except to the extent required to reflect:
 - (A) any material change in the risk profile of the Project arising in connection with the circumstance giving rise to the adjustment; or

- (B) any benefit to the parties, including in connection with an Innovation Proposal; and
- (2) Project Co would not, by reason of the effect of the occurrence of the adjustment or the consequential change in cash flow during the Term as shown in the Financial Model (as adjusted), be placed, in respect of any of the Senior Financing Agreements, in a position worse than it would have been in if the change had not occurred;
- (c) the relevant date for adjustments to the Availability Payments is:
 - (1) in the case of an adjustment occurring before a Site Completion Date, the Site Completion Date, unless otherwise agreed or specified in Schedule 6 [Changes, Minor Works and Innovation Proposals]; or
 - (2) in the case of an adjustment occurring after a Site Completion Date, the start of the next Payment Period in the Financial Model falling after the completion or implementation of the adjustments is achieved;
- (d) if within 10 Business Days after Project Co gives notice of the proposed adjustments the parties agree that the entitlement to payment should be effected by adjustments to the Availability Payments, or if this Project Agreement requires that the entitlement be effected by such adjustments, the parties will implement such adjustments and update the Financial Model accordingly; and
- (e) if completion or implementation of the adjustments is delayed beyond the scheduled date for completion or implementation by reference to which the Financial Model has been re-run in accordance with this Section 10.3 other than delay resulting from an audit under Section 10.4, the date of adjustment to the Availability Payments payable by the Authority will be delayed by a period equal to the delay in the completion or implementation of the required adjustments.

10.4 Audit of Financial Model

Prior to implementing any adjustments to the Availability Payments contemplated in Section 10.3, the Authority may, at its own expense, review and audit the revised Financial Model prepared by Project Co and Project Co will provide such information as is reasonably required by the Authority to conduct such audit.

11. AUTHORITY'S STEP-IN RIGHTS

11.1 Authority's Step-in Rights

If:

- (a) the Authority reasonably considers that a breach by Project Co of any obligation under this Project Agreement is likely to create an immediate and serious threat to the health or safety of any person, any property or the environment; or

- (b) notwithstanding that Project Co is not in breach of its obligations under this Project Agreement, the Authority reasonably considers the circumstances to constitute an Emergency,

then the Authority, acting reasonably, may either:

- (c) if it considers that there is sufficient time and that Project Co is likely to be willing and able to provide assistance, require Project Co by notice to take such steps as are necessary or expedient to mitigate or rectify such state of affairs, including, if applicable due to breach of any Project Contract or Sub-Contract, suspension of the Project Contractor or Sub-Contractor, and Project Co will use commercially reasonable efforts to comply with the Authority's requirements as soon as reasonably practicable; or
- (d) if it considers that there is not sufficient time or that Project Co is not likely to be willing and able to provide assistance, take such steps as it considers are appropriate (either itself or by engaging others) to mitigate or rectify such state of affairs and to ensure performance of the relevant Services to the standards required by this Project Agreement (or as close as possible to those standards as the circumstances permit). The Authority will carry out such steps as quickly as is practicable, and in such manner as will minimize interference with Project Co's performance of its obligations under this Project Agreement.

Project Co will ensure that the provisions contained in all applicable Sub-Contracts will not prevent or inhibit the Authority from exercising its rights under this Section 11 (Authority's Step-In Rights).

11.2 Authority's Rectification Rights

If the Authority gives notice to Project Co under Section 11.1(c) and Project Co either:

- (a) does not confirm, within 5 Business Days of such notice, or such shorter period as is appropriate in the case of an Emergency, that it is willing to take such steps as are required in such notice or present an alternative plan to the Authority to mitigate, rectify and protect against such circumstances that the Authority may, within a further 5 Business Days, accept or reject, acting reasonably; or
- (b) fails to take the steps as are referred to or required in such notice or accepted alternate plan within such time as set out in such notice or accepted alternate plan or within such time as the Authority, acting reasonably, will stipulate,

then the Authority may take such steps as it considers necessary or expedient to mitigate, rectify or protect against such circumstances either itself or by engaging others to take any such steps. Such steps may include the partial or total suspension of the right and obligation of Project Co to provide the relevant Services, but only for so long as the circumstances referred to in Section 11.1(a) or Section 11.1(b) subsist. If the circumstances referred to in Section 11.1(a) or Section 11.1(b) no longer subsist or Project Co has proposed a plan acceptable to the Authority, acting reasonably, for mitigating, rectifying and protecting against such circumstances, any suspension of the right and obligation of Project Co to provide any Services will cease and such right and obligation will once again be in full force and effect.

11.3 Notice of NG-KIH System Change

The Authority will notify Project Co and Operations Co of any NG-KIH System Change which the Authority intends to make pursuant to the exercise of the Authority's rights under Section 11.1(d) or Section 11.2 and provide Project Co a reasonable opportunity, taking into account all the circumstances, to comment on the proposed NG-KIH System Change. In making such NG-KIH System Change, the Authority will reasonably consider comments received in a timely manner from Project Co on the proposed NG-KIH System Change.

11.4 No Effect on Project Co's Design and Construction Responsibility

The exercise by the Authority of any of its rights under this Section 11 (Authority's Step-In Rights) will not reduce or affect in any way Project Co's responsibility under Section 4.1 of Schedule 2 [Design and Construction Protocols].

11.5 Allocation of Costs for Authority Actions

To the extent that any of the circumstances set out in Section 11.1 arise as a result of any breach by Project Co of its obligations under this Project Agreement, then Project Co will pay the Authority the amount of all direct costs and expenses reasonably incurred by the Authority in exercising its rights under Section 11.1 or Section 11.2 and an additional mark-up of 5% of such costs and expenses in respect of indirect costs and overhead not otherwise directly attributable to the exercise of such rights. In all other cases, any actions of the Authority under Section 11.1 and Section 11.2 will constitute a Compensation Event.

12. PROJECT CO EVENTS OF DEFAULT

12.1 Project Co Events of Default

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

- (a) the occurrence of a Project Co Material Breach that is not remedied in accordance with Section 12.3, including in accordance with the program for remediation produced by Project Co in accordance with Section 12.3, or the occurrence of a Project Co Material Breach for which a program for remediation has not been produced by Project Co in accordance with Section 12.3;
- (b) the occurrence of a Project Co Insolvency Event;
- (c) Project Co abandons the Project, other than pursuant to its right to suspend performance under Section 13.3 or due to a Supervening Event;
- (d) System Completion does not occur on or before the Longstop Date;
- (e) Project Co breaches Section 16.1 or a Change in Control occurs which is prohibited by Section 16.2;
- (f) Project Co breaches its obligations under this Project Agreement (other than as a consequence of a breach by the Authority of its obligations under this Project Agreement) which results in a criminal conviction related to health and safety

violations against Project Co or any Project Co Person or the Authority (an “**H&S Conviction**”), except that:

- (1) an H&S Conviction of Project Co, a Project Co Person or the Authority will not constitute a Project Co Event of Default if, within 60 Business Days from the date of the H&S Conviction (whether or not the H&S Conviction is subject to an appeal or any further judicial process), the involvement in the Project of each relevant Project Co Person is terminated or Project Co takes such other action against each such Project Co Person as is acceptable to the Authority acting reasonably; and
- (2) in determining whether to exercise any right of termination for a Project Co Event of Default pursuant to this Section 12.1(f), the Authority will:
 - (A) act in a reasonable and proportionate manner having regard to such matters as the gravity of the offence and the identity of the person committing the act leading to the H&S Conviction; and
 - (B) give all due consideration, where appropriate, to action other than termination of this Project Agreement;
- (g) subject to Sections 8.4(g) and 8.6(f), Project Co accumulates Deductions of \$6,500,000 (Index Linked) or more in any 12 consecutive month period during the Operating Period;
- (h) Project Co makes a representation or warranty in the body of this Project Agreement or Schedules 1 to 20 that is false or misleading when made, and that has or will have at any time a material adverse effect on the performance of the Project or the Services and, in the case of a false or misleading representation or warranty that is capable of being remedied, Project Co has not remedied such breach within 10 Business Days following notice from the Authority; or
- (i) if such consent is required under Section 5.3, Project Co carries out a Refinancing without the Authority’s consent,

unless caused by non-compliance by the Authority with any provision of this Project Agreement or any document, instrument or agreement delivered to Project Co as required under this Project Agreement or any negligent act or omission, or any willful misconduct, of the Authority or any Authority Person.

12.2 Notification

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

12.3 Project Co Material Breach Cure and Remedial Program

After the occurrence of a Project Co Material Breach and while it is subsisting, the Authority may serve a notice on Project Co and Operations Co specifying in reasonable detail the type and nature of the Project Co Material Breach and:

- (a) Project Co will remedy such Project Co Material Breach referred to in such notice (if it is continuing) within 45 days of such notice; or
- (b) if either the Authority (as set out in its notice) or Project Co reasonably considers that a Project Co Material Breach cannot reasonably be remedied within 45 days of such notice, Project Co will deliver to the Authority within 15 Business Days of such notice a reasonable program (set out, if appropriate, in stages) for remedying the Project Co Material Breach, which program will specify in reasonable detail the manner in, and the latest date by, which the Project Co Material Breach is proposed to be remedied.

If Project Co puts forward a program in accordance with Section 12.3(b), the Authority will have 10 Business Days from receipt of the program within which to notify Project Co that the Authority, acting reasonably, does not accept the program. If the Authority notifies Project Co that it does not accept the program as being reasonable or does not respond within 10 Business Days from receipt of the program, the parties will use commercially reasonable efforts within the following 5 Business Days to agree to any necessary amendments to the program put forward. In the absence of an agreement within such 5 Business Days, the question of whether the program (as it may have been amended by agreement) will remedy such Project Co Material Breach in a reasonable manner and within a reasonable time period (and, if not, what would be a reasonable program) may be referred by either party for resolution in accordance with the Dispute Resolution Procedure.

12.4 Authority Termination Right

If:

- (a) a Project Co Material Breach is not remedied before the expiration of the period referred to in Section 12.3(a) and no program has been put forward by Project Co under Section 12.3(b);
- (b) Project Co puts forward a program pursuant to Section 12.3(b) which has been accepted by the Authority (including after agreement under Section 12.3 to amendments to the program) or has been determined to be reasonable pursuant to the Dispute Resolution Procedure and Project Co fails to remedy the Project Co Material Breach before the end date for the program;
- (c) any program put forward by Project Co pursuant to Section 12.3(b) is rejected by the Authority as not being reasonable, and, if such rejection is disputed by Project Co, the Dispute Resolution Procedure does not find against that rejection; or
- (d) any Project Co Event of Default other than a Project Co Material Breach occurs,

then the Authority may (if the Project Co Event of Default continues unwaived and unremedied), subject to the terms of the Lenders' Remedies Agreement, terminate this Project Agreement by notice to Project Co and Operations Co. The right of the Authority to terminate this Project Agreement under this Section 12.4 is in addition, and without prejudice, to any other right which the Authority may have in connection with Project Co's defaults hereunder.

For the purposes of Section 12.4(b), if Project Co's performance of the program is adversely affected by the occurrence of a Supervening Event or a breach by the Authority of its obligations under this Project Agreement, then, subject to Project Co complying with the mitigation and other requirements in this Project Agreement concerning such events, the time for performance of the program or any relevant element of it will be deemed to be extended by a period equal to the delay caused by such events which is agreed by the parties or determined in accordance with the Dispute Resolution Procedure.

12.5 Replacement of Non-Performing Service Provider

- (a) As an alternative to termination of this Project Agreement pursuant to Section 12.4, if:
- (1) the Authority has a right to terminate this Project Agreement due to a Project Co Event of Default that was caused, or contributed to, by the Service Provider; and
 - (2) the actions of the Service Provider constitute a breach under the Services Contract that entitles Project Co to terminate the Service Provider,

the Authority may, acting reasonably, require Project Co to terminate the Service Provider and ensure that a replacement Service Provider is appointed to provide the Services within 40 Business Days.

- (b) If the Authority exercises its rights under this Section 12.5, Project Co shall, within 10 Business Days, put forward a proposal for the interim management or provision of the Services until such time as a replacement Service Provider can be engaged by Project Co. If:
- (1) Project Co fails to submit a proposal for the interim management or provision of the Services, or the Authority is of the opinion, acting reasonably, that Project Co's proposal is not reasonably likely to result in adequate provision of the Services; and
 - (2) the parties cannot agree within a further 3 Business Days to a plan for the interim management or provision of the Services,

then, without prejudice to the other rights of the Authority under this Section 12.5,

- (3) the Authority itself may perform, or engage others (including a third party) to perform, the Services;
- (4) Project Co will pay the Authority the amount of all direct costs and expenses reasonably incurred by the Authority in exercising its rights pursuant to Section 12.5(b)(3) and an additional mark-up of 5% of such

costs and expenses in respect of indirect costs and overhead not otherwise directly attributable to the exercise of such rights; and

- (5) Project Co shall not be subject to Deductions in respect of those Services that are being performed by the Authority or a third party appointed by the Authority pursuant to Section 12.5(b)(3) to the extent and for the duration of time that Project Co is not performing those Services.

Any Dispute in respect of the interim management or provision of the Services will be determined in accordance with the Dispute Resolution Procedure.

- (c) Project Co's appointment of a replacement Service Provider pursuant to this Section 12.5 shall be subject to the following:
 - (1) the Authority's prior written consent, acting reasonably, as to the suitability of the replacement; and
 - (2) the replacement Service Provider entering into:
 - (A) a contract with Project Co upon the same or substantially similar terms as the Person so replaced; and
 - (B) a Project Contractor Collateral Agreement with the Authority and Project Co on the same terms as the Project Contractor Collateral Agreement entered into by the Person so replaced,

unless any material variations are approved by the Authority, acting reasonably.

- (d) If Project Co fails to terminate the Service Provider and to secure a replacement Service Provider in accordance with this Section 12.5, the Authority shall be entitled to exercise its termination rights in accordance with Section 12.4.
- (e) If Project Co terminates the Service Provider and secures a replacement Service Provider in accordance with this Section 12.5, any Deductions accrued by Project Co prior to such replacement will not be counted for the purposes of Section 12.1(g) or Section 6.4 of Schedule 4 [Services Protocols and Specifications].

