

MEMORANDUM OF UNDERSTANDING

THIS MEMORANDUM OF UNDERSTANDING (“MOU”), made and entered into this 15th day of June 2017, by and between the Commonwealth of Kentucky, Finance and Administration Cabinet and Commonwealth of Kentucky, Kentucky Communications Network Authority, Frankfort, Kentucky 40601 (“the Commonwealth” collectively; “Finance” and “KCNA” individually) and the Lexington-Fayette Urban County Government, 200 E. Main St, Lexington, KY 40507 (“LFUCG” or “Government”)(Finance, KCNA and LFUCG may be referred to collectively as “Parties”).

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 will be constructing an open access fiber optic network (“KentuckyWired Network” or “Network”) as described in Attachment A, which is attached hereto and incorporated by reference, throughout the Commonwealth of Kentucky; and

WHEREAS, the Commonwealth will encroach upon LFUCG’s public rights-of-way for the purpose of constructing portions of the KentuckyWired Network that will be located within Lexington-Fayette County; and

WHEREAS, LFUCG will establish procedures to assist the Commonwealth in accessing LFUCG’s public rights-of-way during construction of the KentuckyWired Network; and

WHEREAS, the Commonwealth and LFUCG mutually desire to set forth each party’s rights and responsibilities regarding the Commonwealth’s encroachment upon LFUCG’s public rights-of-way.

NOW, THEREFORE, in consideration of the mutual covenants expressed herein, the Commonwealth and LFUCG, acting through their duly authorized agents, hereby agree as follows:

1. Recitals - The Recitals set forth above are hereby incorporated in and made part of this MOU by reference.
2. Term - This MOU shall be effective from the date of its execution for a period of thirty (30) years. The Parties may renew this MOU and extend this Term as agreed to by the Parties. The repair and maintenance obligations expressed herein shall be considered as running with the land and shall extend to, bind and inure to the benefit of the parties hereto and their respective heirs, assigns or successors in interest.
3. Scope - The terms of this MOU shall apply to construction of any and all portions of the KentuckyWired Network located within Lexington-Fayette County, Kentucky.

4. Costs- LFUCG shall pay the Commonwealth an amount not to exceed \$270,000.00 as budgeted in Fiscal Year 2016 for a 144 ct. bundle of Dielectric Fiber, Corning # 432EU4-T4100A20 to be installed by the Commonwealth in Lexington-Fayette County pursuant to the construction plans set forth herein. LFUCG shall also pay the Commonwealth for construction work in Fiscal Year 2017 an amount estimated not to exceed \$270,000 pursuant to the construction plan set forth herein and subject to sufficient appropriation of funds. LFUCG shall also pay the Commonwealth an estimated amount not to exceed \$20,000.00, subject to sufficient appropriation of funds, for annual maintenance of such fiber.

The Commonwealth hereby agrees to provide LFUCG with a statement of the maintenance work to be performed and fees for such work on or before April 1 of each fiscal year for the duration of this Agreement.

5. Conduit license – LFUCG grants to the Commonwealth a license to occupy 2,344 feet of underground conduit within Lexington-Fayette County, Kentucky. The Commonwealth’s Contractors will provide maps indicating the footage occupied per this paragraph. The term set forth in Paragraph 2 above shall apply to this License. The Commonwealth shall pay \$70,320 for the License for the Term of this Agreement. The Commonwealth will deduct it from the costs set forth in Paragraph 4 above.
6. Authorization to Encroach – Subsequent to the execution of this Agreement, LFUCG authorizes the Commonwealth and its agents to encroach upon its public rights-of-way for the construction of KentuckyWired Network.
7. Agreement to Abide by Ordinances - The Commonwealth’s Contractors shall register with the LFUCG Division of Engineering, Right-of-Way Section and abide by Chapter 17C of the Lexington-Fayette Code of Ordinances (“Chapter 17C”) in its entirety.
8. Filing of Applications and Documents - LFUCG agrees to offer electronic filing for all related LFUCG applications, requests for notification, and other documents required of the Commonwealth during construction of the Network. LFUCG will make every effort to keep electronic submittal systems in working order, but provides no guarantee regarding the service level of electronic submittal systems. In the event of an electronic failure, the Commonwealth shall provide any and all required submittals in writing to the LFUCG Division of Engineering, Right-of-Way Section.
9. Use of Commonwealth Facilities – In addition to the fiber installation and maintenance services set forth herein, the Commonwealth shall permit LFUCG and its authorized agents to lash over any part of the Commonwealth’s Network, occupy the Commonwealth’s conduit, and attach to any poles, or pole space, owned or controlled by the Commonwealth within Lexington-Fayette County at no cost upon thirty (30) days’ written notice, provided that the lashing, occupation of conduit, or attachment does not conflict with prevailing construction standards and does not

impair or impede the Network's effective operation.

10. Storage of Flammable Substances - The Commonwealth shall not store gasoline, coal fuel, or any other flammable substances within or adjacent to LFUCG's public rights-of-way.
11. Responsibility for Maintenance – The Commonwealth assumes all responsibility for maintenance and repair of its facilities constructed as described in Attachment A, in accordance with the requirements of Chapter 17C. The Commonwealth hereby agrees to maintain facilities separately owned by LFUCG pursuant to this Agreement subject to LFUCG's annual payment obligation set forth in Section 4.
12. Abandonment of the Commonwealth's Facilities – Upon permanent discontinuance of the use of all or a portion of the KentuckyWired Network located in Lexington-Fayette County, or upon a temporary discontinuance as defined in Chapter 17C, the Commonwealth shall: (1) upon providing written notice to the Government, abandon all or a portion of such facilities in place or (2) remove all or a portion of such facilities within 90 days.
13. Indemnity – To the extent permitted by law, including but not limited to Section 177 of the Kentucky Constitution, the Commonwealth agrees to indemnify, hold harmless, and defend LFUCG, including its elected and appointed officials, employees, agents and successors in interest, from all claims, damages, losses and expenses, including attorneys' fees, arising out of or resulting directly or indirectly from the Commonwealth's (or its subcontractors) construction of or defective operation, repair, or maintenance of the KentuckyWired Network, provided that such claim, damage, loss, or expense is (1) attributable to personal injury, bodily injury, sickness, death, or to injury or to destruction of property, including the loss of use resulting therefrom, or from negligent acts, errors or omissions and (2) not caused by the negligent act, omission, or willful misconduct of LFUCG, including its elected and appointed officials, agents and successors in interests, and its employees acting within the scope of their employment. This Hold Harmless and Indemnification Clause shall in no way shall survive the termination of this Contract.
14. Disputes – The parties mutually agree to cooperate during construction and operation of the KentuckyWired Network and to negotiate in good faith in an effort to resolve any disputes that may arise.
15. Cancellation clause - Either party may cancel the contract on 30 days' written notice if
 - i. the other is in breach of any material obligation contained in this Agreement, which is not remedied (if the same is capable of being remedied) within 30 days of written notice from the other party so to do; or
 - ii. a voluntary arrangement is approved by the parties.

16. Access to Records - LFUCG agrees that Finance, the Auditor of Public Accounts, and the Legislative Research Commission, or their duly authorized representatives, shall have access to any books, documents, papers, records, or other evidence, which are directly pertinent to this MOU for the purpose of financial audit or program review. LFUCG also recognizes that any books, documents, papers, records, or other evidence, received during a financial audit or program review shall be subject to the Kentucky Open Records Act, KRS 61.870 to 61.884.
17. Additional Costs – LFUCG agrees that it will bear the cost or reimburse the Commonwealth for all incremental costs including, but not limited to, engineering, materials and construction costs that arise due to a request from LFUCG.
18. Notices - Any notices required or permitted to be given hereunder shall be delivered, in writing (a) in person, (b) by certified mail, postage prepaid, return receipt requested, or (c) by facsimile, addressed as follows:

To LFUCG:

Brian C. Knapp, PE, PLS
Municipal Engineer Senior, Right-of-Way Management Branch
Lexington-Fayette Urban County Government
4th Floor Phoenix Building
101 E. Vine Street
Lexington, KY 40507
Fax: (859) 258-3458

To the Commonwealth:


Michael Hayden
Chief Operating Officer
Kentucky Communications Network Authority
209 Saint Clair Street
Frankfort, KY 40601
Fax: (502) 564-0883

IN WITNESS WHEREOF, the parties have executed this Memorandum of Understanding on the date first above written.

APPROVED AS TO FORM
AND LEGALITY

**COMMONWEALTH OF KENTUCKY
FINANCE AND ADMINISTRATION
CABINET**

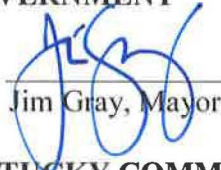
BY: 

BY: 
William M. Landrum, III, Secretary

**LEXINGTON-FAYETTE URBAN COUNTY
GOVERNMENT**

BY:

BY:



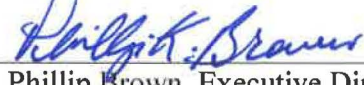
Jim Gray, Mayor

**KENTUCKY COMMUNICATIONS NETWORK
AUTHORITY**

BY:



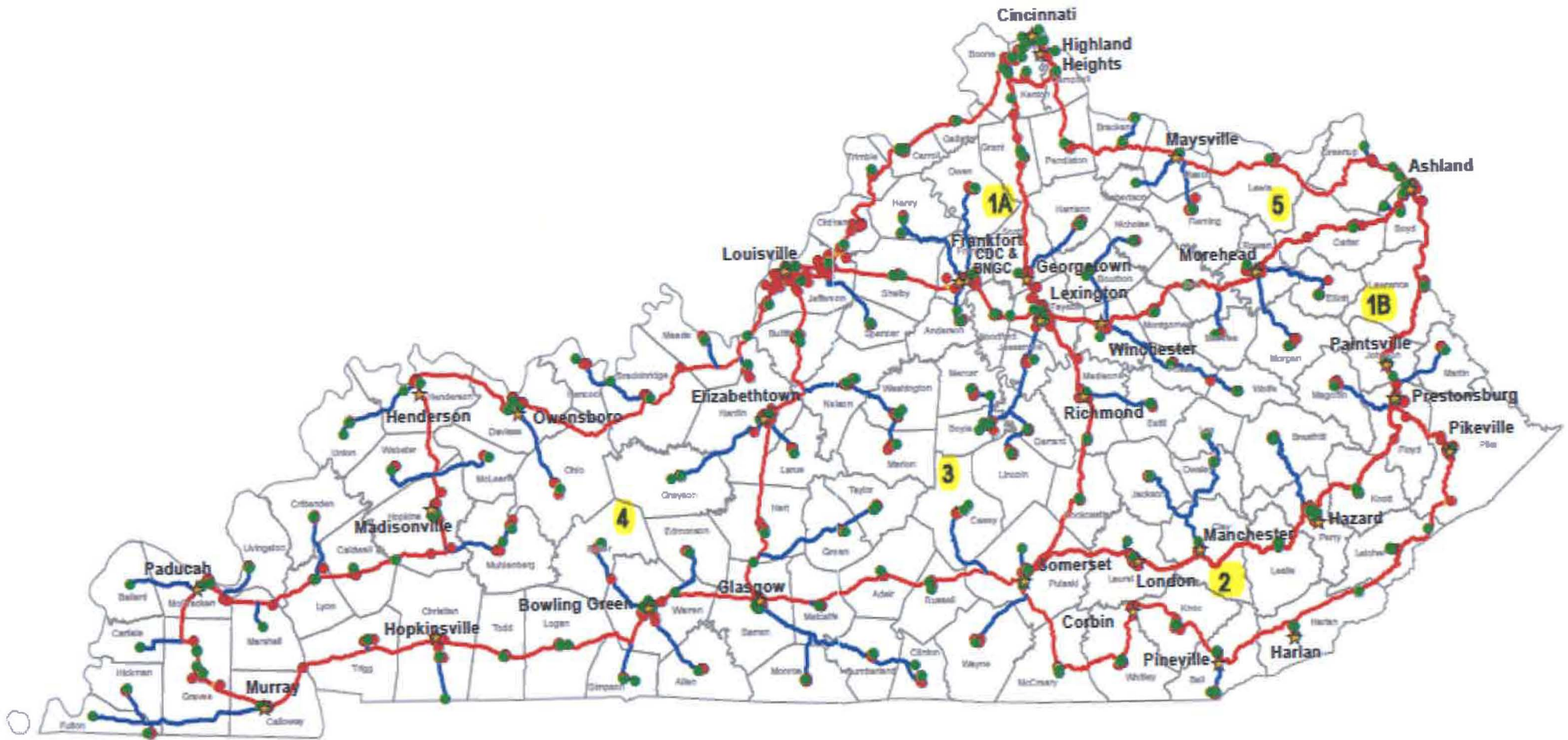
BY:



Phillip Brown, Executive Director

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LFUCG MOU – Exhibit A



FIRST AMENDED MEMORANDUM OF UNDERSTANDING

THIS FIRST AMENDED MEMORANDUM OF UNDERSTANDING (“Amended MOU”), made and entered into this 13 day of January, 2020, by and between the Commonwealth of Kentucky, Finance and Administration Cabinet and Commonwealth of Kentucky, Kentucky Communications Network Authority, Frankfort, Kentucky 40601 (“the Commonwealth” collectively; “Finance” and “the COMMONWEALTH” individually) and the Lexington-Fayette Urban County Government, 200 E. Main St, Lexington, KY 40507 (“LFUCG” or “Government”)(Finance, the COMMONWEALTH and LFUCG may be referred to collectively as “Parties”).

WHEREAS, the Commonwealth and LFUCG entered into a Memorandum of Understanding (“Agreement”) on May 4, 2017 wherein the Commonwealth agreed to build an additional 144 strands of fiber optic cable in the City of Lexington for LFUCG’s use and LFUCG agreed to pay all costs associated with this additional construction;

WHEREAS, LFUCG lacked funding to pay for the construction;

WHEREAS, the Commonwealth continued with construction in accordance with the Agreement;

WHEREAS, the Commonwealth and LFUCG have agreed to amend the Agreement to allow LFUCG certain rights relating to the construction of the KentuckyWired network within the City of Lexington; and

NOW, THEREFORE, in consideration of the mutual covenants expressed herein, the Commonwealth and LFUCG, acting through their duly authorized agents, hereby agree as follows:

A. Paragraph No. 4 of the Agreement shall be replaced with the following language:

Costs- LFUCG has paid the COMMONWEALTH an amount not to exceed \$113,588 in Fiscal Year 2019, less the deduction provided in Section 5 of the Agreement, for the labor and minor material cost and half the material of approximately 27 miles 144-ct. bundle of Corning Dielectric Fiber (hereinafter referred to as “the Fiber”), to be installed by the COMMONWEALTH in Lexington-Fayette County pursuant to the KentuckyWired construction plans set forth herein. A map providing the location of the Fiber within Lexington-Fayette County, including beginning and end points, is attached and incorporated herein by reference as Exhibit B.

The Payment of \$113,588, less the deduction in Section 5 of the Agreement, reserves the Fiber for LFUCG. The LFUCG may pay an additional \$63,588 to obtain an Indefeasible Right of Use (“IRU”) of the Fiber. If LFUCG does not pay this additional amount, the COMMONWEALTH may make the Fiber available to third parties after leasing or selling all other fiber not reserved for the COMMONWEALTH or LFUCG within Lexington-Fayette County.

Prior to any sale or lease of the Fiber to a third party, LFUCG will be allowed first right of refusal to retain full use via an IRU of the Fiber. LFUCG will have sixty (60) business days to exercise its first right of refusal once it has been officially notified, in writing, of the COMMONWEALTH's intent to lease or sell all or some part of the Fiber. If LFUCG exercises its first right of refusal, it shall pay the COMMONWEALTH \$63,588 within thirty (30) days of exercising the right. If LFUCG does not exercise its first right of refusal, the COMMONWEALTH will be authorized to lease or sell all or some part of the Fiber to other entities.

Once LFUCG pays the COMMONWEALTH \$63,588, it will be granted a 28 year indefeasible right of use ("IRU") for the Fiber. The Fiber has not been test certified and does not have any LFUCG access points installed.

Any request for access to the Fiber, once an IRU is extended to LFUCG, shall be by change order by LFUCG. The COMMONWEALTH will provide LFUCG with the estimated cost to install and test access points before authorizing the access point work. When the COMMONWEALTH creates access points for LFUCG, it will also conduct certification testing and provide LFUCG with the test results. The COMMONWEALTH will invoice LFUCG for access point engineering, installation, and fiber testing within thirty (30) days after LFUCG has accepted the installation.

LFUCG shall pay the COMMONWEALTH an estimated amount not to exceed \$20,000.00, subject to sufficient appropriation of funds, for annual maintenance of the Fiber. The annual maintenance cost will be calculated based on the quantity of access points that the Commonwealth has installed for LFUCG. LFUCG annual maintenance cost will not be applicable until it obtains an IRU for the Fiber.

The Commonwealth hereby agrees to provide LFUCG with a statement of the maintenance work to be performed and fees for such work on or before April 1 of each fiscal year for the duration of this Agreement.

B. Paragraph No. 8 of the Agreement shall be replaced with the following language:

Filing of Applications and Documents - LFUCG agrees to offer electronic filing for all related LFUCG applications, requests for notification, and other documents required of the Commonwealth during construction of the Network. LFUCG will make every effort to keep electronic submittal systems in working order but provides no guarantee regarding the service level of electronic submittal systems. In the event of an electronic failure, the Commonwealth shall provide any and all required submittals in writing to the LFUCG Division of Engineering, Right-of-Way Section.

IN WITNESS WHEREOF, the parties have executed this First Amended Memorandum of Understanding on the date first above written.

APPROVED AS TO FORM
AND LEGALITY

**COMMONWEALTH OF KENTUCKY
FINANCE AND ADMINISTRATION
CABINET**

BY: Patrick McLean

BY: Holly M. Johnson
Holly M. Johnson, Secretary

**LEXINGTON-FAYETTE URBAN COUNTY
GOVERNMENT**

BY: Linda Gorton

BY: Linda Gorton
Linda Gorton, Mayor

**KENTUCKY COMMUNICATIONS NETWORK
AUTHORITY**

BY: Stewart Douglas Hines

BY: Joan Li

First Amended Memorandum of Understanding between
Lexington-Fayette Urban County Government,
Commonwealth of Kentucky, Finance and Administration Cabinet, and
Kentucky Communications Network Authority
July--, 2019

