

INDUSTRIAL DEVELOPMENT AUTHORITY
OF THE COUNTY OF PRINCE GEORGE
FIBER TO THE HOME
BROADBAND EXPANSION GRANT

PERFORMANCE AGREEMENT

This **PERFORMANCE AGREEMENT** made and entered this ____ day of June, 2017, by and among **THE COUNTY OF PRINCE GEORGE, VIRGINIA** (the “County”) a political subdivision of the Commonwealth of Virginia, **PGEC ENTERPRISES, LLC** (“PGECE”) a Virginia limited liability company authorized to transact business in the Commonwealth of Virginia, and the **INDUSTRIAL DEVELOPMENT AUTHORITY OF THE COUNTY OF PRINCE GEORGE, VIRGINIA** (the “Authority”), a political subdivision of the Commonwealth of Virginia,

WITNESSETH:

WHEREAS sixty-one percent of all businesses in Prince George County are home-based businesses; and

WHEREAS the extension of broadband provides enhanced educational opportunities and furthers workforce development which supports economic development in Prince George County; and

WHEREAS the availability of secure, reliable, competitive and sustainable infrastructure is essential to meet future broadband needs; and

WHEREAS small and medium size business enterprises with greater high-speed internet use grow faster than those with less high-speed internet use; and

WHEREAS the internet is a powerful catalyst for job creation; and

WHEREAS the internet drives economic modernization; and

WHEREAS the County and Authority wish to make funds available for the purpose of inducing PGECE to expand access through “Fiber To The Home” broadband at an accelerated pace, after making a significant Capital Investment through a Fiber To The Home Broadband Expansion Grant (“Grant”); and

WHEREAS the County is willing to provide funds to the Authority with the expectation that the Authority will provide the funds to PGECE, provided that PGECE has agreed to meet certain performance targets relating to construction of infrastructure, and expanding access to, Fiber To The Home broadband; and

WHEREAS the County, the Authority and PGECE desire to set forth their understanding and agreement as to the payout of the Grant, the use of the proceeds of the Grant, the obligations

of PGECE regarding Capital Investment and the potential for recapture or “claw back” upon default; and

WHEREAS, it is anticipated that the construction, equipping, operation and installation of Phase I of the Fiber To The Home broadband project will require a capital expenditure of One Million Dollars (\$1,000,000.00) by PGECE; and

WHEREAS the stimulation of additional tax revenue to the County and economic activity in the County to be generated by the Capital Investment constitutes a valid public purpose for the expenditure of public funds and is the primary purpose of the Grant by the Authority:

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

Section 1 - Definitions

For the purposes of this Agreement, the following terms shall have the following definitions:

“**Broadband**” – a minimum broadband speed of twenty-five (25) Mbps down and three (3) Mbps up as defined by the FCC.

“**Broadband Availability**” - the availability of the connection necessary to access Fiber To The Home broadband for structures that are within one thousand feet of a VDOT road where an existing PG Electric pole or other access point is located.

“**Consistent**” - ability of service to maintain promised speeds at periods of peak use.

“**Capital Investment**” - a capital expenditure by or on behalf of PGECE for the installation of a Fiber Backbone and Fiber To The Home broadband infrastructure.

“**Event of Force Majeure**” – any circumstances beyond a party’s reasonable control, including acts of God, flood, fire, earthquake or explosion, war, terrorism, invasion, riot or other civil unrest, embargoes or blockades in effect on or after the date of this Agreement, national or regional emergency, strikes, labor stoppages, shortages or slowdowns or other industrial disturbances, passage of law or any action taken by a governmental or public authority, including but not limited to imposing an embargo, export or import restriction, quota or other restriction or prohibition or any complete or partial government shutdown, or national or regional shortage of adequate power, telecommunications or transportation.

“**Fiber Backbone**” - the principal data routes between large, strategically interconnected computer networks and core routers on the Internet.

“**Fiber To The Home**” – installation of fiber optic wire from a central point directly to a structure to provide high-speed internet access.

“**Phase I**” - the successful completion of the necessary infrastructure in order to result in five hundred (500) connections to structures located within one thousand feet of a roadway.

“**Reliable**” - ability to maintain service in the case of storms or system breakdowns consistent with industry standards for a rural fiber optic network.

“**Roadway**” – a road that is part of the Virginia Department of Transportation (VDOT) secondary system, which is immediately adjacent to a fiber network access point owned by Prince George Electric Cooperative.

Section 2 - Broadband Installation Plan.

Within sixty (60) days of the execution of this Agreement, PGECE shall provide to the Authority a broadband installation plan for installation of the Fiber Backbone, in substantial conformity with the attached map, entitled “Potential PGEC Fiber Optic Lines and Broadband Customers,” dated April 21, 2017. The broadband installation plan shall include, but not be limited to, the locations where PGECE proposes to install broadband infrastructure, the types of materials proposed to be used, and the capacity and lifespan of the materials.

Section 3 – Broadband Subscriptions

As of July 1, 2021 PGECE shall have installed and made available consistent and reliable broadband service to a minimum number of five hundred (500) new subscriber structures after the effective date of the Agreement.

PGECE shall provide reasonable documentation to the County and the Authority annually, beginning July 1, 2018 and continuing through July 1, 2021, verifying new subscribers to broadband service with a minimum of one-year subscriptions each.

After the effective date of this Agreement, in the event that PGECE has not provided broadband service to a minimum of five hundred (500) new subscribers on or before July 1, 2021, PGECE shall be in default under the terms of this Agreement as defined in Section 8 – Default herein.

Section 4 - No Degrading of Service

PGECE shall ensure that there is no degrading of broadband service, as defined in this Agreement, to customers during the term of this Agreement.

Section 5 - Continuation of Service/New Customers

PGECE agrees that as long as a reasonable demand exists for broadband service, PGECE will continue to provide broadband service to existing and new subscribers, who reside within one thousand (1,000) feet of a roadway as defined herein.

Section 6 - Disbursement of Grant

(a) Notwithstanding anything in this Agreement to the contrary, the Authority will not have any obligation to disburse any portion of the Grant under this Agreement until and unless this Agreement is approved by the County's Board of Supervisors and the Authority has received such funds from the County.

(b) Subject to the delivery of the Grant by the County to the Authority, within thirty (30) days of its receipt of the Grant funds, the Authority will disburse the Grant funds to PGECE on condition that PGECE has complied with Section 2 of this Agreement.

Section 7 - Community Service Commitments

Upon request, PGECE, at its expense, will construct and make available within a reasonable timeframe, fiber optic cable connections to all public structures and facilities owned or operated by the County that are within one thousand (1,000) feet of Fiber Backbone including, but not limited to schools, libraries, parks and recreation facilities, fire stations, and wireless communications towers. Internet service charges for these facilities shall be at the commercial rate. In addition, upon request, PGECE will construct and make available to the County's Central Wellness Center, the Prince George Emergency Crew Building, the Burrowsville Volunteer Fire Department and the Burrowsville Community Center internet service at the residential internet service rate during the term of this Agreement. At such time as PGECE has satisfied in full all of the requirements of it under the terms of this Agreement, the rate for internet service to the County's Central Wellness Center, the Prince George Emergency Crew building, the Burrowsville Volunteer Fire Department and the Burrowsville Community Center shall be at the PGECE commercial internet rate.

Section 8 - Default

After the effective date of this Agreement, if PGECE fails to make available consistent and reliable broadband service to five hundred (500) new subscribers by July 1, 2021 as set forth in Section 3 – Broadband Subscriptions of this Agreement, then PGECE shall be in default and shall refund to the Authority Two Thousand Dollars (\$2,000.00) for each subscriber not provided consistent and reliable broadband service below the required five hundred (500) new subscribers.

Section 9 - Event of Force Majeure

PGECE shall not be considered in Default under Section 8 – Default, of this Agreement if prevented from meeting the new subscription requirements of this Agreement by July 1, 2021 on account of an Event of Force Majeure as defined herein. If such occurs, PGECE shall be allowed a reasonable extension of time from the date of the occurrence of such Event, to allow PGECE to meet the required subscription objective.

Section 10 – Sale or Assignment of PGECE

In the event of a sale or assignment of PGEC Enterprises, LLC to any person, firm or corporation prior to PGECE's fulfillment of its obligations under the terms of this Agreement, such sale or assignment shall be made expressly subject to all terms of this Agreement.

Section 11 - Discharge by PGECE of Contract Obligations

All parties hereto understand and agree that as of the date PGECE has installed and made available, consistent and reliable broadband service to a minimum of five hundred (500) new subscriber structures, after the effective date of this Agreement and has provided reasonable documentation to the County and to the Authority verifying same, PGECE shall have satisfied in full all of the requirements of it under the terms of this Agreement and shall be discharged from any further obligations to the County and to the Authority hereunder.

Section 12 - Miscellaneous

(a) *Entire Agreement; Amendments:* This Agreement constitutes the entire agreement among the parties and may not be amended or modified, except in writing, signed by each of the parties hereto. Other than this Agreement, PGECE shall not be required to enter into any additional agreements or submit any additional application letters in order to receive the Grant.

(b) *Governing Law; Venue:* This Agreement is made, and is intended to be performed, in the Commonwealth of Virginia and shall be construed and enforced by the laws of the Commonwealth of Virginia without regard to its conflict of laws provisions.

(c) *Counterparts:* This Agreement may be executed in one or more counterparts, each of which shall be an original, and all of which together shall be one and the same instrument.

(d) *Severability:* If any provision of this Agreement is determined to be unenforceable, invalid or illegal, then the enforceability, validity and legality of the remaining provisions will not in any way be affected or impaired, and such provision will be deemed to be restated to reflect the original intentions of the parties as nearly as possible in accordance with applicable law.

Section 13 - Notices

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

if to PGECE, to:
Micheal E. Malandro, Manager
PGEC Enterprises, LLC
7103 General Mahone Hwy
Waverly, Virginia 23890

with copy to:
F. Lewis Wyche, Jr., Esquire
F. Lewis Wyche, Jr., P.C.
6405 Courthouse Road
Post Office Box 160
Prince George, Virginia 23875

and:
C. J. Berkeley Horne, Esquire
LeClair Ryan
919 East Main Street, 24th Floor
Richmond, Virginia 23219

if to the County, to:
Percy C. Ashcraft, County Administrator
County of Prince George
6602 Courts Drive, 3rd Floor
Post Office Box 68
Prince George, Virginia 23875-0068

with copy to:
Steven L. Micas, Esquire
Prince George County Attorney
6602 Courts Drive, 3rd Floor
Post Office Box 68
Prince George, Virginia 23875-0068

if to the Authority, to:
Jeff Stoke, Assistant Secretary
Industrial Development Authority of the
County of Prince George, Virginia
6602 Courts Drive, 3rd Floor
Post Office Box 68
Prince George, Virginia 23875-0068

with copy to:
David L. Richardson, Esquire
McGuire Woods LLP
Gateway Plaza
800 East Canal Street
Richmond, Virginia 23219-3916

IN WITNESS WHEREOF, the parties hereto have executed this Performance Agreement as of the date first written above.

**COUNTY OF PRINCE GEORGE, VIRGINIA, a political subdivision of the
Commonwealth of Virginia**

By _____

Name: _____

Title: _____

Date: _____

PGEC ENTERPRISES, LLC, a Virginia limited liability company

By _____

Name: _____

Title: _____

Date: _____

**INDUSTRIAL DEVELOPMENT AUTHORITY OF THE COUNTY OF PRINCE
GEORGE, VIRGINIA, a political subdivision of the Commonwealth of Virginia**

By _____

Name: _____

Title: _____

Date: _____