



STATE OF IOWA

KIM REYNOLDS, GOVERNOR
ADAM GREGG, Lt. GOVERNOR

ROBERT VON WOLFFRADI
CHIEF INFORMATION OFFICER

Grant No. _____ [For Office use only]

Exhibit E
Office of the Chief Information Officer of the State of Iowa
Grant Agreement

This Grant Agreement ("Agreement" or "Grant Agreement") for the deployment of Broadband Infrastructure as part of the Broadband Grants Program, pursuant to and in accordance with Notice of Funding Opportunity Number 001 issued on December 12, 2017, ("NOFA"), is effective as of the date of last signature below ("Effective Date"), by and between the State of Iowa, acting by and through the Office of the Chief Information Officer ("Office"), and Windstream Services, LLC., a limited liability company organized under the laws of Delaware ("Grantee"). The parties may be referred to herein individually as a "Party" or collectively as the "Parties." In consideration of the promises and mutual covenants and agreements contained herein, the Parties agree as follows:

1. Overview.

- 1.1. *Purpose.* This Agreement establishes the terms, conditions, and requirements pursuant to which Grantee must complete the Project as stated in its Application, including the Project Worksheet, Qualitative Attributes Form, and Budget Plan, in exchange for State funds made available pursuant to and in accordance with Iowa Code section 8B.11, Iowa Administrative Code rule 129—22, and the NOFA and Awarded Grantee as stated in the NOIA issued on ____ - _____. The total award made to Grantee for purposes of this Agreement is \$ _____.
- 1.2. *Term.* The term of this Agreement ("Term") shall begin on the Effective Date and continue until the Office has reimbursed Grantee for all Allowable Expenditures following Project Completion in accordance with the terms, conditions, and requirements of this Agreement, unless otherwise terminated in accordance with the terms and conditions of this Agreement.

2. Definitions. Unless otherwise defined herein, capitalized terms shall have the meaning ascribed to them under Iowa Code chapter 8B, Iowa Administrative Code rule 129—22, and the NOFA. In addition to any other terms defined herein, the following terms shall be ascribed the following meanings:

- 2.1. "Grantee Contractor(s)" means any of Grantee's authorized subcontractors, affiliates, subsidiaries, or any other third party acting on behalf of or at the direction of Grantee, directly or indirectly, in performing or providing the Project under this Agreement.
- 2.2. "Grantee Personnel" means employees, agents, independent contractors, or any other staff or personnel acting on behalf of or at the direction of Grantee or any Grantee Contractor performing or providing the Project under this Agreement.

3. Project Completion.

- 3.1. *Performance/Certification.* Grantee must complete its Project by the date identified in Section 4 (Deployment Timeline) of its Qualitative Attributes Form. In addition, prior to the disbursement of any State funds, Grantee must, subject to confirmation and verification by the Office in accordance with Section 3.2 (Field Testing):

- 3.1.1. Certify to the Office that the Project was completed as proposed/represented in the Application, including but not limited to that:

- 3.1.1.1. The final installation was installed in and/or otherwise facilitates Broadband service at or above 25/3 Broadband in each of the applicable Targeted Service Areas identified in the Application/forming the basis of the Project; and
- 3.1.1.2. The final installation was installed in and/or otherwise facilitates Broadband service at or above 25/3 Broadband to the same number of Broadband Units (homes, schools, businesses) located within Targeted Service Areas identified in the Application/forming the basis of the Project.
- 3.1.2. Identify the total number of Broadband Units to which Broadband service is available in each Targeted Service Area identified in the Application/forming the basis of the Project.
- 3.1.3. Supply the Office with geographic information system ("GIS") data in a form mutually acceptable to both the Office and Grantee demonstrating specifically where broadband infrastructure for which grant funds have been utilized, in whole or in part, has been installed, regardless of whether such infrastructure actually serves any customers in Targeted Service Area(s) forming a basis of the Application at the time such mapping data is supplied to the Office. Such GIS data must enable the Office to determine which specific homes, schools, and businesses within each Targeted Service Area forming the basis of the Project have access to 25/3 Broadband as a result of the Project.
- 3.2. *Field Testing.* The Office may, in its sole discretion, conduct field tests for compliance with the requirements outlined in this Grant Agreement, including Section 3.1 (Performance/Certification), the NOFA, Iowa Code chapter 8B, or Iowa Administrative Code chapter 129—22, on one or multiple occasions for up to five (5) years after broadband service is certified as complete pursuant to Section 3.1 (Performance/Certification) and Iowa Administrative Code rule 129—22.6(3)(b). The Office may exercise this right both before and after reimbursing a Grantee for any claimed, Allowable Expenditures, but if the Office elects to do so before reimbursing a Grantee for any claimed, Allowable Expenditures, it will do so within a reasonable time, not-to-exceed one (1) year, after broadband service is certified as complete pursuant to Section 3.1 (Performance/Certification) and Iowa Administrative Code rule 129—22.6(3)(b). Such field tests may include but not be limited to:
 - 3.2.1. Speed tests anywhere between a Grantee's central office and the demarcation at any customer's location in a Targeted Service Area or census block in which the Project was to be deployed;
 - 3.2.2. In the case of wireless installations, from any location in a Targeted Service Area or census block in which the Project was to be deployed; and/or
 - 3.2.3. In the case where a Grantee does not have a customer in a Targeted Service Area being served by the installation, certification obtained by the Grantee and supplied to the Office from an independent, third-party, properly licensed engineer that the installation facilitates broadband service at or above 25/3 Broadband in applicable Targeted Service Area(s) identified in the original Application. The costs of such certification shall be born by the Grantee.
- 3.3. *Project Completion.* For purposes of this Agreement, a Project shall be considered "complete" as of the later of the date the Office:
 - 3.3.1. Receives the certifications and GIS data required by Section 3.1 (Performance/Certification); and

3.3.2. Verifies a Project certified as complete complies with the requirements of this Grant Agreement, the NOFA, Iowa Code chapter 8B, and Iowa Administrative Code chapter 129—22 pursuant to and in accordance with Section 3.2 (Field Testing), or affirmatively elects not to exercise this right.

