

NEXTIER CONSORTIUM AGREEMENT

This NEXTIER CONSORTIUM AGREEMENT (this “Agreement”) is made and entered into as of this ____ day of July 2020 (the “Effective Date”), by and among each of the parties signing the Signature Page hereto (each a “Party” and collectively, the “Parties” or the “Consortium”).

WHEREAS, the Parties are familiar with plans by the Federal Communications Commission (“FCC”) to conduct a reverse auction known as the Rural Digital Opportunity Fund (“RDOF”) Auction 904 (“Auction”) that will, in Phase I, award up to \$16 billion over ten (10) years to service providers that commit to offer voice and broadband services to fixed locations in areas as designated by the FCC in the Auction;

WHEREAS, the FCC has designated the use of census block groups (“CBGs”) containing one or more eligible census blocks as the minimum geographic area for bidding in the Auction;

WHEREAS, each Party has identified one or more CBGs it seeks to bid on in such areas as shall be defined in a bidding agreement;

WHEREAS, the FCC recognized that entities seeking to participate in the Auction may use permissible auction mechanisms, including consortia, under its rules and procedures to bid for support in the Auction;

WHEREAS, the Parties desire to form a consortium in compliance with the Communications Act of 1934, as amended, and the rules, regulations, and procedures of the FCC (the “Communications Laws”) to allow the Parties to file a single FCC Form 183 (the “Short-Form Application”) to bid in the Auction and later exercise the Divide Winning Bids option so that each Party or its subsidiary may file its own FCC Form 683 (the “Long-Form Application”) for winning CBG bids, consistent with the Bidding Plan and the Communications Laws;

WHEREAS, each Party represents that it meets the qualifications to participate in the Auction, including, but not limited to, the operational requirements established by the FCC, and will be able to meet the minimum requirements for voice and broadband services required for the Auction;

WHEREAS, with respect to the limited purposes of this Agreement, the Parties seek to communicate with one another in accordance with the requirements of the Communications Laws prior to, during, and after the Auction on bids and bidding strategy and to conduct business planning discussions that may affect the support being sought;

WHEREAS, the Parties intend to establish a Bidding Plan that will confirm the understanding among the Parties regarding the participation of the Consortium in the Auction, including, but not limited to, setting forth the general bidding procedures to which the Consortium will adhere in submitting bids in the Auction (*e.g.*, CBGs, performance tiers, including speed and latency combinations);

NOW, THEREFORE, in consideration of the mutual covenants, agreements, representations, and warranties contained in this Agreement, the Parties, intending to be legally bound, do hereby agree as follows:

**ARTICLE I
AUCTION PARTICIPATION**

1.1 Short-Form Application.

(a) The Parties will cooperate to have the Consortium submit to the FCC the Short-Form Application to participate in the Auction no later than 6:00 pm Eastern Time on July 15, 2020 (the “Application Deadline”). Each Party shall have the opportunity to review and comment on a draft of the Short-Form Application before the Application Deadline.

(b) The Parties shall consult with each other prior to the Application Deadline to designate up to three (3) individuals who would be authorized to place bids on behalf of the Consortium in the Auction in accordance with the Communications Laws.

(c) In the Short-Form Application, the Consortium will select the state(s) and the associated performance tier requirements as designated by each Party for the technologies each Party intends to deploy in the designated CBGs.

(d) Neither the Consortium nor any Party shall amend the Short-Form Application in any material manner inconsistent with this Agreement without obtaining the prior written consent of each other Party (not to be unreasonably withheld, delayed or conditioned) unless otherwise required by the Communications Laws.

(e) The Parties acknowledge that a summary of the terms of this Agreement shall be disclosed and described in the Short-Form Application.

1.2 Auction Cooperation. No Party shall knowingly take any action that would reasonably be expected to result in the dismissal of the Short-Form Application or the disqualification of the Consortium to participate in the Auction or that reasonably would be expected to impede a successful bid unless otherwise required by the Communications Laws. Without limiting the foregoing:

(a) The Consortium and each Party shall take any action and furnish all information required or requested by the FCC for the Short-Form Application.

(b) The Consortium and each Party shall timely prepare and file corrections, amendments, or modifications to the Short-Form Application to the extent reasonably necessary and permitted by the FCC.

(c) Each Party agrees that it shall not discuss with or disclose to any third-party any aspect of the Consortium’s bids or bidding strategy in a manner that would violate the FCC’s anti-collusion rule (47 CFR Section 1.2105(c)) or any other applicable law, rule, or regulation. No

Party shall undergo a transfer of control or sale of assets that would be prohibited by the Communications Laws.

(d) Each Party shall promptly provide the other Parties with a copy of any pleading, opposition, order, notice, letter of inquiry, or other document received by or from or filed with the FCC relating to the Auction.

