

C-1

EXHIBIT C-1
DESIGN-BUILDER DIRECT AGREEMENT

See attached.

**DESIGN-BUILD AGREEMENT
NEXT GENERATION KENTUCKY INFORMATION HIGHWAY PROJECT**

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

and

**NG-KIH Design-Build LLC
("Design-Builder")**

Dated: September 3, 2015

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DESIGN-BUILD AGREEMENT

THIS DESIGN-BUILD AGREEMENT dated as of September 3, 2015 is entered into:

BETWEEN:

KentuckyWired Operations Company, LLC
(“Operations Co”)

AND:

NG-KIH Design-Build LLC
(the “Design-Builder”)

WHEREAS:

A. Operations Co has entered into the Project Implementation Agreement with KentuckyWired Infrastructure Company, Inc. (“Project Co”), pursuant to which Operations Co has agreed, *inter alia*, to undertake the Design and Construction of the NG-KIH System.

B. The Design-Builder has agreed to undertake all aspects of the Design and Construction of the NG-KIH System on behalf of Operations Co, subject to and in accordance with the terms of this Design-Build Agreement.

C. The Design-Builder and Operations Co will each perform their respective obligations under this Design-Build Agreement in a collaborative manner with each other and with Project Co and the Authority.

NOW THEREFORE THIS DESIGN-BUILD 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 AND INTERACTION WITH PROJECT AGREEMENT

1.1 Definitions

In this Design-Build Agreement, unless the context otherwise requires, capitalized terms will have the meanings set out in Attachment 1 [Definitions and Interpretation]. Certain words and expressions are defined within the attachments hereto and such definitions will apply, unless the context otherwise requires, in all other parts of this Design-Build Agreement whether or not Attachment 1 [Definitions and Interpretation] contains a cross-reference to such definitions.

1.2 Interpretation

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

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compromise any Project Co Claim without the prior written consent of the Design-Builder, not to be unreasonably withheld or delayed. The Design-Builder shall bear and discharge on a current basis, and shall indemnify Operations Co against all Direct Losses reasonably and properly incurred by Operations Co related to any Project Co Claim, except to the extent that (1) such Direct Losses arise from an Operations Co Event of Default or (2) the liability for the relevant Project Co Claim will be shared by the parties, in which case each party shall bear a fair and reasonable proportion of the related costs and expenses. Direct Losses under this Section 1.4(c) will not include the costs of Operations Co's own personnel, but will include any out-of-pocket expenses of such personnel and costs and expenses of Project Co, the Authority or other Persons where the Design-Builder or Operations Co becomes liable to pay the same.

- (d) The parties acknowledge that where the Project Implementation Agreement contemplates meetings between Operations Co and/or Operations Co's Design and Construction Representative and Project Co, the Authority and/or the Authority's Design and Construction Representative, such provisions generally do not contemplate a right for the Design-Builder to attend such meetings. Where possible, the DB Representative will attend such meetings unless Operations Co advises otherwise. However, in either case, Operations Co will use commercially reasonable efforts to ensure that the Design-Builder is included in such meetings where they pertain to the DB Obligations and, where Operations Co is not successful, Operations Co agrees to keep the Design-Builder informed of any such discussions or meetings between Project Co, the Authority and Operations Co that impact the DB Obligations, and, to the extent that Operations Co has an opportunity to do so vis-à-vis Project Co and the Authority, put forward comments and questions provided to it by the Design-Builder in respect of the subject matter of the relevant discussions or meetings.
- (e) In certain sections of this Design-Build Agreement, there are references to or acknowledgements of the Project Agreement, the Project Implementation Agreement or portions thereof and the absence of such a reference or acknowledgement in any other particular section of this Design-Build Agreement will not be construed for or against either party in interpreting this Design-Build Agreement.

1.5 Communication with the Authority and Third Parties

- (a) To the extent that any written notice, information, consent, claim, request, response, submission or other communication (a "Communication") is required or permitted to be given or made by the Design-Builder directly to Project Co, the Authority or any other third party under this Design-Build Agreement, the Design-Builder will provide a copy of the same to Operations Co at the same time as giving or making the Communication to Project Co, the Authority or such third party. To the extent that any Communication is required or permitted to be given or made by the Design-Builder to Operations Co under this Design-Build Agreement in respect of which a corresponding Communication must be given by Operations Co to Project Co or the Authority or any other third party under the Project Implementation Agreement, the Design-Builder will:

- (1) make all Communications required to be made by the Design-Builder under this Design-Build Agreement within the timeframes contemplated herein or, if no timeframe is set forth herein, in a timely manner so as to permit Operations Co to comply with its obligations under this Design-Build Agreement and the Project Implementation Agreement; or
 - (2) upon written request from Operations Co, submit the Communication directly to Project Co, the Authority or other third party.
- (b) Except as otherwise set out in this Design-Build Agreement, Operations Co hereby gives permission to the Design-Builder to provide Communications directly to Project Co and the Authority in respect of day-to-day matters and deliverables in respect of the performance of the DB Obligations, provided that (i) the permission granted under this Section 1.5(b) will not extend to any Material Project Matter and (ii) the Design-Builder will not be entitled to provide any Communication directly to Project Co or the Authority at any time during the continuance of a DB Event of Default unless Operations Co otherwise consents in writing. Notwithstanding the foregoing, if the Authority requires that all Communications under the Project Agreement be made directly to and from Project Co or Operations Co and does not accept direct Communications from the Design-Builder, then Operations Co will provide all such Communications to Project Co or the Authority, as applicable, and, notwithstanding any time period specifically set out in this Design-Build Agreement, the Design-Builder will provide such Communications directly to Operations Co in a timely manner so as to permit Operations Co to comply with its obligations under this Design-Build Agreement and the Project Implementation Agreement.
- (c) Operations Co will make all Communications required to be made by Operations Co to the Design-Builder under this Design-Build Agreement in a timely manner so as to permit the Design-Builder to comply with its obligations under this Design-Build Agreement and will consult with the Design-Builder in respect of Communications with Project Co or the Authority regarding Material Project Matters and allow the Design-Builder reasonable opportunity to participate in such Communications to the extent so permitted by the Authority.

1.6 Equivalent Project Relief

- (a) To the extent any entitlement of Operations Co under the Project Implementation Agreement (including any rights, remedies or relief) is related to the DB Obligations or the rights or obligations of the Design-Builder under this Design-Build Agreement, the Design-Builder will be entitled to receive the benefit of such entitlement from Operations Co (in accordance with and subject to the provisions of Section 1.6(c)), including the benefit of:
- (1) any indemnification, compensation, damages or other payment of any kind on the same or substantially the same grounds as Operations Co is entitled to indemnification, compensation, damages or other payment of any kind under the Project Implementation Agreement;
 - (2) any other relief (including any extension of time) from the performance of its obligations under, or from termination of, this Design-Build Agreement

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on the same or substantially the same grounds as Operations Co is entitled to be relieved from performance of equivalent obligations under, or from termination of, the Project Implementation Agreement, with reasonable time period and threshold buffers to permit Operations Co time to perform its obligations under the Project Implementation Agreement, and otherwise subject to any express limitations set out in this Design-Build Agreement;

- (3) any entitlement of the Design-Builder under this Design-Build Agreement in respect of which any provision of this Design-Build Agreement states that the Pass-Down Provisions are to apply; and
- (4) any certificate, consent or approval granted under this Design-Build Agreement, the Project Implementation Agreement, the Project Agreement or any other agreement, statute, bylaw or regulation in regard to any matter relating to the DB Obligations, including any entitlement of Operations Co to request or apply for such certificate, consent or approval from Project Co, the Authority or any other Person under this Design-Build Agreement, the Project Implementation Agreement or the Project Agreement,

including, for greater certainty, any benefit to Operations Co arising out of any Change implemented or any Change required by Project Co pursuant to the Project Implementation Agreement or any Compensation Event, Relief Event, Force Majeure Event, Change in Law, Eligible Change in Law Event or remedies or compensation in respect of any Project Co Event of Default (as defined in the Project Implementation Agreement) or any Authority Event of Default (as defined in the Project Agreement) in respect of which Operations Co is entitled to relief, compensation or benefit under the Project Implementation Agreement in respect of Operations Co's obligations that are related to the DB Obligations or the rights or other obligations of the Design-Builder under this Design-Build Agreement, but excluding:

- (5) any compensation payable to Operations Co under the Project Implementation Agreement in respect of any Senior Debt Service Amount (except to the extent that the Design-Builder has previously made payment to Operations Co in respect of increased debt service costs as a result of a Supervening Event, in which case Operations Co will reimburse the Design-Builder in accordance with Section 9.15(c)) or any other obligation of Project Co or Operations Co under the Senior Financing Agreements; and
- (6) any specific loss, cost or expense incurred by Operations Co to which the relevant compensation expressly relates and which is not included in any amount claimed by the Design-Builder.

Operations Co's entitlement under the Project Implementation Agreement in respect of the matters set out in this Section 1.6 is referred to in this Design-Build Agreement as "Equivalent Project Relief".

- (b) The Design-Builder will not be entitled to any relief from, or waiver in respect of performance of the DB Obligations under this Design-Build Agreement other than:
 - (1) in the case of an Operations Co Act, to the extent that it is not caused or contributed to by a Design-Builder Act;
 - (2) to the extent Operations Co receives Equivalent Project Relief; or
 - (3) to the extent expressly provided for in this Design-Build Agreement.
- (c) The Design-Builder will be entitled to the benefit of any Equivalent Project Relief to the extent that Operations Co is or becomes entitled under the Project Implementation Agreement only if, when and to the same extent that Operations Co has received Equivalent Project Relief from Project Co under the Project Implementation Agreement. For greater certainty, other than in respect of any Operations Co Act, Operations Co will in no circumstances be required to provide greater relief or compensation to the Design-Builder in respect of any matter in respect of which Operations Co is entitled to Equivalent Project Relief than Operations Co has actually received from Project Co under the Project Implementation Agreement.
- (d) For purposes of Operations Co asserting a claim under the Project Implementation Agreement against Project Co in respect of Equivalent Project Relief, where the Design-Builder has suffered Direct Losses or otherwise claims relief in respect of any event or circumstance in respect of which Operations Co is entitled to claim Equivalent Project Relief, Operations Co acknowledges that it will be obligated to include such Direct Losses or relief claimed by the Design-Builder in its claim against Project Co under the Project Implementation Agreement, provided that the Design-Builder's recourse against Operations Co and Operations Co's liability to the Design-Builder in respect of any such Direct Losses or relief will be subject to, and strictly limited by, the provisions of Sections 1.6(a) through 1.6(c) above and that Operations Co will not be required to reimburse the Design-Builder to the extent that such Direct Losses or relief arise as a result of any failure on the part of the Authority to perform its obligations under the Project Agreement or Project Co to perform its obligations under the Project Implementation Agreement, unless Operations Co has received compensation from Project Co under the Project Implementation Agreement in respect of such Authority or Project Co failure, in which case the Pass-Down Provisions shall apply.

1.7 Enforcement of Parallel Issues

- (a) Operations Co will use all reasonable efforts to preserve, protect and pursue under the Project Implementation Agreement such rights, remedies and relief as may relate to the DB Obligations or the Design-Builder's rights hereunder, including any claim for Equivalent Project Relief (a "Parallel Issue") in order to secure a favorable resolution of the Parallel Issue, provided that:
 - (1) Operations Co has received written notice from the Design-Builder of the Parallel Issue;

- (2) the Design-Builder will not be entitled to recover from Operations Co any Direct Losses or claims arising out of or in connection with Operations Co pursuing resolution of a Parallel Issue on the Design-Builder's behalf other than in respect of any Operations Co Act or other than any amounts received from Project Co in respect of such Parallel Issue; and
 - (3) the Design-Builder will indemnify Operations Co in respect of any Direct Losses arising out of or in connection with Operations Co pursuing resolution of a Parallel Issue on the Design-Builder's behalf in accordance with this Section 1.7(a), including reimbursing Operations Co for any deduction from, reduction of or exercise of set-off, compensation or similar right against any amount payable by Project Co associated therewith, provided that such indemnification will, unless Operations Co has no entitlement to any amount received in respect of such Parallel Issue, be proportionate to the ultimate entitlements of each party derived from pursuing resolution of such Parallel Issue.
- (b) Operations Co will, at the reasonable request of the Design-Builder, pursue the rights, remedies and relief under the Project Implementation Agreement described in Section 1.7(a) of this Design-Build Agreement on behalf of the Design-Builder in accordance with the reasonable directions of the Design-Builder or, alternatively, Operations Co may consent to the Design-Builder pursuing such rights, remedies and relief in the name of Operations Co, in either case, to the extent that the relevant rights, remedies or relief relate to the DB Obligations or the Design-Builder's rights hereunder and which may, subject to the provisions of Section 9.2 of the Project Implementation Agreement, include the defense of claims where the Design-Builder is required to provide an indemnity to Operations Co in accordance with the indemnity provisions in this Design-Build Agreement. The Design-Builder will be responsible for the cost and expense of pursuing such rights, remedies and relief, provided that, if the Design-Builder is successful in pursuing any claim in respect thereof, such cost and expense will be allocated equitably between the parties in proportion to their ultimate entitlements to same. Operations Co's consent under the first sentence of this Section 1.7(b) will not be unreasonably withheld or delayed where the relevant rights, remedies or relief affect only the Design-Builder and not Operations Co, any Operations Co Person, the Service Provider or any Service Provider Person. For greater certainty, Operations Co will not be obligated to act in accordance with the Design-Builder's instructions or allow the Design-Builder to pursue claims in Operations Co's name to the extent that the relevant rights, relief and remedies relate to rights or obligations of Operations Co, any Operations Co Person, the Service Provider or any Service Provider Person in respect of Project related matters other than the DB Obligations or the Design-Builder's rights hereunder or where, acting reasonably, Operations Co has determined (in which case it will provide the Design-Builder with its grounds) that there is no reasonable cause of action for such claims or such claims are frivolous or vexatious or otherwise an abuse of process.
- (c) Operations Co will not enter into any compromise or settlement of a Parallel Issue with Project Co (or with the Authority, when acting on behalf of Project Co) which affects, in any material respect, the DB Obligations or the Design-Builder's

rights, remedies or relief hereunder without the prior written consent of the Design-Builder, such consent not to be unreasonably withheld or delayed.

- (d) Where Operations Co pursues a Parallel Issue in accordance with this Section 1.7, the Design-Builder will be kept informed of Operations Co's progress under this Section 1.7 and will be given the opportunity to comment on all submissions (written or oral) which are to be put forward by Operations Co in accordance with this Section 1.7.
- (e) If Operations Co does not, after having been given written notice in accordance with Section 1.7(a), take steps to pursue such Parallel Issue within 14 Business Days or prior to that date being 5 Business Days prior to the expiration or other extinguishment of Operations Co's right to pursue such Parallel Issue, the Design-Builder may, in the name of and on behalf of Operations Co, pursue such Parallel Issue itself subject to this Section 1.7, at its sole cost and expense, and Operations Co will (at the sole cost and expense of the Design-Builder) use reasonable efforts to provide assistance, including providing documents, data and information, as the Design-Builder may reasonably request in connection with the pursuit of such Parallel Issue by the Design-Builder.
- (f) The Design-Builder will, at its own cost and within the time frame contemplated by any relevant dispute resolution procedure or, in the absence of such timeframes, as reasonably set by Operations Co, use commercially reasonable efforts to provide assistance, including providing documents, data and information, as Operations Co may reasonably request in connection with the pursuit of any Parallel Issue.
- (g) Any claims in respect of a Parallel Issue and any recoveries obtained by Operations Co or the Design-Builder in respect of any Parallel Issue under the Project Implementation Agreement will be subject to the provisions of Section 1.6 in respect of Equivalent Project Relief.

1.8 Pass-Down Provisions

The parties acknowledge and agree that all provisions of this Design-Build Agreement, including the provisions of each Attachment hereto, will be subject to the provisions of Sections 1.4 through 1.7 of this Design-Build Agreement (the "Pass-Down Provisions"), and the absence of any specific reference to the Pass-Down Provisions will not preclude the application of the Pass-Down Provisions to any provision of this Design-Build Agreement.

1.9 Authority Not Directly Liable

The Designer-Builder acknowledges the provisions of Section 1.9 of the Project Implementation Agreement.

