

Additional Dark Fiber Lease Terms and Conditions

The additional terms in this exhibit apply only to services described as “Dark Fiber” in the DST entry for a Site in the Service Offering Exhibit.

1. Subscriber shall have the right to use and the right to attach Subscriber’s equipment, which equipment must be pre-approved by Vendor, to the ends of, the Dark Fiber. In no event shall Vendor provide any equipment space, licenses, rights of way, or other consents for any attachments to or other uses of the Dark Fiber (e.g., to interconnect with and “light” the Dark Fiber and with other fiber telecommunications cable located on Subscriber’s side of the Demarcation Point(s)), in that equipment space and such usage rights are outside the scope of rights granted to Subscriber in the Dark Fiber.

2. Subscriber is solely responsible all labor, materials, and equipment for any construction that may be required at the Subscriber’s location(s), including, e.g., the installation of new conduit or core drilling and all cabling and infrastructure, required between each Demarcation Point and the Subscriber’s end user’s site in each Subscriber’s location. Subscriber work on the Subscriber’s side of each Demarcation Point includes securing its own rights and related costs to access, occupy, and conduct typical telecommunication operations (which may include construction and other permits and underlying rights, access agreements and fees, lateral and riser fees, cross-connects, and coordination at any third party-owned or leased Subscriber’s location).

3. To the extent any maintenance or repair of the Dark Fiber or any of the Vendor system relates to work necessitated by Subscriber acts or omissions, Subscriber shall pay or reimburse all costs, fees, and expenses thereof.

4. Vendor has all control for determining any routing configurations of, access to, and splicing on the Vendor system (including the Dark Fiber), and all uses of the Vendor system by Vendor, Subscriber, and third parties. Subscriber may not own, control, maintain, repair, modify, and relocate the Vendor system (including the Dark Fiber); physically access the Vendor system (including the Dark Fiber and Vendor’s access points), or encumber or permit encumbrance of the Vendor system (including the Dark Fiber) in any manner. All work with respect to the Vendor system, including the Dark Fibers, shall be performed solely by Vendor or its contractors, subcontractors, or other designees. Subscriber shall have the right only to request Vendor to connect Subscriber’s communications equipment as authorized by Vendor with the ends of the Dark Fiber and, in Vendor’s sole discretion, at any such other access point along the Dark Fibers that has been approved in writing by Vendor in Vendor’s sole discretion, with Subscriber’s use of access points being non-exclusive with any other users. Subscriber shall have no other access rights to the Vendor System unless otherwise agreed in writing by Vendor. If Subscriber desires any splice to the Dark Fibers at and/or on Subscriber’s side of the Demarcation Points or any other access points to which Vendor has agreed, Subscriber shall request such splicing work from Vendor not less than ten (10) days in advance of the date the connection.

5. Subscriber shall use the Dark Fiber solely for lawful purposes and in a way which does not physically interfere with or adversely affects the use of the Vendor system, including the other fibers in the Vendor system, or the fibers or cable of any other person or entity using the Vendor System. In no event shall Subscriber directly or indirectly transfer, sell, assign, swap, exchange, lease, sublease, license, sublicense, resell, or grant indefeasible or other rights of use in or to all or any part of the Dark Fiber or Subscriber’s interest therein, or enter into any other arrangement with any third party for such third party’s use of all or any part of the Dark Fiber, without the prior written consent of Vendor. Any action in violation thereof shall constitute a material breach of this Agreement and shall, in addition to any other remedies available to it, entitle Vendor to terminate the Dark Fiber lease without any liability to Subscriber or the repayment of the lease payments or any other fees or charges paid by Subscriber.

6. Reserved.

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7. All foreign, federal, state and local taxes, and all duties and governmental fees are the obligation of Subscriber. Subscriber shall pay to Vendor amounts equal to Subscriber's proportionate share of any taxes, duties, franchise fees, ad valorem taxes, property taxes, and impositions resulting from any Subscriber activities as to the Dark Fibers, or imposed, assessed, or levied upon the Vendor system or upon the Dark Fibers, exclusive of taxes based upon Vendor's net income.