1.3 Bidding Plan. The Parties will formulate a plan to arrange timely bidding in the Auction and will enter into a written bidding agreement consistent with this Agreement (the “Bidding Plan”). The Bidding Plan shall be executed no later than one (1) week before Auction bidding begins.

(a) The Bidding Plan will set forth the CBG(s) on which the Consortium intends to bid.

(b) Upon execution of its Signature Page, each Party will provide The Fibersmith Company and its affiliates (collectively, “Fibersmith”), as consultant to the Consortium, with its list of CBGs in which it has interest. In the Bidding Plan, the Parties shall select (i) the CBGs which are exclusively of interest to one Party and (ii) the CBGs in which more than one Party may have an interest. If more than one Party identifies the same CBG, the Party that first provided or first provides its list to Fibersmith shall have the right to file the Long-Form Application for such CBGs if the Consortium is successful in the Auction for such CBGs.

(c) The Bidding Plan shall identify the Party that will have the responsibility for filing the Long-Form Application for each CBG for which the Consortium is the winning bidder (“Identified Party”). If the Identified Party chooses to file the Long-Form Application, the Identified Party shall bear sole responsibility for meeting all FCC buildout and public interest obligations for that CBG, and the other Party shall have no obligation or liability to the Identified Party with respect to that CBG.

(d) The Consortium shall enter bids during the Auction in accordance with the Bidding Plan. The Consortium shall comply with any required activity levels established by the FCC in accordance with the agreed upon Bidding Plan.

(e) Fibersmith shall be the Consortium’s exclusive consultant for the Auction. No Party shall be permitted to engage a third-party consultant on its own behalf or on behalf of the Consortium.

(f) The Consortium shall not bid in any manner that is different from the Bidding Plan unless a Party notifies the other Parties in writing.

1.4 Long-Form Application. After completion of the Auction and consistent with the Bidding Plan, the Consortium will use the FCC’s Divide Winning Bids process, in the manner and time specified by the FCC, to inform the FCC which Identified Party (or subsidiary of a Identified Party) will or will not file a Long-Form Application for each of the CBGs for which the Consortium was the winning bidder. Upon the submission of the Divide Winning Bids notice(s), each Identified Party shall be responsible for the preparation, filing and

prosecution of its Long-Form Application, and will not have any obligation to other Parties or incur any liability to the other Parties if it fails to do so or defaults on its winning bid(s). This Agreement shall be filed with each Long-Form Application subject to a request for confidential treatment in accordance with the Communications Laws.

1.5 Additional Consortium Members. Fibersmith may allow additional members meeting the qualifications required hereunder to join the Consortium (“Additional Member”); provided, however, that an Additional Member may not be added to the Consortium or become a Party to this Agreement after the Application Deadline. One or more Additional Members may become a Party hereto by executing and delivering to the Consortium a separate Signature Page. Immediately upon execution and delivery of such Signature Page, each such Additional Member will be a Party to this Agreement and shall have all of the rights and obligations of this Agreement.

ARTICLE II PAYMENT OBLIGATIONS

Each Party shall contribute equally to expenses incurred by the Consortium for the filing of the Short-Form Application, any amendments or attachments to the Short-Form Application and bidding in the Auction that have accrued after the Effective Date of this Agreement. Each Party shall pay its own expenses for the filing of any Long-Form Application filed by that Party or that Party’s subsidiaries. Each Party shall pay its own expenses for any consulting or legal expenses incurred in preparation of this Agreement and any default payments it may incur for reasons including, but not limited to, failing to file a Long-Form Application or withdrawing from the process after filing its Long-Form Application.

ARTICLE III REPRESENTATIONS AND WARRANTIES

3.1 Good Standing. Each Party represents and warrants to the other that it is duly organized, validly existing, and in good standing under the laws of the state of its incorporation or formation.

3.2 Right, Power and Authority. Each Party represents and warrants to the other that it has taken all requisite corporate or limited liability company action, as the case may be, to duly authorize and approve the execution, delivery, and performance of this Agreement. Each Party represents and warrants to the other that it has duly executed and delivered this Agreement, and this Agreement is the legal, valid, and binding obligation of it enforceable against such Party in accordance with its terms, except as enforceability may be limited by any bankruptcy, insolvency, reorganization, moratorium or similar laws affecting the enforcement of creditor’s rights generally and the application of general principles of equity (regardless of whether that enforceability is considered in a proceeding at law or in equity).

3.3 No Litigation or Violation of Law. Each Party represents and warrants to the other that there is no litigation at law or in equity, no arbitration proceeding, and no proceeding before or by any federal, state, local or foreign government, legislature, governmental or administrative agency or commission, any self-regulatory association or authority, any court or

other tribunal of competent jurisdiction, or any other governmental authority or instrumentality, pending or, to its knowledge, threatened, which would reasonably be expected to materially and adversely affect its ability to perform its obligations pursuant to the terms of this Agreement.