2. GENERAL PROJECT TERMS

2.1 Term and Termination

The Design-Builder acknowledges the provisions of Section 2.1 of the Project Implementation Agreement and the provisions of Section 2.1 of the Project Agreement. The term of this Design-

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Build Agreement (the "Term") will commence on the Effective Date and will continue to the Expiration Date unless earlier terminated:

- (a) upon the Authority terminating the Project Agreement at any time in its discretion, and at its convenience, by notice to Project Co stating that termination is for convenience pursuant to Section 2.1(a) of the Project Agreement;
- (b) upon either the Authority or Project Co (with the prior consent of Operations Co) electing to terminate the Project Agreement pursuant to Section 6.3 of the Project Agreement in connection with insufficient insurance;
- (c) upon either the Authority or Project Co (with the prior consent of Operations Co) electing to terminate the Project Agreement pursuant to Section 6.4 of the Project Agreement in connection with uncollectible Insurance Receivables;
- (d) upon the Authority electing to terminate the Project Agreement pursuant to Section 6.10 of the Project Agreement in connection with a Principal Insured Risk becoming Uninsurable;
- (e) upon either the Authority or Project Co (with the prior consent of Operations Co) electing to terminate the Project Agreement pursuant to Section 8.4(c) or 8.4(e) of the Project Agreement, Operations Co electing to terminate the Project Implementation Agreement pursuant to Section 8.4(c) or 8.4(e) of the Project Implementation Agreement or the Design-Builder electing to terminate this Design-Build Agreement pursuant to Section 8.4(c) or 8.4(e) of this Design-Build Agreement, in connection with a Relief Event;
- (f) upon either the Authority or Project Co (with the prior consent of Operations Co) electing to terminate the Project Agreement pursuant to Section 8.6(c) or 8.6(d) of the Project Agreement, Operations Co electing to terminate the Project Implementation Agreement pursuant to Section 8.6(c) or 8.6(d) of the Project Implementation Agreement or the Design-Builder electing to terminate this Design-Build Agreement pursuant to Section 8.6(c) or 8.6(d) of this Design-Build Agreement, in connection with a Force Majeure Event;
- (g) upon the Authority electing to terminate the Project Agreement pursuant to Section 12.4 of the Project Agreement in connection with a Project Co Event of Default (as defined in the Project Agreement) or Project Co electing to terminate the Project Implementation Agreement pursuant to Section 12.4 of the Project Implementation Agreement in connection with an Operations Co Event of Default (as defined in the Project Implementation Agreement);
- (h) by Operations Co pursuant to Section 12.4 in connection with a DB Event of Default;
- (i) upon Project Co (with the prior consent of Operations Co) electing to terminate the Project Agreement pursuant to Section 13.3 of the Project Agreement in connection with an Authority Event of Default or Operations Co electing to terminate the Project Implementation Agreement pursuant to Section 13.3 of the Project Implementation Agreement in connection with a Project Co Event of Default (as defined in the Project Implementation Agreement); or

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- (j) by the Design-Builder electing to terminate this Design-Build Agreement pursuant to Section 13.3 in connection with an Operations Co Event of Default.

Unless otherwise specified, the DB Agreement 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 Design-Build Agreement. Except as referred to in this Section 2.1, neither party will have the right to terminate this Design-Build Agreement.

2.2 Document Deliveries

Concurrently with the execution and delivery of this Design-Build Agreement:

- (a) the Design-Builder will deliver to Operations Co the documents described in Section 2 of Attachment 18 [Completion Documents]; and
- (b) Operations Co will deliver to the Design-Builder the documents described in Section 3 of Attachment 18 [Completion Documents].

2.3 Assumption of Risk

Except to the extent expressly allocated to Operations Co or otherwise provided for under this Design-Build Agreement, all risks, costs and expenses in relation to the performance by the Design-Builder of the DB Obligations are allocated to, and accepted by, the Design-Builder as its entire and exclusive responsibility.

2.4 Opportunities

The Design-Builder acknowledges the provisions of Section 2.4 of the Project Agreement whereby, except as expressly provided in the Project Agreement, or as may be specifically agreed in writing between the Authority and Project Co (with the prior consent of Operations Co pursuant to Section 2.4 of the Project Implementation Agreement) 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 the Design-Builder to Mitigate

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

2.6 General Duty of Operations Co to Mitigate

In all cases where Operations Co is entitled to receive from the Design-Builder any compensation, costs or damages, but not in any other case, Operations Co will use all commercially reasonable efforts (including enforcing its rights against Project Co pursuant to Section 2.6 of the Project Implementation Agreement) to mitigate such amount required to be

paid by the Design-Builder to Operations Co under this Design-Build Agreement (except where Operations Co is unable to do so under the Project Implementation Agreement, including as a result of a circumstance where Project Co is not required to mitigate pursuant to Section 2.6(a) of the Project Implementation Agreement, or the Senior Financing Agreements).

- (a) Not used
- (b) Not used

Operations Co 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 Design-Build Agreement. Upon request from the Design-Builder, Operations Co will promptly submit a detailed description, supported by all such documentation as the Design-Builder may reasonably require, of the measures and steps taken by Operations Co to mitigate and meet its obligations under this Section 2.6.

2.7 Representatives

The Design-Builder will appoint a DB Representative in accordance with, and with the rights and responsibilities as set out in, Section 2 of Attachment 2 [Design and Construction Protocols], and such appointment will be subject to the written approval of Operations Co, including any changes thereto.

2.8 Key Individuals

Attached as Attachment 17 [Key Individuals] is a list of persons (the "Key Individuals") that the Design-Builder will utilize in performing the DB Obligations. With respect to each of the Key Individuals:

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

2.9 Naming

The Design-Builder acknowledges the provisions of Section 2.9 of the Project Agreement.

2.10 Signs

Subject to Section 7.14 of Attachment 2 [Design and Construction Protocols], the Design-Builder 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 Operations Co.

2.11 Early Works

The Design-Builder acknowledges Section 2.11 of the Project Implementation Agreement and acknowledges and agrees that the early works undertaken pursuant to the Master Agreement (as defined in the Project 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 the Design-Builder pursuant to this Design-Build Agreement. The Design-Builder 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 Design-Build Agreement.

3. OPERATIONS CO'S GENERAL OBLIGATIONS

3.1 Payments

Subject to the Design-Builder meeting the requirements for payment set out in this Design-Build Agreement, and subject to the Pass-Down Provisions, as applicable, Operations Co will pay the Design-Builder the amounts expressly provided for herein, including:

- (a) the payments set out in Section 10 (Payments);
- (b) Not used
- (c) the Termination Payments as set out in Attachment 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 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 DB Dispute in accordance with the DB Dispute Resolution Procedure set out in Attachment 13 [Dispute Resolution Procedure],

in accordance with the provisions of this Design-Build Agreement and all applicable Laws.

3.2 Limitation on Payments

Other than the payments expressly provided for herein, the Design-Builder will have no right to any further payment from Operations Co in connection with the DB Obligations or otherwise in connection with the Project.

3.3 Provision of Lands

Operations Co will make the Lands available for the Project pursuant to the Sub-License in accordance with Attachment 7 [Lands] and the parties' rights and obligations in respect of the

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Lands are set out in such Attachment 7. The Design-Builder acknowledges the provisions of Section 3.3 of, and Schedule 7 [Lands] to, the Project Implementation Agreement regarding Operations Co's access to the Lands and the NG-KIH System and agrees that neither the Design-Builder nor any DB Person will have any greater rights than are granted to Operations Co under the Project Implementation Agreement. The Design-Builder will comply, and will ensure that each DB Person complies, with the terms of the Sub-License (as defined in the Project Implementation Agreement) granted by Project Co to Operations Co. The Sub-License granted by Operations Co to the Design-Builder herein will be effective from the date the Sub-License (as defined in the Project Implementation Agreement) takes effect pursuant to the Project Implementation Agreement and will expire on the earlier of the date the Sub-License (as defined in the Project Implementation Agreement) terminates pursuant to the Project Implementation Agreement and the DB Agreement Termination Date.

3.4 Permitting Assistance

The Design-Builder acknowledges the provisions of Section 3.4 of the Project Implementation Agreement and Section 3.4 of the Project Agreement. To the extent appropriate, Operations Co agrees to take commercially reasonable efforts to enforce its contractual rights under Section 3.4 of the Project Implementation Agreement against Project Co in accordance with the Pass-Down Provisions. The Design-Builder agrees that Operations Co will not be responsible for obtaining or for any delay in obtaining or for the failure of the Design-Builder to obtain any DB Permit, unless such delay or failure is caused by an Operations Co Act.

3.5 Operations Co's Representations and Warranties

Operations Co represents and warrants to the Design-Builder, as of the Effective Date, that:

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

3.6 Purchase of Designated Equipment

The Design-Builder acknowledges and agrees that the Authority will purchase the Designated Equipment and arrange for delivery of the Designated Equipment in accordance with the Designated Equipment Protocol. 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 the Design-Builder, subject to the Pass-Down Provisions, Operations Co will, on the System Completion Date, make a payment to the Design-Builder in the amount of the difference between \$28,646,000 and the amount actually paid by the Authority in respect of the Designated Equipment (taking into account changes in the type or quantity of Designated Equipment only).

3.7 Operations Co Common Carrier Covenant

Operations Co covenants not to take or fail to take any action that would result in the designation of the Design-Builder or any DB Person as a Common Carrier or in the application of the Common Carrier Regulations to the Design-Builder, any DB Person the NG-KIH System or any part thereof. Operations Co acknowledges the provisions of Section 3.7 of the Project Agreement whereby the Authority acknowledges and agrees that the performance by Project Co or any Project Co Person (as defined in the Project Agreement) of obligations under the Project Agreement, the Project Implementation Agreement or any Project Contract (as defined in the Project Agreement) does not require any Person, including Project Co or any Project Co Person (as defined in the Project Agreement), to be regulated as a Common Carrier and such obligations are not intended to constitute common carriage under applicable Laws.

3.8 Not Used

3.9 Pole Attachment Agreements

The Design-Builder acknowledges the provisions of Section 3.9 of the Project Agreement whereby the Authority has agreed to (a) enter into each Pole Attachment Agreement required for the Project, (b) if applicable, renew each Pole Attachment Agreement no later than then expiration date set out in such Pole Attachment Agreement to ensure continuous operations of the NG-KIH System and (c) appoint Operations Co as its agent or designee pursuant to each Pole Attachment Agreement. During the Construction Period, Operations Co will appoint the Design-Builder as its agent or designee pursuant to each Pole Attachment Agreement and the Design-Builder shall perform all of Operations Co's obligations and duties in such capacity. The Design-Builder will comply with the Authority's obligations under each Pole Attachment Agreement related to the DB Obligations. Notwithstanding the foregoing, the parties acknowledge and agree that the payment of all Pole Attachment Fees and the administration of the renewal of each Pole Attachment Agreement will be performed by the Service Provider in accordance with the Services Contract and do not form part of the DB Obligations.

Subject to the remaining provisions of this Section 3.9, the Design-Builder 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 under the Project Agreement to review each Simple Pole Attachment Agreement before it is finalized in accordance with the agreed review procedure under the Project Agreement.

For clarity, the Design-Builder 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

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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 the Design-Builder 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] to the Project Agreement, the Design-Builder 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.

Operations Co agrees to use commercially reasonable efforts to cause Project Co to enforce its contractual rights under Section 3.9 of the Project Implementation Agreement against Project Co to ensure that Project Co causes the Authority to provide or cause to be provided such information, documentation and assistance as the Design-Builder may request and as the Authority may reasonably be able to provide to support the negotiation of any Complex Pole Attachment Agreement.

The Design-Builder agrees to participate in discussions among Operations Co and the Authority regarding 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. Such discussion 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 and the Authority 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 (as defined in the Project Agreement) or the Authority.

The parties acknowledge that the discussions 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 the Design-Builder and the Targeted Pole Provider have negotiated an Amended Pole Attachment Agreement, the Design-Builder will submit a Pole Attachment Proposal in accordance with Section 5 of Attachment 6 [Changes and Innovation Proposals]. The parties acknowledge that the Authority has agreed under the Project Agreement 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 [Changes, Minor Works and Innovation Proposals] to the Project Agreement.

3.10 Procurement Protest or Challenge

The Design-Builder acknowledges the provisions of Section 3.10 of the Project Agreement and agrees to assist in the defense of any protest or challenge to the procurement process contemplated thereunder to the extent that it has the information to do so. The Design-Builder will pay any costs incurred in defending the actions of the Design-Builder related to the procurement process or to its interests in this Design-Build Agreement. Operations Co agrees to enforce its contractual rights under Section 3.10 of the Project Implementation Agreement in accordance with the Pass-Down Provisions.

4. DESIGN-BUILDER'S GENERAL OBLIGATIONS

4.1 General Obligations Re: Project

Subject to and in accordance with the provisions of this Design-Build Agreement and all applicable Laws and Permits, the Design-Builder will carry out the DB Obligations and will cooperate with Operations Co and, at Operations Co's request, Project Co and/or the Authority in the fulfillment of the purposes and intent of this Design-Build Agreement and, to the extent applicable to the DB Obligations, the Project Implementation Agreement and the Project Agreement.

4.2 Records and Reports

The Design-Builder will, at its own cost and expense, retain and maintain the records and reports referred to in Attachment 14 [Records and Reports] in accordance with such Attachment and in a form that is capable of audit by Operations Co and to enable Operations Co to fulfill its obligations to Project Co under Section 4.2 of the Project Implementation Agreement.

4.3 Project Management Office

The Design-Builder will establish and maintain a project management office in Lexington, Kentucky to coordinate its performance of the Design and Construction.

4.4 DB Persons

The Design-Builder will, as between itself and Operations Co, 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 DB Person and all references in this Design-Build Agreement to any act, omission, breach, default, non-compliance, negligence or willful misconduct of the Design-Builder will be construed accordingly to include any act, omission, breach, default, non-compliance, negligence or willful misconduct committed by a DB Person.

4.5 Use of DB Sub-Contractors

Without limiting Section 4.4, Operations Co acknowledges that the Design-Builder may carry out some, but not all, of the DB Obligations by contracting such obligations to one or more DB Sub-Contractors. In respect of the Project:

- (a) the Design-Builder will not contract with, or allow any of its DB Sub-Contractors to contract with, any Person that is a Restricted Person;

- (b) the Design-Builder will not utilize, and will not allow any of its DB Sub-Contractors to utilize, any materials from any Restricted State other than unprocessed raw materials and Non-Operative Components; and
- (c) the Design-Builder will ensure that its DB Sub-Contract with Fujitsu Network Communications Inc. and each DB Sub-Contract that, individually or in the aggregate with other DB Sub-Contracts with the same DB Sub-Contractor, has a value in excess of \$30 million enables Operations Co to comply with the relevant provisions of the Project Implementation Agreement and provides that the relevant DB Sub-Contractor will:
 - (1) be required to provide DB Sub-Contractor warranties and, to the extent possible, supplier warranties directly to Operations Co;
 - (2) be required to contract directly with Operations Co or the nominee of the Senior Secured Creditors upon termination of this Design-Build Agreement; and
 - (3) not be entitled to terminate or suspend its DB Sub-Contract without first giving Operations Co notice and an opportunity to cure.

Concurrently with the execution of any such DB Sub-Contract, the Design-Builder will provide Operations Co with a redacted copy or excerpts of such DB Sub-Contract, in either case sufficient to demonstrate to Operations Co compliance with the requirements of this Section 4.5(c). The Design-Builder will not amend the provisions of any such DB Sub-Contract that relate to the requirements of this Section 4.5(c) without the prior written consent of Operations Co.

Notwithstanding the use of DB Sub-Contractors, the Design-Builder:

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

4.6 Project Contracts under Project Implementation Agreement

The Design-Builder acknowledges the provisions of Section 4.6 of the Project Implementation Agreement and agrees that this Design-Build Agreement is a Project Contract under the Project Implementation Agreement. Without limiting the generality of the foregoing, the Design-Builder acknowledges the obligations of Operations Co pursuant to Sections 4.6(a) through 4.6(d) of the Project Implementation Agreement.

4.7 Costs of Request for Consent

Without fettering Operations Co's discretion as to whether it will exercise any of its rights under Section 4.6 of the Project Implementation Agreement, if the Design-Builder requests, or the Design-Builder proposes a course of action that makes it necessary for Operations Co to request consent to a proposed course of action pursuant to Section 4.6 of the Project

Implementation Agreement, the Design-Builder will pay to Operations Co, without duplication, the Authority's reasonable internal administrative and personnel costs and all reasonable out-of-pocket costs in connection with the Authority considering any such request under the Project Agreement. At the time of such request, the Design-Builder will make a payment to Operations Co in the amount of \$5,000 (Index Linked) against its obligations under this Section 4.7. After the Authority renders its decision, Operations Co will either refund any overpayment upon receipt of such amount from Project Co or invoice the Design-Builder for any additional amounts owing under this Section 4.7 and the Design-Builder will promptly pay such amount to Operations Co. The Design-Builder will also pay Operations Co's reasonable internal administrative and personnel costs and all reasonable out-of-pocket costs in connection with considering any such request from the Design-Builder and, if applicable, requesting consent from Project Co and the Authority in connection therewith.

4.8 Not Used

4.9 Not Used

4.10 DB Permits

- (a) Subject to Section 3.9 of the Project Agreement, Section 8 (Supervening Events) and Section 2.1 of Attachment 7 [Lands], the Design-Builder shall, at its own cost and risk and in accordance with the Project Schedule obtain, maintain and, as applicable, renew all DB Permits in accordance with Attachment 2 [Design and Construction Protocols] and comply with all Permits in accordance with their terms.
- (b) Where a DB Permit has requirements that may impose any conditions, liabilities or obligations on the Authority or any Authority Person, on Project Co or any Project Co Person or on Operations Co or any Operations Co Person, the Design-Builder shall not obtain, amend or renew (other than upon the same terms and conditions) such DB Permit without the prior written consent of Operations Co, not to be unreasonably withheld or delayed, provided that Operations Co shall not be responsible for obtaining or for the failure of the Design-Builder to obtain any DB Permit. The Design-Builder acknowledges the provisions of Section 4.10(b) of the Project Implementation Agreement and, to the extent appropriate, Operations Co agrees to take commercially reasonable steps to enforce its contractual rights under Section 4.10(b) of the Project Agreement against Project Co in accordance with the Pass-Down Provisions.
- (c) The Design-Builder shall, at its own cost, provide or cause to be provided such information, documentation, and administrative assistance as the Authority may request from Project Co under the Project Agreement and as Project Co may request from Operations Co under the Project Implementation Agreement and as the Design-Builder may reasonably be able to provide to enable the Authority to demonstrate compliance with any Permit. The Design-Builder shall provide or cause to be provided such information, documentation and assistance pursuant to this Section 4.10(c) within 7 Business Days of receipt of Operations Co's, Project Co's or the Authority's request.

4.11 Design-Builder's Representations and Warranties

The Design-Builder represents and warrants to Operations Co that:

- (a) the Design-Builder is:
 - (1) a limited liability company duly created and validly existing under the laws of the State of Delaware and has full power and capacity to enter into, carry out the transactions contemplated by and duly perform all its obligations contained in this Design-Build Agreement and all other documents, instruments and agreements required to be executed and delivered by the Design-Builder pursuant to this Design-Build Agreement; and
 - (2) validly registered to conduct business in the Commonwealth of Kentucky;
- (b) the information set out in Attachment 12 [Design-Builder's Ownership Information] is true and correct;
- (c) to the Design-Builder's knowledge, none of the Design-Builder, Persons who control the Design-Builder, or any DB Person are Restricted Persons;
- (d) the execution and delivery of this Design-Build Agreement and all other documents, instruments and agreements required to be executed and delivered by the Design-Builder pursuant to this Design-Build Agreement, and the completion of the transactions contemplated by this Design-Build Agreement, have been duly authorized by all necessary action on the part of the Design-Builder, and this Design-Build Agreement has been duly executed and delivered by the Design-Builder and constitutes a legal, valid and binding obligation of the Design-Builder 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 the Design-Builder of, and performance of its obligations under, this Design-Build 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 Operations Co, Project Co and Authority Inquiries

Unless otherwise specified in this Design-Build Agreement, the Design-Builder will respond in writing to all written inquiries received from Operations Co, Project Co or the Authority as soon as reasonably practicable and in any event within 7 Business Days of receipt of such inquiry or such longer period as the circumstances and content of the inquiry may reasonably require, but in all cases within a time frame sufficient to ensure that Operations Co is not placed in breach of the Project Implementation Agreement by the delay of the Design-Builder.

4.13 Design-Builder Common Carrier Covenant

The Design-Builder covenants not to take or fail to take any action that would result in the designation of Operations Co or any Operations Co Person as a Common Carrier or in the application of the Common Carrier Regulations to Operations Co, any Operations Co Person or the NG-KIH System or any part thereof. The Design-Builder acknowledges the provisions of Section 3.7 of the Project Agreement whereby the Authority acknowledges and agrees that the performance by Project Co or any Project Co Person (as defined in the Project Agreement) of obligations under the Project Agreement, the Project Implementation Agreement or any Project Contract (as defined in the Project Agreement) does not require any Person, including Project Co or any Project Co Person (as defined in the Project Agreement), to be regulated as a Common Carrier and such obligations are not intended to constitute common carriage under applicable Laws.

4.14 Compliance with Senior Financing Agreements and Project Implementation Agreement

- (a) The Design-Builder acknowledges that, pursuant to the Project Implementation Agreement, Operations Co cannot agree to, or permit, any assignment, novation or other transfer of this Design-Build Agreement without the prior written consent of the Senior Secured Creditors, and the Design-Builder will not require Operations Co to take any action that would breach such restrictions or make any claim against Operations Co in respect of any failure by Operations Co to take any action to the extent that the taking of such action would be limited by such restrictions.
- (b) The Design-Builder acknowledges that, pursuant to the Project Implementation Agreement, Operations Co is subject to certain restrictions on its ability to, among other things, vary, alter, amend, supplement, surrender, revise or modify the Project Implementation Agreement, this Design-Build Agreement or any other Material Project Contract (as such term is defined in the Senior Financing Agreements) to which the Design-Builder is a party or any other documents entered into in connection therewith without the prior written consent of the Senior Secured Creditors, including agreement by Operations Co to Changes above certain thresholds, and, where Operations Co notifies the Design-Builder that it is subject to such a restriction, the Design-Builder will not require Operations Co to take any action that would breach such restrictions or make any claim against Operations Co in respect of any failure by Operations Co to take any action where the taking of such action would be limited by such restrictions.
- (c) The Design-Builder acknowledges that it has been provided with a copy of the Senior Financing Agreements and the Project Implementation Agreement and the Design-Builder will not take any action under this Design-Build Agreement which would require consent of the Senior Secured Creditors under the Senior Financing Agreements if taken by Operations Co under the Project Implementation Agreement without Operations Co having first obtained the consent of the Senior Secured Creditors.
- (d) The Design-Builder will, at the Design-Builder's cost and expense, execute and deliver to the Senior Secured Creditors all such reasonable acknowledgements,

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agreements, undertakings and other documents as the Senior Secured Creditors may require in connection with their taking security over Operations Co's right, title and interest in and to this Design-Build Agreement and the Project, provided that, notwithstanding the foregoing, the execution and delivery of any acknowledgements, agreements, undertakings and other documents that may be required in connection with any Refinancing (as defined in the Project Agreement) shall be at Operations Co's cost and expense.

- (e) The Design-Builder will provide all information as Operations Co may reasonably request from time to time in respect of the Design-Builder or any of its Affiliates as may be required in order for Operations Co to demonstrate compliance with all applicable anti-money laundering and anti-terrorism financing legislation in the United States and economic sanctions regulations promulgated in the United States to the extent that Operations Co is required to provide such information to the Senior Secured Creditors pursuant to a request under the Senior Financing Agreements.
- (f) The Design-Builder acknowledges the provisions of Sections 4.1(c) and (d) of Schedule 15 [Financing Agreement Obligations] to the Project Implementation Agreement. The Design-Builder will provide to Operations Co:
 - (1) prior to the System Completion Date, monthly progress reports within 20 days following the last day of the preceding month (beginning with the month ending October 31, 2015), which progress reports shall (i) provide an assessment of the overall progress of the Design and Construction since the date of the last report (or, with respect to the first such report, the Effective Date) and setting forth a reasonable estimate as to the completion date for the applicable work, and (ii) provide a reasonably detailed description of any material delays encountered or anticipated in connection with such work, and a reasonably detailed description of the proposed course of action with respect to such delay;
 - (2) promptly so as to permit Operations Co to comply with its obligations under Sections 4.1(c) and (d) of Schedule 15 [Financing Agreement Obligations] to the Project Implementation Agreement, copies of all notices of the matters described in Sections 4.1(c)(8)(B), (D), (E) and (F) of Schedule 15 [Financing Agreement Obligations] to the Project Implementation Agreement to the extent that any such matter relates to the Design-Builder, this Design-Build Agreement or the DB Obligations; and
 - (3) any additional information related to the Design-Builder, this Design-Builder Agreement or the DB Obligations reasonably requested by Operations Co from time to time and that is required by Operations Co to comply with its reporting obligations pursuant to Sections 4.1(c) and (d) of the Project Implementation Agreement,

provided that the above requirements shall not require that the Design-Builder produce a separate record or report to the extent that the records and reports referred to in Attachment 15 [Records and Reports] are sufficient for Operations Co to comply with its obligations pursuant to Sections 4.1(c) and (d) of Schedule

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15 [Financing Agreement Obligations] to the Project Implementation Agreement. If the Design-Builder is unable to determine whether a matter described in Sections 4.1(c)(8)(D), (E) or (F) of Schedule 15 [Financing Agreement Obligations] to the Project Implementation Agreement could reasonably be expected to, or does, cause a Material Adverse Effect (as defined in the Collateral Agency and Account Agreement), the Design-Builder will consult with Operations Co regarding such matter and Operations Co shall determine (in its sole discretion) whether it is required to report such matter pursuant to Section 4.1(c)(8) of Schedule 15 [Financing Agreement Obligations] to the Project Implementation Agreement. If Operations Co notifies the Design-Builder that Operations Co is required to report such matter, the Design-Builder will provide a copy of all notices of such matter to Operations Co in accordance with Section 4.14(f)(2). Notwithstanding Section 17.1, Operations Co may disclose any information provided to Operations Co by the Design-Builder pursuant to this Section 4.14(f) to the extent required for Operations Co to satisfy its reporting and disclosure obligations under the Project Implementation Agreement.

4.15 Design-Builder's Obligations re Third Party Infrastructure Agreements

The Design-Builder acknowledges the provisions of Section 4.15 of the Project Agreement and the provisions of Section 4.15 of the Project Implementation Agreement. The Design-Builder further acknowledges and agrees 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 Attachment 23 [Third Party Infrastructure Term Sheets]. The Design-Builder will be responsible for fulfilling the responsibilities, including ordering and delivery, of Project Co with respect to all Specified Fibers, as defined and contemplated in the Third Party Infrastructure Term Sheet between Project Co and MuniNet Fiber Agency. The parties acknowledge and agree that the Specified Fibers form part of the Designated Equipment.

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 the Design-Builder's obligations under this Design-Build Agreement, the scope or manner of carrying out the DB Obligations or the Design-Builder's costs of carrying out the DB Obligations, the Design-Builder acknowledges that the Authority shall issue a Change Directive in accordance with Section 2.17 of Schedule 6 [Changes, Minor Works and Innovation Proposals] to the Project Agreement in respect of such Change based on a description of the Change provided by the Design-Builder to Operations Co.

During the Construction Period, the Design-Builder will use commercially reasonable efforts to manage the Third Party Infrastructure Providers in accordance with the terms of the Third Party Infrastructure Agreements, including, without limitation, any integration activities necessary to integrate the applicable infrastructure of a Third Party Infrastructure Provider into the NG-KIH System, and administer Project Co's 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 Operations Co, the Design-Builder will promptly submit a detailed description, supported by all such documentation as Operations Co may reasonably require, of the measures and steps taken by the Design-Builder to administer Project Co's rights under each of the Third Party Infrastructure Agreements. Operations Co consents to the Design-Builder

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pursuing all rights, remedies and relief under a Third Party Infrastructure Agreement in the name of Project Co.

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 the Design-Builder 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 Design-Builder acknowledges that 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 Project Co's rights under the Third Party Infrastructure Agreements. Operations Co agrees to enforce its contractual rights under Section 4.15 of the Project Implementation Agreement against Project Co in accordance with the Pass-Down Provisions.

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 with the Authority and Project Co and seek to agree on the steps to be taken by the Design-Builder in administering Project Co's rights under the relevant Third Party Infrastructure Agreement. The parties acknowledge and agree that the compensation to which the Design-Builder will be entitled in respect of any such Compensation Event will include, as a component of the Design-Builder's Direct Losses, the reasonable cost of legal or professional services incurred by the Design-Builder in connection with the administration of Project Co's rights; provided, however, that the Design-Builder will not be required to pursue any judicial remedies against any Third Party Infrastructure Provider. For certainty, Operations Co will not be required hereunder to pursue any judicial remedies against any Third Party Infrastructure Provider.

4.16 Construction Budgets

The Design-Builder acknowledges and agrees that it has been made aware of the provisions of the Senior Financing Agreements in relation to the preparation of Construction Budgets and agrees to provide such information as Operations Co may require, on request by Operations Co, in order to comply with such provisions. The Design-Builder will also be responsible to prepare all Construction Budgets as reasonably required by Operations Co.

4.17 Remedial Plan

The Design-Builder acknowledges and agrees that it has been made aware of the provisions of the Senior Financing Agreements in relation to the preparation of remedial plans. If:

- (a) in any certificate delivered by the Secured Creditors' Technical Advisor in accordance with the Senior Financing Agreements, the Secured Creditors' Technical Advisor opines that the Design and Construction are not progressing such that System Completion will be achieved by the DB Longstop Date and that a remedial plan is required; or

- (b) at any time, the Design-Builder reasonably anticipates that System Completion will not occur by the DB Longstop Date, the Design-Builder will immediately notify Operations Co of such occurrence,

within 20 Business Days of such certificate or notice, as the case may be, the Design-Builder will submit to Operations Co and the Secured Creditors' Technical Advisor:

- (1) a report identifying the reasons for the delay; and
- (2) a remedial plan showing the steps that are to be taken by the Design-Builder to achieve System Completion by the DB Longstop Date.

The Design-Builder will proceed to carry out the remedial plan as approved by the Secured Creditors' Technical Advisor and will ensure that System Completion will occur on or prior to the DB Longstop Date.

If the Design-Builder has delivered a remedial plan that is not acceptable to the Secured Creditors' Technical Advisor, the Design-Builder will submit a replacement remedial plan within 10 Business Days after receipt of notice that it is not acceptable (which notice will include reasons therefor). If such replacement remedial plan is not acceptable to the Secured Creditors' Technical Advisor, the Design-Builder shall negotiate in good faith with Operations Co and the Secured Creditors' Technical Advisor to agree on a replacement remedial plan and shall take such other reasonable steps as may be required under the Senior Financing Agreements with respect to any replacement remedial plan.

5. NOT USED

6. INSURANCE, DAMAGE AND DESTRUCTION

6.1 Insurance Coverage

Subject to Section 6.10(b), Operations Co or the Design-Builder, as applicable, 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 Attachment 5 [Insurance Requirements], including as to the required scope and content (including coverage limits and endorsements) of all applicable insurance policies for all applicable periods and ensuring that the persons required pursuant to Attachment 5 [Insurance Requirements] to be named as named insureds, additional insureds or loss payees are so named. The Design-Builder agrees to pay any deductibles and shall be responsible for any waiting period in the event of an insured loss whether the insurance is provided by the Design-Builder or Operations Co. The Design-Builder further agrees to provide any additional documentation required to satisfy the provisions of the Senior Financing Agreements in relation to the insurance to be provided by the Design-Builder promptly following notice thereof from Operations Co.

6.2 Design-Builder's Obligations - Damage or Destruction

The Design-Builder acknowledges the provisions of Section 6.2 of the Project Implementation Agreement. Without prejudice to Section 8 (Supervening Events) or the Design-Builder's rights under the Interface Agreement, if the NG-KIH System is completely or substantially destroyed during the Construction Period, the Design-Builder will repair, replace or restore those

components of the NG-KIH System still under construction (other than any such damage or destruction caused by an Operations Co Act) in accordance with the Design and Construction Specifications, subject only to:

- (a) applicable Laws; and
- (b) Project Co paying to Operations Co (pursuant to Section 6.2 of the Project Implementation Agreement) and Operations Co paying to the Design-Builder:
 - (1) the amount, if any, by which the cost of such repair, replacement or restoration exceeds the maximum amount of insurance coverage required under the Project Implementation Agreement for such risk (which, for greater certainty, is the maximum amount of coverage prior to any deductibles for which, as between Operations Co and Project Co, Operations Co is responsible pursuant to Schedule 5 [Insurance Requirements] to the Project Implementation Agreement); or
 - (2) if no insurance coverage is required under the Project Implementation Agreement for such risk, an amount equal to the total costs of such repair, replacement or restoration,

and if Project Co pays such amount to Operations Co, Operations Co will pay such amounts to the Design-Builder in accordance with the Pass-Down Provisions promptly upon receipt of one or more invoices from the Design-Builder indicating that such amounts are due and payable by the Design-Builder 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 Operations Co pursuant to the Project Implementation Agreement, the full amount of coverage required under the Project Implementation Agreement for such risk prior to any deductibles for which Operations Co is responsible (as between Operations Co and Project Co) pursuant to Schedule 5 [Insurance Requirements] to the Project Implementation Agreement.

6.3 Insufficient Insurance

The Design-Builder acknowledges the provisions of Section 6.3 of the Project Implementation Agreement. 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 required under the Project Implementation Agreement for the risk that caused the destruction; and
- (c) none of Project Co or the Authority (pursuant to Section 6.3 of the Project Agreement), Operations Co (pursuant to Section 6.3 of the Project Implementation Agreement) or the Design-Builder has agreed to pay the amount by which the cost to repair, replace or restore those components of the NG-KIH

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System still under construction exceeds the Insurance Proceeds and Insurance Receivables with respect to such destruction,

and the Authority or Project Co (with the prior consent of Operations Co) elects to terminate the Project Agreement pursuant to Section 6.3 of the Project Agreement, this Design-Build Agreement will automatically terminate, in which case Operations Co will, subject to the Pass-Down Provisions, pay compensation to the Design-Builder in accordance with Section 5 of Attachment 9 [Compensation on Termination].

6.4 Uncollectible Insurance Receivables

The Design-Builder acknowledges the provisions of Section 6.4 of the Project Implementation Agreement. If the Project Agreement is terminated in accordance with Section 6.4 of the Project Agreement, this Design-Build Agreement will automatically terminate and Operations Co will, subject to the Pass-Down Provisions, pay compensation to the Design-Builder in accordance with Section 5 of Attachment 9 [Compensation on Termination].

6.5 Application of Insurance Proceeds If No Termination

Unless the Project Agreement has been terminated by the Authority or Project Co (including pursuant to Section 6.3 or Section 6.4 thereof), the Design-Builder will cause all:

- (a) applicable Insurance Proceeds which the Design-Builder has received;
- (b) applicable Insurance Proceeds which the Design-Builder is entitled to receive;
- (c) amounts which the Authority has agreed to pay Project Co, Project Co has paid Operations Co and Operations Co has paid the Design-Builder as contemplated in Section 6.2(b); and
- (d) amounts which the Design-Builder 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 Design-Build Agreement.

6.6 Application of Insurance Proceeds In Case of Termination

If this Design-Build Agreement has been terminated pursuant to Section 6.3:

- (a) any Insurance Proceeds received prior to the Termination Payment Date by the Design-Builder in respect of damage to the NG-KIH System and not already applied to the repair of such damage will be paid to Operations Co (or as Operations Co may direct); and
- (b) on the Termination Payment Date, the Design-Builder will assign to Operations Co (or as Operations Co may direct) 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 (with the prior written consent of Operations Co pursuant to Section 6.7 of the Project Implementation Agreement and, where possible, in accordance with the Pass-Down Provisions, with input from and the involvement of the Design-Builder) 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

The Design-Builder and Operations Co 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

The Design-Builder acknowledges the provisions of Section 6.9 of the Project Implementation Agreement and the provisions of Section 6.9 of the Project Agreement. Each party will, forthwith upon Having Knowledge, notify the other if a Principal Insured Risk becomes or is expected to become Uninsurable and Operations Co will so advise the Authority. The Design-Builder, together with its insurance advisor, will participate in any meetings of the Authority, Project Co, Operations Co and their respective insurance advisors to discuss the means by which a Principal Insured Risk should be managed pursuant to Section 6.9 of the Project Agreement (including considering the feasibility of self-insurance by any or all of the Authority, Project Co, Operations Co and the Design-Builder).

6.10 Consequences of Risks Becoming Uninsurable

The Design-Builder acknowledges the provisions of Section 6.10 of the Project Implementation Agreement and the provisions of Section 6.10 of the Project Agreement. If the requirements of Section 6.9 of the Project Agreement are satisfied but the Authority and Project Co (with the prior consent of Operations Co pursuant to Section 6.10 of the Project Implementation Agreement) 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 Design-Builder acknowledges that the Authority shall terminate the Project Agreement, in which case this Design-Build Agreement will automatically terminate and the Design-Builder will, subject to the Pass-Down Provisions, be entitled to compensation on termination as provided in Section 5 of Attachment 9 [Compensation on Termination]; or
- (b) if the Uninsurable Risk is not third party liability:
 - (1) the Design-Builder acknowledges that the Authority may terminate the Project Agreement, in which case this Design-Build Agreement will automatically terminate and the Design-Builder will, subject to the Pass-Down Provisions, be entitled to compensation on termination as provided in Section 5 of Attachment 9 [Compensation on Termination]; or

- (2) if and for as long as the Authority has not terminated the Project Agreement under Section 6.10(b)(1) of the Project Agreement:
- (A) this Design-Build Agreement will continue;
 - (B) neither the Design-Builder nor Operations Co will be obligated by this Design-Build Agreement, Project Co will not be obligated by the Project Implementation Agreement, and the Authority will not be obligated by the Project Agreement, to maintain insurance in respect of the Uninsurable Risk and references in this Design-Build Agreement to the insurance required by this Section 6 (Insurance, Damage and Destruction) or Attachment 5 [Insurance Requirements] will be construed accordingly;
 - (C) an appropriate adjustment to the payment or payments to be paid in accordance with Section 10.1 will be made by agreement of the parties, acting reasonably, or, failing such agreement, by the DB Dispute Resolution Procedure, from the date upon which the Uninsurable Risk became Uninsurable, to reflect any savings in the Design-Builder's insurance cost as a result of the Design-Builder not having to insure against the Uninsurable Risk; and
 - (D) subject to the Pass-Down Provisions, the occurrence of the Uninsurable Risk will be deemed to be a Compensation Event unless the Authority terminates the Project Agreement in which case this Design-Build Agreement will automatically terminate and the Design-Builder will, subject to the Pass-Down Provisions, be entitled to compensation on termination as provided in Section 5 of Attachment 9 [Compensation on Termination].

6.11 Subrogation

If Operations Co makes any payment to the Design-Builder pursuant to the Compensation Event referred to in Section 6.10(b)(2)(D), then the Authority, Project Co and Operations Co, as applicable and to the extent of the amount paid, will be subrogated to the Design-Builder'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. Operations Co may assign its rights under this Section 6.11 to Project Co or the Authority.

6.12 Continuing Attempts to Insure Uninsurable Risks

When there is an Uninsurable Risk for which Operations Co or the Design-Builder is responsible to obtain insurance under Attachment 5 [Insurance Requirements], Operations Co or the Design-Builder, as applicable, 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, the party responsible to obtain the insurance under Attachment 5 [Insurance Requirements] will notify the other party 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 either party becomes aware or is informed by the other party that this is the case (or in the case of Operations Co, is informed by Project Co pursuant to the Project Implementation Agreement), the party responsible to obtain the insurance under Attachment 5 [Insurance Requirements] 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 Design-Build 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 parties will agree upon an appropriate adjustment to the payment or payments to be paid pursuant to Section 10.1 or, failing such agreement, by the DB Dispute Resolution Procedure, from the date upon which the Uninsurable Risk became insurable, to reflect any increase in the Design-Builder's insurance cost as a result of having to insure the risk that ceased to be an Uninsurable Risk.

7. CHANGES AND INNOVATION PROPOSALS

7.1 Changes Required by the Authority or Requested by Operations Co

The Design-Builder acknowledges that the Authority may require Changes during the Construction Period in accordance with Section 7.1 of, and Schedule 6 [Changes, Minor Works and Innovation Proposals] to, the Project Agreement and, in such cases, the Design-Builder will be responsible to fulfill all obligations of Operations Co in respect thereof under the Project Implementation Agreement, to the extent applicable to the DB Obligations, in accordance with Attachment 6 [Changes and Innovation Proposals] and the Pass-Down Provisions. The Design-Builder acknowledges that Operations Co may request Operations Co Initiated Changes in accordance with Attachment 6 [Changes and Innovation Proposals].

7.2 Innovation and Value Engineering

The Design-Builder may submit an Innovation Proposal during the Construction Period for consideration by Operations Co in accordance with Attachment 6 [Changes and Innovation Proposals]. If approved by Operations Co, such approval not to be unreasonably withheld or delayed, Operations Co shall submit such Innovation Proposal to the Authority for its consideration pursuant to Section 7.2 of the Project Implementation Agreement and Schedule 6 [Changes, Minor Works and Innovation Proposals] to the Project Agreement and such submission will be dealt with pursuant to the Pass-Down Provisions. For greater certainty, Innovation Proposals will be approved or rejected by the Authority in accordance with the requirements of Schedule 6 [Changes, Minor Works and Innovation Proposals] to the Project Agreement, and such approval or rejection will be binding on Project Co, Operations Co and the Design-Builder.

7.3 Not Used

8. SUPERVENING EVENTS

8.1 Supervening Events

The Design-Builder acknowledges the provisions of Section 8 of the Project Implementation Agreement and confirms that its rights in relation to Supervening Events, and any claim it may have or make in respect thereof, are subject to the Pass-Down Provisions. If:

- (a) a Compensation Event or Relief Event occurs, the Design-Builder 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 Design-Build Agreement to the extent provided in this Section 8 (Supervening Events) but subject, in each case, to the Pass-Down Provisions where the Applicant is the Design-Builder. The **"Applicant"** means the party making such application.

8.2 Procedures Upon the Occurrence of a Supervening Event

Subject to the Pass-Down Provisions, the following procedure will apply if a Supervening Event occurs:

- (a) as soon as practicable, and in any event within 3 Business Days if the Applicant is the Design-Builder or within 5 Business Days if the Applicant is Operations Co, as applicable, 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 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. Unless Operations Co advises the Design-Builder within 1 Business Day that Operations Co disagrees with a Supervening Event Notice provided by the Design-Builder (in which case the parties will attempt to resolve such disagreement immediately and the DB Dispute Resolution Procedure will apply), the Design-Builder will forthwith deliver the Supervening Event Notice to Project Co and the Authority within the time frame required by Section 8.2(a) of the Project Agreement;
- (b) within 7 Business Days if the Applicant is the Design-Builder or within 10 Business Days if the Applicant is Operations Co, as applicable, 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:
 - (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 the Design-Builder, 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 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 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 Operations Co is claiming the benefit of an Eligible Change in Law Event, the Design-Builder will provide Operations Co information reasonably requested in order for Operations Co to make its claim and as Operations Co may require in connection with its discussions with Project Co and the Authority pursuant to the Project Implementation Agreement;
- (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;
 - (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 Design-Build Agreement; and
 - (3) in the case of the Design-Builder, it has complied with its mitigation obligations pursuant to Section 2.5 and in the case of Operations Co, 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, the Design-Builder's mitigation obligations shall not be interpreted as requiring the Design-Builder to incur any costs associated with obtaining a sufficiently detailed description of any Site Location so as to enable the Design-Builder to carry out its obligations under this Design-Build Agreement by the date reasonably required by the Design-Builder in accordance with the Project Schedule;

- (g) the Applicant will advise whether, in the Applicant's opinion, any amendments should be considered to this Design-Build Agreement or, if the Applicant is Operations Co, any Senior Financing Agreement, as a result of the Supervening Event; and
- (h) the Design-Builder acknowledges that Project Co and Operations Co will meet with the Authority as required by Section 8.2(h) of the Project Implementation Agreement within 15 Business Days of delivery of the Supervening Event Notice to consult and seek to agree to the effect of the Supervening Event. The Design-Builder acknowledges and agrees that, if Project Co, Operations Co and the

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Authority, 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 (with the prior consent of Operations Co) may refer the question of whether a Supervening Event has occurred, whether the conditions in Section 8.2(f) of the Project Agreement 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 pursuant to the Project Agreement. The parties agree to abide by the determination pursuant to the Project Agreement of whether a Supervening Event has occurred, whether the conditions in Section 8.2(f) of the Project Agreement have been satisfied or the extent of relief or compensation to which the affected party is entitled, and neither party will exercise any rights under this Design-Build Agreement nor specifically under the DB Dispute Resolution Procedure to dispute the final determination arising under the Project Agreement in respect thereof, other than in accordance with the Pass-Down Provisions or with respect to a claim in respect of an Operations Co Act.

8.3 Design-Builder's Entitlements Upon Occurrence of a Compensation Event

Subject to the Pass-Down Provisions and Section 8.12, if at any time a Compensation Event has occurred and the Design-Builder has given Operations Co a Supervening Event Notice related thereto:

- (a) the Design-Builder is relieved from any liability or consequence (including termination by Operations Co) under this Design-Build Agreement arising from any delay or failure in performing any of its obligations under or in connection with this Design-Build Agreement to the extent resulting from the Compensation Event (without prejudice to the Design-Builder's obligation to pay Delay Liquidated Damages);
- (b) Not used
- (c) Operations Co will pay to the Design-Builder compensation in respect of a Compensation Event calculated on the basis that the Design-Builder 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; and
 - (2) any net increase or decrease in the costs of the Design-Builder performing its obligations under this Design-Build Agreement resulting from the Compensation Event;
 - (3) Not used

except that:

- (4) any Avoidable Costs and applicable Insurance Proceeds and insurance proceeds which the Design-Builder would have recovered as a result of

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the Compensation Event if it had complied with the requirements of this Design-Build Agreement or any policy of insurance maintained or required to be maintained under this Design-Build Agreement or under the Project Implementation 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 Operations Co under Section 8.3(c), the Design-Builder will assign to Operations Co (or as Operations Co may direct) its rights to all applicable Insurance Receivables (whether or not the Design-Builder 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 the DB Longstop Date will be postponed if, but only to the extent that, such dates are postponed pursuant to Section 8.3(e) of the Project Implementation Agreement.

8.4 Design-Builder's Entitlements Upon Occurrence of a Relief Event

Subject to the Pass-Down Provisions and Section 8.12, if at any time a Relief Event has occurred and the Design-Builder has given Operations Co a Supervening Event Notice related thereto:

- (a) the Design-Builder is relieved from any liability or consequence (including termination by Operations Co, except as provided for in this Section 8.4) under this Design-Build Agreement arising from any delay or failure in performing any of its obligations under this Design-Build Agreement to the extent resulting from the Relief Event (without prejudice to the Design-Builder's obligation to pay Delay Liquidated Damages);
- (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 the DB Longstop Date will be postponed if, but only to the extent that, such dates are postponed pursuant to Section 8.4(b) of the Project Implementation Agreement;
 - (2) Not used
 - (3) Not used
- (c) if Operations Co:
 - (1) has become entitled to terminate the Project Implementation Agreement pursuant to Section 8.4(c) of the Project Implementation Agreement and has not exercised its termination right within 60 days after the date upon which Operations Co became so entitled to terminate the Project

Implementation Agreement (the "Relief Event Termination Entitlement Point"); and

- (2) has not agreed to compensate the Design-Builder for the reasonable direct costs incurred by the Design-Builder from and after the Relief Event Termination Entitlement Point as a result of Operations Co's election not to exercise its termination right under Section 8.4(c) of the Project Implementation Agreement,

the Design-Builder may, at any time thereafter so long as such Relief Event is, or such effect is, continuing, terminate this Design-Build Agreement by notice to Operations Co;

- (d) if the Authority gives notice to Project Co under Section 8.4(c) of the Project Agreement terminating the Project Agreement, Operations Co will not consent under Section 8.4(d) of the Project Implementation Agreement to Project Co requiring the Project Agreement to continue unless either (1) Operations Co has obtained the Design-Builder's prior written consent to do so or (2) Operations Co commits to continue to provide relief to the Design-Builder pursuant to this Section 8.4 notwithstanding that Project Co does not provide corresponding relief to Operations Co and without prejudice to the rights of the Design-Builder pursuant to Section 8.4(c);
- (e) the Design-Builder acknowledges that, if the Design-Builder gives notice to Operations Co under Section 8.4(c) terminating this Design-Build Agreement and, as a result, Operations Co gives notice to Project Co under Section 8.4(c) of the Project Implementation Agreement terminating the Project Implementation Agreement and Project Co gives notice to the Authority under Section 8.4(c) of the Project Agreement terminating the 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 the Project Agreement to continue, in which case:
 - (1) the Design-Builder's termination notice to Operations Co under Section 8.4(c) will be deemed null and void and the Design-Builder, insofar as it is able to do so, will continue to perform its obligations in accordance with the provisions of this Design-Build 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 the Project Agreement by notice to Project Co and Operations Co, in which case Operations Co will give notice of such termination to the Design-Builder and this Design-Build Agreement will terminate automatically; and
 - (4) the Design-Builder 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 the Design-Builder delivered the termination notice to Operations Co referred to in Section 8.4(c),

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terminate this Design-Build Agreement by notice to Operations Co, provided that the parties acknowledge and agree that such notice will not have instantaneous effect in order to enable Operations Co to exercise its own termination right under Section 8.4(e)(4) of the Project Implementation Agreement;

- (f) if the Project Agreement is terminated pursuant to Section 8.4 thereof, this Design-Build Agreement will be automatically terminated and in such case, or in the case of termination of this Design-Build Agreement pursuant to this Section 8.4, the Design-Builder will be entitled to compensation on such termination in accordance with Section 5 of Attachment 9 [Compensation on Termination].
- (g) Not used

8.5 Not Used

8.6 Parties' Entitlements Upon Occurrence of a Force Majeure Event

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

- (a) the Applicant is relieved from any liability or consequence (including termination by Operations Co, except as provided for in this Section 8.6) under this Design-Build Agreement arising from any delay or failure in performing any of its obligations under this Design-Build Agreement as a result of the Force Majeure Event (without prejudice to the Design-Builder's obligation to pay Delay Liquidated Damages);
- (b) if the Applicant is the Design-Builder 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 the DB Longstop Date will be postponed if, but only to the extent that, such dates are postponed pursuant to Section 8.6(b) of the Project Implementation Agreement;
- (c) where Operations Co:
 - (1) has become entitled to terminate the Project Implementation Agreement pursuant to Section 8.6(c) of the Project Implementation Agreement and has not exercised its termination right within 60 days of the date upon which Operations Co became so entitled to terminate the Project Implementation Agreement (the "Force Majeure Event Termination Entitlement Point"); and
 - (2) has not agreed to compensate the Design-Builder for the reasonable direct costs incurred by the Design-Builder from and after the Force Majeure Event Termination Entitlement Point as a result of Operations Co's election not to exercise its termination right under Section 8.6(c) of the Project Implementation Agreement,

the Design-Builder may, at any time thereafter so long as such Force Majeure Event is, or such effect is, continuing, terminate this Design-Build Agreement by notice to Operations Co;

- (d) the Design-Builder acknowledges that if the Design-Builder gives notice to Operations Co under Section 8.6(c) terminating this Design-Build Agreement and as a result Operations Co gives notice to Project Co under Section 8.6(c) of the Project Implementation Agreement terminating the Project Implementation Agreement and Project Co gives notice to the Authority under Section 8.6(c) of the Project Agreement terminating the 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 the Project Agreement to continue, in which case:
 - (1) the Design-Builder's termination notice to Operations Co under Section 8.6(c) will be deemed null and void and the Design-Builder, insofar as it is able to do so, will continue to perform its obligations in accordance with the provisions of this Design-Build Agreement;
 - (2) the Force Majeure Event will be deemed to constitute a Compensation Event occurring as of the date on which 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 the Project Agreement by notice to Project Co and Operations Co, in which case Operations Co will give notice of such termination to the Design-Builder and this Design-Build Agreement will terminate automatically; and
 - (4) the Design-Builder 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 the Design-Builder delivered the termination notice to Operations Co referred to in Section 8.6(c), terminate this Design-Build Agreement by notice to Operations Co, provided that the parties acknowledge and agree that such notice will not have instantaneous effect in order to enable Operations Co to exercise its own termination right under Section 8.6(d)(4) of the Project Implementation Agreement;
- (e) if the Project Agreement is terminated pursuant to Section 8.6(c), 8.6(d)(3) or 8.6(d)(4) of the Project Agreement, this Design-Build Agreement will be automatically terminated and in such case, or in the case of termination of this Design-Build Agreement pursuant to this Section 8.6, the Design-Builder will be entitled to compensation on such termination in accordance with Section 5 of Attachment 9 [Compensation on Termination].
- (f) Not used

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

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

- (a) the Applicant will be entitled to compensation in respect of the Eligible Change in Law Event calculated on the basis that the Design-Builder 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 the Design-Builder performing the Design and Construction resulting from the Eligible Change in Law Event,
 - (3) Not used

except that:

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

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

- (b) in the case of a Relevant Works Change in Law, the Design-Builder will be entitled to compensation from Operations Co 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 or Section 8.7 but subject to the Pass-Down Provisions:

- (a) if compliance by the Design-Builder with a Change in Law is outside the scope of, or inconsistent with, the DB Obligations under this Design-Build Agreement, or would mean a change in the DB Obligations under this Design-Build Agreement or a change in the scope or manner of carrying out the DB Obligations, 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 the

Design-Builder will not be entitled to any payment or other compensation other than as set out in Section 8.4 or Section 8.7;

- (b) except as otherwise provided in this Design-Build Agreement, including in Section 8.4 or Section 8.7, the Design-Builder 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 or Section 8.7 will be interpreted as relieving the Design-Builder of its obligation, following any and all Changes in Law, to perform its obligations under this Design-Build Agreement in compliance with all Laws.

8.9 Labor Disputes

If the Design-Builder Has Knowledge of an actual or potential labor dispute that may affect any of the DB Obligations, the Design-Builder will promptly:

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

The Design-Builder acknowledges that if the labor dispute involves workers of the Design-Builder or any DB Sub-Contractor, or of anyone employed by or through them, none of Operations Co, Project Co or the Authority will 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 in respect of Supervening Events will be made in accordance with Section 10.1. Operations Co will in no circumstances be required to provide greater relief or compensation to the Design-Builder than Operations Co has received from Project Co in respect of the relevant Supervening Event under the Project Implementation Agreement.

8.11 Supervening Events Mitigated by Change

The Design-Builder acknowledges the provisions of Section 8.11 of the Project Implementation Agreement and Section 8.11 of the Project Agreement. Nothing in this Design-Build Agreement will limit the right of Operations Co, on its own initiative or as a result of the actions of Project Co pursuant to the Project Implementation Agreement or the Authority pursuant to the Project Agreement, 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 Design-Build Agreement:

- (a) the Applicant will not be entitled to any compensation, extension of time or relief from its obligations under this Design-Build 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 Design-Builder acknowledges the provisions of Sections 8.13(c), (d) and (e) of the Project Implementation Agreement and shall comply, and enable Operations Co to comply, with those provisions to the extent they relate to the Design-Builder or any of the DB Sub-Contractors.

9. INDEMNITIES AND LIMITS ON LIABILITIES AND REMEDIES

9.1 Obligations to Indemnify

- (a) The Design-Builder will indemnify and keep Operations Co and each Operations Co 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 the avoidance of doubt, Project Co, any Project Co Indemnified Person (as defined in the Project Implementation Agreement), the Authority or any Authority Indemnified Person (as defined in the Project Agreement), or any claim for, or in respect of, the death, personal injury, disease or illness of any Person, including any Project Co Indemnified Person (as defined in the Project Implementation Agreement) or any Authority Indemnified Person (as defined in the Project Agreement), arising by reason of a Design-Builder Act or any claim alleging infringement by the Design-Builder or any DB Sub-Contractor, in relation to the Project, of any Intellectual Property rights of third parties, except in each case to the extent caused, or contributed to, by an Operations Co Act. This Section 9.1(a) may be relied upon by Operations Co Indemnified Persons and may be enforced directly by any of them against the Design-Builder in the same manner and for the same purpose as if pursuant to a contractual indemnity directly between them and the Design-Builder.
- (b) Operations Co will indemnify and keep the Design-Builder and each DB 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 or any claim for, or in respect of, the death, personal injury, disease or illness of any Person arising by reason of an Operations Co Act, except in each case to the extent caused, or contributed to, by a Design-Builder Act. This Section 9.1(b) may be relied upon by DB Indemnified Persons and may be enforced directly by any of them against Operations Co in the same manner

and for the same purpose as if pursuant to a contractual indemnity directly between them and Operations 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 Design-Build 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 Design-Build 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 Design-Build 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 Design-Build 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 (as defined in the Project Implementation Agreement) rights of any Person, the Design-Builder may replace such infringing or allegedly infringing item provided that:
 - (1) the replacement is performed without additional cost to Operations Co; 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 Design-Build 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 Operations Co is the Paying Party, the Design-Builder and DB Persons and their respective employees, directors, officers and agents and will not include, in the case where the Design-Builder is the Paying Party, Operations Co and Operations Co Indemnified Persons.

9.4 Waiver of Remedies

No failure to exercise, and no delay in exercising, any right or remedy under this Design-Build Agreement will be deemed to be a waiver of that right or remedy. No waiver of any breach of any provision of this Design-Build 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 Design-Build 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 Operations Co's Remedies

Operations Co's remedies in respect of any failure by the Design-Builder:

- (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 Operations Co's rights pursuant to Section 11.1 of Attachment 2 [Design and Construction Protocols];
- (b) to achieve System Completion by the Target System Completion Date or the DB Longstop Date will be limited to Operations Co's rights pursuant to Section 9.15 and Section 12.4,
- (c) Not used

provided that nothing in this Section 9.6 will limit Operations Co's right to:

- (d) claim, on or after a termination of this Design-Build Agreement, costs, losses, damages and expenses suffered or incurred by Operations Co as a result of rectifying or mitigating the effects of any breach of this Design-Build Agreement by the Design-Builder except to the extent recovered by Operations Co under this Design-Build Agreement or taken into account to reduce any compensation payable by Operations Co pursuant to Attachment 9 [Compensation on Termination];
- (e) make a claim for indemnification pursuant to Section 9.1;
- (f) deliver to the Design-Builder a DB Dispute Notice or a notice of default or termination pursuant to Section 12 (DB Events of Default) and pursue all remedies in respect thereof;
- (g) pursue any other express remedy available to Operations Co under this Design-Build Agreement or any equitable remedy, including injunctive relief and specific performance; or
- (h) enforce, realize or otherwise call upon the DB Parent Guarantees, the DB Liquid Performance Support or any other Acceptable Credit Support or any other security, bond, insurance or other performance support provided by or on behalf of the Design-Builder pursuant to this Design-Build Agreement.

The Design-Builder will not be liable to pay, and Operations Co will not be entitled to exercise any remedies against the Design-Builder in respect of, increased debt service costs as a result of a delay in receipt of the Milestone Payment or to Site Completion of any Site, Ring Completion of any Ring or System Completion other than any Delay Liquidated Damages payable by the Design-Builder pursuant to Section 9.15 and any amounts payable by the Design-Builder in accordance with Section 11.1 of Attachment 2 [Design and Construction Protocols].

9.7 Limitation on Design-Builder's Remedies

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

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

Without limiting any rights the Design-Builder may have against the Service Provider under the Interface Agreement, all obligations of Operations Co contained in this Design-Build Agreement shall be deemed to be the obligations of Operations Co and not of any other Person (including any shareholder, director, officer or employee of Operations Co) in its or his or her individual or personal capacity and no recourse shall be had against such Person other than Operations Co for the payment of any amount under this Design-Build Agreement or for any indemnity or any other claim based on this Design-Build Agreement.

9.8 Limits on Monetary Compensation

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

9.9 No Liability for Indirect Losses

Unless specifically allowed in this Design-Build Agreement, neither party to this Design-Build 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. For greater certainty, but subject to the DB Liability Cap, the term "Indirect Losses" does not include any losses of third parties of any nature or kind to the extent that Operations Co has been determined to be liable to any such third party for such losses, and such losses shall be considered Direct Losses for the purposes of this Design-Build Agreement.

9.10 No Liability for Governmental Activities

Operations Co will not be liable to the Design-Builder or any DB 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 Design-Build Agreement by the Design-Builder or any DB Person, including, for greater certainty but without limitation, the failure of the Design-Builder

or any DB 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 Operations Co's Right of Set Off

Operations Co may set off any amounts owing by the Design-Builder to Operations Co under this Design-Build Agreement against any payments due by Operations Co to the Design-Builder under this Design-Build Agreement.

The parties agree that if Project Co exercises any set off right available to it pursuant to the terms of the Project Implementation Agreement in respect of an amount relating to or arising from any act, omission or breach on the part of the Design-Builder or any DB Person after a payment is made by Operations Co to the Design-Builder pursuant to the terms of this Design-Build Agreement, the Design-Builder will be obligated to forthwith reimburse Operations Co in an amount equal to the amount set off by Project Co, and such reimbursement obligation will be secured by the DB Parent Guarantees and the DB Liquid Performance Support.

9.12 Design-Builder's Right of Set Off

The Design-Builder may set off any amounts owing by Operations Co to the Design-Builder under this Design-Build Agreement against any payments due by the Design-Builder to Operations Co under this Design-Build 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 Design-Build Agreement, but any disputed portion or amount will not be payable until the DB Dispute is resolved in accordance with the DB Dispute Resolution Procedure. If payment of any amount payable under this Design-Build Agreement is delayed while the matter is in DB Dispute, upon resolution of the DB Dispute, interest will be payable on any amount determined payable pursuant to the DB Dispute Resolution Procedure at the Default Rate, compounded monthly, from the time such amount became payable under this Design-Build Agreement until paid.

9.14 Interest on Overdue Amounts

If payment of any amount payable under this Design-Build Agreement is not made when due (including Termination Payments payable pursuant to Attachment 9 [Compensation on Termination]), interest will, subject to the Pass-Down Provisions, be payable on such amount at the Default Rate, compounded monthly, from the time such amount became payable under this Design-Build 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.

9.15 Delay Liquidated Damages

- (a) The Design-Builder will pay Operations Co monthly:
 - (1) as a genuine pre-estimate of the damages suffered by Operations Co as a result of a delay by the Design-Builder in achieving Ring Availability for Ring 1B by the Original Target Ring Availability Date for Ring 1B, other

than a delay which is a direct result of one or more Relief Events, damages in an amount equal to \$594.600 per day; and

- (2) as a genuine pre-estimate of the damages suffered by Operations Co as a result of a delay by the Design-Builder in achieving the Target Adjusted Site Count for such month, damages in an amount (only if such amount is positive for such month) equal to:
 - (A) (the Target Adjusted Site Count for such month – the Actual Adjusted Site Count for such month) x the Adjusted Escalated Site Value for such month if the delay is a direct result of one or more Relief Events; or
 - (B) (the Target Adjusted Site Count for such month – the Actual Adjusted Site Count for such month) x the Escalated Site Value for such month in all other circumstances.

(collectively, "Delay Liquidated Damages"), except where the applicable delay was caused by an Operations Co Act. Any Delay Liquidated Damages payable in respect of a month will be paid by the Design-Builder to Operations Co on or before the next Scheduled Progress Payment Invoice Date following the end of such month. If, in respect of any Delay Liquidated Damages paid by the Design-Builder pursuant to Section 9.15(a)(2)(A), the relevant delay is subsequently determined not to have been a direct result of a Relief Event, the Design-Builder shall pay to Operations Co promptly, and in any event within 3 Business Days following such determination, an amount equal to the difference between:

- (3) the total amount of Delay Liquidated Damages in respect of such delay calculated pursuant to Section 9.15(a)(2)(B); and
- (4) the amount paid by the Design-Builder to Operations Co pursuant to Section 9.15(a)(2)(A) in respect of such delay.

Worked examples of the calculation of Delay Liquidated Damages are set out in Attachment 25 [Site Values for Delay Liquidated Damages].

- (b) From and after the date that is 12 months following the Original Target Ring Availability Date for Ring 1B, Operations Co will be entitled to withhold the full amount of the Milestone Payment from the next payment(s) due by Operations Co to the Design-Builder under this Design-Build Agreement. Operations Co will pay to the Design-Builder any amount so withheld within 5 Business Days following receipt by Operations Co of the Milestone Payment from Project Co.
- (c) Operations Co will reimburse the Design-Builder in respect of any Delay Liquidated Damages paid by the Design-Builder pursuant to Section 9.15(a) in respect of a Supervening Event to the extent that:
 - (1) Operations Co receives Insurance Proceeds from any advance loss of profits insurance policy for the loss of revenue arising from an event that delays the receipt of the Milestone Payment or the receipt of any portion of the Availability Payment payable to Project Co under the Project

Agreement (but not to the extent of any deductible or waiting period in respect of the relevant period of delay) where such Insurance Proceeds cover the same period of delay; and

- (2) Operations Co received any compensation in respect of such Supervening Event from Project Co,

within 5 Business Days of receipt by Operations Co of any such Insurance Proceeds or compensation from Project Co, as the case may be.

- (d) Payment by the Design-Builder of Delay Liquidated Damages and any other amount contemplated in this Section 9.15 is subject to the limitation of liability under this Design-Build Agreement, including the Delay LD Subcap, but neither such payment nor the existence of any limitations of liability under this Design-Build Agreement will relieve the Design-Builder of its obligations to carry out and complete the other DB Obligations.

9.16 Maximum Aggregate Liability

- (a) Subject to Section 9.16(b), the maximum aggregate liability of the Design-Builder under this Design-Build Agreement (including for Delay Liquidated Damages and indemnities under this Design-Build Agreement) will not exceed 40% of the Contract Price (the "DB Liability Cap").
- (b) The DB Liability Cap will not apply (either in the context of any claim or upon termination of this Design-Build Agreement) in respect of:
 - (1) any liability of the Design-Builder resulting from its abandonment of the Design and Construction;
 - (2) any claims arising from, in connection with or as a result of any fraud or criminal act by the Design-Builder or any DB Person;
 - (3) any claims arising from, in connection with or as a result of any Gross Negligence, fraudulent misrepresentation or willful misconduct by the Design-Builder, a DB Guarantor or any DB Person;
 - (4) liability for losses relating to any event or circumstance in respect of which the Design-Builder is required to maintain insurance or pay deductibles in accordance with this Design-Build Agreement up to the amount of the required insurance and deductibles thereon (except to the extent insurance proceeds are not available in respect of such losses as a result of a failure of Operations Co to maintain such insurance);
 - (5) any amounts which the Design-Builder has recovered from the Service Provider pursuant to the provisions of the Interface Agreement (or would be recoverable but for the limitation on liability of the Service Provider to the Design-Builder under the Interface Agreement) in respect of claims for which liability has been reallocated to the Service Provider from the Design-Builder;

- (6) any amounts paid pursuant to an indemnity under this Design-Build Agreement respecting liability to third parties (other than the Authority, Project Co and the Senior Secured Creditors), including for death, personal injury or damage or loss to property;
- (7) any liabilities arising out of any encumbrances caused by the Design-Builder and not removed or paid by the Design-Builder in accordance with this Design-Build Agreement;
- (8) any amounts paid by the Design-Builder that are subsequently repaid to it by Operations Co (including by way of Equivalent Project Relief), received by the Design-Builder from insurance proceeds (or that would have been recovered by insurance proceeds up to the amount of the required insurance but in respect of which insurance proceeds are not available due to a failure, act or omission on the part of the Design-Builder) or refunded to it by a third party, including the Service Provider;
- (9) any Cost Overruns incurred by the Design-Builder in carrying out the Design and Construction; and
- (10) liability for third party claims with respect to Intellectual Property relating to the Design and Construction.

Operations Co will not be obliged to exhaust its remedies against any insurer before being entitled to make a claim against the Design-Builder hereunder.

- (c) The Design-Builder's maximum aggregate liability for Delay Liquidated Damages under this Design-Build Agreement will be limited to 10% of the Contract Price (the "Delay LD Subcap"). For greater certainty, the Delay LD Subcap is a subset of the DB Liability Cap and the Delay LD Subcap and the DB Liability Cap are not additive.

9.17 Design-Builder Warranties

- (a) The Design-Builder represents, warrants and covenants that the Design and Construction will be free of any Deficiencies, other than any Site Completion Deficiencies that are to be corrected by the Design-Builder in accordance with Section 13.4 of Attachment 2 [Design and Construction Protocols].
- (b) The Design-Builder will, at its expense, correct and make good all Deficiencies and Site Completion Deficiencies that are discovered during the Warranty Period.
- (c) The Design-Builder will, at its expense, correct and make good all Deficiencies in respect of corrective work performed by the Design-Builder pursuant to Section 9.17(b) that are discovered during the Extended Warranty Period.
- (d) If the Design-Builder identifies any Deficiency or Site Completion Deficiency it will promptly notify Operations Co. If directed by Operations Co as a result of such notice, or if the Design-Builder otherwise identifies or receives notice of a Deficiency or Site Completion Deficiency, the Design-Builder will expeditiously and diligently correct any such Deficiency or Site Completion Deficiency. If the

Design-Builder does not promptly and diligently, and in any event within 30 days of a request by Operations Co (or such other period of time as may be acceptable to Operations Co, acting reasonably), remedy a Deficiency or Site Completion Deficiency pursuant to Section 9.17(b) or Section 9.17(c), as the case may be, Operations Co, after notice to the Design-Builder, will have the right to perform or have performed by third parties the necessary remedy, and the Design-Builder will reimburse Operations Co for all reasonable costs and expenses in respect of the exercise of Operations Co's rights hereunder within 5 Business Days of demand by Operations Co.

- (e) While rectifying Deficiencies, Site Completion Deficiencies or otherwise accessing a Site after the Site Completion Date for that Site, the Design-Builder will comply with any reasonable Site safety, security and access requirements of Operations Co and the Service Provider, including reasonable directions necessary to minimize disruption to the Services.
- (f) Subject to Section 9.6, the sole obligations of the Design-Builder with respect to Deficiencies and Site Completion Deficiencies are set out in this Design-Build Agreement and the Interface Agreement, and the remedies of Operations Co with respect to any Deficiencies and Site Completion Deficiencies are limited to enforcement of the obligations of the Design-Builder under this Design-Build Agreement and the Interface Agreement.

10. PAYMENTS

10.1 Lump Sum Payments

To the extent a party:

- (a) is entitled to payment from the other party under this Design-Build Agreement, including in respect of a Change under Section 7 (Changes 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 Design-Build Agreement, including in respect of an Innovation Proposal under Section 7 (Changes 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 such payment will be due and payable within 10 Business Days of delivery of written demand supported by all relevant information. Where the Pass-Down Provisions apply, such amounts shall be due within 3 Business Days of receipt by Operations Co of the corresponding amount from Project Co or 3 Business Days prior to the date on which the corresponding amount is payable by Operations Co to Project Co under the Project Implementation Agreement, as applicable, unless specific additional timeframes are stipulated for payment of any amounts owing or payable by Operations Co to the Design-Builder, or by the Design-Builder to Operations Co, as applicable, under this Design-Build Agreement.

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10.2 Not Used

10.3 Not Used

10.4 Not Used

10.5 Contract Price

- (a) The Design-Builder will perform the DB Obligations for a contract price of \$274,849,304, as amended as a result of Changes, Compensation Events and any other mechanisms specified herein which explicitly adjust the price (the "Contract Price").
- (b) The Contract Price is not subject to change except to the extent expressly provided in this Design-Build Agreement.
- (c) The Contract Price is inclusive of all Taxes. All Taxes levied against Design-Builder's income, capital or activities will be the sole responsibility of Design-Builder.
- (d) The Design-Builder is undertaking the DB Obligations on a fixed price basis, subject to Changes, Supervening Events and other mechanisms which adjust the Contract Price pursuant to this Design-Build Agreement and in accordance with the Pass-Down Provisions, and, in the event that scheduled payments under this Design-Build Agreement in respect of the DB Obligations are insufficient to cover the costs incurred by the Design-Builder in respect of such obligations, the Design-Builder will be liable to provide all required additional capital necessary to fund such costs and the Design-Builder will not be reimbursed for such additional costs by Operations Co, Project Co or the Authority at any time, and the requirement of the Design-Builder to provide such additional capital will not constitute liabilities of the Design-Builder to Operations Co to which the DB Liability Cap applies.

10.6 Mobilization Payment

Operations Co will pay to the Design-Builder an amount equal to \$45,254,080 within 5 Business Days following the Effective Date.

10.7 Progress Payments

Subject to Section 10.9, Operations Co will pay monthly progress payments (each, a "Progress Payment") to the Design-Builder on account of completed Design and Construction work in accordance with the Scheduled Progress Payment Invoice Dates and the process set out in Section 10.9. Operations Co's obligation to make Progress Payments will be subject to the provisions of this Section 10.

10.8 Early Completion Payments

Subject to the Pass-Down Provisions, Operations Co will pay to the Design-Builder on a monthly basis, as an early completion payment (the "Early Completion Payment") for the Design-Builder achieving an Actual Adjusted Site Count in excess of the Target Adjusted Site

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Count specified for such month in Attachment 24 [Target Adjusted Site Count], an amount (only if such amount is positive for such month) equal to $58.72\% \times ((\text{the Actual Adjusted Site Count for such month} - \text{the Target Adjusted Site Count for such month}) \times \text{the Escalated Site Value for such month})$. Any Early Completion Payment will be payable by Operations Co on the next Progress Payment Date following the end of the relevant month. Worked examples of the calculation of Early Completion Payments are set out in Attachment 25 [Site Values for Delay Liquidated Damages].

10.9 Application for Payments

- (a) On each Scheduled Progress Payment Invoice Date, the Design-Builder will deliver to Operations Co, Project Co and the Secured Creditors' Technical Advisor a draft application for a Progress Payment (an "Application for Payment") in respect of the preceding calendar month and specifying the payment required in respect of such portion of the Design and Construction work for such period. Each Application for Payment will be substantially in the form attached hereto as Attachment 20 [Form of Application for Payment] and will contain a detailed breakdown and description of all Design and Construction completed to the end of the preceding month, separately itemize construction costs and applicable taxes, the requested amount of the relevant Progress Payment and such other evidence as is reasonably necessary to enable the Secured Creditors' Technical Advisor to assess the Application for Payment. The sum of:
- (1) the amount of the Progress Payment requested by the Design-Builder in respect of any Scheduled Progress Payment Invoice Date in an Application for Payment; and
 - (2) the aggregate amount of all Progress Payments paid to the Design-Builder prior to such Scheduled Progress Payment Invoice Date,
- will not exceed the amount set out opposite such Scheduled Progress Payment Invoice Date in Attachment 19 [Payment Schedule] under the heading "Cumulative Amount" (the "Drawdown Cap").
- (b) The Design-Builder will co-operate and, if requested by Operations Co, meet with the Secured Creditors' Technical Advisor to reach agreement on a final Application for Payment not later than 10 days after the delivery of the Application for Payment to Operations Co, Project Co and the Secured Creditors' Technical Advisor. Operations Co may, by request to the Design-Builder, be included in the discussions regarding settlement of the Application for Payment. If the Secured Creditors' Technical Advisor requests, the Design-Builder will arrange with the Secured Creditors' Technical Advisor to provide an opportunity for the Secured Creditors' Technical Advisor to inspect the Design and Construction work and to attend at Design-Builder's accounts payable office to review such documentation as the Secured Creditors' Technical Advisor may reasonably request.
- (c) The Design-Builder will submit to the Secured Creditors' Technical Advisor the final Application for Payment no later than the date which is 15 days following the relevant Scheduled Progress Payment Invoice Date, in the amount originally

requested by the Design-Builder or such lesser amount as may be acceptable to the Secured Creditors' Technical Advisor, and the applicable Progress Payment shall be paid to the Design-Builder on or before the date that is 6 Business Days following such submission of the final Application for Payment (such date, a "Progress Payment Date"). For certainty, certification of the final Application for Payment by the Secured Creditors' Technical Advisor in accordance with the terms of the Collateral Agency and Account Agreement shall be a condition to the payment to the Design-Builder of the applicable Progress Payment; provided, further, that upon a determination by the Secured Creditors' Technical Advisor that the System Completion Date will not occur on or before the DB Longstop Date, the applicable Progress Payment will only be payable to the Design-Builder so long as the Design-Builder has provided to the Secured Creditors' Technical Advisor a remedial plan demonstrating that the System Completion Date can be achieved on or before the DB Longstop Date, and the Secured Creditors' Technical Advisor is reasonably satisfied with such plan, which satisfaction must be evidenced by certification thereof in the certificate of the Secured Creditors' Technical Advisor.

- (d) Operations Co will have no obligation to pay or be responsible in any way for payments to DB Sub-Contractors.
- (e) No Progress Payments or partial or entire use of the NG-KIH System or the Lands by Operations Co, Project Co or the Authority will constitute an acceptance by Operations Co of the Design and Construction work, as being in accordance with this Design-Build Agreement.
- (f) If the Secured Creditors' Technical Advisor or the Authority has determined that there has been defective or non-compliant Design or Construction work by the Design-Builder, Operations Co will have the right to abate payments for such work and set-off for any amounts owed by the Design-Builder to Operations Co in accordance with Section 9.11. Operations Co will also be entitled to set-off for amounts in respect of liens or third party claims for which Operations Co is responsible under the Project Implementation Agreement or applicable Laws to the extent such liens or claims are in respect of acts or omissions of the Design-Builder or any DB Person; provided, that Operations Co will not be entitled to set-off to the extent that the Design-Builder or a DB Person has already satisfied, vacated or discharged or withdrawn the lien or claim or is contesting the lien or claim under bona fide proceedings and has paid into court and satisfied, vacated or discharged or withdrawn such lien or claim (other than in circumstances where the existence of any such liens or claims would result in an Operations Co Event of Default (as defined in the Project Implementation Agreement) under the Project Implementation Agreement or in respect of which any claim or right of set-off in favor of Project Co exists under the Project Implementation Agreement and has been exercised by Project Co).
- (g) In the event of a disagreement as to the value or existence of any defects or deficiencies, or costs to remedy a DB Event of Default, the matter will be finally resolved in accordance with Section 15, and Operations Co will pay the Design-Builder the portion of any Progress Payment that is not in dispute, with the amount in dispute to be paid upon correction or completion of such defect or

deficient work, or remedying of the DB Event of Default, to the satisfaction of Operations Co or as otherwise determined in accordance with Section 15.

- (h) Notwithstanding any other provision hereof, Operations Co will be entitled to withhold all or a portion of any Progress Payment if a DB Event of Default has occurred and is continuing as of the relevant Progress Payment Date for so long as such DB Event of Default remains uncured, and Section 9.14 will not apply in respect of such Progress Payment so withheld.

10.10 Payments Subject to Pass-Down Provisions

For certainty, any payment agreed to be made to the Design-Builder by Operations Co hereunder that will be funded by Operations Co indirectly from the Availability Payments or Milestone Payment payable by the Authority to Project Co pursuant to the Project Agreement will be subject to the Pass-Down Provisions.

11. OPERATIONS CO'S STEP-IN RIGHTS

11.1 Operations Co's Step-in Rights

The Design-Builder (a) acknowledges the provisions of Section 11.1 of the Project Implementation Agreement and the rights of Project Co therein and the provisions of Section 11.1 of the Project Agreement and the rights of the Authority therein and (b) agrees that the Pass-Down Provisions apply to the operation of this Section 11.1. If:

- (a) the Authority determines that a breach by Project Co of any obligation under the 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 the Project Agreement, the Authority reasonably considers the circumstances to constitute an Emergency,

then Operations Co will follow the direction given by Project Co pursuant to Section 11.1 of the Project Implementation Agreement. In such case, either:

- (c) Operations Co may require the Design-Builder 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 this Design-Build Agreement or any DB Sub-Contract, Operations Co may require that the Design-Builder or any DB Sub-Contractor suspend its operations in some or all respects and the Design-Builder will use commercially reasonable efforts to comply with Operations Co's requirements as soon as reasonably practicable; or
- (d) the Authority may take such steps as it considers are appropriate pursuant to Section 11.1 of the Project Agreement (either itself or by engaging others) to mitigate or rectify such state of affairs to the standards required by the Project Agreement (or as close as possible to those standards as the circumstances permit) and the Design-Builder will not inhibit or interfere with the exercise of such rights by the Authority.

The Design-Builder will ensure that the provisions contained in all applicable DB Sub-Contracts will not prevent or inhibit the Authority or Operations Co from exercising their rights under this Section 11. Operations Co acknowledges that this Section 11.1 does not create a separate step-in right that can be exercised by Project Co or Operations Co alone in circumstances where the Authority has not asserted its rights pursuant to Section 11.1 of the Project Agreement.