8. If Vendor relocates or substitutes the Dark Fiber or access points, Vendor shall use reasonable efforts to effect the relocation or substitution so that it shall not adversely affect the use, operations, or performance of the Dark Fiber by Subscriber except for interruptions during the implementation of the relocation or substitution.

9. If Vendor is prevented from due to circumstances beyond its control (e.g., labor disputes, power outages or shortages, fire, explosion, flood, drought, acts of God, war or other hostilities, civil commotion, domestic or foreign governmental acts or orders or regulations, inability to obtain facilities or supplies, or notification by a state or federal regulatory body that a Dark Fiber lease does not comply with any applicable law, regulation, rule, or policy), then the obligation to provide the services and/or the Dark Fiber shall be suspended during the period of such disability.

10. VENDOR MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND, EITHER EXPRESSED OR IMPLIED, INCLUDING WARRANTIES OF SERVICES AND VENDOR SYSTEM EQUIPMENT, MERCHANTABILITY, AND/OR FOR FITNESS FOR A PARTICULAR PURPOSE, AND ASSUMES NO OBLIGATION WITH RESPECT TO THE ENFORCEMENT OF ANY MANUFACTURER'S WARRANTIES AND GUARANTEES OR MERCHANTABILITY, NOR ARE ANY SUCH WARRANTIES TO BE IMPLIED WITH RESPECT TO THE PRODUCT OR SERVICES FURNISHED TO SUBSCRIBER, AND ALL EXPRESS AND IMPLIED WARRANTIES ARE HEREBY DISCLAIMED. ORAL STATEMENTS MADE BY VENDOR'S EMPLOYEES, CONTRACTORS, SUBCONTRACTORS, AGENTS, AND DESIGNEES DO NOT CONSTITUTE WARRANTIES, SHALL NOT BE RELIED ON BY SUBSCRIBER, AND ARE NOT PART OF THE DARK FIBER LEASE. IN NO EVENT SHALL VENDOR BE LIABLE FOR (a) SPECIAL, EXEMPLARY, PUNITIVE, INDIRECT, CONSEQUENTIAL, OR INCIDENTAL DAMAGES, INCLUDING DAMAGES FOR LOSS OF USE, LOST PROFIT, LOSS OF BUSINESS OR GOODWILL, OR OTHER FINANCIAL INJURY ARISING OUT OF OR IN CONNECTION WITH THE TESTING, MAINTENANCE, REPAIR, USE, RELOCATION, SUBSTITUTION, PERFORMANCE, OR FAILURE OF THE DARK FIBER OR OTHER EQUIPMENT, OR FOR ANY OTHER REASON, INCLUDING ANY BREACH BY VENDOR UNDER THE DARK FIBER LEASE, EVEN TO THE EXTENT THAT VENDOR HAD NOTICE OF THE POTENTIAL FOR ANY SUCH DAMAGES; (b) ANY LOSS OR DAMAGE RELATING TO A CLAIM FOR PERSONAL INJURY OR PROPERTY DAMAGE ARISING OUT OF, OR IN CONNECTION WITH, ANY INTERRUPTION OR FAILURE OF USE OF, OR ANY SERVICE AS TO OR ON THE DARK FIBER, ACCESS POINTS, OR OTHER EQUIPMENT; AND (c) EXPENSES, DAMAGES, COSTS, OR OTHER LOSSES INCURRED BY SUBSCRIBER AS A RESULT OF DELIVERY DELAYS, EACH REGARDLESS OF THE FORM OF THE ACTION, WHETHER IN CONTRACT, IN TORT (INCLUDING NEGLIGENCE AND STRICT LIABILITY), OR BY STATUTE.

11. Vendor's aggregate liability to subscriber for damages from any cause whatsoever as to the dark fiber lease shall be limited to direct damages and shall not exceed the amount of the total payments received from subscriber by vendor under the dark fiber lease during the twelve-month period immediately preceding the date upon which the claim giving rise to such liability first arose.