3.4 No Other Auction Applications. Each Party represents to the other Parties that no Party will be a party to another FCC Form 183 application to participate in the Auction, including officers, directors, and controlling owners or members of any Party. Each Party represents to the other Parties that it has not entered into any other consortium or other agreement to participate in the Auction.

3.5 FCC Qualifications and Compliance. Each Party represents and warrants to the other Parties that there are no facts or circumstances known to it that might reasonably be expected to result in the dismissal or rejection of the Short-Form Application or the disqualification of the Consortium to participate in the Auction.

3.6 Anti-Collusion Rule. Each Party represents and warrants to the other Parties that such Party is familiar with and will comply with the Communications Laws prohibiting certain communications with third parties in connection with the Auction, including 47 C.F.R. § 1.2105(c) (the “Anti-Collusion Rule”).

ARTICLE IV INDEMNIFICATION

Absent willful misconduct in the performance of its obligations under this Agreement, no Party shall be liable for any third-party harm, loss or damage resulting or alleged to result from participation in this Agreement or the transactions or arrangements contemplated hereunder. No Party shall be liable for any act or omission of any other Party with respect to its obligations under this Agreement or otherwise. Each Party hereby agrees to indemnify, defend, and hold harmless the other Parties and their officers, directors, managers, members, representatives, agents, consultants and employees, without limitation, from and against any and all actions and claims by any third-party arising from or out of this Agreement that is not the direct result of gross negligence or willful misconduct.

ARTICLE V TERMINATION AND REMEDIES

5.1 Term; Termination.

(a) Term. The term of this Agreement shall commence on the date hereof and shall expire on the earlier of (i) the date the Auction closes if the Consortium is not a successful bidder for any CBGs, or (ii) the date the FCC authorizes support for the last CBG for which the Consortium was the successful bidder.

(b) Termination. This Agreement may also be terminated (i) by mutual written agreement of the Parties, or (ii) subject to Section 6.2 of this Agreement, by written notice of one Party to the other Parties upon a determination by the FCC that any material term of this Agreement is invalid or contrary to the Communications Laws.

5.2 Survival. Except as expressly set forth herein, the termination of this Agreement shall not relieve any Party of any liability for willful breach or material default under this Agreement that occurred prior to the date of termination. Notwithstanding anything contained herein to the contrary, provisions which by their nature should survive any termination of this Agreement, including this Article V, and Section 6.1 and Section 6.9 of Article VI, and all payment obligations, shall survive termination of this Agreement.

5.3 Specific Performance.

(a) The Parties agree that irreparable damage would occur if any provision of this Agreement were not performed in accordance with the terms hereof and that the Parties shall be entitled to an injunction or injunctions to prevent breaches or threatened breaches of this Agreement or to enforce specifically the performance of the terms and provisions hereof, in addition to any other remedy to which they are entitled at law or in equity.

(b) Each Party further agrees that: (i) no such Party will oppose the granting of an injunction or specific performance as provided herein on the basis that the other Party has an adequate remedy at law or that an award of specific performance is not an appropriate remedy for any reason at law or equity; and (ii) no other Party or any other person shall be required to obtain, furnish, or post any bond or similar instrument in connection with or as a condition to obtaining any remedy referred to in this Section 5.3, and each Party irrevocably waives any right it may have to require the obtaining, furnishing, or posting of any such bond or similar instrument..

5.4 Liability Limitation. In no event shall any Party have any liability to any other Party, whether based on contract, tort (including negligence or strict liability), warranty or any other legal or equitable grounds, for any punitive, consequential, exemplary, special or incidental loss or damage suffered by the other arising from or related to the performance or nonperformance of this Agreement, even if such Party has been informed of or might otherwise have anticipated or foreseen the possibility of such losses or damages.

**ARTICLE VI
MISCELLANEOUS**

6.1 Confidentiality. Other than as otherwise set forth in this Agreement, this Agreement is confidential to the Parties and their representatives and shall not be disclosed by a Party except as required by law.

6.2 Compliance with Laws. The Parties intend that this Agreement and the performance of the obligations hereunder shall in all respects comply with the Communications Laws and other applicable laws. In the event that the FCC or any other governmental or judicial authority specifically determines that this Agreement does not comply with the Communications Laws, or any other laws, the Parties shall negotiate in good faith and attempt to agree to an amendment to this Agreement that will provide the Parties with a valid and enforceable agreement that conforms to the Communications Laws and other applicable laws, and preserves in all material respects the Parties' rights, benefits and obligations under this Agreement.

6.3 Force Majeure. Neither Party shall be liable to the other for any default or delay in the performance of its obligations under this Agreement (other than an obligation to make monetary payments) to the extent that the default or delay is caused by an event outside of its reasonable control, including without limitation epidemic (including pandemic, disease outbreak, infectious disease, or other declaration of public health emergency), fire, flood, earthquake, war, act of terrorism, labor dispute, government or court action (except with respect to bankruptcy or insolvency proceedings), failure of facilities or act of God.