3.4. *Consequences of Non-Performance.* Failure to fully satisfy all of the the requirements/criteria set forth in Section 3.1 (Performance/Certification), Iowa Code chapter 8B, and Iowa Administrative Code chapter 129—22, as may be verified pursuant to and in accordance with Section 3.2 (Field Testing), or failure to otherwise to complete the Project as represented in the Application, may result in the Office's denial of a request for reimbursement for any or all expenditures related to the Project, and Grantee shall not otherwise be entitled to reimbursement for any such expenditures.

4. Payment Procedures.

4.1. *Timing of Payments.* Payment shall be made in one (1) disbursement upon Project Completion, and only after:

4.1.1. The Office's confirmation and verification of Project Completion pursuant to and in accordance with Section 3.2 (Field Testing), or affirmative election not to exercise this right; and

4.1.2. The Office's receipt of the summary of all final, claimed, Allowable Expenditures and other sufficient or appropriate documentation to support such claimed, Allowable Expenditures in accordance with Section 4.4.

4.2. *Total Payment Not to Exceed Fifteen Percent (15%).* Total payment of State funds under this Agreement shall not exceed the lesser of:

4.2.1. Fifteen percent (15%) of Grantee's total, estimated, Allowable Expenditures as set forth in the Budget Plan; or

4.2.2. Fifteen percent (15%) of Grantee's total, final, Allowable Expenditures upon Project Completion.

4.3. *Allowable Expenditures.* Grantee shall only be reimbursed for "Allowable Expenditures" actually and previously incurred by Grantee. "Allowable Expenditures" are Project expenditures that are:

4.3.1. Directly related to the installation of Broadband Infrastructure that facilitates 25/3 Broadband;

4.3.2. Utilized for the installation of Broadband Infrastructure in Targeted Service Areas identified in the Application/forming the basis of the Project (except and solely to the extent as otherwise permitted by an exception granted to a Grantee by the Office as part of the Application process, as permitted by and in accordance with Iowa Administrative Code chapter 129—22 and the NOFA);

4.3.3. Within the specific categories of expenditures set forth on and permitted by the Budget Plan;

4.3.4. Not incurred prior to the date of Grantee's application.

Allowable Expenditures do not include expenditures that are:

Commented [S51]: For the sake of efficiency and compliance with CAF2 requirements, we will need to commence the Project before the Effective Date.

- 4.3.5. Except for specific expenditures categories identified in the Budget Plan, related to land buildings, structures, improvements, or equipment not directly used in the transmission of data via Broadband;
- 4.3.6. Related to the process of removing existing Broadband Infrastructure, fixtures, or other real property in preparation of the installation of the Broadband Infrastructure,
- 4.3.7. Indirect labor costs and/or administrative overhead;
- 4.3.8. Passthrough expenditures with respect to Grantee Contractors to the extent they are not the result of arm's length transactions or are not reflective of fair-market rates.

The Office may deny a request for reimbursement for any expenditures that do not constitute Allowable Expenditures, and Grantee shall not otherwise be entitled to reimbursement for any such expenditures.

- 4.4. *Proof of Allowable Expenditures.* Within sixty (60) days of Project Completion and prior to the disbursement of any State funds, Grantee must submit a final summary of all Allowable Expenditures for which Grantee seeks reimbursement on forms supplied by the Office and attest that such Allowable Expenditures are true, accurate, and in fact constitute Allowable Expenditures, actually and previously incurred by Grantee. The Office may request, in its sole discretion, and Grantee may be required to supply, additional records to verify any Allowable Expenditures claimed by Grantee. Such records may include invoices, original itemized receipts, copies of checks, check registers, or bank statements indicating credit card invoices were paid. See Department of Administrative Services - State Accounting Enterprise, Procedure Number 204.200, available at https://das.iowa.gov/sites/default/files/acct_sae/sae_manual_204.204-200.pdf, and corresponding procedures referenced therein, for further requirements/guidance on the types of records/proof that may be required to support a claimed reimbursement for Allowable Expenditures. The Office may deny a request for reimbursement for any expenditures Grantee claims that are submitted more than sixty (60) days after Project Completion or that are not supported by sufficient or appropriate documentation, and Grantee shall not otherwise be entitled to reimbursement for any such expenditures.
- 4.5. *Return of Funds to Office.* In addition to and not to the exclusion of any other remedies available to the Office or the State of Iowa under this Agreement, at law, in equity, or otherwise:
 - 4.5.1. Grantee must repay the Office the applicable portion of any grant funds previously distributed by the Office to Grantee if the Office, in its sole discretion determines that:
 - 4.5.1.1. A prior reimbursement, in whole or in part, was comprised of claimed expenditures that did not constitute Allowable Expenditures, was improperly or incorrectly allocated in accordance with the allocation methods approved by the Office as part of the Application process as it relates to the exception process set forth in Iowa Administrative Code rule 129—22.4(5) and the NOFA, or was not supported by sufficient and appropriate documentation;
 - 4.5.1.2. A prior reimbursement, in whole or in part, exceeds the lesser of:
 - 4.5.1.2.1. Fifteen percent (15%) of Grantee's total, estimated, Allowable Expenditures as set forth in the Budget Plan; or
 - 4.5.1.2.2. Fifteen percent (15%) of Grantee's total, final, Allowable Expenditures upon Project Completion.

4.5.2. Grantee shall be obligated to repay the Office the entire amount of any grant funds previously distributed by the Office to Grantee if the Office determines that:

4.5.2.1. A prior reimbursement, in whole or in part, was used for the installation of Broadband Infrastructure that was not in or does not facilitate 25/3 Broadband in a Targeted Service Area identified in the original Application/forming the basis of the Project;

4.5.2.2. Any representation, warranty, or other statement made by Grantee in the Application, this Agreement, or any documentation submitted to the Office related to the administration of the Broadband Grant's Program proves untrue in any material respect as of the date of the issuance or making thereof.

4.5.2.3. Grantee otherwise fails to complete the Project as proposed in its Application.

4.6. *Set-off Against Sums Owed by Grantee.* In the event Grantee owes the Office or any other governmental entity of the State of Iowa any sum under the terms of this Agreement, any other agreement, pursuant to a judgment, or pursuant to any law, rule, or order, the Office or its designee may set off such sum against any sum invoiced to the Office or any other governmental entity to the State of Iowa issued by Grantee. In addition, any amounts due the Office as damages may be deducted by the Office from any money or sum payable by the Office to Grantee pursuant to this Agreement or any other agreement between Grantee and the Office.

5. Default and Termination.

5.1. *Termination for Cause by the Office.* The Office may terminate this Agreement without penalty or legal liability upon written notice of Grantee's breach of any term, condition, requirement, or provision of this Agreement, if such breach is not cured within thirty (30) days of such notice. Whether Grantee has sufficiently cured the breach shall be determined in the sole discretion of the Office. In addition, the Office may terminate this Agreement effective immediately without penalty or legal liability and without advance notice or opportunity to cure for any of the following reasons:

5.1.1. Grantee, directly or indirectly, furnished any statement, representation, warranty or certification in connection with this Agreement that is false, deceptive, or materially incorrect or incomplete;

5.1.2. Grantee's officers, directors, employees, agents, subsidiaries, affiliates, contractors, or subcontractors has committed or engaged in fraud, misappropriation, embezzlement, malfeasance, misfeasance, or bad faith;

5.1.3. Grantee terminates or suspends its business;

5.1.4. Grantee's authorization to engage in business either in Iowa or where organized is suspended, terminated, revoked, or forfeited.

Grantee shall notify the Office in writing if any of the foregoing events occur that would authorize the Office to immediately terminate this Agreement. The right to terminate this Agreement pursuant to this Section shall be in addition to and not exclusive of other remedies available to the Office or the State of Iowa, and the Office or the State of Iowa shall be entitled to exercise any other rights and pursue any other remedies available under this Agreement, in law, at equity, or otherwise.

5.2. *Termination for Cause by Grantee.* Grantee may only terminate this Agreement upon written notice of the breach by the Office of any material term, condition, or provision of this Agreement, if such

breach is not cured within sixty (60) days of the Office's receipt of Grantee's written notice of breach.

- 5.3. *Termination Due to Lack of Funds or Change in Law.* Notwithstanding anything in this Agreement to the contrary, the Office shall, upon written notice, have the right to terminate this Agreement without penalty or legal liability and without any advance notice as a result of any of the following:
- 5.3.1. The legislature, governor, or other applicable governing body fail in the sole opinion of the Office to appropriate funds sufficient to allow the Office to either meet its obligations under this Agreement or to operate as required and to fulfill its obligations under this Agreement;
 - 5.3.2. If funds are de-appropriated, reduced, not allocated, or receipt of funds is delayed, or if any funds or revenues needed by the Office to make any payment hereunder are insufficient or unavailable for any other reason as determined by the Office in its sole discretion;
 - 5.3.3. If the Office's authorization to conduct its business or engage in activities or operations related to the subject matter of this Agreement is withdrawn or materially altered or modified;
 - 5.3.4. If the Office's duties, programs, or responsibilities are modified or materially altered; or
 - 5.3.5. If there is a decision of any court, administrative law judge or an arbitration panel or any law, rule, regulation, or order is enacted, promulgated, or issued that materially or adversely affects the Office's ability to fulfill any of its obligations under this Agreement.
- 5.4. *Limitation of Payment Obligations.* In the event of a termination of this Agreement for any reason (except for termination pursuant to Section 5.3 (Termination Due to Lack of Funds or Change in Law)), the Office shall, at most, pay only those amounts, if any, to Grantee for aspects of a Project the Office has verified as complete in accordance with the terms and conditions of this Agreement, for which the Office has previously stated, in writing, it will make, and for which the Office is otherwise obligated to pay pursuant to this Agreement; provided however, that the Office's obligation to pay Grantee such amounts shall be limited by, and subject to, legally available funds. Notwithstanding the foregoing, this Section in no way limits the rights or remedies available to the Office or the State of Iowa and shall not be construed to require the Office or the State of Iowa to pay any compensation or other amounts hereunder in the event of Grantee's breach of this Agreement or any amounts otherwise withheld by the Office in accordance with the terms of this Agreement. Notwithstanding anything in this Agreement or any related agreement to the contrary, the Office or the State of Iowa shall not be liable, under any circumstances, for any of the following:
- 5.4.1. The payment of unemployment compensation to Grantee or any Grantee Personnel;
 - 5.4.2. The payment of workers' compensation claims, which occur during the Agreement or extend beyond the date on which the Agreement terminates;
 - 5.4.3. Any expenditures that:
 - 5.4.3.1. Do not constitute Allowable Expenditures incurred by Grantee in its performance of this Agreement;
 - 5.4.3.2. Are improperly or incorrectly allocated in accordance with the allocation methods approved by the Office as part of the Application process as it relates

to the exception process set forth in Iowa Administrative Code rule 129—22.4(5) and the NOFA; or

5.4.3.3. Are not supported by sufficient and appropriate documentation.

5.4.4. Any damages or other amounts, including amounts associated with the loss of prospective profits, anticipated sales, goodwill, or for expenditures, investments or commitments made in connection with this Agreement;

5.4.5. Any taxes Grantee may owe in connection with the performance of this Agreement, including sales taxes, excise taxes, use taxes, income taxes or property taxes.

5.5. *Survival.* Expiration or termination of this Agreement for any reason will not release either Party from any liabilities or obligations set forth in this Agreement which:

5.5.1. The Parties have expressly agreed in writing survive any such expiration or termination, including the following Sections:

5.5.1.1. Section 3.2 (Field Testing);

5.5.1.2. Section 4 (Payment Procedures);

5.5.1.3. Section 5.4 (Limitation of Payment Obligations);

5.5.1.4. Section 5.5 (Survival);

5.5.1.5. Section 6 (Indemnification);

5.5.1.6. Section 7 (Record Retention/Access to Records);

5.5.1.7. Section 8 (Compliance with Law);

5.5.1.8. Section 9 (Publicity);

5.5.1.9. Section 10 (Confidentiality);

5.5.1.10. Section 11 (General Provisions).

5.5.2. Remain to be performed or by their nature would be intended to be applicable following any such expiration or termination.

6. Indemnification.

6.1. *Generally.* Grantee shall indemnify and hold harmless the Office and the State of Iowa and their employees, officers, board members, agents, representatives, and officials (“Indemnitees”) from and against any and all claims, actions, suits, liabilities, damages, losses, settlements, demands, deficiencies, judgments, fines, penalties, taxes, costs and any other expenses (including the reasonable value of time of the Attorney General’s Office and the costs, expenses and attorney fees of other counsel retained by any Indemnitee) directly or indirectly related to, resulting from, or arising out of this Agreement, including any claims related to, resulting from, or arising out of:

6.1.1. Any violation or breach of any term or condition of this Agreement by or on behalf of Grantee, including those caused by Grantee, Grantee Contractors, or Grantee Personnel;

6.1.2. Grantee’s, Grantee Contractor’s, or Grantee Personnel’s performance, failed performance, or attempted performance of this Agreement,

- 6.1.3. Any negligent act or omissions, intentional or willful misconduct, or unlawful acts of Grantee, Grantee Contractors, or Grantee Personnel;
 - 6.1.4. The failure by Grantee, Grantee Contractors, or Grantee Personnel to comply with any applicable local, state, and federal laws, rules, ordinances, regulations, standards, or orders;
 - 6.1.5. The furnishing or making by Grantee, Grantee Contractors, or Grantee Personnel, directly or indirectly, of any statement, representation, warranty, or certification in connection with this Agreement that is false, deceptive, or misleading;
 - 6.1.6. Any failure by Grantee or Grantee Contractors to make any reports, payments, withholdings, or provide any insurance required by federal and state law, including with respect to Social Security, unemployment compensation, workers compensation, employee income, the Affordable Care Act, sales taxes, excise taxes, income taxes, property taxes, and/or other taxes, fees, or costs required by Grantee or Grantee Contractors to conduct business in the State;
 - 6.1.7. Any claim for wages, benefits, compensation, insurance, discrimination, or other similar claims asserted against the Office or the State of Iowa by any Grantee Personnel, or any claim, penalties, or fines made, levied, assessed, or imposed by another governmental entity or any Grantee Personnel against the Office or the State of Iowa in any way related to or involving the misclassification of employees as independent contractors or any allegations or findings of the existence of a joint-employment relationship involving any Grantee Personnel;
 - 6.1.8. Any claim involving any personal injury or damage to property, caused, in whole or in part, by Grantee, Grantee Contractors, or Grantee Personnel in any way related to this Agreement;
 - 6.1.9. Any claim for violation or infringement of any statutory, regulatory, or common law rights or any other rights of any person or entity, including any claims or causes of action involving torts, personal injury, defamation, or rights of publicity, privacy, security, confidentiality, misappropriation, or security; or
 - 6.1.10. Any claim of misappropriation of a trade secret or infringement or violation of any intellectual property rights, proprietary rights, or personal rights of or made by Grantee, Grantee Contractors, Grantee Personnel, or any third party, including any claims related to the violation or misappropriation of any patent, copyright, trade secret, trademark, trade dress, mask work, utility design, or other proprietary right;
 - 6.1.11. Any claim related to the Office's failure to disclose GIS data pursuant to applicable state, federal, and/or international laws, rules, regulations, or orders, including Iowa Code Chapter 22 and any corresponding implementing rules, regulations, or orders;
 - 6.1.12. Any indemnification obligation of Grantee set forth in the NOFA.
- 6.2. Grantee's duties as set forth in this Section shall survive termination of this Agreement and shall apply to all acts or omissions taken or made in connection with Grantee's, Grantee Contractor's, or Grantee Personnel's performance of this Agreement regardless of the date any potential claim is made or discovered by the Office, the State of Iowa, or any Indemnitee.
7. **Record Retention/Access to Records.** Grantee shall maintain accurate, current and complete books, documents, and records that sufficiently and appropriately document the proper use of State funds for a period of, whichever is later:

Commented [552]: Indemnification should be limited to third-party claims. With regard to direct claims, the Office is protected under 11.23 for attorney's fees and expenses.

- 7.1. At least five (5) years from the date of any final reimbursement disbursed by the Office hereunder; or
- 7.2. If any litigation, claim, negotiation, audit, or other action involving the books, documents, and records has commenced before the expiration of the five-year (5) period, until completion of the action and resolution of all issues which arise from it.

Grantee shall permit the Office or its designee to access and examine, audit, excerpt, and transcribe any pertinent books, documents, and records, electronic or optically stored and created records or other records relating, directly or indirectly, to Grantee's use of State funds hereunder, and shall deliver and provide, at no charge, complete copies of such books, documents, and records to the Office or its designee in such formats and within such time periods as may be specified by the Office, at no charge.

- 8. **Compliance with Law.** Grantee represents, warrants, covenants, and promises that Grantee, Grantee Contractors, and Grantee Personnel have complied with and will continue to comply with, and that the installation of Broadband Infrastructure forming the basis of the Project will comply with, all applicable federal, state, foreign, and local laws, rules, regulations, codes, standards, ordinances, and orders both generally and in connection with the performance of this Agreement, including the following:

- 8.1. Those prohibiting discriminatory employment practices or related to equal opportunity in employment or affirmative action under federal or state law, rules, regulations, or orders, including Iowa Code chapter 216 and section 19B.7 and the rules of the Iowa Department of Administrative Services and the Iowa Civil Rights Commission. Upon the State's written request, Grantee shall submit to the State a copy of its affirmative action plan, containing goals, time specifications, accessibility plans, and policies as required by Iowa Administrative Code chapter 11—121.
- 8.2. Those pertaining to any permitting and licensure requirements in carrying out the work performed under this Agreement.
- 8.3. Those relating to prevailing wages, occupational safety and health standards, payment of taxes, gift laws, and lobbying laws.

Grantee shall take such steps as necessary to ensure Grantee Contractors and Grantee Personnel are bound by the terms and conditions contained in this Section. Notwithstanding anything in this Agreement to the contrary, Grantee, Grantee Contractors, and Grantee Personnel's failure to fulfill any requirement set forth in this Section shall be regarded as a material breach of this Agreement and the Office may cancel, terminate, or suspend, in whole or in part, this Agreement without penalty or legal liability. In addition, the Office may declare Grantee ineligible for future State contracts in accordance with authorized procedures or Grantee may be subject to other sanctions as provided by law, rule, or order.

- 9. **Publicity.** During the Term and at all times after the termination or expiration of this Agreement, Grantee will ensure that all marketing materials in printed and electronic form in any way related to this Agreement or the Project indicate the Office of the Chief Information Officer of the State of Iowa's support of the Project, either by including the Office's logo, verbiage, or other mutually agreed upon representation. Marketing materials affecting a broader service area that the Project area will not be subject to these requirements. The Office may waive this requirement in its sole discretion. In addition, during the Term and at all times after the termination or expiration of this Agreement, Grantee, Grantee Contractors, and Grantee Personnel shall not make any media release or other public announcement related to the Project without the Office's prior written consent and opportunity for participation/involvement. Except as otherwise required or permitted herein, Grantee, Grantee Contractors, and Grantee Personnel shall acquire no right to use, and shall not use, without OCIO's or the the State of Iowa's prior written consent, the terms or existence of this Agreement, the names, trade names, trademarks, service marks, artwork, designs, or copyrighted materials of the Office or the State of Iowa, its related entities, employees, assigns, successors

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or licensees: (a) in any advertising, publicity, press release, customer list, presentation or promotion; or (b) to express or to imply any endorsement of the Project.

10. Confidentiality. Subject to applicable state, federal, and/or international laws, rules, regulations, or orders (including Iowa Code Chapter 22 and any corresponding implementing rules, regulations, or orders), the Office will not intentionally disclose GIS data supplied by Grantee to the Office. Notwithstanding and in addition to the foregoing, the Office may disclose GIS data supplied by Grantee:

- 10.1. Pursuant to any legal, judicial, regulatory, or administrative proceedings, subpoena, summons, deposition, interrogatory, requests for documents, order, ruling, civil investigative demand, or other legal, administrative or regulatory processes;
- 10.2. Pursuant to any applicable laws, rules, or regulations;
- 10.3. If the Office reasonably determines such information is not a confidential record pursuant to Iowa Code Section 22.7 or other applicable laws, rules, and regulations; or
- 10.4. If the Office, in the Office's sole discretion, determines Grantee has not provided or is unwilling to provide facts sufficient to enable the Office to make a determination as to whether such information constitutes a confidential record under Iowa Code Section 22.7 or other applicable laws, rule, and regulations.

Prior to disclosing such data as permitted above, the Office shall provide reasonable notice to Grantee of the circumstances giving rise to such disclosure.

11. General Provisions.

- 11.1. *Administration.* The Office may require Grantee to communicate with it about the status of the Project. Such communications may include a conference call or an in person meeting ("Status Meeting") or submission to the Office of a report ("Status Report") regarding: (a) An overview and status of the Project; (b) Issues encountered and being resolved; (c) Updates on the timing of Project Completion; (d) Any other information that the Office may reasonably request.
- 11.2. *Contractor.* Grantee, Grantee Contractors, and Grantee Personnel shall not hold itself out as an employee or agent of the Office or the State of Iowa. Grantee or Grantee Contractors shall be responsible for maintaining and furnishing a place of work, and any tools, supplies, apparel, facilities, equipment, and appropriate communications devices and services required for Grantee Personnel to perform and provide the Project. Grantee Personnel are not eligible for and Grantee shall ensure Grantee Personnel never claim they are eligible for or otherwise entitled to any State employee benefits, including retirement benefits, insurance coverage, or the like. Grantee Personnel shall not be considered employees of the Office or the State of Iowa for any purpose, including for federal or State tax purposes. The Office or the State of Iowa shall not withhold taxes on behalf of Grantee. Grantee shall be responsible for payment of all taxes in connection with any income earned from performing this Agreement. The Office shall have no right or authority to direct or control Grantee Personnel with respect to the performance or delivery of the Project. The Office is interested only in the results to be achieved by Grantee under this Agreement; the manner and method of performing and delivering the Project shall be under the exclusive control of Grantee, in accordance with the terms of this Agreement. Grantee and Grantee Contractors shall be free to hire employees as is necessary for their business purposes; provided, that such employees providing or delivering the Project hereunder shall satisfy the terms and conditions of this Agreement. The Parties acknowledge and agree that the Office will not have the authority to hire, fire, supervise, control, or manage Grantee Personnel. Grantee Personnel shall not receive performance reviews, vocational training, or business cards from the Office; shall clearly state in any and all communications related to the performance or delivery of the Project hereunder that

Commented [554]: This provision is unnecessary in light of other covenants, representations, and indemnities.

they are employees of Grantee or Grantee Contractors; and shall not be subject to the Office's or the State of Iowa's standard disciplinary practices or procedures.

- 11.3. *Not a Joint Venture.* Nothing in this Agreement shall be construed as creating or constituting the relationship of a partnership, joint venture, or other association of any kind or agent/principal relationship between the Parties hereto. No Party, unless otherwise specifically provided for herein, has the authority to enter into any agreement or create an obligation or liability on behalf of, in the name of, or binding upon, another Party to this Agreement.
- 11.4. *Obligations of Joint Entities.* If Grantee is a joint entity, consisting of more than one individual, partnership, corporation or other business organization, all such entities shall be jointly and severally liable for carrying out the activities and obligations of this agreement, and for any default with respect to such activities and obligations.
- 11.5. *Assignment and Delegation.* This Agreement may not be assigned, transferred, or conveyed in whole or in part without the prior written consent of the other Party, except that the Office may assign, transfer, or convey this Agreement, in whole or in part, to any governmental entity that succeeds the Office's duties hereunder or otherwise assumes responsibility for the functions or duties currently assumed by the Office. For purposes of construing this clause, a transfer of a controlling interest in Grantee, a merger, sale or consolidation of Grantee, or a sale of substantially all of Grantee's assets shall be considered an assignment; provided, however, that any reorganization ordered in Case No. 19-22312 in the United States Bankruptcy Court for the Southern District of New York shall not be considered an assignment.
- 11.6. Grantee agrees that it shall provide the Office with the earliest possible advance notice of any proposed sale or transfer or any controlling interest in or substantial assets of Grantee and of any proposed merger, sale, or consolidation of Grantee. Grantee agrees that it shall not use this Agreement, or any portion thereof, for collateral or to otherwise secure any financial obligation of Grantee or any affiliate thereof without the prior written consent of the Office. Grantee further agrees that it may not assign, pledge as collateral, grant a security interest in, create a lien against, or otherwise encumber any payments that may or will be made to Grantee under this Agreement.
- 11.7. *Use of Third Parties.* Grantee may enter into contracts or subcontracts for the provision or delivery of services related to the Project. Any such contract or subcontract shall be in writing and shall in no way alter the terms and conditions of this Agreement. All contracts or subcontracts shall be subject to the terms and conditions of this Agreement. No, contractor, subcontract, or other delegation of work shall relieve or discharge Grantee from any obligation, provision, or liability under this Agreement. Grantee shall remain responsible for such performance and shall be fully responsible and liable for all acts or omissions of any Grantee Contractors or Grantee Personnel. Any action of a Grantee Contractor or Grantee Personnel, which, if done by Grantee, would constitute a breach of this Agreement, shall be deemed a breach by Grantee and have the same legal effect. The term "Grantee" as used in this Agreement shall, unless the context clearly requires to the contrary, be deemed to include Grantee Contractors and Grantee Personnel. Grantee shall be solely responsible and liable for any and all payments that may be due Grantee Contractors and Grantee Personnel pursuant to any contract or subcontract. Grantee shall indemnify and hold harmless the State, the Office, and any officers, directors, employees, officials, and agents of either of the foregoing from and against any and all claims, demands, liabilities, suits, actions, damages, losses, taxes, penalties, costs and expenses of every kind and nature whatsoever arising out of, resulting from, or in any way related to Grantee's breach of any contract or subcontract into which it enters, including Grantee's failure to pay any and all amounts due to any Grantee Contractor or Grantee Personnel. If Grantee fails, neglects, or refuses to pay promptly, as due, any claim for labor or services furnished to Grantee or any Grantee Contractor or Grantee Personnel in connection with the Project, the Office may pay such claim and charge the amount of the payment against funds due or to become due Grantee under this Agreement. The payment of a claim in such manner shall

Commented [S55]: Windstream filed for Chapter 11 protection on February 25, 2019 and we anticipate a reorganization as part of the Chapter 11 process.

not relieve Grantee or its surety from any obligation with respect to any unpaid claims. All contracts or subcontracts shall contain provisions which allow the Office or its designee to access books, documents, and records and for inspections of work of Grantee Contractors or Personnel, as required of Grantee herein.

- 11.8. *Third Party Beneficiaries.* Except as otherwise expressly stated herein, there are no third party beneficiaries to this Agreement. This Agreement is intended only to benefit the Office, the State of Iowa, the Office's respective successors and permitted assigns, Grantee, and the citizens of the State of Iowa residing in the Targeted Services Areas identified in the Application/forming the basis of the Project.
- 11.9. *Time is of the Essence.* Time is of the essence with respect to Grantee's performance of its obligations under this Agreement.
- 11.10. *Legally Available Funds.* All payments under this Agreement are subject to the Office's receipt of sufficient funds. Any termination, reduction or delay of state funds to the the Office shall, at the Office's sole discretion, result in the termination, reduction, or delay of State funds to Grantee.
- 11.11. *Cumulative Rights.* The various rights, powers, options, elections, and remedies of the Office and the State provided for in this Agreement shall be construed as cumulative and no one of them is exclusive of the others or exclusive of any rights, remedies or priorities available at law, in equity, or otherwise, and shall in no way affect or impair the right of the Office or the State of Iowa to pursue any other contractual, equitable, or legal remedy to which they may be entitled. The election by the Office or the State of Iowa of any one or more remedies shall not constitute a waiver of the right to pursue other available remedies.
- 11.12. *Choice of Law and Forum.* This Agreement shall be governed in all respects by, and construed in accordance with, the laws of the State of Iowa, without giving effect to the choice of law principles thereof. Any and all litigation or actions commenced in connection with this Agreement, including after expiration or termination of this Agreement, shall be brought in Des Moines, Iowa, in Polk County District Court for the State of Iowa, if jurisdiction is proper. However, if jurisdiction is not proper in the Iowa District Court for Polk County, but is proper only in a United States District Court, the matter shall be commenced in the United States District Court for the Southern District of Iowa, Central Division. Grantee irrevocably: (i) consents and agrees that any legal or equitable action or proceeding arising under, in connection with or arising out of this Agreement shall be brought and maintained exclusively in the aforesaid courts; (ii) submits to and accepts, with respect to any such action or proceeding, for it and in respect of its properties and assets regardless of the physical or legal situs thereof, generally and unconditionally, the jurisdiction of the aforesaid courts; and (iii) waives any objection to such jurisdiction based on forum non conveniens or otherwise. Grantee irrevocably consents to service of process by certified or registered mail addressed to Grantee's agent identified in Section 11.12 (Notices). If for any reason Grantee's agent is unable to act as such or the address of the agent changes, Grantee shall immediately appoint a new agent and provide the Office with written notice of the change in agent or address. Any change in the appointment of the agent or address will be effective only upon actual receipt by the Office. Nothing in this provision will alter the right of the Office to serve process in any other manner permitted by law.
- 11.13. *Notices.* Notices under this Agreement shall be in writing and delivered to the representative of the Party to receive notice (identified below) at the address of the Party to receive notice as it appears below or as otherwise provided for by proper notice hereunder. The effective date for any notice under this Agreement shall be the date of delivery of such notice (not the date of mailing) which may be affected by certified U.S. Mail return receipt requested with postage prepaid thereon or by recognized overnight delivery service, such as Federal Express or UPS:

If to the State:

Attn: Business Services Division Administrator

Iowa Office of the Chief Information Officer

Hoover State Office Building, Level B

Des Moines, IA 50319

If to Grantee:

- 11.14. *Integration.* This Agreement represents the entire agreement between the Parties concerning the subject matter hereof, and neither Party is relying on any representation that may have been made which is not included or incorporated into this Agreement. Grantee acknowledges that it has thoroughly read this Agreement and all related terms and conditions, including any attached or incorporated schedules, exhibits, and other like documents, and has had the opportunity to receive competent advice and counsel necessary for it to form a complete understanding of all rights and obligations herein and to accept the same freely and without coercion of any kind. Accordingly, this Agreement shall not be construed or interpreted against the Office or the State of Iowa on the basis of draftsmanship or preparation thereof.
- 11.15. *Amendments.* This Agreement may be amended, modified, or replaced from time to time by mutual consent of the Office and Grantee. Both Parties must execute all amendments to this Agreement in writing. Notwithstanding the foregoing, the Office may unilaterally modify the Agreement in order to accommodate any change in any applicable federal, state or local laws, regulations, rules, policies, or orders. A copy of such unilateral modification will be provided to Grantee as an amendment to this Agreement.
- 11.16. *Severability.* If any provision of this Agreement is determined by a court of competent jurisdiction to be invalid or unenforceable, such determination shall not affect the validity or enforceability of any other part or provision of this Agreement.
- 11.17. *Headings or Captions and Terms.* The section headings or captions used in this Agreement are for identification purposes only and do not limit or construe the contents of the sections. Unless the context of this Agreement otherwise clearly requires, references to the plural include the singular, references to the singular include the plural, and the word "or" has the inclusive meaning represented by the phrase "and/or." The words "include" and "including" shall be deemed to be followed by the phrase "without limitation." The words "thereof," "herein," "hereunder," and similar terms in this Agreement refer to this Agreement as a whole and not to any particular provision of this Agreement.

