

## **FINANCING & PERFORMANCE AGREEMENT**

THIS AGREEMENT (“Agreement”) is entered as of this \_\_\_\_ day of November, 2019, by and between the FRANKLIN COUNTY BROADBAND AUTHORITY, a political subdivision of the Commonwealth of Virginia (the “Authority”), and SHENANDOAH TELECOMMUNICATIONS COMPANY, a Virginia corporation (“Shentel”), each a “Party” and collectively the “Parties.” For their Agreement, the Parties state:

### **Recitals:**

WHEREAS, the Authority is a political subdivision of the Commonwealth of Virginia, authorized to make contracts for the purpose of the provision of telecommunications services pursuant to the Wireless Service Authorities Act, Sections 15.2-5431.1 et seq. of the Code of Virginia, 1950, as amended; and

WHEREAS, Shentel is a corporation that provides telecommunications services in Franklin County, Virginia; and

WHEREAS, Shentel has provided an unsolicited proposal under the Public-Private Education Facilities and Infrastructure Act of 2002 (PPEA) to expand broadband services in Franklin County; and

WHEREAS, Shentel anticipates an expansion of its service area in Franklin County, Virginia, at an estimated cost of \$ 380,153 , and has in collaboration with the Authority sought and obtained a grant from the Virginia Telecommunications Initiative (VATI) of the Virginia Department of Housing and Community Development (DHCD) to work on the expansion of availability of telecommunications services, and said grant, in the amount of \$285,115, has been conditionally approved by DHCD and

WHEREAS, the Authority wishes to make a grant to Shentel, for the purposes of assisting Shentel to expand its facilities in Franklin County and expand the availability of qualifying communications services in accordance with the statutory purposes of the Authority.

### **Witnesseth:**

NOW THEREFORE, in consideration of the foregoing premises, the mutual benefits, promises, and undertakings of the parties to this Agreement as set forth below, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties covenant and agree as follows:

#### **I. Definitions & Incorporations by Reference.**

For the purposes of this Agreement, the following terms shall have the following definitions, unless the context or manifest purpose of this Agreement indicate otherwise:

*Capital Expenditure* means a capital expenditure by Shentel as set forth in the Grant Agreement. The total expected Capital Expenditure is not less than \$380,153.

*DHCD* or *VATI* means the Virginia Department of Housing and Community Development VATI program, which is providing grant funds for the Project.

*Performance Date* means [**One Year from Date of Agreement**].

*Project* means that project contemplated by the VATI Application.

*Targets* means the Shentel's obligation pursuant to this Agreement to make Capital Expenditures at the Project of at least \$380,153 (inclusive of the grant funds and local investments) and achieving the other goals set forth in Section II of this Agreement as of the Performance Date. The Company shall also, as of the Performance Date, provide documentation of (1) the number of actual passings, takes, and the take rate; (2) the speeds achieved by the Project; and (3) such other information as may be required by DHCD..

This Agreement incorporates by reference the following documents, which may be referred to as follows:

*Grant Application* means the 2020 VATI Application submitted to and approved by DHCD.

*Grant Agreement* means . 2020 VATI Grant Agreement between FCBA and DHCD

## **II. Targets.**

Shentel will construct and operate the Project in the County shall be substantially complete and in operation as of the Performance Date, generally known as a Penhook Project. The Project includes the following extensions:

Old Salem Road: Coaxial cable/fiber extension of approximately 40,000 linear feet (pending final engineering).

The Penhook Project will result in approximately 190 new passings of homes and businesses. Minimum speeds provided at passings shall be not less than 50 mbps download, 10 mbps upload. Plans including up to 1 gigabit per second symmetrical will be available.

## **III. Grant.**

The Franklin County Broadband Authority, as the grantee of the DHCD funds, will make the Grant as set forth herein. Shentel will use the Grant proceeds as reimbursement of expenses actually outlaid related to construction of the Project, which expenses may include permit fees charged by Franklin County, Virginia, and paid by the Company for the Project. The total amount of the Grant shall be not more than \$285,115.00.

Grant disbursements shall be made not more frequently than monthly upon Shentel's submission to the Authority of detailed invoices verifying expenditure of funds and delivery of goods, services, or construction work in furtherance of the Project. For each invoice, the Authority will issue a grant payment of 95% of the face amount of each invoice, until it has reached the maximum cash match of \$285,115.00, less 5% (\$270,859.25). If Shentel substantially completes the Project on or before the Performance Date, the Authority will disburse a final payment of \$14,255.75 upon achievement of all Targets.

In the event the above grants are not made due to an event of non-appropriation or otherwise, the Company's obligations for performance under this Agreement subsequent to such event of non-appropriation or other failure on the part of the Authority shall be void and of no force and effect.

**IV. Reporting.**

Shentel shall provide, at its own expense, detailed verification reasonably satisfactory to the Authority of its progress on the Targets in aid of the Authority’s reporting requirements to the Virginia Department of Housing and Community Development (DHCD). Such progress reports will be provided monthly upon request. For the purposes of verifying the accuracy of reports, and for no other purpose, the Company hereby waives its protections under Section 58.1-3 of the Code of Virginia, 1950, as amended, and authorizes the Commissioner of the Revenue for Franklin County, Virginia, to provide verification to the Authority of personal and real property reported for taxation purposes from his records; provided, however, that such disclosure shall not waive the protections of § 58.1-3 as to any other person, nor authorize the Authority to disclose such information to any other person other than DHCD. Further, Shentel grants the Authority the right to inspect any site at which work on the Project is or has been carried on during the term of this Agreement in order to verify work for which an invoice has been submitted.

Shentel will assist the County with providing the detailed verification information required by DHCD and uploading this information into a CAMS-type system, if required.

Shentel and Authority staff should meet on a regular basis, not less frequently than quarterly, in order to discuss progress on the Project and ensure positive communications. The meeting may be carried out by telephone or canceled if no significant matters are necessary for discussion in a particular time period.

**V. Notices.**

Any notices required or permitted to be given under this Agreement shall be given in writing, and shall be deemed to be received upon receipt or refusal after mailing of same in the United States by First-Class U.S. Mail, certified, postage prepaid, or by customary commercial overnight courier (refusal shall mean return of certified mail or overnight courier package not accepted by addressee):

If to Shentel, to:

With a copy to:

If to the Authority, to:

With a copy to:

Franklin County Broadband Authority  
1255 Franklin Street  
Rocky Mount, Virginia 24151  
Attn: Leland Mitchell, Chair

Authority Counsel  
Guynn, Waddell, Carroll & Lockaby, P.C.  
415 South College Avenue  
Salem, Virginia, 24153  
Attn: Michael Lockaby, Esq.

The addresses set forth in this section only may be amended by sending written notice to all other parties of a change of address, without need of signed amendment to this Agreement.

**VI. Miscellaneous.**

*Indemnity.* The Company agrees to indemnify and hold harmless the Authority and its officers, directors, and employees for and from any and all claims, causes of action, damages or any liability of any type, including reasonable attorney's fees, on account of any claims by or any injury or damage to any persons or property growing out of or directly or indirectly resulting or arising in any way out of any actions, omissions or activities of the Company or its agents, employees or representatives arising out of or connected in any way to any of the matters involved in this Agreement or its performance.

*Integration.* This Agreement, including the exhibits hereto, constitutes the full and complete agreement of the Parties respecting its subject matter, and any prior or contemporaneous agreements or understandings, written or oral, are hereby merged into and superseded by the provisions of this Agreement. This Agreement may only be amended or supplemented by a subsequent writing of equal dignity except where expressly set forth herein.

*Assignment.* This Agreement may not be assigned by a Party without the prior written consent of the other Party.

*No covenants of officials.* No covenant, agreement, or obligation contained in this Agreement shall be deemed to be a covenant, agreement or obligation of any present or future director, officer, employee or agent of the Authority or the Company in his or her individual capacity, and neither the directors of the Authority nor any officer, employee or agent thereof executing this Agreement or any related instrument shall be liable personally on this Agreement or such instrument or be subject to any personal liability or accountability by reason of the execution and delivery thereof. No director, officer, employee, or agent of the Authority shall incur any personal liability with respect to any other action taken by him or her pursuant to this Agreement or any of the transactions contemplated hereby or thereby, provided he acts in good faith.

*Not a pledge of full faith and credit.* Any obligation of the Authority to pay, set aside, or otherwise appropriate funds for performance of this Agreement shall be construed to be subject to appropriation, and shall not be construed to be a general obligation of the Authority. THE OBLIGATIONS OF THE AUTHORITY UNDER THIS AGREEMENT ARE NOT GENERAL OBLIGATIONS OF THE AUTHORITY OR OF FRANKLIN COUNTY, VIRGINIA, BUT ARE LIMITED OBLIGATIONS PAYABLE SOLELY FROM THE REVENUES AND RECEIPTS DERIVED BY THE AUTHORITY PURSUANT TO RELATED AGREEMENT WITH THE COMMONWEALTH UNDER THE VATI GRANT. THE OBLIGATIONS OF THE AUTHORITY HEREUNDER SHALL NOT BE DEEMED TO CONSTITUTE A DEBT OR A PLEDGE OF THE FAITH AND CREDIT OF THE COMMONWEALTH OF VIRGINIA OR ANY POLITICAL SUBDIVISION THEREOF, INCLUDING THE AUTHORITY.

*Rule of construction for dates.* If any action is required to be performed, or if any notice, consent or other communication is given, on a day that is a Saturday or Sunday or a legal holiday in the Commonwealth of Virginia, such performance shall be deemed to be required, and such notice, consent or other communication shall be deemed to be given, on the first business day following such Saturday, Sunday or legal holiday. Unless otherwise specified herein, all references in this Agreement to a "day" or "days" shall refer to calendar days and not business days.

*Choice of law.* This Agreement shall be construed according to the laws of the Commonwealth of Virginia without regard to its principles of conflicts of laws. The Parties consent to exclusive venue and jurisdiction in the Circuit Court or General District Court, as appropriate, of Franklin County, Virginia.

*Attorneys' fees.* The Parties agree that, except as specifically provided in this Agreement, if any Party pursues legal action to enforce the terms of this Agreement, the American Rule shall apply and each Party shall bear its own attorneys' fees and expert costs and no fee shifting shall occur.

*Drafter & Severability.* This Agreement has been jointly drafted by the Parties and is to be construed as jointly drafted and not be construed against any of the Parties as the drafter. This Agreement is severable, and if any provision is found to be invalid by any court of competent jurisdiction, the remainder shall survive. The section and paragraph headings in this Agreement are for convenience of reference only and do not modify or restrict any provisions hereof and shall not be used to construe any provisions of this Agreement except to clarify the intent of a section.

*Covenant of Authority.* All Parties warrant that the signatories below have full authority and have undertaken such legal actions as may be necessary to ensure such authority, to bind the entities of which they are representatives to the full extent permitted by law. Company agrees that, during the term of this Agreement, it shall not allow its corporate existence to lapse or its certificate of authority in the Commonwealth of Virginia to be revoked or cancelled at any time. This Agreement may be executed by facsimile, electronic or original signature of the parties and in counterparts which, assuming no modification or alteration, shall constitute an original and when taken together, shall constitute one and the same instrument. All Parties further warrant that they have full legal authority to carry out the actions contemplated by this Agreement, and that they are aware of no litigation pending or threatened that would draw such authority into question,

*Time of the Essence.* Time is of the essence of all obligations set forth herein for which a time is stated.

*Waiver.* The failure of any Party to this Agreement to insist upon strict compliance with any term herein shall not be construed to be a waiver of that requirement.

*Assignment of Agreement.* Any obligation under this Agreement may only be assigned to a third party with the prior written consent of all Parties.

*Counterparts.* This Agreement may be executed in one or more counterparts, each of which shall be construed to be an original and production of all of which shall not be necessary to prove the contents of this Agreement.

IN WITNESS WHEREOF, see the following signatures, of even date herewith:

**FRANKLIN COUNTY BROADBAND AUTHORITY:**

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Leland Mitchell  
Chairman

**SHENANDOAH TELECOMMUNICATIONS COMPANY, INC.:**

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