6.4 Rules of Interpretation. The following rules of interpretation shall apply to this Agreement: (i) the words “include,” “includes,” and “including” are deemed to be followed by the words “without limitation;” (ii) the word “or” is not exclusive; and (iii) the words “herein,” “hereof,” “hereby,” “hereto,” and “hereunder” refer to this Agreement as a whole. Unless the context otherwise requires, references herein to sections, annexes schedules, and exhibits mean the sections of, and schedules, annexes and exhibits attached to, this Agreement. The Parties have participated jointly in the negotiation and drafting of this Agreement and, in the event an ambiguity or question of intent or interpretation arises, this Agreement shall be construed as jointly drafted by the Parties and no presumption or burden of proof shall arise favoring or disfavoring any Party by virtue of the authorship of any provision of this Agreement. The schedules, annexes and exhibits referred to herein shall be construed with, and as an integral part of, this Agreement to the same extent as if they were set forth verbatim herein.

6.5 Entire Understanding. This Agreement, including the Exhibits hereto, contains the entire understanding among the Parties with respect to the transactions contemplated herein and therein, and supersedes all negotiations, representations, warranties, commitments, offers, letters of intent, contracts, agreements, understandings, and writings not set forth herein or therein. No waiver and no modification or amendment of any provision of this Agreement shall be effective, unless specifically made in writing and duly signed by all Parties. The failure of any Party at any time or times to require performance of any provision of this Agreement shall not affect the exercise of a Party’s rights at a later date.

6.6 Headings. The Article and Section headings contained herein are for convenience and for reference purposes only, and shall not in any way affect the meaning or interpretation of this Agreement.

6.7 No Third-Party Beneficiaries. This Agreement shall not confer any rights or remedies upon any person or entity other than the Parties and their respective successors and permitted assigns.

6.8 Applicable Law. This Agreement and the negotiation, execution, performance or nonperformance, interpretation, termination, construction and all matters based upon, arising out of or related to this Agreement, whether arising in law or in equity, shall be governed by and construed under and in accordance with the laws of the state of Delaware (excluding choice-of-law provisions thereof) and subject to all applicable rules, regulations, and orders, including, without limitation, the provisions of the Communications Laws.

6.9 Severability. If any term or provision of this Agreement is invalid, illegal, or unenforceable in any jurisdiction, such invalidity, illegality, or unenforceability shall not affect

any other term or provision of this Agreement or invalidate or render unenforceable such term or provision in any other jurisdiction. Upon such determination that any term or other provision is invalid, illegal, or unenforceable, the Parties shall negotiate in good faith to modify this Agreement so as to effect the original intent of the Parties as closely as possible in a mutually acceptable manner in order that the transactions contemplated hereby be consummated as originally contemplated to the greatest extent possible.

6.10 Assignment.

(a) No Party may assign or transfer, by operation of law or otherwise, or sell its interest in, this Agreement or any of its rights, interests, or obligations under this Agreement without the prior written consent of the other Parties, which, except as provided below, may be withheld in such other Party's sole discretion.

(b) Notwithstanding the foregoing, any Party may assign its rights and obligations under this Agreement to any of its wholly owned subsidiaries in accordance with the Communications Laws. No assignment will be effective if it would result in the disqualification of the Consortium from the Auction.

6.11 Notices. All notices, requests, consents, claims, demands, waivers, and other communications hereunder (each, a "Notice") shall be in writing and shall be addressed to the signatory for each Party identified on the Signature Page. All Notices shall be delivered by personal delivery, nationally recognized overnight courier (with all fees pre-paid) or email (with confirmation of transmission) or certified or registered mail (in each case, return receipt requested, postage pre-paid). Except as otherwise provided in this Agreement, a Notice is effective only (a) upon receipt by the receiving Party, and (b) if the Party giving the Notice has complied with the requirements of this Section 6.11.

6.12 Counterparts. This Agreement may be executed in one (1) or more counterparts each of which shall be deemed to be an original, but all of which together shall constitute one (1) and the same instrument. Any such counterpart signature page may be delivered by electronic means, including email in PDF or other image form, and shall become binding on the delivering Party upon receipt by the other Party.

[SIGNATURES APPEAR ON FOLLOWING SIGNATURE PAGES]

SIGNATURE PAGE

_____ (“Party”) hereby agrees to the terms and conditions of the foregoing NexTier Consortium Agreement and agrees to be bound by its terms.

Name: _____

Address: _____

Responsible Party: _____

Email: _____

Phone Number: _____

FRN: _____

Filed Form 477 for Past Two Years (Y/N)?: _____

List of CBGs of Interest: