

DARK FIBER AGREEMENT
INDEFEASIBLE RIGHT OF USE

THIS INDEFEASIBLE RIGHT OF USE AGREEMENT ("Agreement") is made as of the ____ day of _____, by and between the COMMONWEALTH OF KENTUCKY, FINANCE AND ADMINISTRATION CABINET, located at 702 Capitol Avenue, Capitol Annex, Frankfort, Kentucky 40601, ("Commonwealth" or "Grantor"), and the LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT, an urban county government created pursuant to KRS 67A, having its principal address at 200 East Main Street, Lexington, Kentucky 40507 ("LFUCG" or "Grantee") (collectively, "the Parties").

RECITALS:

WHEREAS, the Commonwealth and LFUCG are interested in providing modern, high capacity fiber in order to allow businesses to compete globally, to enable educators to expand their resources, and to provide consumers with high-speed Internet access; and

WHEREAS, the Commonwealth constructed an open access fiber optic network (Commonly referred to as "KentuckyWired Network" and hereinafter referred to as "Network"); and

WHEREAS, the Commonwealth encroached upon LFUCG's public rights-of-way for the purpose of constructing portions of the Kentucky Wired Network that will be located within Lexington-Fayette County. LFUCG established procedures to assist the Commonwealth in accessing LFUCG's public rights-of-way during construction of the Network; and

WHEREAS, the Parties entered into a Memorandum of Understanding on May 4, 2017 setting forth each party's rights and responsibilities regarding the Commonwealth's encroachment upon LFUCG's public rights-of-way; and which required LFUCG to pay a sum of \$270,000.00 for a 144 ct. bundle of Dielectric Fiber, Coming # 432EU4-T4100A20 to be installed by the Commonwealth in Lexington-Fayette County pursuant to the construction plans set forth therein, and an ongoing sum for annual maintenance of the fiber; and

WHEREAS, the fiber referenced above was installed by the Commonwealth; and

WHEREAS, after a miscommunication between the parties regarding the above installation payment, the Parties entered into the First Amendment of Memorandum of Understanding on January 13, 2020, which reserved approximately 27 miles of the 144 ct. bundle of dark Corning Dielectric Fiber referenced above within the urban county (hereinafter referred to as "the Licensed Fiber" or "the Licensed Fibers") for the Grantee upon payment of \$113,588.00, less a deduction for in-kind labor and material costs provided by the LFUCG to Grantor. According to the First Amendment, the LFUCG could also pay an additional \$63,588.00 to obtain an Indefeasible Right of Use to the Licensed Fiber, and any annual maintenance costs would be capped at \$20,000.00. The Memorandum of Understanding and the First Amendment of Memorandum of

Understanding referenced above are attached hereto as Exhibit A and incorporated herein by reference; and

WHEREAS, the Licensed Fiber is currently reserved for the Grantee; and

WHEREAS, upon payment of \$63,588.00, Grantor is willing, subject to the terms, covenants and conditions set forth in this Agreement, to grant to Grantee an indefeasible right of use for the operation and use of the Fiber in its Network to Grantee, and Grantee desires to license, subject to the terms, covenants and conditions of this Agreement, the use of the Fiber for all purposes allowed by law.

NOW THEREFORE, in consideration of the foregoing, and of the promises and covenants contained in this Agreement, the parties agree as follows:

1. Scope of Indefeasible Right of Use. The Grantor hereby grants to Grantee an indefeasible and exclusive right to use the strand or strands of the Fiber described in Exhibit B, as the same may be amended from time to time according to the terms of this Agreement (the "Licensed Fibers"). This IRU authorizes Grantee to use the Licensed Fiber in accordance with the terms of this Agreement.

2. Effective Date and Term. This Agreement shall become effective as of the Fiber Acceptance Date ("Commencement Date") and shall remain in effect unless and until terminated in accordance with the termination provisions of this Agreement. The term of this Agreement ("Term") shall be for a period of 28 years from and after the Commencement Date unless terminated earlier according to the terms of this Agreement.

The Licensed Fibers, identified in Exhibit B, may be changed from time to time in writing signed by the Grantor and Grantee, as specified in the applicable amended Exhibit B, which shall be attached to this Agreement.