12. In addition to any other industry standard defaults, the following shall constitute an event of default: Subscriber fails to perform and said failure causes interference to any of the Vendor system or any use thereof, and such failure is not cured by Subscriber within four (4) hours.

13. In the event of a default by Subscriber, Vendor shall have the right to exercise any or all of these remedies to the extent applicable: (a) terminate the Dark Fiber lease; (b) declare all unpaid lease payments and other amounts under the Dark Fiber lease immediately due and payable; (c) enforcement of the remedies of a secured party under North Carolina law; (d) court action to enforce performance of this Agreement and/or recover all damages arising out of any default or exercise any other right or remedy available at law or in equity; and (e) disconnect and/or remove the fiber optic cable and equipment or require Subscriber to do so. Any choice of said remedies shall not be deemed a waiver of any other remedies or preclude the exercise of other remedies thereafter. In the event of a default, breach, or non-performance of this Agreement by Vendor, Subscriber's sole and exclusive remedies shall be, at Vendor's election, Vendor's re-performance and/or repair or replacement of any defective Dark Fiber.

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14. Upon the expiration or termination of its term, the Dark Fiber lease immediately shall terminate and shall not renew, all rights of Subscriber to use the Dark Fiber and access points shall cease, all rights to the use of the Dark Fiber and the access points shall revert to Vendor, and Vendor shall owe Subscriber no further duties, obligations, or consideration. After expiration or termination of the Term, Vendor shall have the right and easement to keep that portion of the Vendor system on Subscriber's property in place and, at Vendor's sole option, Vendor shall have the right and easement to remove, maintain, repair, or mark said portion of the Vendor system; and Subscriber shall not require any removal of said portion of the Vendor system from said property. All payment obligations and the provisions of Paragraph 10 and this paragraph shall survive said expiration and termination.

15. Subscriber at its cost and expense shall maintain industry standard insurance, provided such insurance minimally shall include a general liability insurance policy with coverage amounts of at least One Million Dollars (\$1,000,000.00), insuring Vendor and Subscriber against liability arising out of the Dark Fiber and access points. Subscriber must obtain a written obligation from its said insurer to notify Vendor in writing at least thirty (30) days prior to cancellation or refusal to renew or material changes to any said policy of insurance. Subscriber shall provide Vendor a certificate of said insurance. Any insurance policy maintained by Subscriber shall include a waiver of any right of subrogation by Subscriber and its affiliates and insurer as to Vendor and its affiliates, directors, officers, employees, agents, contractors, and subcontractors.

16. Nothing contained in the Dark Fiber lease shall be construed to create any partnership or agency relationship between the Subscriber and Vendor for any purpose.

17. Nothing in the Dark Fiber lease shall be construed as granting any right or license under any copyrights, inventions, or patents now or hereafter owned or controlled by Subscriber or Vendor granting any right, title, or interest in the other Party's trademarks, trade names, or service marks. Neither Subscriber nor Vendor shall use the lawful trademarks, trade names, or service marks of the other without prior written permission of said other party.

18. The Dark Fiber lease, together with Subscriber's existing Subscription Agreement(s) to the NCTN represent(s) the entire agreement between Subscriber and Vendor relating to the Dark Fiber lease. No prior or contemporaneous discussions, representations, understandings, or statements, oral or written, relating to the Dark Fiber lease or Subscriber's existing Subscription Agreement(s) to the NCTN shall have any force or effect except as expressly stated in the Dark Fiber lease and Subscriber's existing Subscription Agreement(s) to the NCTN.

19. Subscriber and Vendor shall furnish to each other five names with contact information in ascending escalation to contact for fiber operations related issues. Initial notices as to service and Dark Fiber failures or deficiencies shall be made by a report, orally or in writing, via a contact made to the applicable party according to its escalation list.

20. Flow-down terms of National Telecommunications and Information Administration Grants to Vendor will be incorporated in and made a part of the Dark Fiber lease.

21. Any amendment or modification to the Dark Fiber lease shall be made in a writing signed by Subscriber and Vendor.

22. Subscriber may not assign, sublease, or license the Dark Fiber lease or any interest, payment, or rights under the Dark Fiber lease without the prior written consent of Vendor.

23. If any provision(s) of the Dark Fiber lease are deemed to be illegal or otherwise unenforceable, such provision(s) shall be modified, wherever possible, to provide binding force and effect. If modification is not possible, the elimination of such provision(s) shall not invalidate the Dark Fiber lease and all remaining provisions of the Dark Fiber lease shall remain valid and enforceable, unless such provision or provisions are a material basis of this Agreement, in which event the Dark Fiber lease shall terminate.

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24. The failure of Subscriber or Vendor to enforce at any time, or for a period of time, any of the provisions of the Dark Fiber lease shall not be construed as a waiver of such provision or of the right of such party thereafter to enforce such provision.

25. These provisions shall apply to the Dark Fiber lease:

(a) Vendor was awarded grants (the “BTOP Grants”) by the National Telecommunications and Information Administration (“NTIA”) during the Broadband Technology Opportunities Program (“BTOP”) under the American Reinvestment and Recovery Act to fund Vendor’s construction of a multi-strand optical fiber cable system located in North Carolina, and the Dark Fiber lease and Subscriber’s and Vendor’s obligations under the Dark Fiber lease are subject to all rules and requirements applicable to the BTOP Grants (the “BTOP Requirements”). In accordance with the BTOP Grants, Vendor will be required to execute a security interest or other statement, acceptable to NTIA, evidencing NTIA’s interest in real property, broadband facilities, and equipment acquired or improved by Vendor with federal funds, which must be placed on record in accordance with local law (the “NTIA Interest”). This security interest or other statement will provide that, for the estimated useful life of the real property, facilities, or equipment acquired or improved by Vendor with federal funds, Vendor will not sell, transfer, convey, or mortgage any interest in said real property including broadband equipment acquired or improved in whole or in part with federal funds made available under the BTOP Grants, nor shall Vendor use said real property including broadband facilities and equipment for purposes other than the purposes for which the BTOP Grants were made, without the prior written approval of the appropriate NTIA authority. Without limiting the generality of Vendor’s unlimited assignment rights, the Dark Fiber lease is assignable by Vendor at the direction of NTIA if Vendor fails to act in accordance with the terms and conditions of the BTOP Grants.

(b) In accordance with the BTOP Grants, Vendor commits to the following Nondiscrimination and Interconnection Obligations (collectively, the “Obligations”) subject to the limitations described herein below: (a) adhere to the principles contained in the FCC’s Internet Policy Statement (FCC 05-151, adopted August 5, 2005); (b) not favor any lawful Internet applications and content over others; (c) display any network management policies in a prominent location on its web page and provide notice to Subscribers of changes to these policies; (d) connect to the public Internet directly or indirectly, such that the project is not an entirely private closed network; and (e) offer interconnection, where technically feasible without exceeding current or reasonably anticipated capacity limitations, on reasonable rates and terms to be negotiated with requesting parties. This includes both the ability to connect to the public Internet and physical interconnection for the exchange of traffic. Vendor, as of the date of the Dark Fiber lease, represents that the Dark Fiber lease and all of its material terms comply in all material respects with the BTOP Requirements. Subscriber agrees that it will reasonably cooperate with Vendor in connection with Vendor’s compliance with the BTOP Requirements. All substantive decisions and actions that impact the ability of Vendor to carry out its program or the overall success of the program rest solely with Vendor.

(c) Subscriber certifies that it will use the Dark Fibers to meet its current and reasonably anticipated broadband capacity needs and that it is not entering into the Dark Fiber lease to acquire unnecessary capacity that would prevent other service providers from providing a competing broadband service. Based on such certification, Subscriber and Vendor acknowledge and agree that Subscriber has shown that it would not be technically feasible to offer interconnection pursuant to the prior paragraph and Subscriber shall not be required to comply with this condition.