12.6 The Authority's Costs

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

13. AUTHORITY EVENTS OF DEFAULT

13.1 Authority Events of Default

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

- (a) a failure by the Authority to pay any amount due and owing to Project Co under this Project Agreement on the due date (which amount is not being disputed in

Project Agreement
NG-KIH Project

good faith) and the Authority has not remedied such failure to pay within 10 Business Days of notice from Project Co;

- (b) except as provided for in Section 13.1(a), a breach, or series of breaches, by the Authority of any term, covenant or undertaking to Project Co, or any representation or warranty made by the Authority to Project Co in this Project Agreement is incorrect when made, the consequence of which:
 - (1) has a material adverse effect on the performance of the Design, Construction, Services or System Refresh; or
 - (2) results in any material provision of this Project Agreement being unenforceable against the Authority,

and, as a result thereof, Project Co is reasonably likely to be materially deprived of the benefit of this Project Agreement;

- (c) if any material part of the NG-KIH System, the portion of the Lands on which the NG-KIH System is situated, or any interest in Project Co is expropriated by any Governmental Authority and as result thereof Project Co is reasonably likely to be materially deprived of the benefit of this Project Agreement; or
- (d) the Authority breaches Section 16.4.

13.2 Notification

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

13.3 Project Co's Options

After the occurrence of an Authority Event of Default and while an Authority Event of Default is continuing, Project Co may, at its option exercise one or more of the following, as applicable:

- (a) in respect of the Design and the Construction prior to the System Completion Date, suspend performance by it of its obligations under this Project Agreement until such time as the Authority has demonstrated to the reasonable satisfaction of Project Co that it will perform and is capable of performing its obligations under this Project Agreement and the Target Site Completion Dates, Target Ring Completion Dates, Target System Completion Date, Outside Ring Completion Dates and Longstop Date will be extended by the time such suspension is in effect;
- (b) in the case of an Authority Event of Default under Section 13.1(a), suspend performance by it of its obligations under this Project Agreement until the Authority has remedied such Authority Event of Default and the Target Site Completion Dates, Target Ring Completion Dates, Target System Completion Date, Outside Ring Completion Dates and Longstop Date will be extended by the

time such suspension is in effect and such additional time as may be reasonably required to return to normal operations following such suspension;

- (c) in the case of an Authority Event of Default under Sections 13.1(a), 13.1(b) or 13.1(c), serve notice on the Authority of the occurrence specifying details of such Authority Event of Default and if the relevant matter or circumstance has not been rectified or remedied by the Authority or otherwise within 45 days of such notice (or in the case of an Authority Event of Default under Section 13.1(b) or 13.1(c) such longer period as is reasonably required for the Authority to rectify or remedy such Authority Event of Default as long as the Authority is diligently pursuing such rectification or remedy), Project Co may serve a further notice on the Authority terminating this Project Agreement with immediate effect; or
- (d) in the case of an Authority Event of Default under Section 13.1(d), terminate this Project Agreement by notice to the Authority with immediate effect.

13.4 Project Co's Costs

The Authority will reimburse Project Co for any and all reasonable costs incurred by Project Co in exercising any of its rights (including, but not limited to, any relevant increased administrative expenses, interest expenses during Construction and actual legal and other expenses) under this Section 13 (Authority Events of Default).

14. PROCEDURE ON TERMINATION

14.1 Compensation on Termination

- (a) If this Project Agreement is terminated pursuant to its terms, compensation on termination will be determined and paid in accordance with Schedule 9 [Compensation on Termination].
- (b) If this Project Agreement is terminated by the Authority pursuant to Section 12.4, in lieu of paying the Project Co Default Termination Amount as a lump sum pursuant to Section 6.1 of Schedule 9 [Compensation on Termination], the Authority may, in its sole discretion and subject to providing notice to Project Co and Operations Co within 10 Business Days of the Termination Date, elect to pay the Project Co Default Termination Amount over the remaining period until the Expiration Date, subject to and in accordance with Sections 14.1(c), (d) and (e). If the Authority so elects, from the Termination Date and until the Expiration Date (such period, the "**Termination Payment Period**"), the Authority shall pay to Project Co the Scheduled Pro Rata Principal Repayment Amount on each principal repayment date set forth in the Senior Financing Agreements for the Senior Debt issued thereunder and falling due during the Termination Payment Period, in an aggregate amount not to exceed the Project Co Default Termination Amount.
- (c) Interest shall accrue on the unpaid Pro Rata Principal Amount for the Senior Debt issued and outstanding under the Senior Financing Agreements at a rate equal to the non-default interest rate provided for in the Senior Financing Agreements with respect to such Senior Debt for the period from (but excluding) the Termination Date to (and including) the Expiration Date (or the date on which

the Project Co Default Termination Amount is paid sooner pursuant to Section 14.1(d)). Such accrued and unpaid interest shall be paid on each interest payment date set forth in the Senior Financing Agreements for the Senior Debt issued thereunder and falling due during the Termination Payment Period.

- (d) The Authority may, in its sole discretion and at any time during the Termination Payment Period, pay all (but not part) of the then outstanding Project Co Default Termination Amount to Project Co as a lump sum.
- (e) Notwithstanding Section 14.1(b), the amount by which the Project Co Default Termination Sum exceeds the amount required to repay the Senior Debt, if any, will be paid to Project Co as a lump sum on the Termination Payment Date.

14.2 Transfer to the Authority of Assets, Contracts, etc.

On or promptly after the Termination Date:

- (a) if prior to the System Completion Date:
 - (1) in so far as any transfer will be necessary to fully and effectively transfer property to the Authority, Project Co will transfer to, and there will vest in, the Authority (or any New Project Co as may be appointed by the Authority) free from all financial encumbrances:
 - (A) such part of the NG-KIH System as has been constructed on or has become affixed to the Lands; and
 - (B) all construction materials on-hand to be affixed to the Lands or otherwise used in the NG-KIH System; and
 - (2) if the Authority so elects:
 - (A) the construction equipment will remain available to the Authority or the New Project Co for the purposes of completing the Design and Construction; and
 - (B) all other Project related materials will remain available to the Authority or the New Project Co for the purposes of completing the Design and Construction,
- subject to payment by the Authority of the Design-Builder's reasonable charges;
- (b) if the Authority so elects, Project Co will cause any or all of the Project Contracts to be novated or assigned to the Authority, provided that:
 - (1) Project Co will not be obligated to assign to the Authority any of Project Co's rights to claim against the applicable Project Contractor that arose under such Project Contract prior to the date of such novation or assignment; and

- (2) if termination occurs under Section 13.3, the consent of the applicable Project Contractor will be required;
- (c) Project Co will, or will cause any Project Contractor to, offer to sell to the Authority at the Fair Market Value, free from any security interest all or any part of the stocks of material and other assets, vehicles, spare parts and other moveable property owned by Project Co or any Project Contractor and reasonably required by the Authority in connection with the operation of the NG-KIH System or the provision of the Services;
- (d) Project Co will deliver to the Authority (to the extent not already delivered to the Authority):
 - (1) all existing designs, network configurations, plans and other documents produced in connection with the NG-KIH System and in the control of Project Co;
 - (2) one complete set of existing "as built drawings" showing all alterations made to the NG-KIH System since the commencement of operation of the NG-KIH System; and
 - (3) one complete set of existing up to date maintenance, operation and training manuals for the NG-KIH System,subject to reasonable generally applicable third party licensing terms;
- (e) Project Co will use commercially reasonable efforts to ensure that the benefit of existing Project Intellectual Property and all warranties in respect of mechanical and electrical equipment used or made available by Project Co under this Project Agreement and included in the NG-KIH System but not previously assigned or licensed to the Authority are assigned, licensed or otherwise transferred to the Authority;
- (f) to the extent permitted by Law, Project Co will assign to the Authority (or any New Project Co as may be appointed by the Authority) all Permits;
- (g) Project Co will deliver to the Authority all records required to be kept by Project Co hereunder (Project Co having the right to retain copies thereof) unless such documents are:
 - (1) required by Law to be retained by Project Co, Operations Co, a Project Contractor or a Sub-Contractor, in which case complete copies will be delivered to the Authority; or
 - (2) privileged from production pending resolution of any outstanding Dispute, in which case such records will be delivered forthwith upon resolution of such Dispute, provided that any records that are necessary for the performance of the Design, Construction, Services or System Refresh will be delivered to the Authority no later than the Termination Payment Date; and

- (h) return to the Authority all Confidential Information of the Authority within the possession or control of Project Co, Operations Co, any Project Contractor or any Sub-Contractor.

Project Co will ensure that provision is made in all applicable contracts to ensure that the Authority will be in a position to exercise its rights, and Project Co will be in a position to comply with its obligations, under this Section 14.2 without additional payment or compensation to any Person.

14.3 Transition Out Arrangements

On the Expiration Date, Project Co will:

- (a) on request by the Authority, for a period not to exceed 6 months after the Expiration Date:
 - (1) co-operate fully with the Authority and any successor providing to the Authority services in the nature of any of the Services or any part of the Services to achieve a timely, safe, orderly, effective and efficient transition of the performance of services in the nature of the Services and to avoid or mitigate in so far as reasonably practicable any material interruption to the Services or risk to the health and safety of any person; and
 - (2) continue to provide the Services or any part of the Services required by the Authority and the Authority will pay to Project Co a reasonable price for such services determined with reference to Project Co's price for such Services prior to the Expiration Date;
- (b) subject to Section 14.3(a), as soon as practicable following the Expiration Date remove all property of Project Co or any Project Co Person that is not acquired by the Authority pursuant to Section 14.2 (or not belonging to the Authority) and if it has not done so within 20 Business Days after any notice from the Authority requiring it to do so the Authority may (without being responsible for any loss, damage, costs or expenses) remove and sell any such property and will hold any proceeds less all costs incurred to the credit and direction of Project Co;
- (c) subject to Section 14.3(a), on the Expiration Date deliver to the Authority:
 - (1) all keys, access codes and/or other devices required to operate the NG-KIH System in the control of Project Co; and
 - (2) any Project Intellectual Property required to be delivered by Project Co pursuant to Section 14.2(e);
- (d) subject to Section 14.3(a), as soon as practicable after the Expiration Date, vacate, and cause the Project Co Persons to vacate, those parts of the NG-KIH System over which Project Co has control and occupation and will leave such parts of the NG-KIH System in a safe, clean and orderly condition; and
- (e) comply with all requirements of Appendix 4B [Handback Requirements].

14.4 Project Co to Cooperate

If the Authority wishes to conduct a solicitation prior to the Expiration Date with a view to entering into an agreement for the provision of services (which may or may not be the same as, or similar to, the Services or any of them) following the expiration of this Project Agreement, the Authority will provide notice of same to Project Co and Operations Co and, upon receipt of any such notice from the Authority, Project Co will, prior to the Expiration Date, co-operate with the Authority fully in such solicitation process including by:

- (a) providing any information in Project Co's control or possession which the Authority may reasonably require to conduct such solicitation except that information which is commercially sensitive to Project Co or a Project Co Person (and, for such purpose commercially sensitive means information which would if disclosed to a competitor of Project Co or a Project Co Person give that competitor a competitive advantage over Project Co or the Project Co Person and thereby prejudice the business of Project Co or the Project Co Person); and
- (b) assisting the Authority by providing any participants in such solicitation process with access to the Lands and the NG-KIH System provided such access does not affect the Services in a way that results in any reduction in Availability Payments.

Project Co will be entitled to reimbursement for all reasonable out-of-pocket expenses and costs incurred in connection with the foregoing services.

14.5 Project Co Materials

In connection with all information, records, documents, data and other materials delivered by Project Co to the Authority as required pursuant to this Section 14 (Procedure on Termination) (collectively, the "**Project Co Materials**") Project Co shall deliver to the Authority a certificate of an officer of Project Co addressed to the Authority in form and substance satisfactory to the Authority, certifying, among other things:

- (a) all Project Co Materials delivered to the Authority are true, accurate and complete copies of the originals of all such Project Co Materials;
- (b) with respect to Project Co Materials that constitute agreements, understandings, indentures, contracts, leases, deeds of trust, licenses, options, instruments or other commitments between Project Co and any Persons:
 - (1) all are in good standing and in full force and effect with no amendments and Project Co is entitled to all rights and benefits thereunder;
 - (2) Project Co has complied with all terms thereof, has paid all amounts due thereunder, has not waived any rights thereunder and no default or breach exists in respect thereof on the part of any of the parties thereto and no event has occurred which, after the giving of notice or the lapse of time or both, would constitute such a default or breach; and
 - (3) all are valid and binding obligations of the parties thereto enforceable in accordance with their respective terms; and

- (c) other than Project Co Materials there no other material agreements, understandings, indentures, contracts, leases, deeds of trust, licenses, options, instruments or other commitments relating to the Project.

14.6 Continued Performance

Subject to Project Co's rights of suspension under Sections 13.3(a) and 13.3(b) and subject to the provisions of this Section 14 (Procedure on Termination), the parties will continue to perform their obligations under this Project Agreement (including the Authority continuing to make Availability Payments) notwithstanding the giving of any notice of default or notice of termination.

15. DISPUTE RESOLUTION

15.1 Procedure

Except as otherwise provided in this Project Agreement, any Dispute will be resolved in accordance with, and the parties will comply with, the Dispute Resolution Procedure set out in Schedule 13 [Dispute Resolution Procedure].

16. ASSIGNMENT/CHANGE IN CONTROL

16.1 Limitations on Assignment of Project by Project Co

Project Co will not assign, transfer or otherwise dispose of any interest in this Project Agreement, the Project Implementation Agreement or a Project Contract except:

- (a) as security, substantially in a form approved by the Authority, acting reasonably, prior to its grant for any loan made to Project Co under any Senior Financing Agreement and provided the Collateral Agent enters into the Lenders' Remedies Agreement;
- (b) in connection with the exercise of rights of the Collateral Agent under the Senior Financing Agreements in accordance with the Lenders' Remedies Agreement; or
- (c) otherwise:
 - (1) prior to the day (the "**Transfer Restriction Date**") that is one year after the System Completion Date, with the written consent of the Authority, which may be given or withheld in the Authority's discretion; and
 - (2) after the Transfer Restriction Date, with the written consent of the Authority, which will not be unreasonably withheld or delayed,

provided that, in the case of an assignment under Section 16.1(b) or 16.1(c), the assignee:

- (d) is not a Restricted Person; and
- (e) assumes all the obligations of Project Co under this Project Agreement.

16.2 Limitations on Change in Control

No Change in Control of Project Co will be permitted (whether by Project Co or otherwise) to occur except:

- (a) in connection with the exercise of rights of the Collateral Agent under the Senior Financing Agreements in accordance with the Lenders' Remedies Agreement, provided that such Change in Control does not result in a Restricted Person obtaining Control of Project Co;
- (b) arising from any bona fide open market transaction in any shares or other securities of Project Co or any other Person effected on a recognized public stock exchange;
- (c) if Control of Project Co following the Change in Control is held by one or more Affiliates of Project Co immediately prior to the Change in Control; or
- (d) otherwise:
 - (1) prior to the Transfer Restriction Date, with the written consent of the Authority, which may be given or withheld in the Authority's discretion; or
 - (2) after the Transfer Restriction Date, with the written consent of the Authority, which will not be unreasonably withheld or delayed.

16.3 Factors Authority May Consider

In determining whether to provide its consent under Section 16.1(c) or 16.2(d), the Authority may consider any factors that are relevant to the determination and, without limiting the generality of the foregoing, it will be reasonable for the Authority to refuse its consent if:

- (a) the proposed assignee or the new party in control of Project Co, as the case may be, is a Restricted Person;
- (b) the proposed assignee or the new party in control of Project Co, as the case may be, is, in the reasonable opinion of the Authority, not sufficiently creditworthy or having sufficient financial capacity taking into account the nature of the obligations under this Project Agreement; or
- (c) the assignment or Change in Control could, in the reasonable opinion of the Authority, have a material adverse effect on the Authority or the Project.

16.4 Limitations on Assignment of Project by Authority

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

- (a) the assignment, transfer or other disposition is to a department or agency of the Commonwealth of Kentucky;

- (1) having the legal capacity, power, authority and ability to become a party to and to perform the obligations of the Authority under this Project Agreement; and
 - (2) whose ability to discharge the payment obligations under this Project Agreement is equivalent in every respect to the Authority's ability to discharge the payment obligations under this Project Agreement;
- (b) the assignee assumes all the obligations of the Authority under this Project Agreement; and
 - (c) the assignment, transfer or other disposition in no way changes the nature of the payment obligations under this Project Agreement as a contractual obligation of the Commonwealth of Kentucky, regardless of the department or agency of the Commonwealth of Kentucky to which they are assigned.

16.5 Costs of Request for Consent

If Project Co requests consent to an assignment, transfer or disposition pursuant to Section 16.1 or to a Change in Control pursuant to Section 16.2, Project Co will pay the Authority's reasonable internal administrative and personnel costs and all reasonable out-of-pocket costs in connection with considering any such request. At the time of such request, Project Co will make a payment to the Authority in the amount of \$10,000 (Index Linked) against its obligation under this Section 16.5. After the Authority renders its decision, the Authority will either refund any over payment or invoice Project Co for any additional amounts owing under this Section 16.5 and Project Co will promptly pay such amount to the Authority.

17. GENERAL

17.1 Confidentiality

- (a) Subject to Section 17.1(b), each party will hold in confidence any Confidential Information received from the other party, except that this Section 17.1 will not restrict:
 - (1) Project Co from disclosing or granting access to such information to its professional advisers and consultants, to the extent necessary, to enable it to perform (or to cause to be performed) or to enforce its rights or obligations under this Project Agreement and provided further that Project Co may, subject to obtaining confidentiality restrictions similar to those set out in this Project Agreement:
 - (A) provide to the Senior Secured Creditors and other potential lenders, equity providers, underwriters, arrangers, investment dealers, monoline insurers and their respective advisors such documents and other information as are reasonably required by them in connection with raising financing for the Project or complying with the terms of the Senior Financing Agreements or related agreements; and

- (B) provide to Operations Co or a Project Contractor and its advisors, or provide or cause to be provided to other third parties, Confidential Information which is necessary to enable Project Co to perform (or to cause to be performed) its obligations under this Project Agreement but which Confidential Information is not used by Operations Co or the Project Contractor, its advisors, or other third parties, as applicable, for any other purpose; and
 - (2) the Authority from disclosing or granting access to such information to any department of the Commonwealth of Kentucky or any other Governmental Authority which requires the information in relation to the Project.
- (b) Subject to any restrictions on the Confidential Information which are imposed by a third party that may own any Confidential Information, the obligation to maintain the confidentiality of the Confidential Information does not apply to Confidential Information:
 - (1) which the party that disclosed the Confidential Information confirms in writing is not required to be treated as Confidential Information;
 - (2) which is or comes into the public domain otherwise than through any disclosure prohibited by this Project Agreement;
 - (3) to the extent any Person is required to disclose such Confidential Information by Law, including the Open Records Act;
 - (4) to the extent consistent with any Authority's policy concerning the Authority's Confidential Information, the details of which have been provided to Project Co in writing prior to the disclosure; or
 - (5) that is known to the recipient of the Confidential Information prior to disclosure to the recipient by the other party or becomes known to the recipient thereafter by way of disclosure to the recipient by any other Person who, to the knowledge of the recipient, is not under any obligation of confidentiality with respect thereto.
- (c) Without prejudice to any other rights and remedies that the other party may have, a party may be entitled to the remedies of injunction, specific performance or other equitable relief for any threatened or actual breach of Section 17.1(a).
- (d) Project Co will be fully liable for any breach of confidentiality under this Section 17.1 by any Person to whom Project Co has disclosed or granted access to Confidential Information under this Section 17.1 to the same extent as if Project Co itself breached confidentiality under this Section 17.1.

17.2 Public Communications

Unless expressly provided in this Project Agreement or otherwise required by any Law, including the Open Records Act, (but only to that extent), neither party will make or permit to be made any public announcement or disclosure whether for publication in the press, radio,

television or any other medium of any Confidential Information or any matters relating thereto, without the consent of the other party (which will not be unreasonably withheld or delayed). The parties will comply with Schedule 16 [Communication Roles].

17.3 Law of Agreement

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

17.4 Venue

Any legal actions or proceedings brought by either party hereto against the other party shall be brought in state court in Franklin County, Kentucky in accordance with KRS 45A.245. Each party acknowledges the competence of such court and the convenience and propriety of the venue and agrees to be bound by any judgment thereof and not to seek, and hereby waive, review of its merits by the courts of any other jurisdiction.

17.5 Entire Agreement, Waivers and Consents in Writing

This Project Agreement and the instruments and documents to be executed and delivered pursuant to this Project Agreement constitute the entire agreement between the parties.

The parties acknowledge that, due to the size and complexity of the Project, they have clarified through extensive negotiation the contents of both the RFP and the proposal(s) (including any clarifications, modifications or amendments thereto) submitted in response to either the RFP or the Master Agreement.

Accordingly, the body of this Project Agreement and Schedules 1 to 20 expressly supersede the contents of both the RFP and the proposal(s) (including any clarifications, modifications or amendments thereto) submitted in response to either the RFP or the Master Agreement, other than the components of the original proposal required pursuant to Section 6, Item 6.1 (Transmittal Letter), Section 6, Item 6.2 (Disclosure of Violation of Statutes), Section 6, Item 6.3 (Kentucky Tax Registration Application), Section 6, Item 6.4 (Registration with the Secretary of State by a Foreign Entity), Section 6, Item 6.5 (Required Affidavits), Section 6, Item 6.6 (Completed and signed face of solicitation), Section 6, Item 6.7 (Signed face of latest addendum of the solicitation), Section 6, Item 6.8 (EEO Forms), Section 6, Item 6.9 (Vendor Background and Project Resources), Section 6, Item 6.10 (Comparable Experiences), Section 6, Item 6.11 (Financial Viability – Finance Partner and Concessionaire) and Section 6, Item 6.18 (Network Security Plan) of the RFP.

This Project Agreement also expressly supersedes all prior agreements and communications (both oral and written) between the parties hereto with respect to all matters contained herein or therein and, except as stated herein or in the instruments and documents to be executed and delivered pursuant hereto, contains all the representations and warranties of the respective parties. In addition, no waiver of any provision of this Project Agreement and no consent required pursuant to the terms of this Project Agreement is binding or effective unless it is in writing and signed by the party providing such waiver or consent.

17.6 Notices

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

If to the Authority:

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

Attention: Secretary of the Finance and Administration Cabinet


With a copy to:

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

Attention: Stephanie Williams, Buyer
Email: StephanieR.Williams@ky.gov

If to Project Co:

KentuckyWired Infrastructure Company, LLC

Attention: Lori Hudson Flanery, Director
Email: 

With a copy to:

Office of Financial Management
Finance and Administration Cabinet
702 Capitol Avenue
Capitol Annex Room 076
Frankfort, KY 40601

Attention: Ryan Barrow, Executive Director
Email: Ryan.Barrow@ky.gov

With a copy to Operations Co:

KentuckyWired Operations Company, LLC
c/o Macquarie Infrastructure Developments LLC
Level 16, 125 West 55th Street
New York, NY 10019

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

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

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

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

17.7 Further Assurances

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

17.8 Counterparts

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

17.9 No Partnership

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

17.10 Survival

Notwithstanding any other provision of this Project Agreement, the provisions of Section 8 (Supervening Events) (if and to the extent a Compensation Event relates to a claim made by a third party against Project Co after the Termination Date), Section 9 (Indemnities and Limits on Liabilities and Remedies), Section 14 (Procedure on Termination), Section 15 (Dispute Resolution), Section 17.1, Appendix 4B [Handback Requirements], Schedule 9 [Compensation on Termination] and Schedule 13 [Dispute Resolution Procedure] will survive the expiration or any earlier termination of this Project Agreement.

[signature page follows]

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

THE COMMONWEALTH OF KENTUCKY

Per: *Lori Hudson Flanery*
Name: Lori Hudson Flanery
Title: Secretary, Kentucky Finance
& Administration Cabinet

I have the authority to bind the
Commonwealth.

**KENTUCKYWIRED INFRASTRUCTURE
COMPANY, INC.**

Per: *Steve Rucker*
Name: Steve Rucker
Title: Director

I have the authority to bind the corporation.

**SCHEDULE 1
DEFINITIONS AND INTERPRETATION**

1. DEFINITIONS

In this Project Agreement:

“Accounts Agreement” has the meaning given to it in the Senior Financing Agreements;

“Actual Coverage Amount” has the meaning set out in Schedule 5 [Insurance Requirements];

“Adjusted Pole Attachment Costs” has the meaning set out in Schedule 8 [Payments];

“Affiliate” in respect of:

- (a) a Person (other than Project Co) means any other Person that, directly or indirectly, through one or more intermediaries, Controls, is Controlled by, or is under common Control with, such first Person; and
- (b) Project Co means:
 - (1) any Person that, directly or indirectly, through one or more intermediaries, Controls, is Controlled by, or is under common Control with, Project Co; or
 - (2) any Person owned, in whole or in part, by (i) Project Co or (ii) any Affiliate of Project Co under (b)(1) above, whether the ownership interest is direct or indirect and legal, beneficial or equitable;

“Allowable Capital Expenditure” means the Capital Expenditure incurred by Project Co as a direct consequence of a Relevant Works Change in Law;

“Amended Pole Attachment Agreement” has the meaning set out in Section 3.9;

“Applicant” has the meaning set out in Section 8.1;

“Authority” means the Commonwealth of Kentucky;

“Authority Activities” means any activities carried on or to be carried on by the Authority, or other Persons permitted by the Authority, on or connected to the NG-KIH System, related to the Project;

“Authority Event of Default” has the meaning set out in Section 13.1;

“Authority Indemnified Person” means:

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

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

“Authority Person” means:

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

“Availability” means the proportion of time a path is in an Available state during an observation period, as measured in accordance with ITU Recommendation R F 1703;

“Availability Payment” has the meaning set out in Schedule 8 [Payments];

“Available” means that the NG-KIH System, as measured at the relevant Demarcation Point, is capable of offering the applicable services set out in Appendix 3A [Product Service Catalog] for the applicable Site;

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

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

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

“Base Date” means June 30, 2016;

“Baseline Pole Attachment Costs” has the meaning set out in Schedule 8 [Payments];

“Baseline Services Costs” has the meaning set out in Schedule 8 [Payments];

“Beneficiary” has the meaning set out in Section 9.2;

“Bonds” has the meaning set out in Section 3.8;

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

“Capital Expenditure” means an expenditure related to the Project which is treated as a capital expenditure in accordance with GAAP;

“Certificate of Site Completion” has the meaning set out in Schedule 2 [Design and Construction Protocols];

“Change” has the meaning set out in Schedule 6 [Changes, Minor Works and Innovation Proposals];

“Change Certificate” has the meaning set out in Schedule 6 [Changes, Minor Works and Innovation Proposals];

“Change Directive” has the meaning set out in Schedule 6 [Changes, Minor Works and Innovation Proposals];

“Change in Control” means with respect to a relevant Person any direct or indirect change in the ownership or Control of any legal, beneficial or equitable interest in any or all of the shares, units or equity in the relevant Person (including the control over the exercise of voting rights conferred on equity share capital, unit interests or equity interests or the control over the right to appoint or remove directors, a general partner or other managers), including changes arising from assignment or transfer of existing shares, units or equity, issuance of new shares, units or equity or amalgamation, merger, consolidation, amendment of a limited partnership certificate or other reorganization, or any other direct or indirect change which results in a Person or group of Persons, other than the equity holders of the relevant Person immediately prior to the change, directly or indirectly:

- (a) controlling the composition of the majority of the board of directors of the relevant Person or of a general partner or manager of the relevant Person;
- (b) controlling the decisions made by or on behalf of the relevant Person, including by controlling the voting power of the board of directors or by controlling the voting power of any class of shareholders or equity holders of the relevant Person, a general partner of the relevant Person or a manager of the relevant Person or otherwise;
- (c) holding equity (either beneficially or otherwise) of the relevant Person with a subscribed value (taking into account contributions to be made in the case of a limited partnership) of more than one half of the subscribed value (taking into account contributions to be made in the case of a limited partnership) or equity (either beneficially or otherwise) of the relevant Person with more than one half of the voting rights; or
- (d) having the ability to direct or cause the direction of the management, actions or policies of the relevant Person;

“Change in Law” means the coming into effect after the Effective Date of:

- (a) any final and non-appealable new Law; or

- (b) any final modification (including repeal or appeal) of any Law existing on such date,

which is binding on Project Co or the Authority, but excluding in each such case:

- (c) any lawful requirements of any Governmental Authority in effect on the Effective Date; and
- (d) any change in the interpretation of any Law, other than a judgment of a relevant court which changes binding precedent in the Commonwealth of Kentucky;

“Change Mark-Up” has the meaning set out in Schedule 6 [Changes, Minor Works and Innovation Proposals];

“Change Report” has the meaning set out in Schedule 6 [Changes, Minor Works and Innovation Proposals];

“Change Report Costs” has the meaning set out in Schedule 6 [Changes, Minor Works and Innovation Proposals];

“Charge” has the meaning set out in Schedule 7 [Lands];

“Collateral Agency and Account Agreement” means the collateral agency and account agreement between Project Co, as borrower, U.S. Bank National Association, as trustee, and U.S. Bank National Association, as collateral agent;

“Collateral Agent” means U.S. Bank National Association;

“COLO Equipment and Cabling” has the meaning set out in Schedule 8 [Payments];

“Commissioning” has the meaning set out in Schedule 2 [Design and Construction Protocols];

“Commissioning Plan” has the meaning set out in Schedule 2 [Design and Construction Protocols];

“Common Carrier” means any Person engaged as a common carrier for hire under applicable Law;

“Common Carrier Regulations” means any applicable Law governing Common Carriers;

“Compensation Event” means any of the following events or circumstances if and to the extent that it interferes adversely with, or causes a failure of, the carrying out of the Design, Construction, Services or System Refresh, causes an Outage or causes Direct Losses to Project Co or any Project Co Person:

- (a) a breach by the Authority of any of its obligations under this Project Agreement, including a failure of the Authority to grant, or cause to be granted, and to maintain, or cause to be maintained, the License as set out in Section 2.1 of Schedule 7 [Lands];
- (b) a breach of any representation or warranty by the Authority set out in this Project Agreement;

- (c) any misconduct of the Authority or an Authority Person, including unauthorized use of the NG-KIH System;
- (d) a negligent act or omission of the Authority or an Authority Person;
- (e) the discovery or exacerbation of any:
 - (1) Hazardous Substances located in, on, below or that have migrated to the Lands; or
 - (2) Hazardous Substances located in, on, below or that have migrated to any other location at which any aspect of the Project is performed, but only to the extent that Project Co's Direct Losses related thereto exceed \$200,000 in the aggregate over the Term,

in either case, other than Project Co Hazardous Substances;

- (f) if:
 - (1) the terms and conditions of any Permit, or the refusal to issue a Permit, require (i) the Construction to be performed in a manner that materially differs from the conceptual design prepared by Project Co as of the Effective Date or (ii) the creation of a new route in connection with the Project that differs from the conceptual design prepared by Project Co as of the Effective Date and Project Co's Direct Losses related thereto exceed \$25,000 in the aggregate over the Term;
 - (2) during the Construction Period, any Permit that falls into one of the Permit Classes set out in Appendix 2E [Expected Permit Timing] is not received within the Permit Delivery Time Period associated with the relevant Permit Class or, if a Permit (other than a Simple Pole Attachment Agreement) does not fall within one of the Permit Classes set out in Appendix 2E [Expected Permit Timing], there is an unreasonable delay in the receipt of such Permit, which delay has an impact on any critical path matter in the Project Schedule, provided that Project Co has submitted a complete and accurate Permit application and provided further that, in respect only of the Federal Permits, Project Co's Direct Losses related thereto exceed \$50,000 in the aggregate over the Term;
 - (3) notwithstanding (f)(2) above, the Authority does not execute a finalized Simple Pole Attachment Agreement provided to the Authority by Project Co within 3 Business Days of receipt thereof or any Pole Provider refuses to enter into a Simple Pole Attachment Agreement or a Complex Pole Attachment Agreement; or
 - (4) Project Co is required to obtain an Environmental Permit or any Permit that requires any Environmental Assessment to be performed on the Lands or any other location at which any aspect of the Project is performed;

- (g) the existence of any encumbrance enforceable against or affecting the Lands or the NG-KIH System;
- (h) the discovery of any human remains, relics or other articles or structures of historical, antiquarian or archaeological interest on, in, under or adjacent to the Lands or any other location at which any aspect of the Project is performed;
- (i) a Public Protest Action;
- (j) a lawful or unlawful strike, lockout, job action or other labor dispute by employees of the Authority or an Authority Person;
- (k) the existence of geotechnical conditions that are materially different from those reasonably anticipated in the conceptual design prepared by Project Co as of the Effective Date:
 - (1) on, in or under the Lands that will be utilized for the Huts;
 - (2) in connection with any water crossings, provided that Project Co has investigated and confirmed that the following are not viable options in advance of placing new conduit underground at a water crossing: attaching to an existing aerial crossing, pulling fiber through an existing underground conduit or an existing conduit on a bridge or placing new conduit on an existing bridge; or
 - (3) in connection with any wetlands, provided that Project Co has investigated and confirmed that the following are not viable options in advance of placing new conduit underneath the wetlands: attaching to an existing aerial crossing, pulling fiber through an existing underground conduit or an existing conduit on a bridge or placing new conduit on an existing bridge;
- (l) the event referred to in Section 6.10(b)(2)(D);
- (m) the event referred to in Section 8.4(e)(2);
- (n) the event referred to in Section 8.6(d)(2);
- (o) the actions referred to in Section 11.5 as constituting a Compensation Event;
- (p) the event referred to in Sections 7.11(a) or (c) of Schedule 2 [Design and Construction Protocols];
- (q) Project Co's compliance with a direction from the Authority under Section 3.3 of Schedule 13 [Dispute Resolution Procedure] when the matter in dispute is subsequently resolved, or settled, in Project Co's favor, unless relief has otherwise been provided pursuant to the Dispute Resolution Procedure;
- (r) the execution of works, other than usual or reasonably expected works, on the Lands or in respect of the NG-KIH System not forming part of this Project Agreement by:

- (1) the Authority;
- (2) any person permitted to execute such works by the Authority or any Authority Person; or
- (3) any Utility Company,

including any relocation of the NG-KIH System required due to the construction of a highway, pipeline or other infrastructure;

- (s) an activity undertaken by the Authority or any Authority Person in accordance with Section 2.4 that has a material adverse effect on Project Co's ability to perform the Design, Construction, Services and/or System Refresh;
- (t) if part of the NG-KIH System or part of the portion of the Lands on which the NG-KIH System is situated or any interest of Project Co is expropriated by any Governmental Authority and such expropriation is not an Authority Event of Default as set out in Section 13.1(c);
- (u) an event that causes a loss of or physical damage to any portion of the NG-KIH System at a Site Location;
- (v) an earthquake, tornado, hurricane, fire, wind storm, ice storm, mud slide, rock slide, flood, explosion, lightning or any other act of God that impacts:
 - (1) the aerial plant in excess of 15 pole spans or 3000 aerial feet of fiber;
 - (2) the underground plant in excess of 500 feet of fiber; or
 - (3) a combination of the aerial plant and the underground plant with an aggregate impact comparable to (1) or (2) above, assuming a ratio of 6 feet of aerial fiber being equal to 1 foot of underground fiber,

for each single event;

- (w) during the Construction Period, an injunction or other order of a court of competent jurisdiction resulting from a challenge to, or an expropriation that materially adversely interferes with, Project Co's right to access any lands, easements or other property (including, without limitation, access to the poles owned by any Utility Company);
- (x) a failure by a Third Party Infrastructure Provider to comply with the relevant Third Party Infrastructure Agreement, a breach by a Third Party Infrastructure Provider of any of its obligations under the relevant Third Party Infrastructure Agreement, a negligent act or omission of a Third Party Infrastructure Provider or the bankruptcy or insolvency of a Third Party Infrastructure Provider;
- (y) any change to the Site Access Plan that impacts the Project Schedule;
- (z) during the Construction Period, without limiting Project Co's obligation to provide stand-by power facilities for the NG-KIH System in accordance with the Design

and Construction Specifications, a failure by any Utility Company, local authority or other like body to perform works (which includes the approval of any application for work and the remediation of any pole violations not caused by Project Co) or provide services required to be provided by them, or requested of them, in a reasonably timely manner, or any unreasonable interference with the Construction by any such body as a result of maintenance or other work and, with respect to any make-ready work required to be performed by any Utility Company, local authority or other like body, a reasonably timely manner is deemed to mean approval of an application for make-ready work (without a restriction on the timing to commence such work) within 30 calendar days of receipt by the Utility Company, local authority or other like body of a complete and accurate application from Project Co and, if any of them require the self-performance of the make-ready work, then completion of such work within 5 weeks (for a Utility Company, local authority or other like body, other than a telecom carrier) and 12 weeks (for a telecom carrier) of the approval of the quote by Project Co;

- (aa) Project Co is required to obtain an easement or other right of access to any lands (other than the Lands) from a private landowner to carry out the Project in accordance with this Project Agreement, provided that the costs related thereto exceed \$200,000 in the aggregate over the Term;
- (bb) any Dispute in respect of a Change Directive issued pursuant to Section 4.15 (Project Co's Obligations re Third Party Infrastructure Agreements);
- (cc) a failure by the Authority to provide a sufficiently detailed description of each Site Location so as to enable Project Co to carry out its obligations under this Project Agreement by the date reasonably required by Project Co in accordance with the Project Schedule; or
- (dd) any other event which is expressly stated in this Project Agreement to constitute a Compensation Event,

except to the extent that any of such events arise or are contributed to, directly or indirectly, as a result of any willful misconduct, negligent act or omission or non-compliance with the terms of this Project Agreement by Project Co or any Project Co Person;

"Complex Pole Attachment Agreement" means any agreement with a Pole Provider that is not a Simple Pole Attachment Agreement and includes, but is not limited to, an agreement with specialized negotiated rates, extended term, trades, swaps or other subject matter not contemplated in a Simple Pole Attachment Agreement;

"Confidential Information" means:

- (a) information obtained in the course of performing the Services; and
- (b) information of a party that the party has designated as confidential at the time of disclosure and which is supplied, or to which access is granted, to or on behalf of the other party (whether before or after the Effective Date), either in writing, or in any other form, directly or indirectly pursuant to discussions with the other party and includes all analyses, compilations, studies and other documents whether

prepared by or on behalf of a party which contain or otherwise reflect or are derived from such designated information;

“Construction” means everything (other than Design) required to achieve System Completion, including the construction of the NG-KIH System, temporary works and the supply of all labor and materials, construction equipment, management, supervision and support of any kind or nature whatsoever required for the construction of the NG-KIH System and the supply, installation, testing and commissioning of all Equipment;

“Construction Period” means:

- (a) in respect of any Site, the period commencing on the Effective Date and ending on the Site Completion Date for that Site;
- (b) in respect of any Lateral, the period commencing on the Effective Date and ending on the Lateral Completion Date for that Lateral; and
- (c) in respect of any Ring, the period commencing on the Effective Date and ending on the Ring Completion Date for that Ring;

“Contract Year” means each of:

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

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

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

“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;

“Debt” of any Person at any date means:

- (a) all obligations of such Person for borrowed money;

- (b) all obligations of such person evidenced by bonds, debentures, notes or other similar instruments;
- (c) all obligations of such person to pay the deferred purchase price of property or services, except trade accounts payable arising in the ordinary course of business;
- (d) all obligations of such person under leases which are or should be, in accordance with GAAP, recorded as capital leases in respect of which such person is liable, except leases arising in the ordinary course of business;
- (e) all obligations of such Person to purchase securities (or other property) which arise out of or in connection with the sale of the same or substantially similar securities (or property);
- (f) all deferred obligations of such Person to reimburse any bank or other Person in respect of amounts paid or advanced under a letter of credit or other similar instrument;
- (g) all Debt (as otherwise defined in this definition) of others secured by a Charge on any asset of such Person, provided such Debt (as otherwise defined in this definition) is assumed by such Person; and
- (h) all Debt (as otherwise defined in this definition) of others guaranteed directly or indirectly by such Person or as to which such Person has an obligation substantially the economic equivalent of a guarantee;

“Deduction” has the meaning set out in Schedule 8 [Payments];

“Default Rate” means, on any day, 2% per annum over the Prime Rate, provided that, with respect to any amount payable by the Authority, such rate shall not exceed the penalty for late payment prescribed by KRS 45.454;

“Deficiency” has the meaning set out in Schedule 2 [Design and Construction Protocols];

“Demarcation Point” means the physical point at which the NG-KIH System ends and another network begins;

“Design” means everything required for the design of the NG-KIH System, except for any design that is expressly excluded from Project Co’s responsibility under this Project Agreement;

“Design and Construction Plan” has the meaning set out in Schedule 2 [Design and Construction Protocols];

“Design and Construction Protocols” means the provisions of Schedule 2 [Design and Construction Protocols];

“Design and Construction Representative” has the meaning set out in Schedule 2 [Design and Construction Protocols];

“Design and Construction Specifications” mean the provisions of Schedule 3 [Design and Construction Specifications], which are comprehensive and reflect all of the design and construction requirements for the Project;

“Design-Build Agreement” means the design-build agreement between Operations Co and the Design-Builder, a certified copy of which has been delivered by Project Co to the Authority;

“Design-Builder” means NG-KIH Design-Build LLC or any assignee or replacement permitted under this Project Agreement;

“Designated Equipment” means the equipment listed in Appendix 3C [Designated Equipment];

“Designated Equipment Protocol” means the protocol in respect of the Designated Equipment set out in Appendix 3D [Designated Equipment Protocol];

“Development Change” has the meaning set out in Schedule 6 [Changes, Minor Works and Innovation Proposals];

“Development Change Record” has the meaning set out in Schedule 6 [Changes, Minor Works and Innovation Proposals];

“Development Change Record Confirmation” has the meaning set out in Schedule 6 [Changes, Minor Works and Innovation Proposals];

“Development Change Register” has the meaning set out in Schedule 6 [Changes, Minor Works and Innovation Proposals];

“Direct Losses” means in respect of a condition, event or omission, without duplication, all damages, losses, liabilities, penalties, fines, assessments, claims (including by third parties), actions, costs (including increased Capital Expenditures), expenses (including the reasonable cost of legal or professional services), demands and charges, whether arising under statute, contract or at common law, which result directly from such condition, event or omission:

- (a) net of related Insurance Proceeds and Insurance Receivables and any amount which the relevant party would have recovered (in respect of such condition, event or omission) if it had complied with the requirements of this Project Agreement or any policy of insurance maintained or required to be maintained under this Project Agreement;
- (b) excluding any Indirect Losses, except to the extent included in a third party claim; and
- (c) in the case of Project Co, without limiting the foregoing, including the full amount of the related loss or reduction of any Availability Payments (which includes, for clarity, the Senior Debt Service Amount), net of Avoidable Costs related to such condition, event or omission,

and, in calculating any amount of any additional Capital Expenditure, labor or similar cost claimed by Project Co under this definition of **“Direct Losses”**, Project Co will be entitled to add to such amounts the mark-ups referred to in Section 2.11 of Schedule 6 [Changes, Minor Works and Innovation Proposals];

“Disability-Owned Business Enterprise” has the meaning set out in Schedule 2 [Design and Construction Protocols];

“Disadvantaged Business Enterprise” has the meaning set out in Schedule 2 [Design and Construction Protocols];

“Dispute” means any disagreement, failure to agree or other dispute between the Authority and Project Co arising out of or in connection with this Project Agreement, including in respect of the interpretation, breach, performance, validity or termination of this Project Agreement, whether in the law of contract or any other area of law;

“Dispute Notice” has the meaning set out in Schedule 13 [Dispute Resolution Procedure];

“Dispute Resolution Procedure” has the meaning set out in Schedule 13 [Dispute Resolution Procedure];

“Distribution” means, without duplication or double counting, whether in cash or in kind, any:

- (a) distribution in respect of equity interests in any Person;
- (b) redemption or purchase of any equity interest in any Person or reduction of capital or the amount of a shareholder’s contribution or any other reorganization or variation to such Person’s capital;
- (c) payment in respect of Junior Debt (whether of fees, principal, interest including capitalized interest and interest on overdue interest, breakage costs, or otherwise and whether or not such items are included or excluded from the definition of Junior Debt);
- (d) payment, loan, contractual arrangement, including any management agreement or payment in respect thereof, or transfer of assets or rights, in each case to the extent made or entered into after the Effective Date and not in the ordinary course of business or not on commercially reasonable terms, including to any current or former shareholder or any current or former Affiliate of any current or former shareholder; and
- (e) conferral of any other benefit which is not conferred and received in the ordinary course of business or is not conferred or received on commercially reasonable terms, including to any current or former shareholder or any current or former Affiliate of any current or former shareholder,

and, where any such Distribution is not in cash, the equivalent cash value of such Distribution will be calculated;

“DMS” has the meaning set out in Schedule 14 [Records and Reports];

“Draft Market Testing Proposal” has the meaning set out in Schedule 19 [Market Testing Procedure];

“Early Works” has the meaning set out in Section 2.11;

“Effective Date” means the date of this Project Agreement;

“Eligible Change in Law Event” means the occurrence of:

- (a) a Relevant Change in Law; or
- (b) a Relevant Works Change in Law;

“Emergency” means any situation, event or circumstance that:

- (a) constitutes or may constitute a hazard to or jeopardizes or may jeopardize the health and safety of any persons or any part of or the whole of the NG-KIH System;
- (b) causes or may cause damage or harm to property, buildings and/or equipment; or
- (c) constitutes a state of emergency declared as such by any Governmental Authority,

and which requires immediate action to prevent and/or mitigate the occurrence (or risk of the occurrence) of the foregoing;

“Employee Information” has the meaning set out in Schedule 9 [Compensation on Termination];

“Employee Payments” has the meaning set out in Schedule 9 [Compensation on Termination];

“Environmental Assessment” means an environmental assessment of any kind, including an environmental impact assessment;

“Environmental Laws” means all Laws relating to the protection of human health and all plant, animal, land, water and air resources that may be affected by the Project;

“Environmental Permit” means any Permit required pursuant to Environmental Laws, including any Permit required pursuant to the National Environmental Policy Act or Section 404 of the Clean Water Act, as well as any Permit required by the U.S. Army Corps of Engineers, the United States Department of Agriculture, the National Park Service, the U.S. Fish and Wildlife Service, any Native American Tribe or the Kentucky Heritage Council;

“Equipment” means any passive or electronic components necessary to deliver the xWDM, Ethernet or IP/MPLS services as set out in Schedule 3 [Design and Construction Specifications];

“Equipment-Only Outage” has the meaning set out in Schedule 4 [Services Protocols and Specifications];

“Excusing Event” means any of the following events or circumstances if it occurs during the Operating Period and if and to the extent that it interferes adversely with, or causes a failure of, the performance of the Services or causes an Outage:

- (a) the carrying out by Project Co of Minor Works required by the Authority in accordance with this Project Agreement;
- (b) compliance by Project Co with an order or direction by police, fire officials, medical health officer or any comparable public authority having the legal authority to make such order or give such direction;
- (c) a Change in Law during the Operating Period;
- (d) without limiting Project Co's obligation to provide stand-by power facilities for the NG-KIH System in accordance with the Design and Construction Specifications:
 - (1) a failure or shortage of power;
 - (2) a failure by any Utility Company, local authority or other like body to perform works or provide services required to be provided by them in a reasonably timely manner; or
 - (3) any unreasonable interference with the Services by any Utility Company, local authority or other like body as a result of maintenance or other work;
- (e) a failure or underperformance of the telecommunications infrastructure that permits the transmission of data between the NG-KIH System and other internet networks, provided that such telecommunications infrastructure is owned and operated by a third party that is not an Affiliate of Project Co;
- (f) a cyber attack, cyber security failure or denial of service impacting the NG-KIH System;
- (g) any vandalism or theft of any component of the NG-KIH System;
- (h) an industry-wide shortage of key materials or equipment necessary for the performance by Project Co of its obligations under this Project Agreement;
- (i) an injunction or other order of a court of competent jurisdiction resulting from a challenge to the procurement process pursuant to which Project Co was selected to enter into this Project Agreement or to the Authority's or Project Co's right to proceed with the Project or any aspect thereof;
- (j) the First System Refresh is not complete by the date that is 11 years from the Effective Date or the Second System Refresh is not complete by the date that is 21 years from the Effective Date, in each case, in accordance with the System Refresh Baseline Requirements or such other requirements as may be agreed by the parties from time to time or the Authority does not initiate the Market Testing Procedure or complete the Market Testing Procedure in accordance with Schedule 19 [Market Testing Procedure];
- (k) an injunction or other order of a court of competent jurisdiction resulting from a challenge to, or an expropriation that materially adversely interferes with, Project Co's right to access any lands, easements or other property (including, without limitation, access to the poles owned by any Utility Company);

- (l) unauthorized access by any Person to a Site or the NG-KIH System; or
- (m) any other event which is expressly stated in this Project Agreement to constitute an Excusing Event,

except to the extent that any of such events arise or are contributed to, directly or indirectly, as a result of any willful misconduct, negligent act or omission or non-compliance with the terms of this Project Agreement by Project Co or any Project Co Person;

“Exempt Refinancing” means:

- (a) a change in taxation or change in accounting treatment pursuant to changes in Laws or GAAP;
- (b) the exercise of rights, waivers, consents and similar actions which relate to day to day administrative and supervisory matters that are solely in respect of:
 - (1) breach of representations, warranties, covenants or undertakings;
 - (2) movement of monies between the Project Accounts (as defined in the Senior Financing Agreements) in accordance with the terms of the Senior Financing Agreements;
 - (3) late or non-provision of information or consents;
 - (4) amendments to the Project Implementation Agreement, Project Contracts or Senior Financing Agreements;
 - (5) approval of revised technical and economic assumptions for financial model runs (to the extent required for forecasts under the Senior Financing Agreements);
 - (6) restrictions imposed by the Senior Secured Creditors on the dates at which the financing provided by the Senior Secured Creditors under the Senior Financing Agreements can be advanced to Project Co under the Senior Financing Agreements, and which are given as a result of any failure by Project Co to ensure that the Design and the Construction are carried out in accordance with the Project Schedule and which are notified in writing by Project Co or the Senior Secured Creditors to the Authority prior to being given;
 - (7) changes to milestones for drawdown set out in the Senior Financing Agreements and which are given as a result of any failure by Project Co to ensure that the Design and the Construction are carried out in accordance with the Project Schedule and which are notified in writing by Project Co or the Senior Secured Creditors to the Authority prior to being given;
 - (8) failure by Project Co to obtain any consents from Governmental Authorities required by the Senior Financing Agreements; or

- (9) voting by the Senior Secured Creditors and the voting arrangements between the Senior Secured Creditors in respect of the levels of approval required by them under the Senior Financing Agreements;
- (c) an amendment or variation of an agreement approved by the Authority as part of any Change; or
- (d) a Qualifying Bank Transaction;

“Expiration Date” means the date that is 30 years after the Effective Date;

“Fair Market Value” means the amount at which an asset or a liability would be exchanged in an arm’s length transaction between informed and willing parties, other than in a forced or liquidation sale;

“Federal Permit” means any Permit set out in Part 2 of Appendix 2E [Expected Permit Timing];

“Fiber Outage” has the meaning set out in Schedule 4 [Services Protocols and Specifications];

“Field Locations” has the meaning set out in Appendix 4A [Services Specifications];

“Financial Model” means Project Co’s financial model for the Project, a copy of which is attached as Schedule 15 [Financial Model], as updated or amended from time to time in accordance with the terms of this Project Agreement;

“First System Refresh” means the first refresh of the NG-KIH System in accordance with Schedule 19 [Market Testing Procedure];

“Force Majeure Event” means the occurrence after the Effective Date of:

- (a) war, civil war, armed conflict or terrorism;
- (b) nuclear, radioactive, chemical or biological contamination, except to the extent that such contamination arises or is contributed to, directly or indirectly, as a result of any willful misconduct, negligent act or omission or non-compliance with the terms of this Project Agreement by Project Co or a Project Co Person; or
- (c) pressure waves caused by devices traveling at supersonic speeds,

which directly causes a party to be unable to comply with all or a material part of its obligations under this Project Agreement;

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

“Governmental Activities” means the provision of all governmental services and the conduct of all activities provided in connection or otherwise associated with the Lands and/or the NG-KIH System by any Governmental Authority;

“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 Project Agreement or the Project;

“H&S Conviction” has the meaning set out in Section 12.1(f);

“Handback Amount” has the meaning set out in Appendix 4B [Handback Requirements];

“Handback Certificate” has the meaning set out in Appendix 4B [Handback Requirements];

“Handback Holdback” has the meaning set out in Appendix 4B [Handback Requirements];

“Handback Requirements” means the requirements set out in Appendix 4B [Handback Requirements];

“Handback Survey” has the meaning set out in Appendix 4B [Handback Requirements];

“Handback Works” has the meaning set out in Appendix 4B [Handback Requirements];

“Handback Works Plan” has the meaning set out in Appendix 4B [Handback Requirements];

“Has Knowledge”, “Have Knowledge” or “Having Knowledge” means:

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

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

“Hazardous Substance” means any hazardous waste, hazardous product, contaminant, toxic substance, deleterious substance, dangerous good, pollutant, waste, reportable substance and any other substance, in respect of which the storage, manufacture, handling, disposal, treatment, generation, use, transport, remediation or release into or presence in the environment is prohibited, controlled or regulated under Environmental Laws;

“Hut” means a physical structure used to house a Node Site at certain Sites;

“IEEE” means the Institute of Electrical and Electronics Engineers;

“Implementation Plan” has the meaning set out in Schedule 2 [Design and Construction Protocols];

“Income Tax” means any tax imposed on the income of a Person by any Governmental Authority;

“Indemnifier” has the meaning set out in Section 9.2;

“Independent Certifier” has the meaning set out in Schedule 2 [Design and Construction Protocols];

“Independent Certifier’s Monthly Report” has the meaning set out in Schedule 2 [Design and Construction Protocols];

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

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

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

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

and shall be deemed not to include any loss of Availability Payments, the Milestone Payment (or any foregone interest thereon) or other amounts expressly payable by one party to the other party under this Project Agreement;

“Innovation Proposal” has the meaning set out in Schedule 6 [Changes, Minor Works and Innovation Proposals];

“Insurance Proceeds” means the amount of any insurance proceeds received by a Person in respect of a claim made under any policy of insurance required to be maintained under this Project Agreement other than:

- (a) any policy of insurance maintained by the Authority solely for the benefit of the Authority; and
- (b) for the purposes of Sections 6.3, 6.5 and 6.6, insurance proceeds received by Project Co or the Senior Secured Creditors from the delay in start-up insurance described in Section 2 of Schedule 5 [Insurance Requirements];

“Insurance Proceeds Account” has the meaning set out in Schedule 10 [Lenders’ Remedies Agreement];

“Insurance Receivables” means the amount of any insurance proceeds which a Person is entitled to receive pursuant to policies of insurance required to be maintained under this Project Agreement other than:

- (a) any policy of insurance maintained by the Authority solely for the benefit of the Authority; and
- (b) for the purposes of Sections 6.3, 6.5 and 6.6, insurance proceeds received by Project Co or the Senior Secured Creditors from the delay in start-up insurance described in Section 2 of Schedule 5 [Insurance Requirements];

“Intellectual Property” means any or all of the following and all rights, arising out of or associated therewith:

- (a) national, international and foreign patents, utility models, mask works, and applications therefor and all reissues, divisions, renewals, extensions, provisionals, continuations and continuations-in-part thereof;
- (b) inventions (whether patentable or not), invention disclosures, improvements, trade secrets, proprietary information, know-how, technology, technical data and customer lists, product formulations and specifications, and all documentation relating to any of the foregoing throughout the world;
- (c) copyrights, copyright registrations and applications therefor, and all other rights corresponding thereto throughout the world;
- (d) industrial designs and any registrations and applications therefor throughout the world;
- (e) rights in any internet uniform resource locators (URLs), domain names, trade names, logos, slogans, designs, common law trade-marks and service marks, trade-mark and service mark registrations and applications therefor throughout the world;
- (f) data bases and data collections and all rights therein throughout the world;

- (g) moral and economic rights of authors and inventors, however denominated, throughout the world; and
- (h) any similar or equivalent rights to any of the foregoing anywhere in the world;

“Intended Uses” has the meaning set out in Schedule 2 [Design and Construction Protocols];

“ITU” means the International Telecommunications Union;

“Junior Debt” means indebtedness issued by Project Co which ranks subordinate in all respects to the Senior Debt, excluding:

- (a) all amounts not actually paid to Project Co by cash advance, rights entitling Project Co to a cash advance, or other consideration;
- (b) all fees, including commitment fees and standby fees, paid or to be paid by Project Co; and
- (c) capitalized interest, and interest on overdue interest;

“Junior Loan Agreement” means the subordinated loan agreement between KEDFA, as issuer, and Project Co, as borrower, pursuant to which KEDFA agreed to loan the entire proceeds of the Series 2015 Subordinated Bonds to Project Co, together with any other subordinated loan agreement entered into between KEDFA and Project Co pursuant to which KEDFA agrees to loan the entire proceeds of a series of Additional Subordinated Bonds (as defined in the Collateral Agency and Account Agreement) to Project Co;

“KEDFA” has the meaning set out in Section 3.8;

“Key Individuals” has the meaning set out in Section 2.8;

“Labor Inflation Index” means the Employment Cost Index (ECI), Utilities, as published by the U.S. Bureau of Labor Statistics, seasonally adjusted, base period of December, 2005 = 100, or, if such index in its present form becomes unavailable, such similar index as may be agreed by the parties, acting reasonably, or failing agreement as determined by the Dispute Resolution Procedure;

“Lands” has the meaning set out in Schedule 7 [Lands];

“Lateral” means physical fiber from a Node Site or Ring to a Service Level 1 Site and/or Service Level 3 Site;

“Lateral Completion” means that Site Completion has been achieved for all Sites on a Lateral;

“Lateral Completion Date” means the date that Lateral Completion has been achieved in respect of a Lateral;

“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;

“**Lender Endorsements**” has the meaning set out in Schedule 5 [Insurance Requirements];

“**Lenders’ Remedies Agreement**” means the agreement between the Authority, the Collateral Agent (on behalf of the Senior Secured Creditors), Project Co and Operations Co in the form set out in Schedule 10 [Lenders’ Remedies Agreement], as amended, supplemented or replaced from time to time in accordance with this Project Agreement;

“**Liability Payment**” has the meaning set out in Section 9.3;

“**License**” has the meaning set out in Schedule 7 [Lands];

“**Longstop Date**” means the date that is 12 months after the Target System Completion Date, as adjusted in accordance with this Project Agreement;

“**Market Testing**” has the meaning set out in Schedule 19 [Market Testing Procedure];

“**Market Testing Date**” has the meaning set out in Schedule 19 [Market Testing Procedure];

“**Market Testing Meeting**” has the meaning set out in Schedule 19 [Market Testing Procedure];

“**Market Testing Procedure**” means the procedure out in Schedule 19 [Market Testing Procedure];

“**Market Testing Proposal**” has the meaning set out in Schedule 19 [Market Testing Procedure];

“**Master Agreement**” has the meaning set out in Recital B of this Project Agreement;

“**Material Telecommunications Company**” has the meaning set out in Schedule 8 [Payments];

“**Materials Inflation Index**” means the Consumer Price Index for All Urban Consumers (CPI-U), as published by the U.S. Bureau of Labor Statistics, base period of 1982-84 = 100, or, if such index in its present form becomes unavailable, such similar index as may be agreed by the parties, acting reasonably, or failing agreement as determined by the Dispute Resolution Procedure;

“**Maximum Availability Payment**” has the meaning set out in Schedule 8 [Payments];

“**Milestone Payment**” has the meaning set out in Schedule 8 [Payments];

“**Minor Works**” has the meaning set out in Schedule 6 [Changes, Minor Works and Innovation Proposals];

“**Minor Works Rates**” has the meaning set out in Schedule 6 [Changes, Minor Works and Innovation Proposals];

“**Minority-Owned Business Enterprise**” has the meaning set out in Schedule 2 [Design and Construction Protocols];

“NG-KIH Account” has the meaning given to it in the Senior Financing Agreements;

“NG-KIH PoP” or **“NG-KIH Point of Presence”** means a facility at a terminal or intermediate location along the NG-KIH System that permits access to the NG-KIH System and the secure co-location of multiple vendor/ISP equipment for interconnection to the NG-KIH System;

“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 a fully functional and operating telecommunications carrier system over the Term of this Project Agreement;

“NG-KIH System Change” has the meaning set out in Schedule 6 [Changes, Minor Works and Innovation Proposals];

“Net Change Value” has the meaning set out in Schedule 6 [Changes, Minor Works and Innovation Proposals];

“NOC” has the meaning set out in Appendix 4A [Services Specifications];

“Node Site” has the meaning set out in Schedule 8 [Payments];

“Nominal” means calculated in nominal terms at current prices recognizing adjustment for indexation in respect of forecast inflation;

“Non-Operative Components” means components of the NG-KIH System that are not capable of performing, nor of hosting inserted technology that is capable of performing, data extraction and transmission functions;

“Notifying Party” has the meaning set out in Schedule 5 [Insurance Requirements];

“Open Records Act” means KRS 61.870 through KRS 61.884;

“Operating Period” means:

- (a) in respect of any Site, the period commencing on the day following the Site Completion Date for that Site and ending on the Termination Date;
- (b) in respect of any Lateral, the period commencing on the day following the Lateral Completion Date for that Lateral and ending on the Termination Date; and
- (c) in respect of any Ring, the period commencing on the day following the Ring Completion Date for that Ring and ending on the Termination Date;

“Operating Period Representative” has the meaning set out in Schedule 4 [Services Protocols and Specifications];

“Operating Plan” has the meaning set out in Schedule 4 [Services Protocols and Specifications];

“Operations Co” means KentuckyWired Operations Company, LLC;

“Outage” has the meaning set out in Schedule 4 [Services Protocols and Specifications];

“Outage Deduction” has the meaning set out in Schedule 8 [Payments];

“Outside Ring Completion Date” means the date that is 6 months after the Target Ring Completion Date for a Ring, as adjusted in accordance with this Project Agreement;

“Outside Ring Completion Holdback” has the meaning set out in Schedule 2 [Design and Construction Protocols];

“Paying Party” has the meaning set out in Section 9.3;

“Payment Adjustment Report” has the meaning set out in Schedule 8 [Payments];

“Performance Monitoring Plan” has the meaning set out in Schedule 4 [Services Protocols and Specifications];

“Performance Monitoring Program” has the meaning set out in Schedule 4 [Services Protocols and Specifications];

“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 Project Agreement;

“Permitted Debt” means:

- (a) trade or other similar indebtedness incurred in the ordinary course of business (unless being contested in good faith and with appropriate proceedings with an adequate reserve therefor in accordance with GAAP having been placed on the Project Co’s books and records);
- (b) Taxes and governmental charges, salaries, related employee payments and trade payables; and
- (c) contingent liabilities relating to the endorsement of negotiable instruments received in the normal course of business or incurred with respect to any Permit, the Project Implementation Agreement, any Project Contract or this Project Agreement,

but does not include any Senior Debt or Junior Debt;

“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;

“Planned Maintenance” means maintenance on the NG-KIH System that is set out in or scheduled pursuant to the Operations and Maintenance Plan and is in full compliance with all manufacturers’ recommendations;

“Pole Attachment Adjustment Mechanism” has the meaning set out in Schedule 8 [Payments];

“Pole Attachment Agreements” has the meaning set out in Schedule 8 [Payments];

“Pole Attachment Fees” means any amounts payable to a Pole Provider under a Pole Attachment Agreement;

“Pole Attachment Proposal” has the meaning set out in Schedule 6 [Changes, Minor Works and Innovation Proposals];

“Pole Provider” has the meaning set out in Schedule 8 [Payments];

“PoP” or **“Point of Presence”** means an access point to the internet;

“Preferred Service Tenderer” has the meaning set out in Schedule 19 [Market Testing Procedure];

“Preliminary Change Instruction” has the meaning set out in Schedule 6 [Changes, Minor Works and Innovation Proposals];

“Preliminary Estimate” has the meaning set out in Schedule 6 [Changes, Minor Works and Innovation Proposals];

“Prime Rate” means the annual rate of interest published in the Wall Street Journal as the WSJ prime rate from time to time;

“Principal Insured Risk” means a risk that would be insured against by policies for the insurance referred to in Sections 2 and 3 of Schedule 5 [Insurance Requirements];

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

“Project Agreement” means this project agreement, including any recitals, schedules, appendices and attachments to this agreement, as amended or restated from time to time;

“Project Co” means KentuckyWired Infrastructure Company, Inc.;

“Project Co Default Termination Amount” means the Termination Payment calculated in accordance with Section 3.1 or Section 3.2 of Schedule 9 [Compensation on Termination];

“Project Co Event of Default” has the meaning set out in Section 12.1;

“Project Co Hazardous Substances” means any Hazardous Substances brought onto:

- (a) the Lands; or
- (b) any property acquired or accessed by Project Co or any Project Co Person in connection with the NG-KIH System,

by Project Co or any Project Co Person during the Term;

“Project Co Insolvency Event” means any of the following events:

- (a) a receiver, receiver manager or other encumbrance holder taking possession of or being appointed over, or any distress, execution or other process being levied

or enforced upon, the whole or any material part of the assets of Project Co and, if such proceedings are commenced against Project Co and are disputed by Project Co, such proceedings are not discontinued, withdrawn, dismissed or otherwise remedied within 90 days of such proceedings being instituted;

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

“Project Co Material Breach” means:

- (a) a failure by Project Co to pay any amount due and owing to the Authority under this Project Agreement on the due date (which amount is not being disputed in good faith) and Project Co has not remedied such failure to pay within 10 Business Days following notice from the Authority;
- (b) a failure by Project Co to:
 - (1) maintain the policies of insurance required to be maintained by Project Co under this Project Agreement;
 - (2) maintain such policies on the terms required under this Project Agreement (including a failure to comply with its obligation under Schedule 5 [Insurance Requirements] to name the Authority as an insured party); or
 - (3) provide evidence to the Authority as required by the terms of this Project Agreement that such policies have been taken out, maintained, paid for and renewed in accordance with the terms of this Project Agreement; or
- (c) except as provided above, a breach (other than a breach for which a Deduction can be made), or series of breaches (other than a series of breaches for which

Deductions can be made), by Project Co of its obligations under this Project Agreement (other than as a consequence of a breach by the Authority of its obligations under this Project Agreement), which results in:

- (1) a risk to the safety of the public;
- (2) a risk of material liability of the Authority to third Persons or other material financial loss to the Authority;
- (3) a material adverse effect on the performance of the Design, Construction, Services or System Refresh and, as a result thereof, the Authority is reasonably likely to be materially deprived of the benefit of this Project Agreement; or
- (4) any material provision of this Project Agreement being unenforceable against Project Co and, as a result thereof, the Authority is reasonably likely to be materially deprived of the benefit of this Project Agreement,

and, in the case of a breach that is capable of being remedied, Project Co has not remedied such breach within 10 Business Days following notice from the Authority;

“Project Co Materials” has the meaning set out in Section 14.5;

“Project Co Person” means:

- (a) any director, officer, employee or agent of Project Co in each case acting as such;
- (b) Operations Co, any Project Contractor, any Sub-Contractor and any representative, advisor (including any legal and financial advisor) or contractor of Project Co, in any such Person’s capacity as a provider of services, work or materials, directly or indirectly to Project Co in connection with the Project; or
- (c) any invitee of Project Co or any of the Project Co Persons referred to in (a) or (b) above who enters upon the Lands,

but specifically excludes any Third Party Infrastructure Provider;

“Project Co Proposal” has the meaning set out in Schedule 19 [Market Testing Procedure];

“Project Co Proposal Validity Period” has the meaning set out in Schedule 19 [Market Testing Procedure];

“Project Co’s Rights” has the meaning set out in Section 8.13;

“Project Contract” means either the Design-Build Agreement or the Services Contract, and **“Project Contracts”** means both of them;

“Project Contractor” means either the Design-Builder or the Service Provider, and **“Project Contractors”** means both of them;

“Project Contractor Breakage Costs” has the meaning set out in Schedule 9 [Compensation on Termination];

“Project Contractor Collateral Agreement” means the agreement to be entered into between the Authority, a Project Contractor, Operations Co and Project Co in the form set out in Schedule 11 [Project Contractor Collateral Agreement], as amended, supplemented or replaced from time to time in accordance with this Project Agreement;

“Project Implementation Agreement” means the project implementation agreement between Project Co and Operations Co, a certified copy of which has been delivered by Project Co to the Authority;

“Project Implementation Costs” has the meaning set out in Schedule 9 [Compensation on Termination];

“Project Intellectual Property” means the Intellectual Property that is created, brought into existence, acquired, licensed or used by Project Co, Operations Co, any Project Contractor, any Sub-Contractor or any other third party, directly or indirectly, for the purposes of the Design, Construction, Services or System Refresh, or otherwise for the purposes of this Project Agreement, but does not include the Financial Model;

“Project Schedule” has the meaning set out in Schedule 2 [Design and Construction Protocols];

“Pro Rata Principal Amount” means, with respect to any Senior Debt issued and outstanding under the Senior Financing Agreements, an amount equal to the Project Co Default Termination Amount multiplied by a fraction whose numerator is the outstanding principal amount of such Senior Debt and the denominator is the aggregate principal amount of all Senior Debt issued and outstanding under the Senior Financing Agreements;

“Prospective Service Tenderers” has the meaning set out in Schedule 19 [Market Testing Procedure];

“Protected Personal Information” means an individual’s personal information that is considered confidential and privileged in accordance with applicable Law;

“Prudent Coverage Amount” has the meaning set out in Schedule 5 [Insurance Requirements];

“Public Protest Action” means any civil disobedience, protest action, riot, civil commotion, blockade or embargo, including any action taken or threatened to be taken, by any Person or Persons protesting or demonstrating against:

- (a) the carrying out of any part of the Project, including the construction of the NG-KIH System; or
- (b) the construction or operation of the NG-KIH System in general, occurring after the Effective Date,

but excluding any lawful or unlawful strike, lockout, job action or other labor dispute;

“Qualified Insurer” means a reputable insurer of good standing authorized to conduct business in the Commonwealth of Kentucky and having a financial strength rating of A- VIII or better with A.M. Best;

“Qualifying Bank Transaction” means:

- (a) the disposition by a Senior Lender to a Qualifying Institution of any of its rights or interests in the Senior Financing Agreements;
- (b) the grant by a Senior Lender to a Qualifying Institution of any rights of participation in respect of the Senior Financing Agreements; or
- (c) the disposition or grant by a Senior Lender to a Qualifying Institution of any other form of benefit or interest in either the Senior Financing Agreements or the revenues or assets of Project Co, whether by way of security or otherwise;

“Qualifying Institution” means any of the following:

- (a) a United States bank, saving and loan institution, trust company, insurance company, investment company, pension fund or other institution which has or manages at least \$500 million in assets, including entities wholly owned by any such institution;
- (b) an institution which is recognized or permitted under the law of any member state of the European Economic Area to carry on the business of a credit institution pursuant to Council Directive 2000/12/EC relating to the taking up and pursuit of the business of credit institutions or which is otherwise permitted to accept deposits in the United Kingdom or any other European Economic Area member state;
- (c) an institution which is recognized or permitted under the law of any member state of the Organization for Economic Cooperation and Development to carry on within the Organization for Economic Cooperation and Development member states the business of a credit institution, insurance company, investment company or pension fund and which has or manages at least \$500 million in assets, including entities wholly owned by any such institution; or
- (d) any other institution consented to in writing by the Authority;

“Qualifying Refinancing” means any Refinancing that will give rise to a Refinancing Gain greater than zero that is not an Exempt Refinancing;

“Qualifying Service Tender” has the meaning set out in Schedule 19 [Market Testing Procedure];

“Quality Assurance Plan” has the meaning set out in Schedule 2 [Design and Construction Protocols];

“Quality Assurance Program” has the meaning set out in Schedule 2 [Design and Construction Protocols];

“Reasonably Expected Performance” shall be determined based on the following:

- (a) if a period of time equal or greater than 6 months has elapsed since the System Completion Date, an average of the Availability Payment amounts payable to Project Co during the previous 6 month period;
- (b) if a period of time greater than 1 month but less than 6 months has elapsed since the System Completion Date, an average of the Availability Payment amounts payable to Project Co since the System Completion Date; or
- (c) if a period of time equal to or less than 1 month has elapsed since the System Completion Date or if System Completion has not been achieved, the Maximum Availability Payment;

“Receiving Party” has the meaning set out in Section 9.3;

“Referee” has the meaning set out in Schedule 13 [Dispute Resolution Procedure];

“Referee Agreement” has the meaning set out in Schedule 13 [Dispute Resolution Procedure];

“Referee Notice” has the meaning set out in Schedule 13 [Dispute Resolution Procedure];

“Refinancing” means:

- (a) Project Co incurring, creating, assuming or permitting to exist any Debt other than Permitted Debt;
- (b) any transaction in which the Authority, with the consent or at the request of Project Co, grants rights to any Person under an agreement similar to the Lenders’ Remedies Agreement or any other agreement that provides for step-in rights or similar rights to such Person, other than the Lenders’ Remedies Agreement entered into on the Effective Date;
- (c) any amendment, variation, novation, supplement or replacement of any Senior Debt or Senior Financing Agreement;
- (d) the exercise of any right, or the grant of any waiver or consent, under any Senior Financing Agreement;
- (e) the disposition of any rights or interests in, or the creation of any rights of participation in respect of, the Senior Financing Agreements or Senior Debt or the creation or granting of any other form of benefit or interest in the Senior Financing Agreements, the Senior Debt or the contracts, revenues or assets of Project Co whether by way of security or otherwise; or
- (f) any other arrangement put in place by Project Co or another Person which has an effect which is similar to any of (a) through (e) above or which has the effect of limiting Project Co’s ability to carry out any of the actions referred to in (a) through (e) above,

but excluding any financing pursuant to Section 10.2;

“Refinancing Gain” means either the reduction in Senior Debt Service Amounts over the remainder of the Term as a result of a Refinancing or the net proceeds of a Refinancing;

“Relevant Change in Law” means a change in the applicability of any taxes in connection with the Lands or the NG-KIH System relative to that which is described in Section 3.5 of Schedule 7 [Lands] or a Change in Law:

- (a) which specifically applies to:
 - (1) the Project or telecommunications-related projects procured and contracted on a basis similar to the Project;
 - (2) Project Co, Operations Co or Persons that have contracted on similar telecommunications-related projects procured and contracted with the Authority or another statutory or public body on a basis similar to the Project; or
 - (3) Persons holding shares or other evidences of ownership in Persons whose principal business is contracting on other similar telecommunications-related projects procured and contracted on a basis similar to the Project and not other Persons;
- (b) which principally affects or principally relates to the design, provision, operation or maintenance of telecommunications infrastructure and associated services; or
- (c) which results in the designation of Project Co or any Project Co Person as a Common Carrier or in the application of the Common Carrier Regulations to Project Co, any Project Co Person or the NG-KIH System or any part thereof,

and compliance with which would require a variation (as applicable) in the design, quality, scope, methodology or cost of the Design, Construction, Services or System Refresh;

“Relevant Works Change in Law” means a Change in Law (other than a Relevant Change in Law) which causes Project Co to incur Capital Expenditures to perform works affecting the NG-KIH System (being any work of alteration, addition, demolition or extension or variation in the quality or function of the NG-KIH System) which is not work which Project Co would otherwise be required to perform under this Project Agreement;

“Relief Event” means any of the following events or circumstances if and to the extent it interferes adversely with, or causes a failure of, the carrying out of the Design, Construction, Services or System Refresh or causes an Outage:

- (a) an earthquake, tornado, hurricane, fire, wind storm, ice storm, mud slide, rock slide, flood, explosion, lightning or any other act of God, in each case, to the extent it does not constitute a Compensation Event;
- (b) ionizing radiation to the extent it does not constitute a Force Majeure Event;
- (c) a lawful or unlawful strike, lockout, job action or other labor dispute generally affecting the construction, telecommunications maintenance or management industry or a significant sector thereof;

- (d) during the Construction Period, any delay of more than 3 days in respect of any critical path matter in the Project Schedule caused by compliance by Project Co with an order or direction by police, fire officials, medical health officer or any comparable public authority having the legal authority to make such order or give such direction;
- (e) a Change in Law during the Construction Period;
- (f) an unreasonable delay in the payment of any Insurance Receivables;
- (g) any accidental loss of or physical damage to the NG-KIH System or any portion thereof, except any portion of the NG-KIH System that has not been properly marked and GPS located by Project Co in accordance with the Design and Construction Specifications, or any roads servicing the Lands;
- (h) a blockade or embargo to the extent it does not constitute a Force Majeure Event;
- (i) during the Construction Period, an industry-wide shortage of key materials or equipment necessary for the performance by Project Co of its obligations under this Project Agreement, which shortage has an impact on any critical path matter in the Project Schedule;
- (j) during the Construction Period, an injunction or other order of a court of competent jurisdiction resulting from a challenge to the procurement process pursuant to which Project Co was selected to enter into this Project Agreement or to the Authority's or Project Co's right to proceed with the Project or any aspect thereof; or
- (k) any other event which is stated in this Project Agreement to constitute a Relief Event,

except to the extent that any of such events arise or are contributed to, directly or indirectly, as a result of any willful misconduct, negligent act or omission or non-compliance with the terms of this Project Agreement by Project Co or any Project Co Person;

“Repair” means a repair to the NG-KIH System undertaken at any time after the System Completion Date except for the completion of Deficiencies;

“Reporting Error” has the meaning set out in Schedule 8 [Payments];

“Representative” means, as the case may be, a Design and Construction Representative or an Operating Period Representative;

“Respond Deduction” has the meaning set out in Schedule 8 [Payments];

“Restoration Deduction” has the meaning set out in Schedule 8 [Payments];

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

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

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

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

"Reviewed Drawings and Specifications" has the meaning set out in Schedule 2 [Design and Construction Protocols];

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

"Ring" means each of Ring 1A, Ring 1B, Ring 2, Ring 3, Ring 4 and Ring 5, as represented in Appendix 3E [Design Map];

"Ring Availability" means that a Ring has achieved required redundancy;

“Ring Availability Date” means the date that Ring Availability has been achieved;

“Ring Completion” means that Site Completion has been achieved for all Sites on a Ring;

“Ring Completion Date” means the date that Ring Completion has been achieved in respect of a Ring;

“Rock Risk Amount” has the meaning set out in Schedule 2 [Design and Construction Protocols];

“Scheduled Pro Rata Principal Repayment Amount” means, with respect to any Senior Debt issued and outstanding under the Senior Financing Agreements and falling due for repayment on a certain date, an amount equal to the Project Co Default Termination Amount multiplied by a fraction whose numerator is the principal amount of Senior Debt then due and the denominator is the aggregate principal amount of all Senior Debt issued and outstanding under the Senior Financing Agreements on such date;

“Second System Refresh” means the second refresh of the NG-KIH System in accordance with Schedule 19 [Market Testing Procedure];

“Security Documents” has the meaning given to it in the Senior Financing Agreements;

“Senior Debt” means:

- (a) all amounts of principal and interest outstanding, including interest and default interest accrued, from Project Co to the Senior Secured Creditors under the Senior Financing Agreements, provided that default interest will not include any increased interest, fees or penalty amounts payable by Project Co for any reason other than a failure by Project Co to pay any amount when due;
- (b) all costs of early termination of interest rate or currency hedging arrangements and other breakage costs or make-whole amounts payable by Project Co to the Senior Secured Creditors as a result of a prepayment under the Senior Financing Agreements due to the termination of this Project Agreement; and
- (c) all other fees, costs and expenses for which Project Co is responsible under the Senior Financing Agreements;

“Senior Debt Service Amount” means, for any period, the principal and interest payable by Project Co to the Senior Secured Creditors in the normal course (which, for greater certainty, does not include breach or default circumstances) under the Senior Financing Agreements;

“Senior Executive” has the meaning set out in Schedule 13 [Dispute Resolution Procedure];

“Senior Financing Agreements” means:

- (a) the Collateral Agency and Account Agreement;
- (b) the Senior Indenture;
- (c) the Senior Loan Agreement;

- (d) the Security Documents;
- (e) the Lenders' Remedies Agreement;
- (f) the direct agreement dated as of the Effective Date between Project Co, Operations Co, the Collateral Agent and the Design-Builder;
- (g) the direct agreement dated as of the Effective Date between Project Co, Operations Co, the Collateral Agent and the Service Provider; and
- (h) any other document, agreement or instrument which the Collateral Agent, the Authority and Project Co may from time to time agree (in writing) is a Senior Financing Agreement,

certified copies of each of which have been delivered by Project Co to the Authority, and as amended from time to time in accordance with the terms of this Project Agreement;

"Senior Indenture" means the trust indenture between KEDFA, as issuer, and U.S. Bank National Association, as trustee, pursuant to which KEDFA issued the Series 2015 Senior Bonds;

"Senior Loan Agreement" means the senior loan agreement between KEDFA, as issuer, and Project Co, as borrower, pursuant to which KEDFA agreed to loan the entire proceeds of the Series 2015 Senior Bonds to Project Co, together with any other senior loan agreement entered into between KEDFA and Project Co pursuant to which KEDFA agrees to loan the entire proceeds of a series of Additional Senior Bonds (as defined in the Collateral Agency and Account Agreement) to Project Co;

"Senior Secured Creditors" means U.S. Bank National Association, in its capacity as trustee pursuant to the Senior Indenture (on behalf of itself and the holders of the Series 2015 Senior Bonds and any Additional Senior Bonds issued pursuant to the Senior Indenture) and any holders of (and any representatives of) any Other Permitted Senior Secured Indebtedness (as defined in the Collateral Agency and Account Agreement);

"Service Level 1 Site" has the meaning set out in Schedule 8 [Payments];

"Service Level 3 Site" has the meaning set out in Schedule 8 [Payments];

"Service Provider" means LTS Kentucky Managed Technical Services LLC or any assignee or replacement permitted under this Project Agreement;

"Service Tender Requirements" has the meaning set out in Schedule 19 [Market Testing Procedure];

"Service Tenderers" has the meaning set out in Schedule 19 [Market Testing Procedure];

"Service Tender Validity Period" has the meaning set out in Schedule 19 [Market Testing Procedure];

"Services" means everything required to operate and maintain the NG-KIH System as set out in Schedule 4 [Services Protocols and Specifications] and Appendix 4A [Services Specifications],

but excluding the First System Refresh and the Second System Refresh except in accordance with Schedule 19 [Market Testing Procedure];

“**Services Change**” has the meaning set out in Schedule 6 [Changes, Minor Works and Innovation Proposals];

“**Services Contract**” means the services contract between Operations Co and the Service Provider, a certified copy of which has been delivered by Project Co to the Authority;

“**Services Protocols and Specifications**” means the provisions of Schedule 4 [Services Protocols and Specifications];

“**Services Specifications**” means the provisions of Appendix 4A [Services Specifications], which are comprehensive and reflect all of the service specifications required for the Project and required to meet the rigorous performance standards set out in Schedule 8 [Payments];

“**Simple Pole Attachment Agreement**” means a standard form pole attachment agreement that a Pole Provider provides to Project Co or that Project Co provides to a Pole Provider, that is not negotiated by the Pole Provider, Project Co or the Authority, and that requires only minor changes, additions or modifications necessary to create a binding agreement, such as the insertion of the Pole Provider’s suggested rate, the legal names of the contracting parties, contact names and numbers for notification and the effective date;

“**Simple Pole Attachment Agreement Amendment Period**” has the meaning set out in Section 3.9;

“**Site**” means any Person that is connected to the NG-KIH System under this Project Agreement, including each Node Site, Service Level 1 Site and Service Level 3 Site;

“**Site Access Plan**” has the meaning set out in Schedule 2 [Design and Construction Protocols];

“**Site Completion**” means that all of the following have been achieved in relation to a Site:

- (a) the Site is located on a Ring that has achieved Ring Availability;
- (b) the Independent Certifier has issued a Certificate of Site Completion with respect to the Site based on the criteria set out in Section 2.13 (Turn-up and Test Services) and Section 2.14 (Service Migration) of Schedule 3 [Design and Construction Specifications] and:
 - (1) pursuant to Section 2.13 (Turn-Up and Test Services) of Schedule 3, the Independent Certifier has received a turn-up and test package, including an MOP, Site turn-up and test results and Site acceptance test results; and
 - (2) pursuant to Section 2.14 (Service Migration) of Schedule 3, the Independent Certifier has received a service migration package, including network discovery data, network analysis data and the service migration method of procedure;

- (c) all necessary Permits have been issued for the use and operation of the Site;
and
- (d) Project Co has delivered to the Authority a report confirming completion of all Commissioning scheduled in the Commissioning Plan to be completed before Site Completion in respect of the Site;

“Site Completion Date” means the date when all criteria for Site Completion that have not been waived in writing have been satisfied as certified by the Independent Certifier in accordance with Schedule 2 [Design and Construction Protocols];

“Site Completion Deficiency” has the meaning set out in Schedule 2 [Design and Construction Protocols];

“Site Locations” has the meaning set out in Schedule 7 [Lands];

“Site Migration” has the meaning set out in Schedule 8 [Payments];

“Site Migration Date” has the meaning set out in Schedule 8 [Payments];

“Site Multiplier” has the meaning set out in Schedule 8 [Payments];

“Site Value” has the meaning set out in Schedule 8 [Payments];

“Sub-Contract” means any contract entered into by a Project Contractor (except Project Contracts), or a sub-contractor of a Project Contractor of any tier, with one or more Persons in connection with the carrying out of Project Co’s obligations under this Project Agreement, as amended or replaced from time to time;

“Sub-Contractor” means any Person that enters into a Sub-Contract;

“Submittals” has the meaning set out in Schedule 2 [Design and Construction Protocols];

“Submittal Schedule” has the meaning set out in Schedule 2 [Design and Construction Protocols];

“Suitable Substitute Project Co” has the meaning given to it in the Lenders’ Remedies Agreement;

“Supervening Event” means any of a Compensation Event, Relief Event, Excusing Event, Force Majeure Event or Eligible Change in Law Event;

“Supervening Event Notice” has the meaning set out in Section 8.2(a);

“System Completion” means that Site Completion has been achieved for all Sites;

“System Completion Date” means the date that System Completion has been achieved;

“System Outage” means an Outage that is not an Equipment-Only Outage;

“System Refresh” means the First System Refresh and the Second System Refresh;

“System Refresh Baseline Requirements” has the meaning set out in Schedule 19 [Market Testing Procedure];

“Target Ring Completion Dates” means the dates, as set out in the Project Schedule (as updated from time to time in accordance with Schedule 2 [Design and Construction Protocols]), that Project Co estimates that Ring Completion for each Ring will occur, and **“Target Ring Completion Date”** means any one of them;

“Target Site Completion Dates” means the dates, as set out in the Project Schedule (as updated from time to time in accordance with Schedule 2 [Design and Construction Protocols]), that Project Co estimates that Site Completion for each Site will occur, and **“Target Site Completion Date”** means any one of them;

“Target System Completion Date” means the date, as set out in the Project Schedule (as updated from time to time in accordance with Schedule 2 [Design and Construction Protocols]), that Project Co estimates System Completion will occur;

“Targeted Pole Provider” has the meaning set out in Section 3.9;

“Tax” or **“Taxes”** means, from time to time, all taxes, surtaxes, duties, levies, imposts, rates, payments, assessments, withholdings, dues and other charges of any nature imposed by any Governmental Authority (including income, capital (including large corporations), withholding, consumption, sales, use, transfer, goods and services or other value-added, excise, customs, anti-dumping, countervail, net worth, stamp, registration, franchise, payroll, employment, health, education, business, school, property, local improvement, development, education development and occupation taxes, surtaxes, duties, levies, imposts, rates, payments, assessments, withholdings, dues and charges) together with all fines, interest, penalties on or in respect of, or in lieu of or for non-collection of, those taxes, surtaxes, duties, levies, imposts, rates, payments, assessments, withholdings, dues and other charges;

“Telecommunications Company” has the meaning set out in Schedule 8 [Payments];

“Term” has the meaning set out in Section 2.1;

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

“Termination Payment” means the amount, if any, owing by the Authority to Project Co pursuant to Schedule 9 [Compensation on Termination];

“Termination Payment Date” means the date on which the Authority must make the Termination Payment as provided for in Schedule 9 [Compensation on Termination];

“Termination Payment Period” has the meaning set out in Section 14.1(b);

“Third Party Infrastructure Agreement” means, as applicable, each Third Party Infrastructure Term Sheet or definitive contractual agreement entered into by Project Co and a Third Party Infrastructure Provider;

“Third Party Infrastructure Providers” means MuniNet Fiber Agency and Cincinnati Bell Telephone Company LLC, and **“Third Party Infrastructure Provider”** means either of them;

“Third Party Infrastructure Term Sheet” has the meaning set out in Section 4.15;

“Transfer Restriction Date” has the meaning set out in Section 16.1(c)(1);

“Uninsurable” means, in relation to a risk:

- (a) insurance as required under this Project Agreement is not available in respect of the Project with Qualified Insurers; or
- (b) the insurance premium payable or the terms and conditions for insuring such risk at the levels and on the terms required by this Project Agreement are such that contractors, concessionaires, owners or others having a substantially similar interest in a project such as the Project in the United States are not generally insuring against such risk with Qualified Insurers,

except to the extent that any of such events arise or are contributed to, directly or indirectly, as a result of any willful misconduct, negligent act or omission or non-compliance with the terms of this Project Agreement by Project Co or any Project Co Person;

“Uninsurable Risk” has the meaning set out in Section 6.10;

“Unplanned Maintenance” means unanticipated maintenance on the NG-KIH System that is required in a timely manner and is conducted in accordance with the standards set out in the Operations and Maintenance Plan and in full compliance with all manufacturers’ recommendations;

“Updated Project Schedule” has the meaning set out in Schedule 2 [Design and Construction Protocols];

“Utility Company” means any Person, except a regional wastewater commission established pursuant to KRS 65.8905 and, for purposes of paragraphs (a), (b), (c), (d), and (f) below, a city, who owns, controls, operates or manages any facility used or to be used for or in connection with:

- (a) the generation, production, transmission or distribution of electricity to or for the public, for compensation, for lights, heat, power or other uses;
- (b) the production, manufacture, storage, distribution, sale or furnishing of natural or manufactured gas, or a mixture of same, to or for the public, for compensation, for light, heat, power or other uses;
- (c) the transporting or conveying of gas, crude oil or other fluid substance by pipeline to or for the public, for compensation;
- (d) the diverting, developing, pumping, impounding, distributing or furnishing of water to or for the public, for compensation;
- (e) the transmission or conveyance over wire, in air or otherwise, of any message by telephone or telegraph for the public, for compensation; or

- (f) the collection, transmission or treatment of sewage for the public, for compensation, if the facility is a subdivision collection, transmission or treatment facility plant that is affixed to real property and is located in a county containing a city of the first class or is a sewage collection, transmission or treatment facility that is affixed to real property, that is located in any other county, and that is not subject to regulation by a metropolitan sewer district or any sanitation district created pursuant to KRS Chapter 220;

“Veteran-Owned Business Enterprise” has the meaning set out in Schedule 2 [Design and Construction Protocols];

“Wavelength” means an unique optical channel defined by the wavelength of operation; and

“Women-Owned Business Enterprise” has the meaning set out in Schedule 2 [Design and Construction Protocols].

2. INTERPRETATION

This Project Agreement will be interpreted according to the following provisions, except to the extent the context or the express provisions of this Project Agreement otherwise require:

- (a) the parties waive the application of any rule of law which otherwise would be applicable in connection with the construction of this Project Agreement that ambiguous or conflicting terms or provisions should be construed against the party who (or whose counsel) prepared the executed agreement or any earlier draft of the same;
- (b) the table of contents, headings and sub-headings, marginal notes and references to them in this Project Agreement are for convenience of reference only, do not constitute a part of this Project Agreement, and will not be taken into consideration in the interpretation or construction of, or affect the meaning of, this Project Agreement;
- (c) each reference to a Section, Schedule, Appendix or Attachment is a reference to a Section of, Schedule to, Appendix to a Schedule to this Project Agreement; or each Attachment to an Appendix, and each Appendix is uniquely designated by using the number of the Schedule to which the Appendix is attached following by an alphabetical designator in sequence (for example, Appendix 4B [Handback Requirements] means the second Appendix attached to Schedule 4 [Services Protocols and Specifications]). A Schedule includes all of the Appendices attached to that Schedule. An Appendix includes all the Attachments attached to that Appendix;
- (d) each reference to an agreement, document, standard, principle or other instrument includes (subject to all relevant approvals and any other provision of this Project Agreement expressly concerning such agreement, document, standard, principle or other instrument) a reference to that agreement, document, standard, principle or instrument as amended, replaced, novated or assigned, and a reference to an “amendment” and similar terms (including “amend” and “amended”) include a reference to supplement, alteration, substitute, variation, change and any other modification and similar terms;

- (e) each reference to a statute or statutory provision (including any subordinate legislation) includes any statute or statutory provision which amends, extends, consolidates or replaces the statute or statutory provision or which has been amended, extended, consolidated or replaced by the statute or statutory provision;
- (f) each reference to time of day is a reference to Eastern Standard Time or Eastern Daylight Time, as the case may be;
- (g) words importing the singular include the plural and vice versa;
- (h) words importing a particular gender include all genders;
- (i) each reference to a public organization is deemed to include a reference to any successor(s) to such public organization or any organization or entity or organizations or entities which has or have taken over the functions or responsibilities of such public organization;
- (j) unless the context otherwise requires, each reference to “parties” means the parties to this Project Agreement and each reference to a “party” means any one of the parties to this Project Agreement, provided however that a reference to a third party does not mean a party to this Project Agreement;
- (k) all monetary amounts are expressed in U.S. Dollars;
- (l) whenever this Project Agreement obliges a party (the “**Payor**”) to pay any amount to the other party (the “**Payee**”) in respect of any costs, expenses, fees, charges, liabilities, losses, claims or other sums incurred by the Payee:
 - (1) such obligation will be construed as applying only to so much of such sums as have been properly incurred on an arm’s length commercial basis or, where not incurred on an arm’s length commercial basis (including when the payment is made to an Affiliate of the Payee), so much of them as are proper and reasonable; and
 - (2) the Payee will, when requested by the Payor, provide supporting evidence of such costs, expenses, fees, charges, liabilities, losses, claims or other sums;
- (m) each requirement for a thing or action to be “in accordance with” or “in compliance with” any standard, code or specification or other requirement or stipulation means that such thing or action is to exceed or at least equal that standard, code, specification or other requirement or stipulation;
- (n) the words “include”, “includes” and “including” are to be construed as meaning “include without limitation”, “includes without limitation” and “including without limitation”, respectively;
- (o) whenever the terms “will” or “shall” are used in this Project Agreement in relation to Project Co or the Authority they shall be construed and interpreted as

synonymous and to read “Project Co shall” or “the Authority shall”, as the case may be;

- (p) when a party has “discretion”, it means that party has the sole, absolute and unfettered discretion, with no requirement to provide reasons unless specifically required under the provisions of this Project Agreement;
- (q) any consent contemplated to be given under this Project Agreement must be in writing;
- (r) general words are not given a restrictive meaning:
 - (1) if they are introduced by the word “other”, by reason of the fact that they are preceded by words indicating a particular class of act, matter or thing; or
 - (2) by reason of the fact that they are followed by particular examples intended to be embraced by those general words;
- (s) words or abbreviations which have well-known trade meanings are used in accordance with those meanings;
- (t) the expression “all commercially reasonable efforts” and expressions of like import, when used in connection with an obligation of either party, means taking in good faith and with due diligence all commercially reasonable steps to achieve the objective and to perform the obligation, including doing all that can reasonably be done in the circumstances taking into account each party’s obligations hereunder to mitigate delays and additional costs to the other party, and in any event taking no less steps and efforts than those that would be taken by a commercially reasonable and prudent Person in comparable circumstances but where the whole of the benefit of the obligation and where all the results of taking such steps and efforts accrued solely to that Person’s own benefit, provided that the foregoing will not require the Authority to:
 - (1) take any action which is contrary to the public interest, as determined by the Authority in its discretion; or
 - (2) undertake any mitigation measure that might be available arising out of its status as a public body that would not normally be available to a private commercial party;
- (u) the expressions “by Project Co” and “by or through Project Co” and expressions of like import are synonymous and mean by Project Co or by anyone employed by or through Project Co, including Project Co and all contractors, sub-contractors and suppliers of any tier and their respective officers, employees, consultants and agents;
- (v) all accounting and financial terms used herein are, unless otherwise indicated, to be interpreted and applied in accordance with GAAP, consistently applied;

- (w) where this Project Agreement requires the calculation of something that is calculated in the Financial Model, the calculation will be done in a manner consistent with the calculation methodology in the Financial Model;
- (x) if the time for doing an act falls or expires on a day that is not a Business Day, the time for doing such act will be extended to the next Business Day;
- (y) in the event that any provision of this Project Agreement shall be held by a court of competent jurisdiction to be illegal, invalid or unenforceable for any reason, unless severance of such provision would materially alter the essence of this Project Agreement for either party, the provision shall be fully severable and shall not affect the remaining provisions of this Project Agreement, and this Project Agreement shall be construed and enforced as if the illegal, invalid or unenforceable provision had not been included therein. The parties shall promptly meet and endeavor in good faith to negotiate new provisions to eliminate such illegality, invalidity or unenforceability as much as possible and to restore this Project Agreement as nearly as possible to its original intent and effect; and
- (z) to the extent permitted by applicable Law, each release, waiver of liability and indemnity in this Project Agreement expressed to be given in favor of a party is and will be interpreted as having been given in favor of and may be enforced by that party and, in the case of the Authority, by the Authority Indemnified Persons, and, in the case of Project Co, by Project Co Persons.

3. ORDER OF PRECEDENCE

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

- (a) the provisions establishing the higher quality, manner or method of performing the Design, Construction or Services, using the more stringent standards, will prevail, with the intent that the provisions which produce the higher quality with the higher levels of safety, reliability, durability, performance and service will prevail;
- (b) the provisions of the main body of this Project Agreement will prevail over any of the Schedules hereto other than Schedule 11 [Project Contractor Collateral Agreement] or Schedule 10 [Lenders' Remedies Agreement];
- (c) the provisions of the main body of this Project Agreement and all Schedules will prevail over Schedule 21 [Master Agreement];
- (d) the provisions of the Lenders' Remedies Agreement will prevail over the Project Contractor Collateral Agreements; and
- (e) if the ambiguity, conflict or inconsistency is between a provision of general application and a provision that applies only to a specific part of the Design, Construction, Services or System Refresh, the provision that applies to the specific part of the Design, Construction, Services or System Refresh shall

prevail for that specific part of the Design, Construction, Services or System Refresh.

4. FINANCIAL MODEL

Except where expressly referred to, the Financial Model and its contents will not be used to interpret, and will not affect the meaning of, this Project Agreement.