3. Definitions. For purposes of this Agreement, the terms set forth below shall be defined as follows:

Acceptance Test - The tests conducted on the Licensed Fibers by the Grantor to ensure that the Licensed Fibers meet or exceed the fiber specifications outlined in Exhibit C.

Access Point – The physical location(s) at which Grantee may connect its telecommunications system with the Licensed Fibers.

Agreement – this Indefeasible Right of Use Agreement and all extensions and modifications hereof, together with all Schedules and/or Annexes.

Fiber Acceptance Date - The date of the applicable Notice of Acceptance which evidences that the Licensed Fibers in Exhibit A have passed the Acceptance Test and have met the conditions of Section 5.

Indefeasible Right of Use or IRU – An exclusive and irrevocable right to use Licensed Fibers, subject to the terms and conditions of this IRU Agreement.

License Fee – The License Fee have the definition provided in Section 4 of this Agreement.

Licensed Fibers - shall have the definition set forth in Section 1 of this Agreement.

Notice of Acceptance - Grantee's written approval that the Licensed Fibers have passed the Acceptance Test.

4. Price and Payment.

4.1. Grantee shall pay the Grantor a one-time License Fee in the amount of \$63,588.00. The License Fee must be paid no later than sixty (60) days after the Commencement Date and before the Licensed Fibers will be made available to Grantee for use.

4.2. Subject to sufficient appropriation of funds, Grantee shall pay the Grantor an annual maintenance fee in an amount not to exceed \$20,000.00, which shall be calculated based on the quantity of access points that the Grantor has installed for Grantee. No maintenance fees shall be required until an access point has been installed. The Grantor shall provide Grantee with a statement of the maintenance work to be performed and such fees for such work on or before April 1 of each fiscal year for the duration of this Agreement.

4.2.1. In consideration of the Maintenance Fee described in 4.2., Grantor shall during the Term of this Agreement, at its sole cost and expense, care for and maintain the Licensed Fibers in a safe and serviceable condition, ensuring that the Licensed Fibers meet or exceed industry standards for performance. Grantor shall schedule and perform periodic inspections (at a minimum annually), maintenance, and repair to identify and correct any failure, interruption, or impairment in the operation of the Licensed Fiber. Grantor shall not permit the Licensed Fibers to be damaged or depreciated in value by any negligent act or omission of Grantor, its agents, or employees. Grantor shall respond promptly to any reasonable complaints from the Grantee or its lessees, if applicable.

4.3. Construction of Access Points. Upon request by the Grantee via change order, the Grantor shall provide the estimated cost to install and test one or more Access Points within thirty (30) days. If approved by the Grantee, the Grantor shall construct the requested Access Points within a reasonable time and conduct certification testing. After receiving the results of the certification testing, the Grantee shall have thirty (30) calendar days to verify that the Access Point's performance is consistent with industry standards. On or before the expiration of the thirty (30) day period the Grantee will provide notice to Grantor that it accepts the Access Point, or rejects it by specifying the defect or failure in the test report that is the basis for such rejection. If the Grantee fails to notify Grantor of its acceptance or rejection of the Access Point within thirty (30) days following the Grantee's receipt of notice of availability, the Grantee shall be deemed to have accepted the Access Point. In the event of any good faith rejection by Grantee, Grantor shall take such action as reasonably necessary, and as expeditiously as practicable, to correct or

cure such defect or failure; or the Grantee may terminate this Agreement without cost to it, including, but not limited to, payment for the engineering, installation, and testing of the Access Point. The Grantor shall invoice Grantee for the engineering, installation, and testing of the access points within thirty (30) days after Grantee has accepted the installation.

4.4. Grantee shall pay the Grantor for Grantee's share of federal or state taxes, if any, which may be imposed on the Licensed Fibers during the term of this Agreement.

5. Acceptance Testing of Licensed Fibers.

5.1 At its expense, Grantor shall test the Licensed Fibers to identify end-to-end attenuation, end-to-end signature and splice testing results for each strand of the Licensed Fibers in accordance with the procedures and standards specified in Exhibit C, and shall provide the results of such testing to the Grantee. Grantor shall notify the Grantee in writing (email being sufficient) when test results are available for verification.