11.2 Operations Co's Rectification Rights

The Design-Builder (a) acknowledges the provisions of Section 11.2 of the Project Implementation Agreement and the rights of Project Co therein and the provisions of Section 11.2 of the Project Agreement and the rights of the Authority therein, and (b) agrees that the Pass-Down Provisions apply to the operation of this Section 11.2. If Operations Co gives notice to the Design-Builder under Section 11.1(c) and the Design-Builder either:

- (a) does not confirm, within 3 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 Operations Co to mitigate, rectify and protect against such circumstances that Operations Co may, within a further 7 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 Operations Co, acting reasonably, will stipulate,

then Operations Co or 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 the Design-Builder to perform the Design or Construction, 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 the Design-Builder has proposed a plan acceptable to Operations Co, acting reasonably (and the Authority pursuant to Section 11.2 of the Project Agreement) for mitigating, rectifying and protecting against such circumstances, any suspension of the right and obligation of the Design-Builder to perform any Design or Construction will cease and such right and obligation will once again be in full force and effect.

11.3 Notice of NG-KIH System Change

Operations Co will notify the Design-Builder of any NG-KIH System Change which the Authority intends to make (or which Project Co advises Operations Co that the Authority intends to make) pursuant to the exercise of the Authority's rights under Section 11.1(d) or Section 11.2 of the Project Agreement and provide the Design-Builder a reasonable opportunity, taking into account all the circumstances, to comment on the proposed NG-KIH System Change. Operations Co will reasonably consider comments received in a timely manner from the Design-Builder on the proposed NG-KIH System Change and, subject to the Pass-Down Provisions, will use commercially reasonable efforts to have Project Co and the Authority consider such comments.

11.4 No Effect on Design-Builder's Design and Construction Responsibility

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

11.5 Allocation of Costs for Operations Co Actions

The Design-Builder acknowledges the provisions of Section 11.5 of the Project Agreement and the right of the Authority to require Project Co to reimburse certain of its costs and additional mark-up. To the extent that any of the circumstances set out in Section 11.1 arise as a result of any breach by the Design-Builder of the DB Obligations, then the Design-Builder will pay Operations Co 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 of the Project Agreement 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, Project Co or Operations Co under Section 11.1 and Section 11.2 will, subject to the Pass-Down Provisions, constitute a Compensation Event.

12. DB EVENTS OF DEFAULT

12.1 DB Events of Default

For the purposes of this Design-Build Agreement, "DB Event of Default" means any of the following events or circumstances:

- (a) the occurrence of a DB Material Breach that is not remedied in accordance with Section 12.3, including in accordance with the program for remediation produced by the Design-Builder in accordance with Section 12.3, or the occurrence of a DB Material Breach for which a program for remediation has not been produced by the Design-Builder in accordance with Section 12.3;
- (b) subject to the Acceptable Remaining Party Principle, the occurrence of an Insolvency Event in respect of the Design-Builder or a DB Guarantor;
- (c) the Design-Builder repudiates this Design-Build Agreement, the Interface Agreement, the DB Collateral Agreement or the DB Lenders' Remedies Agreement, or 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 DB Longstop Date;
- (e) the Design-Builder breaches Section 16.1 or Section 16.2;
- (f) the Design-Builder breaches its obligations under this Design-Build Agreement (other than as a consequence of a breach by Operations Co of its obligations under this Design-Build Agreement, a breach by Project Co of its obligations under the Project Implementation Agreement or a breach by the Authority of its obligations under the Project Agreement) which results in a criminal conviction

related to health and safety violations against the Design-Builder, any DB Person, Project Co, any Project Co Person, Operations Co, any Operations Co Person, the Service Provider, any Service Provider Person or the Authority (an "H&S Conviction"), except that:

- (1) an H&S Conviction of the Design-Builder, a DB Person, Project Co, a Project Co Person, Operations Co, an Operations Co Person, the Service Provider, a Service Provider Person or the Authority will not constitute a DB Event of Default if, within 45 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 DB Person is terminated or the Design-Builder takes such other action against each such DB Person as is acceptable to Operations Co acting reasonably; and
- (2) in determining whether to exercise any right of termination for a DB Event of Default pursuant to this Section 12.1(f) Operations Co 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 Design-Build Agreement;
- (g) Not used
- (h) the Design-Builder making any material representation or warranty in this Design-Build Agreement, the DB Lenders' Remedies Agreement or any Parent Guarantee 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 DB Obligations and, in the case of a false or misleading representation or warranty that is capable of being remedied, the Design-Builder has not remedied such breach within 7 Business Days following notice from Operations Co;
- (i) Not used
- (j) the accumulation of Delay Liquidated Damages in excess of the Delay LD Subcap in Section 9.16(c) that would be payable by the Design-Builder if not for such Delay LD Subcap;
- (k) the accumulation of damages or other amounts, including Delay Liquidated Damages, in excess of the DB Liability Cap in Section 9.16(a) that would be payable by the Design-Builder if not for such DB Liability Cap;
- (l) any DB Parent Guarantee or the DB Liquid Performance Support is:
 - (1) not provided or maintained as required under this Design-Build Agreement and, in the case of the DB Liquid Performance Support, is not (X) replaced within the time period set out in Section 17.13(c) in the case of a Ratings Downgrade, (Y) renewed within 20 Business Days after the

date required to be renewed pursuant to Section 17.13(b), or (Z) drawn and the proceeds of such draw deposited into a Cash Collateral Account; or

- (2) withdrawn, terminated or breached (including as a result of non-payment by an issuer of Acceptable Credit Support following demand) or otherwise becomes void, voidable or unenforceable for any reason and, in the case of the DB Liquid Performance Support or any other Acceptable Credit Support, is not replaced within 10 Business Days;
- (m) the DB Lenders' Remedies Agreement is or becomes wholly or partially void, voidable, unenforceable, invalid or illegal as a result of any act or omission of the Design-Builder and such agreement is not replaced by an agreement on substantially similar terms within 20 days of becoming wholly or partially void, voidable, unenforceable, invalid or illegal or such longer period, not exceeding 160 days, reasonably necessary to effect such replacement;
- (n) the occurrence of an Operations Co Event of Default (as defined in the Project Implementation Agreement) under the Project Implementation Agreement that is caused by a DB Event of Default or any other act or omission of the Design-Builder or a DB Person or breach by the Design-Builder of its obligations hereunder; or
- (o) subject to the Acceptable Remaining Party Principle, a DB Guarantor repudiates its DB Parent Guarantee,

unless caused by (i) non-compliance by the Authority with any provision of the Project Agreement or any document, instrument or agreement delivered to Project Co as required under the Project Agreement or any negligent act or omission, or any wrongful misconduct, of the Authority or any Authority Person, (ii) non-compliance by Project Co with any provision of the Project Implementation Agreement or any document, instrument or agreement delivered to Operations Co as required under the Project Implementation Agreement or any negligent act or omission, or any wrongful misconduct, of Project Co or any Project Co Person or (iii) non-compliance by Operations Co with any provision of this Design-Build Agreement or any document, instrument or agreement delivered to the Design-Builder as required under this Design-Build Agreement or any negligent act or omission, or any wrongful misconduct, of Operations Co or any Operations Co Person.

12.2 Notification

The Design-Builder will notify Operations Co of the occurrence, and details, of any DB 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 DB Event of Default, in either case, promptly and in any event within 2 Business Days from the date that the Design-Builder Has Knowledge of its occurrence.

12.3 DB Material Breach Cure and Remedial Program

The Design-Builder acknowledges the provisions of Section 12.3 of the Project Agreement and the Authority's rights and discretions provided for therein and the provisions of Section 12.3 of the Project Implementation Agreement and Project Co's rights and discretions provided for therein. The Design-Builder further acknowledges that where the Authority exercises its rights

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or its discretion under Section 12.3 of the Project Agreement, Project Co will exercise the same rights or discretions under the Project Implementation Agreement and, to the extent that such circumstance has arisen from an act, omission or breach of this Design-Build Agreement by the Design-Builder, Operations Co will exercise the same rights or discretions under this Design-Build Agreement. After the occurrence of a DB Material Breach and while it is subsisting, Operations Co may serve a notice on the Design-Builder specifying in reasonable detail the type and nature of the DB Material Breach and:

- (a) the Design-Builder will remedy such DB Material Breach referred to in such notice (if it is continuing) within 35 days of such notice; or
- (b) if either Operations Co (as set out in its notice) or the Design-Builder reasonably considers that a DB Material Breach cannot reasonably be remedied within 35 days of such notice, the Design-Builder will deliver to Operations Co within 12 Business Days of such notice a reasonable program (set out, if appropriate, in stages) for remedying the DB Material Breach, which program will specify in reasonable detail the manner in, and the latest date by, which the DB Material Breach is proposed to be remedied.

If the Design-Builder puts forward a program in accordance with Section 12.3(b), Operations Co will have 13 Business Days from receipt of the program within which to notify the Design-Builder that Operations Co, acting reasonably, does not accept the program. If Operations Co notifies the Design-Builder that it does not accept the program as being reasonable or does not respond within 13 Business Days from receipt of the program, the parties will use all 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 DB 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 DB Dispute Resolution Procedure.

12.4 Operations Co Termination Right

The Design-Builder acknowledges the provisions of Section 12.4 of the Project Agreement and the Authority's rights and discretions provided for therein and the provisions of Section 12.4 of the Project Implementation Agreement and Project Co's rights and discretions provided for therein. The Design-Builder further acknowledges that where the Authority exercises its rights or its discretion under Section 12.4 of the Project Agreement, Project Co will exercise the same rights and discretions under the Project Implementation Agreement and Operations Co will exercise the same rights or discretions under this Design-Build Agreement to the extent that such circumstance has arisen from an act, omission or breach of this Design-Build Agreement by the Design-Builder. If:

- (a) a DB 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 the Design-Builder under Section 12.3(b);
- (b) the Design-Builder puts forward a program pursuant to Section 12.3(b) which has been accepted by Operations Co (including after agreement under Section 12.3 to amendments to the program) or has been determined to be reasonable pursuant to the DB Dispute Resolution Procedure and the Design-Builder fails to

remedy the DB Material Breach before the end date for the program, as the case may be;

- (c) any program put forward by the Design-Builder pursuant to Section 12.3(b) is rejected by Operations Co as not being reasonable, and, if such rejection is disputed by the Design-Builder, the DB Dispute Resolution Procedure does not find against that rejection; or
- (d) any DB Event of Default other than a DB Material Breach occurs,

then Operations Co may (if the DB Event of Default continues unwaived and unremedied) terminate this Design-Build Agreement by notice to the Design-Builder. The right of Operations Co to terminate this Design-Build Agreement under this Section 12.4 is in addition, and without prejudice, to any other right which Operations Co may have in connection with the Design-Builder's defaults hereunder. For greater certainty and without limitation, if a DB Event of Default resulted in an Operations Co Event of Default (as defined in the Project Implementation Agreement) under the Project Implementation Agreement, Operations Co will be entitled to terminate this Design-Build Agreement upon Project Co becoming entitled to terminate the Project Implementation Agreement as a result of the corresponding Operations Co Event of Default.

For the purposes of Section 12.4(b), if the Design-Builder's performance of the program is adversely affected by the occurrence of a Supervening Event or a breach by Operations Co of its obligations under this Design-Build Agreement, a breach by Project Co of its obligations under the Project Implementation Agreement or a breach by the Authority of its obligations under the Project Agreement, then, subject to the Design-Builder complying with the mitigation and other requirements in this Design-Build Agreement concerning such events and the application of the Pass-Down Provisions, 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 to by the parties or determined in accordance with the DB Dispute Resolution Procedure.

12.5 Not used

12.6 Operations Co's Costs

The Design-Builder will reimburse Operations Co for any and all reasonable costs incurred by Operations Co in exercising any of its rights (including, but not limited to, any relevant increased administrative expenses, any amounts payable by Operations Co to Project Co pursuant to the Project Implementation Agreement and actual legal expenses) under this Section 12 (Design-Builder Events of Default).

12.7 Operations Co Remedies

Without prejudice to the other rights of Operations Co in this Section 12, at any time during which a DB Event of Default is continuing, Operations Co may (i) at the Design-Builder's risk and expense, take such steps as Operations Co considers appropriate (or instructed by Project Co to take pursuant to the Project Implementation Agreement), either itself or by engaging others (including a third party) to take such steps, to perform or obtain the performance of the Design-Builder's obligations under this Design-Build Agreement or to remedy such DB Event of Default, and/or (ii) subject to the Senior Financing Agreements, present for payment all or any

security held by Operations Co for the performance of the DB Obligations or draw upon the DB Liquid Performance Support.

13. OPERATIONS CO EVENTS OF DEFAULT

13.1 Operations Co Events of Default

For the purposes of this Design-Build Agreement, "Operations Co Event of Default" means any of the following events or circumstances:

- (a) a failure by Operations Co to pay any amount in excess of \$125,000 due and owing to the Design-Builder under this Design-Build Agreement on the due date and Operations Co has not remedied such failure to pay within 10 Business Days' of notice from the Design-Builder, except to the extent that such amount is being disputed in good faith by Operations Co or Operations Co's non-payment is a direct result of any non-payment by Project Co under the Project Implementation Agreement, in which case Operations Co's cure period will extend until the date which is 5 Business Days after all cure periods in respect of Project Co's non-payment under the Project Implementation Agreement have expired and Operations Co is entitled to terminate the Project Implementation Agreement;
- (b) Not used
- (c) Not used
- (d) Not used
- (e) the occurrence of an Insolvency Event in respect of Operations Co; or
- (f) except as provided in Section 13.1(a) above, a breach by Operations Co of any of its material obligations under this Design-Build Agreement and Operations Co has not:
 - (1) cured the breach within forty-five (45) days following notice of the occurrence thereof from the Design-Builder pursuant to Section 13.3(c); or
 - (2) where the relevant breach cannot be cured within forty-five (45) days, initiated, within such forty-five (45) day period, a commercially reasonable course of action designed to cure the relevant breach and thereafter diligently pursued such course of action until the relevant breach is cured; or
 - (3) where the relevant breach is incurable, initiated, within forty-five (45) days following notice of the occurrence thereof from the Design-Builder pursuant to Section 13.3(c), a commercially reasonable course of action designed to mitigate the consequences of such incurable breach to the maximum extent practicable and thereafter diligently pursued such course of action until the consequences of the incurable breach have been so mitigated.

13.2 Notification

Operations Co will notify the Design-Builder of the occurrence, and details, of any Operations 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 an Operations Co Event of Default, in either case, promptly and in any event within 2 Business Days from the date that Operations Co Has Knowledge of its occurrence.

13.3 Design-Builder's Options

After the occurrence of an Operations Co Event of Default and while an Operations Co Event of Default is continuing but subject to Section 13.5, the Design-Builder 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 Design-Build Agreement until such time as Operations Co has demonstrated to the reasonable satisfaction of the Design-Builder that it will perform and is capable of performing its obligations under this Design-Build Agreement and, if so extended under the Project Implementation Agreement pursuant to Section 13.3(a) thereof, the Target Site Completion Dates, Target Ring Completion Dates, Target System Completion Date, Outside Ring Completion Dates and DB Longstop Date will be extended by the time such suspension is in effect;
- (b) in the case of an Operations Co Event of Default under Section 13.1(a), suspend performance by it of its obligations under this Design-Build Agreement until Operations Co has remedied such Operations Co Event of Default and, if so extended under the Project Implementation Agreement pursuant to Section 13.3(b) thereof, the Target Site Completion Dates, Target Ring Completion Dates, Target System Completion Date, Outside Ring Completion Dates and DB 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; or
- (c) in the case of an Operations Co Event of Default under Sections 13.1(a), 13.1(e) or 13.1(f), serve notice on Operations Co of the occurrence specifying details of such Operations Co Event of Default and if the relevant matter or circumstance has not been rectified or remedied by Operations Co or otherwise within 45 days of such notice (or in the case of an Operations Co Event of Default under Section 13.1(f) such longer period as is reasonably required for Operations Co to rectify or remedy such Operations Co Event of Default as long as Operations Co is diligently pursuing such rectification or remedy), the Design-Builder may serve a further notice on Operations Co terminating this Design-Build Agreement with immediate effect, provided that the Design-Builder shall not be entitled to terminate this Design-Build Agreement in accordance with this Section 13.3(c) as a result of an Operations Co Event of Default under Section 13.1(f) where such Operations Co Event of Default occurs as a direct result of a breach by Project Co of its obligations under the Project Implementation Agreement and Operations Co is diligently pursuing its rights and remedies against Project Co under the Project Implementation Agreement.

- (d) Not used

If Operations Co has become entitled to suspend performance by it of its obligations under the Project Implementation Agreement pursuant to Section 13.3(b) of the Project Implementation Agreement, the Design-Builder may, at its option, suspend performance by it of its obligations under this Design-Build Agreement for so long as Operations Co remains entitled to suspend performance of its obligations pursuant to Section 13.3(b) of the Project Implementation Agreement and, if so extended under the Project Implementation Agreement pursuant to Section 13.3(b) thereof, the Target Site Completion Dates, Target Ring Completion Dates, Target System Completion Date, Outside Ring Completion Dates and DB 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.

13.4 Design-Builder's Costs

Operations Co will reimburse the Design-Builder for any and all reasonable costs incurred by the Design-Builder 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 (Operations Co Events of Default).

13.5 Direct Agreements

The Design-Builder's right to exercise any of its remedies pursuant to Section 13.3 or to terminate this Design-Build Agreement in accordance with this Section 13 will be subject to the Senior Secured Creditors' rights under the DB Lenders' Remedies Agreement and the Authority's rights under the DB Collateral Agreement.

13.6 No Other Rights to Terminate

The Design-Builder will have no right or entitlement to terminate this Design-Build Agreement, nor to accept any repudiation of this Design-Build Agreement, and will not exercise, nor purport to exercise, any such right or entitlement except as expressly set forth in this Design-Build Agreement.

13.7 Termination for Convenience

- (a) Neither party will have the right to terminate this Design-Build Agreement for convenience.
- (b) The Design-Builder acknowledges the provisions of Section 2.1(a) of the Project Agreement pursuant to which the Authority may, in its sole discretion and for any reason whatsoever, be entitled to terminate the Project Agreement at any time on written notice to Project Co and Operations Co. Operations Co will provide notice to the Design-Builder as soon as reasonably practicable following receipt of notice from the Authority that it is exercising its right to terminate the Project Agreement for convenience. This Design-Build Agreement will automatically terminate upon termination of the Project Agreement by the Authority in accordance with Section 2.1 thereof.

13.8 Automatic Termination upon Project Agreement Termination

For greater certainty, and in addition to the specific provisions herein with respect to termination of this Design-Build Agreement, this Design-Build Agreement will automatically terminate upon any termination of the Project Agreement, including where the Authority terminates the Project Agreement as a result of a Project Co Event of Default thereunder.

14. PROCEDURE ON TERMINATION

14.1 Compensation on Termination

If this Design-Build Agreement is terminated pursuant to its terms, compensation on termination will be determined and paid in accordance with Attachment 9 [Compensation on Termination].

14.2 Transfer to Operations Co of Assets, Contracts, etc.

The Design-Builder acknowledges the provisions of Section 14.2 of the Project Implementation Agreement. On or promptly after the DB Agreement 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 Operations Co (or as Operations Co may direct), the Design-Builder will transfer to, and there will vest in Operations Co (or Operations Co may direct) 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 pursuant to Section 14.2(a) of the Project Agreement:
 - (A) the construction equipment will remain available to the Authority, Project Co or Operations Co (or as Operations Co may direct) for the purposes of completing the Design and Construction; and
 - (B) all other Project related materials will remain available to the Authority, Project Co or Operations Co (or as Operations Co may direct) for the purposes of completing the Design and Construction,

subject to payment by Operations Co of the Design-Builder's reasonable charges;
- (b) if the Authority so elects pursuant to Section 14.2(b) of the Project Agreement, the Design-Builder acknowledges and agrees that Operations Co will novate or assign this Design-Build Agreement to the Authority, provided that if termination

of the Project Agreement occurs under Section 13.3 of the Project Agreement, the consent of the Design-Builder will be required;

- (1) Not used
- (2) Not used
- (c) the Design-Builder will offer to sell to Project Co or Operations Co (or as Operations Co may direct), as the case may be, 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 the Design-Builder and reasonably required by Project Co, Operations Co or the Authority in connection with the operation of the NG-KIH System or the provision of the Services;
- (d) the Design-Builder will deliver to Operations Co (to the extent not already delivered to Operations Co) or as Operations Co may direct:
 - (1) all existing designs, network configurations, plans and other documents produced in connection with the NG-KIH System and in the control of the Design-Builder;
 - (2) one complete set of existing "as built drawings"; and
 - (3) Not usedsubject to reasonable generally applicable third party licensing terms;
- (e) the Design-Builder will use commercially reasonable efforts to ensure that the benefit of existing Project Intellectual Property (as defined in the Project Agreement) of the Design-Builder and all warranties in respect of mechanical and electrical equipment used or made available by the Design-Builder under this Design-Build Agreement and included in the NG-KIH System but not previously assigned or licensed to Operations Co are assigned, licensed or otherwise transferred to Operations Co (or as Operations Co may direct);
- (f) to the extent permitted by Law, the Design-Builder will assign to Operations Co (or as Operations Co may direct) all Permits;
- (g) the Design-Builder will deliver to Operations Co (or to such Person as Operations Co may direct) all records required to be kept by the Design-Builder hereunder (the Design-Builder having the right to retain copies thereof) unless such documents are:
 - (1) required by Law to be retained by the Design-Builder or a DB Sub-Contractor, in which case complete copies will be delivered to Operations Co (or as Operations Co may direct); or
 - (2) privileged from production pending resolution of any outstanding DB Dispute, in which case such records will be delivered forthwith upon resolution of such DB Dispute, provided that any records that are

necessary for the performance of the DB Obligations will be delivered to Operations Co (or as Operations Co may direct) no later than the Termination Payment Date; and

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

The Design-Builder will ensure that provision is made in all applicable contracts to ensure that Operations Co will be in a position to exercise its rights, and the Design-Builder 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 Not Used

14.4 Not Used

14.5 DB Materials

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

- (a) all DB Materials so delivered are true, accurate and complete copies of the originals of all such DB Materials;
- (b) with respect to DB Materials that constitute agreements, understandings, indentures, contracts, leases, deeds of trust, licenses, options, instruments or other commitments between the Design-Builder and any Persons:
 - (1) all are in good standing and in full force and effect with no amendments and the Design-Builder is entitled to all rights and benefits thereunder;
 - (2) the Design-Builder 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 DB Materials there are 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 the Design-Builder'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 Design-Build Agreement notwithstanding the giving of any notice of default or notice of termination.

15. DISPUTE RESOLUTION

15.1 Procedure

Except as otherwise provided in this Design-Build Agreement, any DB Dispute will be resolved in accordance with, and the parties will comply with, the DB Dispute Resolution Procedure set out in Attachment 13 [DB Dispute Resolution Procedure].

16. ASSIGNMENT

16.1 Limitations on Assignment of Project by Design-Builder

The Design-Builder will not assign, transfer or otherwise dispose of any interest in this Design-Build Agreement without the prior written consent of Operations Co.

The Design-Builder acknowledges and agrees that any assignment, transfer or disposition by the Design-Builder of any of the Design-Builder's interest in this Design-Build Agreement will be subject to the consent of the Senior Secured Creditors under the Senior Financing Agreements and in accordance with the DB Lenders' Remedies Agreement and Operations Co will not be entitled to consent to any such assignment, transfer or other, disposition where the Senior Secured Creditors have not provided their consent in accordance with the foregoing.

The Design-Builder will be responsible for all costs incurred by Operations Co in connection with the Authority providing its consent (pursuant to the Project Agreement) or the Senior Secured Creditors providing their consent to any assignment, transfer or other disposition by the Design-Builder of any of the Design-Builder's interest in this Design-Build Agreement.

Notwithstanding any other provision of this Design-Build Agreement, the Design-Builder will not assign, transfer or otherwise dispose of any interest in this Design-Build Agreement to a Person who is a Restricted Person.

16.2 Limitations on Change in Control

Notwithstanding any other provision of this Design-Build Agreement, the Design-Builder will not be, nor will it become at any time, a Restricted Person.

16.3 Not Used

16.4 Limitations on Assignment of Project by Operations Co

Operations Co will not assign, transfer, or otherwise dispose of any interest in this Design-Build Agreement without the prior consent of the Design-Builder, such consent not to be unreasonably delayed, withheld or conditioned. Notwithstanding the foregoing, Operations Co may assign its right, title and interest in and to this Design-Build Agreement, the Interface

Agreement, the DB Parent Guarantees, the DB Liquid Performance Support and any other Acceptable Credit Support to the Collateral Agent as security for Operations Co's liabilities and obligations under the Senior Financing Agreements or in connection with the exercise of rights of the Senior Secured Creditors under the Senior Financing Agreements, in each case in accordance with the DB Lenders' Remedies Agreement and the DB Collateral Agreement.

16.5 Not Used

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) each party 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 Design-Build Agreement and provided further that Operations Co may, subject to obtaining confidentiality restrictions similar to those set out in this Design-Build 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 the Service Provider and its advisors, or provide or cause to be provided to other third parties, Confidential Information which is necessary to enable the Design-Builder to perform (or to cause to be performed) its obligations under this Design-Build Agreement but which Confidential Information is not used by the Service Provider, its advisors, or other third parties, as applicable, for any other purpose; and
 - (2) Operations Co from disclosing or granting access to such information to Project Co, the Authority, any department of the Commonwealth of Kentucky or any other Governmental Authority which requires the information in relation to the Project; or
- (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 Design-Build Agreement;
 - (3) to the extent any Person is required to disclose such Confidential Information by Law, including the Open Records Act;
 - (4) Not used; 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) The Design-Builder will be fully liable for any breach of confidentiality under this Section 17.1 by any Person to whom the Design-Builder has disclosed or granted access to Confidential Information under this Section 17.1 to the same extent as if the Design-Builder itself breached confidentiality under this Section 17.1.

17.2 Public Communications

Unless expressly provided in this Design-Build Agreement or otherwise required by any Law, including the Open Records Act, (but only to that extent), the Design-Builder will not 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 Operations Co (which will not be unreasonably withheld or delayed). The parties will comply with Attachment 16 [Communication Roles].

17.3 Law of Agreement

This Design-Build 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. 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 Design-Build Agreement and the instruments and documents to be executed and delivered pursuant to this Design-Build Agreement constitute the entire agreement between the parties, expressly superseding 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

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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 Design-Build Agreement and no consent required pursuant to the terms of this Design-Build 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 Design-Build 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 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

if to the Design-Builder:

NG-KIH Design-Build LLC
c/o Overland Contracting Inc.
10950 Grandview #34
Overland Park, KS 66210

Attention: Dean Siegrist
Email: siegristDA@bv.com

with a copy to:

LTS Solutions (USA) LLC
9330 Corporate Drive, Suite 407
Selma, TX 78108

Attention: Allen Hemrich
Email: Allen.Hemrich@ledcor.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 Design-Build Agreement or for the purpose of establishing compliance with the representations, warranties and obligations of this Design-Build Agreement.

17.8 Counterparts

This Design-Build 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 Design-Build Agreement so that it will not be necessary in making proof of this Design-Build Agreement to produce or account for more than one such counterpart.

17.9 No Partnership

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

17.10 Survival

Notwithstanding any other provision of this Design-Build 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 the Design-Builder 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, Attachment 9 [Compensation on Termination] and Attachment 13 [DB Dispute Resolution Procedure] will survive the expiry or any earlier termination of this Design-Build Agreement.

17.11 DB Parent Guarantees

- (a) The Design-Builder will deliver the DB Parent Guarantees on the date of this Design-Build Agreement and ensure that the DB Parent Guarantees remain in full force and effect until the Expiration Date.

- (b) The Design-Builder acknowledges that pursuant to an assignment by way of security of the DB Parent Guarantees in favor of the Collateral Agent, the rights of Operations Co under the DB Parent Guarantees will be assigned to the Collateral Agent as security for the obligations of Operations Co under the Senior Financing Agreements.

17.12 DB Liquid Performance Support

- (a) The Design-Builder will, or will cause one of its Affiliates to, provide liquid security in the form of a combination of (1) Acceptable Credit Support and (2) cash collateral (collectively, the "DB Liquid Performance Support") in an aggregate amount equal to 10% of the Contract Price (the "Required Amount"). The Design-Builder will have the right to vary the relative portions of the DB Liquid Performance Support comprised of Acceptable Credit Support and cash collateral from time to time provided that the aggregate amount of such liquid security will never be less than the Required Amount (net of any amounts previously drawn by Operations Co against such liquid security). To the extent that any portion of the DB Liquid Performance Support is provided by way of cash collateral, such cash collateral will be maintained in a Cash Collateral Account. Where cash collateral has been posted in accordance with the foregoing, Operations Co will be entitled to draw on such cash collateral in any circumstance in respect of which it would be entitled to draw on any Acceptable Credit Support provided by the Design-Builder.
- (b) On the System Completion Date, the Required Amount will be reduced to an amount equal to 1% of the Contract Price and the DB Liquid Performance Support will remain in place at such reduced amount during the Warranty Period.
- (c) On the first day after the expiry of the Warranty Period, the Required Amount shall be further reduced to an amount equal to the aggregate of the amount, if any, of the outstanding warranty claims by Operations Co against the Design-Builder.
- (d) For greater certainty, after the expiry of the Warranty Period and all warranty claims being rectified or paid by the Design-Builder, the DB Liquid Performance Support shall be released to the Design-Builder or returned to the Design-Builder for cancellation.
- (e) Operations Co may make multiple draws on the DB Liquid Performance Support and may draw on the DB Liquid Performance Support:
 - (1) upon the occurrence of any DB Event of Default;
 - (2) upon any failure on the part of the Design-Builder to pay Delay Liquidated Damages when due; or
 - (3) in accordance with Section 17.13(d).
- (f) The Design-Builder acknowledges that the Senior Secured Creditors will have a security interest in Operations Co's rights under the DB Liquid Performance Support and/or that such rights will be assigned to the Collateral Agent as

security for the obligations of Operations Co under the Senior Financing Agreements and consents to same.

17.13 Acceptable Credit Support Requirements

- (a) The Design-Builder acknowledges and agrees that any letter of credit delivered by the Design-Builder pursuant to this Design-Build Agreement must be Acceptable Credit Support.
- (b) The Design-Builder will renew any letter of credit delivered hereunder or cause the issuance of a replacement letter of credit for any such expiring letter of credit not later than 20 Business Days prior to the date of expiration thereof.
- (c) In the event an issuer of Acceptable Credit Support experiences a Ratings Downgrade at any time, upon the request of either Operations Co or the Senior Secured Creditors, such Acceptable Credit Support will be replaced by an unconditional, irrevocable standby letter of credit, in substantially the form set out in Attachment 21 [Form of DB Liquid Performance Support], issued by another Institution which meets the Required Rating within 10 Business Days following such request or, if no Institution then meets the Required Rating, as agreed by Operations Co and the Senior Secured Creditors, provided that the first mentioned Acceptable Credit Support may be drawn down if not so replaced by the end of such 10 Business Day period and the proceeds deposited to a Cash Collateral Account on the basis that, subject to Sections 17.13(d) and 17.13(e), the cash collateral would be released to the relevant party who posted such first mentioned Acceptable Credit Support upon the delivery of a replacement unconditional, irrevocable stand by letter of credit that constitutes Acceptable Credit Support.
- (d) If the Design-Builder fails to deliver a replacement letter of credit or replacement letters of credit by the end of the 10 Business Day period set out in Section 17.13(c) or if the Design-Builder fails to renew any letter of credit in accordance with Section 17.13(b), Operations Co will be entitled to immediately draw down the full available amount of such letter of credit and deposit the proceeds to a Cash Collateral Account. Operations Co will be entitled to withdraw funds from the Cash Collateral Account in any circumstance in respect of which Operations Co would be entitled to draw on the Acceptable Credit Support in respect of which such cash collateral has been received.
- (e) If the Design-Builder, subsequent to Operations Co drawing down any letter of credit in accordance with Section 17.13(c) or 17.13(d), delivers a replacement letter of credit or letters of credit which constitute Acceptable Credit Support and in substantially the form attached as Attachment 21 [Form of DB Liquid Performance Support] to this Design-Build Agreement, Operations Co will release from the Cash Collateral Account to the Design-Builder the lesser of (i) all amounts standing to the credit of the Cash Collateral Account and (ii) the aggregate face amount of such letter of credit or letters of credit.

[signature page follows]

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

**KENTUCKYWIRED OPERATIONS COMPANY,
LLC**

Per: _____
Name:
Title:

Per: _____
Name:
Title:

I/We have the authority to bind the Company

NG-KIH DESIGN-BUILD LLC

Per: _____
Name:
Title:

Per: _____
Name:
Title:

I/We have the authority to bind the Company