- 11.18. *Multiple Counterparts.* This Agreement may be executed in several counterparts, all of which when taken together shall constitute one contract binding on all Parties, notwithstanding that all Parties are not signatories to the same counterpart. Each copy of this Agreement so executed shall constitute an original.
- 11.19. *Attachments.* The Parties agree that if an addendum, attachment, rider, schedule, appendix, or exhibit is attached hereto by the Parties, or referred to herein, then the same shall be deemed incorporated herein by reference. In addition, the NOFA and Grantee's Application, including the Project Worksheet, Qualitative Attributes Form, and Budget Plan, together with any clarifications, attachments, appendices, or amendments to the NOFA and Application are incorporated into this Agreement by this reference as if fully set forth herein; provided, however, that none of Grantee's exceptions, objections or proposed modifications respecting the NOFA or any terms associated therewith (collectively "Grantee Exceptions") shall be incorporated into this Agreement unless expressly set forth herein. The terms and conditions of the NOFA and of Grantee's Application are made contractual obligations of Grantee, except that any Grantee Exceptions shall not be deemed to limit, modify or otherwise affect any of the contractual obligations of Grantee, the Office, or the State of Iowa hereunder, unless expressly stated herein. In the case of any conflict or inconsistency between the specific provisions of this document, the NOFA or the Application, any conflict or inconsistency shall be resolved as follows: first, by giving preference to the specific provisions of this document, the Grant Agreement, and any schedules, exhibits or other attachments; second, by giving preference to the specific provisions of the NOFA; and third, by giving preference to the specific provisions of the Application, including the Project Worksheet, Qualitative Attributes Form, and Budget Plan, but excluding any Grantee Exceptions that are not expressly made a part of this Agreement. References to the Parties' obligations, which are contained in this document, are intended to change, modify, supplement or clarify the obligations as stated in the NOFA and Grantee's Application. Failure of the Parties to make reference to the terms of the NOFA or Application in this document shall not be construed as creating a conflict and will not relieve Grantee of the contractual obligations imposed by the terms of the NOFA and Grantee's Application. Terms offered or stated in Grantee's Application, which exceed the requirements of the NOFA, shall not be construed as creating an inconsistency or conflict with the NOFA or this document. Notwithstanding anything herein to the contrary, the Office shall have only those obligations that are expressly stated in this document, and the NOFA and/or Application shall not create any express or implied obligations of the Office.
- 11.20. *Material Breaches.* References in this Agreement to specific material breaches of this Agreement shall not be construed as implying that other breaches of this Agreement are not material.
- 11.21. *Taxes.* Grantee shall be responsible for paying any taxes (including sales taxes, excise taxes, use taxes, income taxes or property taxes) incurred by Grantee in the performance of this Agreement.
- 11.22. *Exclusivity.* This Agreement is not exclusive, and the Office or the State of Iowa may enter into other Agreements with third parties for the provision of similar services.
- 11.23. *Sovereign Immunity.* Notwithstanding anything in this Agreement to the contrary, neither the Office nor the State of Iowa waives any immunity defenses (including sovereign immunity, governmental immunity, immunity based on the Eleventh Amendment to the Constitution of the United States, or otherwise) and all other defenses available to it by entering into this Agreement and specifically retains and reserves all immunity defenses (including sovereign immunity, governmental immunity, immunity based on the Eleventh Amendment to the Constitution of the United States, or otherwise) and all other defenses available to it under State and federal laws, rules, and regulations for any claim arising out of or related to this Agreement, whether in state or federal court or any other tribunal or forum.
- 11.24. *Attorney's Fees and Expenses.* In the event Grantee defaults on any of its obligations under this Agreement, Grantee shall pay to the Office all costs and expenses (including the reasonable value

of time of the Attorney General's Office and the costs, expenses and attorney fees of other counsel retained by or on behalf of the State of Iowa) incurred by the Office or the State of Iowa in enforcing this Agreement or any of its rights and remedies with respect thereto.

- 11.25. *Conflicts of Interest.* Grantee represents, warrants, and covenants that no relationship exists or will exist during the term of the Agreement between Grantee, Grantee Contractors, or Grantee Personnel and the Office or the State of Iowa that is or may constitute a conflict of interest or the appearance of impropriety. To the extent applicable, the provisions of Iowa Code Chapter 68B shall apply to this Agreement, and Grantee, Grantee Contractors, and Grantee Personnel shall not engage in any conduct or permit any third party from engaging in any conduct that would violate that chapter.
- 11.26. *Final Authority.* The Office shall have the final authority to interpret, construe, and apply the terms and conditions of this Agreement. Any decision of the Office related to the interpretation, construction, or Application of any terms or conditions or resolution of any disputes under or related to this Agreement shall be final and binding on Grantee, subject to Iowa Administrative Code rule 129—22.6(5) and Iowa Code chapter 17A.
- 11.27. *Authorization.* Grantee represents and warrants that it, directly or through its affiliates, has the right, power, and authority to enter into and perform its obligations under this Agreement and that it has taken all requisite action (corporate, statutory, or otherwise) to approve execution, delivery, and performance of this Agreement, and this Agreement constitutes a legal, valid, and binding obligation of Grantee, enforceable in accordance with its term.

IN WITNESS WHEREOF, the Parties have caused their respective duly authorized representatives to execute this Agreement, which is effective as of the date of last signature, below ("Effective Date").

STATE OF IOWA, acting by and through the
Office of the Chief Information Officer
("State of Iowa" or "State")

Windstream Services, LLC
("Grantee")

By: _____

Name: _____

Title: _____

Date: _____

By: Paul F. Jarvis

Name: Paul F. Jarvis

Title: Staff Manager - Government Programs

Date: 3-15-19

Handwritten text, likely bleed-through from the reverse side of the page. The text is illegible due to fading and is arranged in several lines.