5.2 Notice of Completion to Grantee. Following written provision to the Grantee of test results described in subparagraph 5.1 above, the Grantee shall have thirty (30) calendar days to verify that Licensed Fibers' performance is consistent with industry standards. On or before the expiration of the thirty (30)-day period the Grantee will provide a Notice of Acceptance to Grantor that it accepts the Licensed Fiber, or that it rejects the Licensed Fiber by specifying the defect or failure in the test report that is the basis for such rejection. If the Grantee fails to notify Grantor of its acceptance or rejection of the Licensed Fibers within thirty (30) days following the Grantee's receipt of notice of availability, the Grantee shall be deemed to have accepted the Licensed Fiber. In the event of any good faith rejection by Grantee, Grantor shall take such action as reasonably necessary, and as expeditiously as practicable, to correct or cure such defect or failure; or the Grantee may terminate this Agreement without cost to it, including, but not limited to, paying the Licensed Fee as provided in 4.1 and 5.3.

5.3. The Grantee shall pay the License Fee no later than sixty (60) days after acceptance of the Licensed Fibers as provided above.

6. Use of Licensed Fibers; Access.

6.1. The Licensed Fibers may be used for any lawful purpose, including leasing, in whole or in part, the Licensed Fibers to another entity, including universities and colleges created pursuant to Chapter 164 of the Kentucky Revised Statutes.

6.2. Unless otherwise expressly agreed by Grantor in writing (such agreement not to be unreasonable withheld), the Grantee shall not have the right to physically access the Grantor Network, including the Licensed Fiber. All physical activities relating to the Grantor Network, including splicing, shall be undertaken solely by Grantor or its authorized agent.

7. Ownership and Title. All ownership, rights, title and interest in all the Licensed Fibers and any Access Points shall at all times remain exclusively with the Grantor. All right, title and interest in the Grantee's Equipment shall at all times remain exclusively that of the Grantee.

8. Liens and Encumbrances. Neither party, directly or indirectly, shall create or impose any lien on the property of the other or on the rights or title relating thereto or any interest therein or in this Agreement. Notwithstanding the above, the Grantee may lease a portion of the Licensed Fibers as provided in Section 6.1.

9. Insurance.

9.1. Grantor shall cause its subcontractor, throughout the Term, to maintain insurance coverages of the types and in the minimum amounts, as required by the underlying Project Implementation Agreement controlling the rights and obligations regarding the design, construction and maintenance of the Network and, for clarity, set forth below, as applicable:

Type of Insurance	Limit
General Liability	(\$1 million per occurrence, \$2 million aggregate or \$2 million combined single limit);
Commercial Automobile Liability	(combined single, \$1 million per occurrence);
Professional Liability	(\$1 million per occurrence, \$2 million aggregate);
Worker's Compensation	(Statutory); and
Employer's Liability	(\$1 million).

9.2. Also Insured Status and Other Provisions. The grantor shall cause its subcontractor to name the Grantee as an additional insured by way of a policy endorsement on above referenced insurance policy. Grantor shall cause its subcontractor to provide certificates of insurance and, if requested, copies of any policy to the Grantee. For clarity, the terms and conditions of the insurance policy are set out in the Project Implementation Agreement regarding the design, construction and maintenance of the Network.

10. Default.

10.1. Default Defined. A default shall be deemed to have occurred under this Agreement if, in the case of a material breach of this Agreement, a Party fails to cure such material breach within thirty (30) days after written notice specifying such breach, provided that if the breach is of a nature that cannot be cured within thirty (30) days, a default shall not have occurred so long as the breaching Party has commenced to cure within said time period and thereafter diligently pursues such cure to completion.

10.2. Remedies Upon Default. Upon the occurrence of a default, the non-defaulting party shall have all remedies available at law or at equity including but not limited to, termination, damages, specific performance, and/or relief from further performance. Each such remedy shall be cumulative and not exclusive. Without limiting the foregoing, in the case of uncured default by Grantor, the Grantee may be granted permission to operate, maintain, or repair the Network to the extent necessary to maintain the Licensed Fibers, reserving the cost as damages against the Grantor.

10.3. No Early Termination of IRU for Grantee Default. Subject to the limitations provided in the Kentucky Constitution and/or any applicable Kentucky Revised Statutes, notwithstanding anything to the contrary in this Agreement, once Grantee has paid the License Fee, Grantor may not terminate Grantee's rights in the Leased Fiber for any reason.

10.4. Grantee's Cure of Service Default. Notwithstanding any other provision of this Agreement, in the event, regardless of reason or Grantor's good faith attempts. Grantor does not or is unable to perform the services described in this Agreement, or does not or is unable to perform services in compliance with the standards and specifications set forth in this Agreement, Grantee may (but is not obligated), upon written notice to Grantor reasonable under the circumstances but without authorization from Grantor, to perform such services or work and/or take such action that it deems necessary without subjecting itself to any liability to Grantor. In such instances, Grantee may request Grantor to pay Grantee an amount equal to the actual costs of services performed by Grantee. If Grantee requests payment, Grantor will remit payment to Grantee within thirty (30) days from the date of Grantee's invoice.

10.5. Injunctive Relief. The Parties acknowledge and agree that irreparable damage would occur in the event that any of the provisions of this Agreement were not performed in accordance with their specific terms and agree that, due to the unique subject matter covered by this Agreement, each Party shall be entitled to specific performance of the obligations hereunder and/or injunctive relief, this being in addition to any other right or legal remedy available to such Party.

11. Force Majeure Events. Neither party shall be liable to the other for any failure of performance under this Agreement due to causes beyond its control, including but not limited to: acts of God, fire, flood or other catastrophes; any law, order, regulation, direction, action or request of the United States Government, or of any other government, including state and local governments having or claiming jurisdiction over such party, or of any department, agency, commission, bureau, corporation or other instrumentality of any one or more of these federal, state or local governments, or of any civil or military authority; national emergencies; insurrections; riots; wars; permitting authorities, pole or right-of-way owners; or strikes, lock outs, work stoppages or other labor difficulties.

12. Kentucky Law and Venue. This Agreement shall be governed in all respects by the laws of the Commonwealth of Kentucky and venue for all actions shall lie in the Circuit Court of Franklin County, Kentucky.

13. Amendments. By mutual agreement, the parties to this Agreement may, from time to time, make written changes to any provision hereof. Organization acknowledges that LFUCG may make such changes only upon approval of its legislative authority, the Lexington-Fayette Urban County Council, and the signature of its Mayor.

14. Notice. Any written notice required by the Agreement shall be delivered by certified mail, return receipt requested, to the following:

For Organization:

For Government:

Lexington-Fayette Urban County Government

200 East Main Street

Lexington, Kentucky 40507

Attn: Chief Information Officer

15. Miscellaneous.

15.1. Headings. Headings and captions of this Agreement's paragraphs are only for convenience and reference. These headings and captions shall not affect or modify this Agreement's terms or be used to interpret or assist in the construction of this Agreement.

15.2. Severability. If any provision of this Agreement is illegal or unenforceable, the Agreement's unaffected provisions will remain in effect.

15.3. Disclaimers. There are no agreements, warranties or representations, express or implied either in fact or by operation of law, statutory or otherwise, including warranties of merchantability and fitness for a particular purpose or use, except those expressly set forth herein.

15.4. Waiver. Any right or remedy provided for in this Agreement shall not preclude the exercise of any other right or remedy under this Agreement or under any provision of law,

nor shall any action taken or failure to take action in the exercise of any right or remedy be deemed a waiver of any other rights or remedies at the time.

15.5. Entire Agreement. This Agreement shall constitute the entire agreement between the parties and no representations, inducements, promises or agreements, oral or otherwise, which are not embodied herein shall be effective for any purpose. This Agreement shall replace any previous agreement between the parties on the same subject matter.

15.6. No Third Party Beneficiaries. Nothing contained herein shall create any relationship, contractual or otherwise, or any rights, in favor of any third party.

15.7. Counterparts. This Agreement may be signed in counterparts, each of which will be deemed an original and all of which taken together will constitute one and the same instrument.

IN WITNESS WHEREOF, the parties have executed this Agreement at Lexington, Kentucky, the day and year first above written.

[SIGNATURE PAGE TO FOLLOW]

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT

BY: _____
LINDA GORTON, MAYOR

ATTEST:

Clerk of the Urban County Council

COMMONWEALTH OF KENTUCKY,
FINANCE AND ADMINISTRATION
CABINET

BY: _____

ATTEST:

WITNESS: _____

DATE: _____