

Appendix F
OPERATING AGREEMENT DRAFT

This Operating Agreement (this “**Agreement**”) is made and entered into this XX day of September, 2011 (the “**Effective Date**”) by and between OpenCape Corporation, a Massachusetts nonprofit corporation (“**OpenCape**”), and XXXXXXXXXXXXXXXX, a Massachusetts corporation (the “**Operator**”).

RECITALS:

WHEREAS, OpenCape owns, has rights in, has constructed or is planning to construct a Collocation Data Center (the “**Data Center**”) within the Regional Collocation Center at 3195 Main Street, Barnstable, Massachusetts 02630 and seeks to license the operation and maintenance of the Data Center;

WHEREAS, OpenCape and XXXXXXXXXXXXXXXX, have entered into that certain Construction Contract dated XX September, 2011 (the “**Construction Contract**”), a copy of which is attached hereto as Exhibit B and incorporated herein by this reference, for XXXXXXXXXXXXXXXX to construct the Data Center on behalf of OpenCape;

WHEREAS, the Operator wishes to be granted the right to use, and OpenCape is willing to grant a right to operate and maintain the Data Center, all on the terms and conditions set forth below; and

NOW, THEREFORE, for and in consideration of the foregoing, and in consideration of the mutual covenants and agreements herein contained, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follow:

ARTICLE I: GRANT OF OPERATING LICENSE

1.1. Grant. Effective as of the date the Operator achieves Substantial Completion under the Construction Contract and upon the Operator’s payment of the first year of License Fees (as hereinafter defined), OpenCape grants to the Operator, and the Operator accepts from OpenCape, a license to use (the “**License**”):

(a) One hundred percent (100%) of the Data Center space and equipment as more particularly described in Exhibit B attached hereto, provided that:

(1) Five percent (5%) of the Data Center space shall be reserved for and made available to government entities at no cost for floor space, energy, climate control, access, and cross connects;

(2) One hundred (100) square feet shall be reserved for OpenCape or its licensed designee and the Operator shall provide the energy, climate control, access, and cross connects necessary for OpenCape or its

designee's use of such portion of the Data Center, all at no cost to OpenCape.

(b) The nonexclusive right to use any Open Cape and/or Data Center related tangible and intangible property to the extent, and only to the extent, reasonably necessary for the use of the Data Center or to operate and maintain the Data Center (collectively, the "**Associated Property**").

1.2. Terms and Conditions. The License is granted on the terms and subject to the covenants and conditions set forth in this Agreement. The License shall be exclusive as to the Data Center, and nonexclusive as to Associated Property. The License does not include the right of the Operator to own, control, modify or revise the Data Center or Associated Property, or the right to encumber the Data Center in any manner except as expressly set forth herein. Moreover, the Operator acknowledges that OpenCape has received funds from the Broadband Technology Opportunity Program administered by the National Telecommunications and Information Administration ("**NTIA**") as well as funds from The Commonwealth of Massachusetts pursuant to Task Order 10-3 by and between OpenCape and the Massachusetts Technology Collaborative, based on grant applications made by OpenCape. All or a portion of the funds received by OpenCape were provided under the American Recovery and Reinvestment Act ("**ARRA**"). As such, the Operator represents that all actions by the Operator under this Agreement shall comply with all applicable laws, rules and regulations, OpenCape's grant application, and laws, rules and regulations applicable to ARRA funds and OpenCape's funding sources.

1.3. Equipment. The Operator acknowledges and agrees that OpenCape is the owner of all equipment, furniture and fixtures purchased by OpenCape or purchased or installed as part of the construction of the Data Center under the Construction Contract. During the Term (as hereinafter defined in Section 3.1), the Operator shall be obligated, at the Operator's cost, to outfit the Data Center with additional necessary equipment to support the growth of customers to one hundred percent (100%) of Data Center capacity and all such equipment shall be the property of OpenCape. The Operator shall repair, replace and maintain any equipment, whether owned by OpenCape or the Operator, that is damaged or fails to function properly that is not from the negligence or willful misconduct of OpenCape. Any equipment, furniture or fixtures purchased and/or installed by the Operator to replace or repair the original equipment purchased by OpenCape or purchased or installed under the Construction Contract shall be the property of OpenCape.

1.4. Relationship to Construction Contract. The Operator acknowledges and accepts that this Agreement shall automatically terminate, without notice to the Operator, if OpenCape terminates the Construction Contract between OpenCape and the Operator.

ARTICLE II: CONSIDERATION FOR GRANT

2.1. License Fee. In consideration of the grant of the License hereunder by OpenCape to the Operator, the Operator agrees to pay to OpenCape a License fee (the "**License Fee**") of \$50,000 per year. The first License Fee shall be due and payable to OpenCape within ten (10) days of Substantial Completion of the Data Center (as such term is defined in the Construction

Contract) (the “**Anniversary Date**”). Thereafter, the License Fee shall be paid annually on the Anniversary Date.

2.2. Increase in License Fee. The License Fee shall be adjusted annually on the Anniversary Date by the increase, if any, in the U.S. Produce Price Index (Bureau of Labor Standards “All Finished Goods” Series ID WPUSOP3000). Notwithstanding anything to the contrary in this Agreement, there shall be no reductions in the License Fee from either the initial year or any subsequent year to the next year of the Agreement if the CPI decreases.

2.3. Revenue Sharing Fee. In addition to the License Fee, the Operator shall pay to OpenCape XX percent (xx%) of the gross revenue, net of state sales taxes, gross receipts taxes, and excise taxes (“**Net Revenues**”) generated by or derived from the sale, lease or licensing of services utilizing the Data Center and the Associated Property (collectively, the “**Revenue Sharing Fee**”).

(a) The Revenue Sharing Fee shall be paid quarterly, based upon actual Net Revenues collected by the Operator. Payments shall be made 30 days from the end of each calendar quarter. The initial Revenue Sharing Fee payment, which shall be due and payable 30 days after the end of the calendar year quarter in which the Data Center reaches Substantial Completion under the Construction Contract, shall include all Net Revenue received by the Operator between the date of selection of the Operator under the request for proposal and the date of such payment.

(b) OpenCape and its agents and consultants shall have the right to conduct an annual audit of the Net Revenues and Revenue Sharing Fee upon no less than 10 days written notice to the Operator. Such audit will be conducted at the offices of the Operator or at such other mutually-agreed upon location during regular business hours, and the Operator agrees to provide OpenCape with reasonable access to all the Operator’s documents and records necessary to perform such an audit of Net Revenues and the Revenue Sharing Fee.

In the event OpenCape conducts an audit and such audit reveals that the Operator failed to pay the proper Revenue Sharing Fees to OpenCape, in addition to any other rights and remedies available to OpenCape, the Operator shall pay, on demand from OpenCape, a penalty of two hundred percent (200%) of the underpayment of the Revenue Sharing Fee. In the event of repetitive and large-scale attempts to reduce or avoid paying the Revenue Sharing Fees due under this Agreement, OpenCape, in addition to any other rights and remedies, shall be permitted to immediately terminate this Agreement.

2.4. Payment. The Operator shall pay all fees and charges due under this Agreement by wire transfer of immediately available funds to the account or accounts designated by OpenCape.

2.5. Interest. If the Operator fails to make any payment under this Agreement, other than the Revenue Sharing Fee, when due, such amount shall accrue interest from the date such payment is due until paid, including accrued interest compounded monthly, at the lesser of the prime rate published by The Wall Street Journal on the due date plus ten percent (10%) or the

highest percentage allowed by law. If a dispute arises concerning an amount due by the Operator, and it is later determined that the amount is due and owing to OpenCape, such amount shall bear interest from the date when due until paid to OpenCape, at the foregoing rate.

2.6. Guaranty. The Operator's payment obligations and obligations to operate and maintain the Data Center, shall be guaranteed by XXXXXXXXXXXXXXXX (the "**Guarantor**"), pursuant to the Guaranty attached hereto and incorporated herein as Exhibit A, to be executed and delivered by the Guarantor as a condition to the effectiveness hereof and the performance by OpenCape of its obligations hereunder.

2.7. Community Contribution Requirements. The Operator and OpenCape shall develop a plan to support OpenCape and the community through technical assistance, sponsorships, and grants in an effort to aid the community in the development of applications that will improve government services and increase economic development. OpenCape and the Operator shall conduct an annual meeting to review performance in this regard and to formulate a community contribution plan for the following year.

ARTICLE III: TERM

3.1. Term. The grant of the License shall become effective on the date the Operator achieves Substantial Completion under the Construction Contract and shall extend for a period of ten (10) years thereafter. The period of the License is herein defined as the "**Term**." Thereafter, provided the Operator is not in default and the Operator has provided OpenCape of its intention to renew this Agreement no less than one year prior to the end of the original term or such Renewal Term (as hereinafter defined), the Operator shall have two (2) options to renew this Agreement for a renewal term (each, a "**Renewal Term**") of five (5) years each. At the expiration of the Term, Renewal Term, or any earlier termination of this Agreement, the License shall immediately terminate, and all rights of the Operator to use, operate and maintain the Data Center, or any part thereof, shall cease, and the parties shall comply with the termination provisions contained in Article XV.

ARTICLE IV: MAINTENANCE AND REPAIR OF THE SYSTEM

4.1. Maintenance Agreement. The Operator shall maintain the Data Center in good working order, and shall replace, repair or upgrade any component of the Data Center when required. The Operator's maintenance obligations shall include both routine maintenance and emergency maintenance. In fulfilling its obligations under this Article, the Operator shall be required to use commercially reasonable efforts to comply with any procedures, protocols or other obligations required by the owners of the Underlying Rights (as hereinafter defined), including Barnstable County. In the event that any owner of an Underlying Right imposes new procedures, protocols or obligations not in effect as of the Effective Date which materially increase the Operator's costs, upon (i) receipt by OpenCape of documentation from the Operator detailing the relevant procedures, protocols or obligations and the Operator's increased costs, and (ii) mutual agreement of the parties, OpenCape shall reimburse the Operator for such increased costs. Appropriately trained and licensed individuals shall perform any and all activities performed by the Operator under this Agreement.

4.2. Except as otherwise provided in this Agreement, the parties agree that the Operator is not entitled to compensation and/or reimbursement for maintenance, repairs, replacements or necessary upgrades, and that the License Fee and Revenue Sharing Fee have been calculated based on the parties understanding that the Operator would be responsible for the repair, replacement, upgrade, and maintenance of the entire Data Center. Absent the prior written approval of OpenCape, which approval shall not be withheld unreasonably, the Operator shall be prohibited from delegating, assigning or subcontracting out any of its maintenance responsibilities to a third party.

4.3. Escrow of Information and Materials. On a continuous basis, each party shall escrow essential information necessary to operate and maintain the Data Center with a mutually acceptable third party escrow agent. The Operator shall pay the costs associated with maintaining the escrow account. The Operator shall provide certain information to the escrow agent, including, but not limited to, configuration, operation and maintenance information for the Data Center, equipment inventories, passwords and access codes for OpenCape owned and Operator owner equipment, and OpenCape shall provide certain information to the escrow agent, including, but not limited to, all documents evidencing municipal approvals, rights of way, easements, and other Underlying Rights-related documents (collectively, the “**Escrowed Information**”). At any time, each party shall be entitled to request a report from the escrow agent confirming the other party’s compliance with its obligation to continuously update the Escrowed Information. Upon an Event of Default (as hereinafter defined), including the filing of bankruptcy by or on behalf of either party, or upon the expiration or earlier termination of this Agreement, the non-breaching party shall be entitled to access the Escrowed Information.

ARTICLE V: DATA CENTER MONITORING

5.1. As part of the Operator’s obligation to maintain and operate the Data Center, the Operator shall continuously monitor the Data Center to help ensure proper operation, detect and resolve outages, and help ensure the Data Center meets the highest level of service and reliability. In addition, the Operator shall regularly perform monitoring, error detection, capacity planning and reporting (including power and cooling), and security monitoring. The Operator shall prepare quarterly reports for OpenCape summarizing performance, health, changes and outages, security breaches or attempted breaches, and power usage effectiveness (PUE) for the Data Center. Basic Data Center monitoring performance and health statistics, trouble tickets and similar documentation shall be uploaded on a regular basis to a controlled access website for OpenCape’s review. In addition, OpenCape shall be entitled to access, upon reasonable notice and during business hours, any and all Data Center monitoring information and reports generated by the Operator which relate to the Data Center.

ARTICLE VI: ACCESS

6.1. Access for Maintenance. The Operator is hereby granted a non-exclusive right of access to the Data Center as is necessary for the Operator to fully perform its obligations to operate, maintain and monitor the Data Center.

ARTICLE VII: RIGHTS OF WAY, RELOCATIONS AND GOVERNMENT AUTHORIZATIONS

7.1. Underlying Rights. OpenCape has obtained or will obtain certain rights for the Operators construction of and use of the Data Center, including, without limitation, a Lease from Barnstable County which owns the building in which the Data Center will be located (the “**Underlying Rights**”). Except for building permits and certificates of occupancy related to the construction of the Data Center under the Construction Contract, OpenCape agrees to maintain during the Term, at its sole cost and expense, all rights and governmental authorizations required by applicable law or otherwise necessary for the construction, installation and maintenance of the Data Center, and such rights and governmental authorizations will and shall remain sufficient to allow such party to perform its obligations and to exercises its rights set forth in this Agreement.

7.2. The foregoing notwithstanding, the License is subject to the terms, conditions, limitations, restrictions and reservations of the Underlying Rights, and subject to the terms, conditions, limitations, restrictions and reservations under which the rights are owned or held by the grantors of the Underlying Rights, including, but not limited to, covenants, conditions, restrictions, easements, reversionary interests, bonds, mortgages and indentures, and other matters, whether or not of record, and to the rights of tenants and licensees in possession. The License granted hereunder is further subject and subordinate to the prior right of the grantors of the Underlying Rights. The rights granted herein are expressly made subject to each and every limitation, restriction or reservation affecting the Underlying Rights. Nothing herein shall be construed as to be a representation, warranty or covenant of OpenCape’s right, title or interest with respect to the Underlying Rights, all of which are disclaimed.

7.3. Compliance. The Operator agrees to use the Data Center only in a manner consistent with the Underlying Rights, agrees that its rights shall in all respects be subject to the terms and conditions of the Underlying Rights, and agrees not to cause or allow to be caused any default under the Underlying Rights.

7.4. Inspection. On the Operator’s request, and in addition to OpenCape’s escrow obligations, OpenCape shall make available for inspection by the Operator, at OpenCape’s offices, copies of all information, documents, agreements, reports, permits, drawings and specifications that relate to the Data Center, including, without limitation, documents evidencing that OpenCape has obtained the Underlying Rights.

7.5. Expiration. On the expiration or other termination of an Underlying Right that is necessary in order to grant, continue or maintain a License granted hereunder in accordance with the terms and conditions hereof, OpenCape, at its sole cost and expense, shall use all reasonable efforts to renew the Underlying Rights.

7.6. Length of Term of Underlying Rights. OpenCape has obtained or will use reasonable efforts to obtain Underlying Rights that are perpetual or have a stated term of not less than twenty-five (25) years.

ARTICLE VIII: USE OF DATA CENTER

8.1. Requirements. The requirements, restrictions, and/or limitations on the Operator's right to use the Data Center and Associated Property, and safety, operational and other rules imposed by applicable law or regulation in connection with the Underlying Rights are referred to collectively as the "**Underlying Rights Requirements.**"

8.2. Operator's Obligations. The Operator represents, warrants and covenants that it will use the Data Center and the Associated Property in compliance with and subject to the Underlying Rights Requirements that have been disclosed to the Operator in writing, and all applicable government codes, ordinances, laws, rules and regulations, including any term, condition or other provision in the grant applications and awards received by OpenCape.

8.3. Use. Subject to the limitations set forth in this Agreement, the Operator may use the Data Center and the Associated Property for any lawful collocation or data center purpose. The Operator shall keep the Data Center free from any liens, rights or claims of any third party attributable to the Operator. In addition, in connection with the Operator's business:

(a) the Operator represents and warrants that its use of the Data Center shall comply with all applicable laws, ordinances, rules, regulations and restrictions, and that the Operator shall require all customers or end users to comply all applicable laws, ordinances, rules, regulations and restrictions;

(b) the Operator shall be responsible for the configuration and operation of the Data Center, including interconnection facilities, equipment, testing equipment and procedures, maintenance, and other facilities or actions necessary to use the Data Center;

(c) the Operator shall maintain a distinct space for telecommunications companies to physically connect to one another and exchange data without incurring local loop charges, commonly referred to as a "meet me room" (MMR). Installation of large amounts of customer equipment in the MMR should be discouraged; however, accommodation of multiplexing equipment to enable customers to create a single connection between their MMR equipment and the rest of their equipment in the building is required.

(d) the Operator shall have a pricing scheme that offers a twenty percent (20%) discount to non-profit corporations and thirty (30%) discount to government entities below the for-profit commercial rate for all services offered in the Data Center. The Operator shall be solely responsible for determining the for-profit commercial rate for all services offered in the Data Center. The percentage discounts for non-profit and government entities shall apply to the Operator's then current for-profit commercial rate.

8.4. Loss. The Operator and OpenCape shall promptly notify each other of any matters pertaining to, or the occurrence (or impending occurrence) of, any event which would be reasonably likely to give rise to any damage or impending damage to or loss of the Data Center that are known to such party.

8.5. No Interference. Each party shall use commercially reasonable efforts to ensure that it does not, and does not permit or enable its customers or authorized users to use its facilities in a way that interferes in any way with or adversely affects the use of the Data Center.

8.6. Cooperation. The Operator and OpenCape agree to cooperate with and support the other in complying with any requirements applicable to their respective rights and obligations hereunder, or any rights or obligations imposed by any governmental agency, regulatory agency or authority.

8.7. The Operator acknowledges and agrees that OpenCape has or will execute a security interest or other statement of NTIA's interest in the real and personal property, including broadband facilities and equipment, acquired or improved with federal funds received by OpenCape, which OpenCape has or will perfect and place on record in accordance with applicable law, rules, guidance and regulations. This security interest will provide that, for the estimated useful life of the real and personal property, facilities, or equipment that are part of the Data Center, OpenCape will not sell, transfer, convey, or mortgage any interest in the real and personal property including equipment acquired or improved in whole or in part with federal funds made available under the award, nor shall the recipient use the real and personal property including facilities and equipment and for purposes other than the purposes for which the award was made, without the prior written approval of the NTIA grants officer. The grants officer may withhold such approval until such time as the recipient first pays to NTIA the Federal share of the real and personal property, including facilities and equipment, as provided in 15 CFR 14.32. This security interest shall be executed in advance of any sale or lease and not later than closeout of the grant.

8.8 The Operator shall provide to its customers a Service Level Agreement (SLA) setting forth the Data Center services to be provided to customers and the service levels in accordance with which such services will be provided, customer notification and compensation requirements for failure to meet Operator obligations under the SLA; a Privacy Policy that sets forth the customers privacy protections; an Acceptable Use Policy that sets forth the proper use and restrictions of customer activity that protects the Operator and OpenCape from fraud and other abuses; and a Security Policy that sets for the physical security program for the Data Center. The breach of SLAs or the policies set forth in this Subsection by the Operator shall be an Event of Default under this Agreement.

ARTICLE IX: LIMITATION ON LIABILITY

9.1. Consequential Damages. Notwithstanding any provision of this Agreement to the contrary, except to the extent caused by its willful misconduct, neither party shall be liable to the other party for any special, incidental, indirect, punitive or consequential costs, liabilities or damages, whether foreseeable or not, arising out of, or in connection with, such party's performance of its obligations under this Agreement.

9.2. Waiver. To the extent that OpenCape is required under the terms or provisions of any easement, right of way, lease, indefeasible right of use agreement or other agreement relating to the provisioning of any service hereunder, to indemnify the grantor or provider thereof from and against any and all claims, demands, suits, judgments, liabilities, losses or

expenses arising out of or related to the Operator's negligence or intentional misconduct in connection with such agreements, the Operator hereby release and waives any claims against such third party.

9.3. Indemnity. The Operator shall indemnify, defend and hold harmless OpenCape from and against any third party claims, actions, damages, liabilities, costs, judgments or expenses (including attorney fees) arising out of or relating to the Operator's negligence or intentional misconduct in connection with performing its obligations under this Agreement, and/or actions by the Operator that are illegal or that infringe any third parties intellectual property rights. OpenCape shall indemnify, defend and hold harmless the Operator from and against any third party claims, actions, damages, liabilities, costs, judgments or expenses (including attorney fees) arising out of or relating to OpenCape's negligence or intentional misconduct in connection with performing its obligations under this Agreement, and/or actions by OpenCape that are illegal or that infringe any third parties intellectual property rights.

9.4. Claims of Customers. In addition to the foregoing indemnities, with respect to third parties that use services provided in the Data Center, the Operator shall make reasonable efforts to obtain a waiver of any claims by such third parties for damages arising or resulting from any defect in or failure of the Data Center.

9.5. Environmental Issues. The Operator shall be deemed the generator of all waste associated with work that it performs that is related to the Data Center, and shall both remove that waste from the area and dispose of or otherwise manage it at its own expense, in compliance with all applicable laws. "Waste" shall include without limitation, any manmade materials (including asbestos) and any soil or other environmental media that may be removed or excavated by the Operator, and all hazardous and non-hazardous substances and materials associated with work that is performed by the Operator that are intended to be discarded, scrapped, or recycled. It shall be presumed that all the substances and material brought to the area of that work by the Operator that are not incorporated into the work (including without limitation damaged components or tools, leftovers, containers, garbage, scrap, residues, or byproducts), except for substances and materials that the Operator intends to use in their original form in connection with similar work, are waste to which the above obligations apply.

ARTICLE X: INSURANCE

10.1. Within thirty (30) days after the Effective Date and throughout the remainder of the Term, the Operator shall secure and maintain insurance coverage, at the Operator's expense, in form and amounts set forth in the following paragraphs from companies lawfully approved to do business in The Commonwealth of Massachusetts, and provide OpenCape with an insurance certificate and copies of insurance policies, with all endorsements, confirming compliance with this requirement for each policy providing such required coverage. Each insurance policy shall contain an endorsement obligating the insurer to provide OpenCape with a minimum of thirty (30) days notice prior to the cancellation of any policy. In addition, the Operator shall be obligated to notify OpenCape within five (5) business days of any material change in coverage to any insurance policy and provide OpenCape with the appropriate documentation or endorsements evidencing such material change. All coverage secured by the Operator, other than professional liability insurance, shall be on a "Per Occurrence" basis. Professional liability

insurance shall be secured on a “claims made” basis. All insurance policies shall be obtained and maintained with companies rated “A” or better by AM Best. The Operator’s insurance shall cover its permitted subcontractors, or the Operator shall require each such subcontractor to maintain insurance of the type and amounts required of the Operator.

10.2. OpenCape, its subsidiaries, affiliates, directors, officers and owners shall be listed as additional insureds for general liability, protection and indemnity, excess liability, and automobile liability coverages required under this Agreement. This coverage shall be primary and non-contributory. The Operator and all of its subcontractors hereby waive all rights of subrogation against OpenCape, its subsidiaries, affiliates, directors, officers and owners. In addition, the Operator hereby waives any and all rights to recover against OpenCape, or its subsidiaries, affiliates, directors, officers and owners, for any loss or damage to the Operator arising from any cause covered by any insurance required to be carried pursuant to this section or any other insurance actually carried by the Operator. The Operator, from time to time, will cause its insurers to issue appropriate waiver of subrogation rights endorsements to all property, general liability and workers’ compensation insurance policies carried in connection with this Agreement.

10.3. Insurance coverage provided for under this Agreement shall be written for not less than the limits of liability described in the following paragraphs or such limits as may be required by law, whichever are greater.

(a) Workers’ Compensation and Employer’s Liability Insurance covering all employees of the Operator and any subcontractors wherever they may be in the United States, so long as they are engaged in the work covered by this Agreement. Workers’ Compensation insurance in amounts required by applicable law and Employer’s Liability insurance with a limit of at least two million dollars (\$2,000,000.00) per occurrence is required. For any activity that takes place over water, such Workers’ Compensation policy shall include a Federal Act Longshore Harbor Workers Coverage Act “endorsement,” which shall be specifically listed on the required insurance certificate.

(b) Commercial General Liability Insurance (Bodily Injury and Property Damage) which shall provide not less than three million dollars (\$3,000,000.00) combined single limit liability insurance, per job aggregate, on a per occurrence basis, with the railroad exclusion and marine liability exclusion deleted, protecting the Operator and any subcontractors from liability arising out of the Work for: (1) bodily injury, sickness, or disease, including death at any time resulting therefrom, sustained by any person; and (2) damage to or destruction of property, including loss of use thereof.

(c) Protection and Indemnity Policy in an amount not less than two million dollars (\$2,000,000).

(d) An Excess/Umbrella policy in an amount not less than two million dollars (\$2,000,000).

(e) The Operator shall maintain at all times during the term of this Agreement “All Risk” property insurance in an amount equal to the replacement cost of any and all

equipment owned, leased, or borrowed while in the Operator's or subcontractor's care, custody, or control, including while in transport at the direction of the Operator or subcontractor. Such "All Risk" insurance shall also cover all materials and equipment stored on a project site for incorporation into the Work as well as all partially constructed structures.

(f) The Operator shall procure and maintain automobile liability insurance covering death or injury to any person or persons, or damage to property arising from the operation of vehicles or equipment, with limitations of not less than two million dollars (\$2,000,000).

(g) Prior to commencing any design or engineering work, the Operator, or the subcontractor performing such design or engineering work, shall procure and maintain professional liability insurance, with limitations of not less than one million dollars (\$1,000,000) combined single limit for each occurrence and two million dollars (\$2,000,000) in the aggregate.

(h) Any other insurance coverages required pursuant to the terms of the Underlying Rights or the rules and regulations of the owner of such Underlying Right.

10.4. Failure. If the Operator fails to obtain the required insurance or fails to obtain the required certificates from any contractor and a claim is made or suffered, the Operator shall indemnify and hold harmless the other party from any and all claims for which the required insurance would have provided coverage. Further, in the event of any such failure which continues after seven (7) days' written notice thereof by OpenCape, OpenCape may, but shall not be obligated to, obtain such insurance and will have the right to be reimbursed for the cost of such insurance by the Operator.

10.5. Denial of Coverage. If coverage is denied or the insurance carrier disputes reimbursement of a properly presented claim, the Operator shall make good-faith efforts to pursue such claim with its carrier.

ARTICLE XI: TAXES, FEES AND OTHER GOVERNMENTAL IMPOSITIONS

11.1. Impositions. In addition to the License Fee and other amounts set forth in this Agreement, the Operator agrees to pay applicable taxes, fees, levies, imposts, duties, or withholdings arising out of the transactions contemplated by this Agreement that are imposed by any federal, state or local government or other public taxing authority (collectively, the "**Impositions**"). Impositions shall not include taxes, fees or similar levies based on net income, property taxes and similar ad valorem taxes. The parties agree to cooperate with each other to minimize the aggregate Impositions payable with respect to the Data Center.

11.2. Contest by User. The Operator shall have the right to contest by appropriate proceedings any Imposition (including by nonpayment of such Imposition). In such event, the Operator shall indemnify and hold OpenCape harmless from any expense, legal action or cost, including reasonable attorneys' fees, resulting from the Operator's exercise of its rights hereunder.

11.3. Cooperation. OpenCape and the Operator agree to cooperate fully in the preparation of any returns or reports relating to the Impositions, and in the efforts of either party to contest an Imposition.

11.4. Future Changes. OpenCape and the Operator acknowledge and agree that the provisions of this Article are intended to allocate the Impositions on procedures and methods of computation that are in effect on the date of this Agreement. Material changes in such procedures and methods could significantly alter the fundamental economic assumptions of the parties underlying this Agreement. Accordingly, the parties agree that, if such procedures or methods of computation change materially, the parties will negotiate in good faith an amendment to this Article to preserve, to the extent reasonably practicable, the economic intent and effect of this Article.

ARTICLE XII: NOTICES

12.1. Notice Addresses. Unless otherwise provided in this Agreement, all notices and communications required or permitted under this Agreement shall be in writing and addressed to the other party as follows:

OpenCape: OpenCape Corporation
P.O. Box 1148
Barnstable, MA 02630-2148
Attention: Daniel Gallagher
Email: dgallagher@opencape.com

with a copy to: Nutter McClennen & Fish, LLP
1471 Iyannough Road
P.O. Box 1630
Hyannis, MA 02601
Attention: Michael E. Scott, Esq.
Email: mscott@nutter.com

Operator: XXXXXX
XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXX, XX xxxxx
Attention: xxxxxxxxxxxx
Email: xxxxxx@xxxxxxxx.com

with a copy to: XXXXXX
XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXX, XX xxxxx
Attention: xxxxxxxxxxxx
Email: xxxxxx@xxxxxxxx.com

Or at such other address as may be designated in writing to the other party.

12.2. Notice and Invoice Delivery. Unless otherwise provided herein, notices and invoices shall be in writing, hand delivered, sent by registered or certified U.S. Mail, postage prepaid, or by commercial overnight delivery service, or transmitted by electronic mail. Any such notice shall be deemed served or delivered to the addressee or its office when received at the address for notice specified above when hand delivered, upon confirmation of sending when sent by electronic mail, on the day after being sent when sent by overnight delivery service, or three (3) United States Postal Service business days after deposit in the mail when sent by U.S. mail.

ARTICLE XIII: CONFIDENTIALITY/PUBLIC RELATIONS

13.1. Duties. As used herein, “**Confidential Information**” shall mean this Agreement and all materials, maps, network, engineering or technical information, customer information, product, service or pricing information, and any other documents that are marked confidential and disclosed by one party to the other in fulfilling the provisions and intent of this Agreement, as well as confidential or proprietary information that is orally disclosed, provided that, for information that is orally disclosed, the disclosing party indicates to recipient at the time of disclosure the confidential or proprietary nature of the information and confirms in writing to the recipient within 30 days after such disclosure that such information is confidential.

(a) Each party agrees to hold the Confidential Information of the other party in confidence. Neither party shall divulge or otherwise disclose the provisions of this Agreement to any third party without the prior written consent of the other party, except that either party may make disclosure to those required for the implementation of this Agreement, and to customers and prospective customers, purchasers and prospective purchasers, auditors, attorneys, financial advisors, lenders and prospective lenders, investors and prospective investors, provided that in each case the recipient agrees in writing to be bound by the confidentiality provisions set forth in this section. In addition, either party may make disclosure as required by (i) a governmental agency officer, employee or auditor in connection with compliance with any grant and/or funding requirements, (ii) a court order, or (iii) by law or in any legal or arbitration proceeding relating to this Agreement.

(b) If either party is required by law, by any federal or state funding source, or by interrogatories, requests for information or documents, subpoena, civil investigative demand or other legal process to disclose the provisions of this Agreement or the design information referred to in this section, it will provide the other party with prompt prior written notice of such request or requirement so that such party may seek an appropriate protective order and/or waive compliance with this section. The party whose consent to disclose information is requested shall respond to such request, in writing, within five (5) working days of the request by either authorizing the disclosure or advising of its election to seek a protective order, or if such party fails to respond within the prescribed period the disclosure shall be deemed approved.

(c) Nothing herein shall be construed as granting any right or license under any copyrights, inventions, or patents, enhancements thereto, or other intellectual

property now or hereafter owned or controlled by OpenCape or the Operator, respectively.

(d) Upon termination of this Agreement for any reason or upon request of either party, the other party shall return all Confidential Information (except such Confidential Information that is necessary to operate and maintain the Data Center), together with any copies of same, to the party requesting the return of its Confidential Information. The requirements of confidentiality set forth herein shall survive return of such Confidential Information and the expiration of the Term.

(e) Neither party shall use any trademark or trade name of the other party or refer to the subject matter of this Agreement or the other party in any promotional activity or otherwise, nor disclose to others any specific information about the content of this Agreement, without the prior written consent of the other party. The parties agree that either party can generally reference the Data Center, and the Operator may discuss the Data Center in its sales and marketing efforts to customers and prospects in connection with this Agreement.

13.2. Press Releases/Public Relations.

(a) Neither party shall publish or use any advertising, sales promotions, or other publicity materials that use the other party's logo, trademarks, or service marks without the prior written approval of the other party.

(b) Each party shall have the right to review and approve any publicity material, press releases, or other public statements by the other that refer to such party or that describe any aspect of this Agreement or which relate to the Data Center. Each party agrees not to issue any such publicity materials, press releases, or public statements without the prior written approval of the other party, except as are required to comply with federal or state securities laws.

(c) Nothing in this Agreement establishes a lease, license or right for either party to use any of the other party's brands, marks, or logos without prior written approval of the other party.

13.3. Survival. The provisions of this Article shall survive expiration or other termination of this Agreement.

ARTICLE XIV: DEFAULT PROVISIONS AND REMEDIES

14.1. Events of Default by the Operator. Each of the following shall be deemed an Event of Default by the Operator under this Agreement:

(a) Failure of the Operator to pay the License Fee, the Revenue Sharing Fee, or any other undisputed fees or sums required to be paid under the terms of this Agreement and such default continues for a period of thirty (30) days after written notice of any unpaid due amounts is provided to the Operator;

(b) Failure of the Operator to satisfy its obligations regarding Escrowed Information, and such default continues for a period of thirty (30) days after written notice thereof from OpenCape is provided;

(c) Failure by the Operator to perform or observe any other material term, covenant, agreement or condition of this Agreement on the part of the Operator to be performed and such default continues for a period of thirty (30) days after written notice thereof from OpenCape (provided that if such default cannot be cured within such thirty (30) day period, this period will be extended if the Operator commences to cure such default within such thirty (30) day period and proceeds diligently thereafter to effect such cure);

(d) The filing of a tax, mechanic's or any other lien against the Data Center or other property of OpenCape which is not bonded or discharged within forty-five (45) days of the date the Operator receives notice that such lien is filed;

(e) An event of the Operator's or the Guarantor's bankruptcy;

(f) If the Operator knowingly uses the Data Center in violation of any law or in aid of any unlawful act or undertaking; or

(g) If any authorization which lawfully may be required of the Operator by any governmental or private authority for the operation of the Data Center is denied or revoked.

14.2. OpenCape Remedies. Subject to Section 14.1, upon the occurrence of an Event of Default, OpenCape, without further notice to the Operator in any instance (except where expressly provided for below or by applicable law) may do any one or more of the following:

(a) If the Event of Default occurs due to an Event of Default listed in Section 14.1(a), (b), (c) or (e), terminate the Agreement immediately;

(b) Elect to terminate the License on thirty (30) days notice if such Event of Default is not cured within such thirty (30) day period;

(c) Perform, on behalf and at the expense of the Operator, any obligation of the Operator under this Agreement which the Operator has failed to perform and of which OpenCape shall have given the Operator notice, the cost of which performance by OpenCape shall be payable by the Operator to OpenCape upon demand; and/or

(d) Exercise any other legal or equitable right or remedy that it may have.

In the event OpenCape is successful in enforcing its rights or remedies under this Agreement, all costs and expenses incurred by OpenCape concerning the successful aspects of any enforcement action (including, without limitation, reasonable attorneys' fees) in enforcing any of its rights or remedies under this Agreement shall be repaid to OpenCape by the Operator on demand.

14.3. If the License is terminated by OpenCape pursuant to this Article, the Operator nonetheless shall remain liable for any License Fee and other payments and damages which may be due or sustained prior to such termination, all reasonable dues, fees and expenses including, but not limited to, reasonable attorneys' fees, costs and expenses incurred by OpenCape in pursuit of its remedies hereunder (all such License Fees, damages, costs, fees and expenses being referred to herein as "**Termination Damages**"), which Termination Damages, at a minimum, shall be an amount equal to the present worth (as of the date of such termination) of (a) the annual License Fees which, but for termination of the License would have become due during the remainder of the term of the License, and (b) the Revenue Sharing Fees which, but for termination of the License would have become due during the remainder of the term of the License, which shall be calculated to be an amount equal to the average of the Revenue Sharing Fees in the three prior years (or if three years of the Term has not yet occurred, the average of the anticipated Revenue Sharing Fees) multiplied by the number of years remaining in the Term. "Present worth" shall be computed by discounting such amount to present worth at a discount rate equal to one percentage point above the discount rate then in effect at the New York Federal Reserve Bank. Termination Damages shall be due and payable immediately upon demand by OpenCape following any termination of the License pursuant to this Article.

14.4. All rights and remedies of OpenCape set forth in this Agreement shall be cumulative, and none shall exclude any other right or remedy, now or hereafter allowed by or available under any statute, ordinance, rule of court, or the common law, either at law or in equity, or both.

14.5. Events of Default by OpenCape. The following events or occurrences shall constitute a default by OpenCape under this Agreement:

- (a) Any material noncompliance by OpenCape with the terms of this Agreement;
- (b) Any material breach by OpenCape of a representation or warranty under this Agreement.

The Operator shall give prompt written notice to OpenCape of the occurrence of any default under this Agreement. If such default continues for thirty (30) days after receipt of such notice (provided that if such default cannot be cured within such thirty (30) day period, this period will be extended if OpenCape continues to cure such default within such thirty (30) day period and proceeds diligently thereafter to effect such cure), the Operator may at its option, terminate the License Agreement without further obligation and pursue any legal remedies it may have at law or equity.

14.6. Operator's Remedies. Subject to Section 14.5 above, upon the occurrence of an Event of Default by OpenCape, the Operator, without further notice to OpenCape may do any one or more of the following:

- (a) Elect to terminate the License on thirty (30) days notice if such Event of Default is not cured within such thirty (30) day period;

(b) Perform, on behalf and at the expense of OpenCape, any obligation of OpenCape under this Agreement which OpenCape has failed to perform and of which the Operator shall have given OpenCape notice, the cost of which performance by the Operator shall be payable by OpenCape to the Operator upon demand; and/or

(c) Exercise any other legal or equitable right or remedy that it may have.

In the event the Operator is successful in enforcing its rights or remedies under this Agreement, all costs and expenses incurred by the Operator concerning the successful aspects of any enforcement action (including, without limitation, reasonable attorneys' fees) in enforcing any of its rights or remedies under this Agreement shall be repaid to the Operator by OpenCape on demand.

ARTICLE XV: TERMINATION

15.1. Termination. This Agreement shall automatically terminate on the expiration of the Term, or earlier as provided in this Agreement. Upon the expiration of the Term or other termination of this Agreement, the License shall immediately terminate and all rights of the Operator to use the Data Center and the Associated Property shall cease, all rights to use of the Data Center shall revert to OpenCape, and OpenCape shall owe the Operator no further duties or consideration. The Operator shall either transfer ownership of the Operator's equipment in the Data Center to OpenCape or promptly remove all electronics, equipment and other property owned by the Operator from the Data Center that is not the property of OpenCape pursuant to the terms of this Agreement or which OpenCape elects not to purchase pursuant to Section 15.3, at the Operator's sole cost and under OpenCape's supervision. Moreover, OpenCape shall be immediately entitled to access the Escrowed Information upon the expiration or earlier termination of this Agreement.

15.2. Effect of Termination. Except as otherwise provided in this Agreement, the Operator shall not be entitled to, nor shall OpenCape be liable for, any refunds of amounts paid to OpenCape by reason of early termination of this Agreement unless termination is due to an Event of Default by OpenCape.

15.3. Right to Acquire Equipment at Termination. Upon the expiration or earlier termination of this Agreement, the parties acknowledge and agree that OpenCape may, at OpenCape's option, purchase some or all of the electronics, equipment and other property owned by the Operator and used in connection with the Data Center, at the fair market value of each such item on the date of termination or expiration of this Agreement.

15.4. Notwithstanding the foregoing, no termination or expiration of this Agreement shall affect any right or obligation that would be due or performed after the relinquishment, expiration, or termination of this Agreement which shall survive the relinquishment, expiration or termination of this Agreement or any part thereof.

ARTICLE XVI: FORCE MAJEURE

Neither party shall be liable to the other party and each party's performance under this Agreement shall be excused, if and to the extent that any failure or delay in such party's

performance of one or more of its obligations hereunder caused by any of the following conditions, and such party's performance of such obligations or obligations shall be excused and extended for and during the period of any such delay: act of God; fire, flood, fiber, cable or other material failures, shortages or unavailability or other delay in delivery not resulting from the responsible party's failure to timely place orders therefor; lack of or delay in transportation; government codes, ordinances, laws, rules, regulations or restrictions; war or civil disorder; strikes or other labor disputes; failure of a third party to grant or recognize an Underlying Right; or any other cause beyond the reasonable control of such party. The party claiming relief under this Article shall notify the other in writing of the existence of the event relied on and the cessation or termination of said event, and the party claiming relief shall exercise reasonable commercial efforts to minimize the time of any such delay.

ARTICLE XVII: DISPUTE RESOLUTION

17.1. Waiver. EACH PARTY TO THIS AGREEMENT HEREBY WAIVES ITS RESPECTIVE RIGHT TO A JURY TRIAL OF ANY CLAIMS OR CAUSE OF ACTION BASED UPON OR ARISING OUT OF THIS AGREEMENT. ALL DISPUTES ARISING FROM OR RELATING TO THIS AGREEMENT SHALL BE RESOLVED PURSUANT TO THIS ARTICLE.

17.2. Binding Arbitration. Any dispute arising between OpenCape and the Operator in connection with this Agreement that is not settled to their mutual satisfaction within the applicable notice or cure periods provided in this Agreement, shall, upon the demand for arbitration by either party, be settled by arbitration in Boston, Massachusetts, in accordance with the Commercial Arbitration Rules of the American Arbitration Association in effect on the date that a party gives notice of its demand for arbitration under this Article. If the parties cannot agree on a single arbitrator within fifteen (15) calendar days after the notice demanding arbitration is received by the receiving party, OpenCape and the Operator shall each select an arbitrator within such fifteen (15) day period and the two (2) arbitrators shall select a third arbitrator within ten (10) calendar days.

If the parties fail to appoint arbitrators or the arbitrators cannot agree on a third arbitrator, then either party may request that the American Arbitration Association select and appoint a neutral arbitrator who shall act as the sole arbitrator. The parties shall be entitled to submit expert testimony and/or written documentation on such arbitration proceeding. The decision of the arbitrator or arbitrators shall be final and binding on OpenCape and the Operator and shall include written findings of law and fact, and judgment may be obtained thereon by either OpenCape or the Operator in a court of competent jurisdiction. The cost of the arbitration, including the fees and expenses of the arbitrator or arbitrators, shall be borne by non-prevailing party unless the award otherwise provides. In no event shall the arbitrator or arbitrators have the power to award any damages described in and precluded by Article IX (Limitation of Liability) which Article shall be binding on the arbitrator(s).

17.3. Exceptions to Arbitration Obligation. The obligation to arbitrate shall not be binding on either party with respect to requests for preliminary injunctions, temporary restraining orders, specific performance, or other procedures in a court of competent jurisdiction

to obtain interim relief when deemed necessary by such court to preserve the status quo or prevent irreparable injury pending resolution by arbitration of the actual dispute.

17.4. Arbitrator Confidentiality Obligation. Any arbitrator appointed to act under this Article must agree to be bound to the provisions of Article XIII (Confidentiality) with respect to the terms of this Agreement and any information obtained during the course of the arbitration proceedings.

17.5. Payment Disputes. The Operator and OpenCape shall attempt in good faith to resolve any bona fide dispute arising out of or relating to any monetary obligation under this Agreement as expeditiously as possible by negotiations between a Vice President of the Operator or his or her designated representative with sufficient authority to negotiate a resolution of the dispute and an executive of OpenCape with similar authority. Either the Operator or OpenCape may give the other party written notice of any such payment dispute which notice shall include documentation substantiating the dispute. In the event the amount in dispute is in excess of \$25,000.00 and is not resolved on or before its actual or purported due date hereunder, then the amount in dispute shall be deposited with an escrow agent mutually acceptable to the parties who shall hold said sum along with all interest earned thereon, in escrow, pending resolution of the dispute hereunder and shall distribute said sums in accordance with the resolution of the parties under this section or the decision of the arbitrator under this Article. All undisputed payments shall be paid in accordance with the due date set forth herein regardless of any dispute hereunder.

(a) Within twenty (20) days after delivery of notice of a payment dispute as described above, the designated executives shall meet at a mutually acceptable time and place, and thereafter as often as they reasonably deem necessary to exchange information and to attempt to resolve the dispute. If the matter has not been resolved within thirty (30) days after the first meeting, either the Operator or OpenCape may demand arbitration in accordance with the provisions of this Article.

(b) To the extent any payment dispute described hereunder is resolved in favor of a party, whether pursuant to the provisions of this section or pursuant to arbitration, the escrow agent shall pay the appropriate amount of the total amount previously placed in escrow under this section to the prevailing party with the other party paying interest at the rate set forth in Section 2.5 on such amount less, however, the proportionate amount of any interest earned (net of any account charges) thereon while in escrow and distributed to the prevailing party. Any amounts remaining in escrow with any interest earned thereon (net of any account charges) shall be distributed to the party that deposited such amount.

(c) All negotiations conducted pursuant to this section shall be confidential.

Unless a different interest rate is set forth herein, the prevailing party in any payment dispute shall be entitled to interest at the rate set forth in Section 2.5 on the disputed amounts measured from the date the disputed amount was due or the disputed amount was invoiced to the date payment of the disputed amount was made, and to have its costs associated with establishing any escrow described above reimbursed by the other party.

ARTICLE XVIII: ASSIGNMENTS/NON-COMPETITION

18.1. Assignments. Except as specifically provided in this Article, the Operator may not transfer or assign all or any part of its interest in this Agreement or in the Data Center or the Associated Property, in whole or in part, or delegate any duties, burdens, or obligations arising hereunder, without the consent of OpenCape, which consent may be given or withheld in OpenCape's sole discretion. A transfer or assignment of substantially all of the assets of the Operator, or a transfer or assignment of fifty (50%) percent or more of the assets or interests in the Operator (whether by transfer of stock, merger, consolidation, partnership interest, or otherwise), either in one transaction or a series of transactions, shall be deemed to be a transfer hereunder requiring the consent of OpenCape.

This Agreement and each of the parties' respective rights and obligations under this Agreement shall be binding upon and shall inure to the benefit of the parties hereto and each of their respective permitted successors and assigns. Except as otherwise provided in this Agreement, OpenCape and the Operator do not intend that this Agreement shall benefit or be enforceable by any person other than OpenCape and the Operator and their respective successors and assigns.

ARTICLE XIX: REPRESENTATIONS AND WARRANTIES

19.1. By Each Party. By execution of this Agreement each party represents and warrants to the other that:

- (a) It has the full right and authority to enter into, execute, deliver and perform its obligations under this Agreement;
- (b) This Agreement constitutes a legal, valid and binding obligation enforceable against such party in accordance with its terms, subject to a bankruptcy or solvency, creditor's rights and general equitable principles;
- (c) Except as otherwise disclosed to in writing prior to the execution hereof, there are no actions, suits or proceedings pending or overtly threatened against such party before any court or administrative agency that would materially impair such party's performance of its obligations under this Agreement;
- (d) Its execution of and performance under this Agreement will not violate any applicable statutes, regulations, rules or court orders of any local, state or federal governmental authority; and
- (e) The execution, delivery and performance of this Agreement by such party has been duly authorized by all requisite corporate action, and the signatories for such a party thereto are authorized to sign.

19.2. Disclaimer. EXCEPT AS SPECIFICALLY SET FORTH IN THIS ARTICLE, OPENCAPE MAKES NO WARRANTY, EXPRESS OR IMPLIED, WITH RESPECT TO THE USER FIBERS, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR

FITNESS FOR A PARTICULAR PURPOSE, AND ALL SUCH WARRANTIES ARE HEREBY EXPRESSLY DISCLAIMED. EXCEPT AS SPECIFICALLY SET FORTH IN THIS ARTICLE, THE OPERATOR MAKES NO WARRANTY, EXPRESS OR IMPLIED, WITH RESPECT TO ITS OBLIGATIONS UNDER THIS AGREEMENT, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND ALL SUCH WARRANTIES ARE HEREBY EXPRESSLY DISCLAIMED.

ARTICLE XX: GENERAL PROVISIONS

20.1. Binding Effect. This Agreement and each of the parties' respective rights and obligations under this Agreement, shall be binding on and shall inure to the benefit of the parties hereto and each of their respective permitted successors and assigns.

20.2. Contingent on Receipt of Funds. This Agreement is contingent on OpenCape's obtaining final funding commitments from federal and state sources as well as OpenCape's receipt of all funds committed. In the event all committed funds are not received, at the election of OpenCape, this Agreement shall terminate without recourse to either party.

20.3. Waiver. No delay or omission by either party to exercise any right or power occurring upon non-compliance or failure of performance by the other party, nor shall any custom or practice which may arise between the parties in the administration of any part of this Agreement, be construed to waive or lessen the right of a party to insist upon the performance by the other party in strict accordance with the provisions hereof, nor shall it impair that right or power or be construed to be a waiver. A waiver by either party of any of the covenants, conditions or Agreements to be performed by the other party shall not be construed to be a general waiver or relinquishment on its part of any such provision, but the same shall nevertheless be and remain in full force and effect. The failure of either party to insist upon or enforce strict performance by the other party of any provision of this Agreement, or to exercise any right under this Agreement, shall not be construed as a waiver or relinquishment of such party's right to enforce any such provision or right in any other instance.

20.4. Governing Law. This Agreement shall be governed by and construed in accordance with the domestic laws of The Commonwealth of Massachusetts without reference to its choice of law principles. If the Parties mutually agree not to pursue arbitration for the settlement of any dispute arising under this Agreement, or if arbitration is for any reason unavailable or inapplicable, venue for all causes of action will be in Boston, Massachusetts, or, for federal actions, in the federal district court for the District of Massachusetts.

20.5. Rules of Construction. The captions or headings in this Agreement are strictly for convenience and shall not be considered in interpreting this Agreement or as amplifying or limiting any of its content. Words in this Agreement that import the singular connotation shall be interpreted as plural, and words that import the plural connotation shall be interpreted as singular, as the identity of the parties or objects referred to may require.

(a) Unless expressly defined herein, words having well known technical or trade meanings shall be so construed. All listings of items shall not be taken to be

exclusive, but shall include other items, whether similar or dissimilar to those listed, as the context reasonably requires.

(b) Except as set forth to the contrary herein, any right or remedy of the Operator or OpenCape shall be cumulative and without prejudice to any other right or remedy, whether contained herein or not.

(c) Nothing in this Agreement is intended to provide any legal rights to anyone not an executing party of this Agreement.

(d) The parties and their respective counsel have reviewed this Agreement in its entirety and acknowledge that each has had a full opportunity to negotiate the terms of this Agreement. Therefore, the parties waive any and all applicable common law and statutory rules of construction that any provision of this Agreement should be construed against the drafter of the Agreement. The Agreement and all provisions thereof shall in all cases be construed as a whole, according to the fair meaning of the language used.

(e) All actions, activities, consents, approvals and other undertakings of the parties in this Agreement shall be performed in a reasonable and timely manner, it being expressly acknowledged and understood that time is of the essence in the performance of obligations required to be performed by a date expressly specified herein. Except as specifically set forth herein, for the purpose of this Agreement the standards and practices of performance within the telecommunications industry in the relevant market shall be the measure of a party's performance.

20.6. Entire Agreement. This Agreement, together with the Construction Contract entered into simultaneously herewith, constitutes the entire and final agreement and understanding between the parties with respect to the subject matter hereof and supersedes all prior written and oral agreements, representations and understandings between the Parties relating to the subject matter hereof, which are of no further force or effect. The Exhibits referred to herein are an integral part hereof and are hereby incorporated into this Agreement. To the extent that any of the provisions of any Exhibit hereto are inconsistent with the express terms of this Agreement, the terms of this Agreement shall control. This Agreement may only be modified or amended by an instrument in writing executed by an authorized representative of each party and delivered to the party relying on the writing. Neither electronic mail nor instant messaging shall be considered a "writing" sufficient to change, modify, extend or otherwise affect the terms of this Agreement. The parties agree to review the terms of this Agreement every five years from the Effective Date to make any mutually-agreed to changes to address the current economic and business climate at that time.

20.7. No Personal Liability. Each action or claim against any party arising under or relating to this Agreement shall be made only against such party as a corporation, and any liability relating thereto shall be enforceable only against the corporate assets of such party. Except in connection with OpenCape's enforcement of the Guaranty, no party shall seek to pierce the corporate veil or otherwise seek to impose any liability relating to, or arising from, this Agreement against any shareholder, employee, officer or director of the other party. Each of

such persons is an intended beneficiary of the mutual promises set forth in this Article and shall be entitled to enforce the obligations of this section.

20.8. Relationship of the Parties. The relationship between the Operator and OpenCape is that of independent contractors and independent parties, and is not that of partners, agents, or joint venturers of one another, and nothing contained in this Agreement shall be deemed to constitute a partnership or agency agreement between them for any purpose, including, but not limited to federal income tax purposes. The Operator and OpenCape, in performing any of their obligations hereunder, shall discharge their contractual obligations at their own risk subject, however, to the terms and conditions hereof.

20.9. Severability. If any term, covenant or condition contained herein is, to any extent, held invalid or unenforceable in any respect by any court having jurisdiction, the remainder of this Agreement shall not be affected thereby, but shall remain in full force and effect, and each term, covenant or condition of this Agreement shall be valid and enforceable to the fullest extent permitted by law. It is the intention of the parties to this Agreement, and the parties hereto agree, that in lieu of each clause or provision of this Agreement that is illegal, invalid or unenforceable, the court shall supply, as a part of this Agreement, an enforceable clause or provision as similar in terms to such illegal, invalid or unenforceable clause or provision as may be possible.

20.10. No Third Party Beneficiary. Except as expressly stated in this Agreement, the provisions of this Agreement are for the sole benefit of the parties to this Agreement, and no third party may seek to enforce or benefit from these provisions.

20.11. Nonprofit Status. The parties agree to use commercially reasonable efforts to make any and all modifications to this Agreement or the Construction Contract that are necessary and appropriate to enable OpenCape to maintain its nonprofit status.

20.12. Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original, and all of which taken together shall constitute one and the same instrument. Electronic mail transmission of any signed original document and/or retransmission of any signed electronic mail transmission shall be deemed the same as delivery of an original. The parties agree to exchange original signature pages as soon as practicable following exchange of electronic mail signature pages (if that occurs), but the original signatures are not required in order to enforce this Agreement.

[SIGNATURES ON FOLLOWING PAGE]

In confirmation of their consent and agreement to the terms and conditions contained in this Agreement and intending to be legally bound hereby, the parties have executed this Agreement under seal as of the date first above written.

OpenCape Corporation, a Massachusetts
nonprofit corporation

By: _____
Name: Daniel J. Gallagher
Title: CEO

By: _____
Name: Sean M. O'Brien
Title: Treasurer

XXXXXX, a Massachusetts corporation

By: _____
Name:
Title:

By: _____
Name:
Title:

By: _____
Name:
Title:

EXHIBIT A

GUARANTY

This GUARANTY (the “**Guaranty**”) is dated as of xx day of June, 2011, and is executed and delivered by xxxxxxxxxxxxxxxxxxxxxxxxxxxx, a Massachusetts corporation, with a notice address of xxxxxxxxxxxxxxxxxxxxxxxx, xxxxxxxxxxxx, xxxxxxxxxxxx xxxx (the “**Guarantor**”) to OpenCape Corporation, a Massachusetts nonprofit corporation, with a notice address of 3225 Main Street, Barnstable, Massachusetts 02630 (“**OpenCape**”).

Recitals

Simultaneously with the execution of this Guaranty, OpenCape and xxxxxxxxxxxxxxxxxxxx, a Massachusetts corporation (the “**Operator**”) are entering into that certain Operating Agreement (the “**Agreement**”) granting the Operator the right to use the OpenCape Regional Collocation Data Center and associated property (the “**Data Center**”) being constructed on behalf of OpenCape provided xxxxxxxxxxxxxxxx operates and maintains the Data Center.

Guarantor desires, to guarantee the payment and performance of all of the Operator’s obligations under the Agreement.

Agreement

1. **Nature of Guaranty.** For consideration received, and in order to induce OpenCape to enter into the Agreement, Guarantor hereby absolutely and unconditionally guarantees to OpenCape the complete and prompt payment, performance and observance of all of the covenants, conditions and agreements in the Agreement to be paid, performed and observed by the Operator, its successors and assigns, for the entire term thereof, as the same may be extended or renewed, and for any holdover term thereafter. This Guaranty shall apply to the entire Data Center, as the same may be expanded, contracted, relocated, sublet, licensed and/or assigned (voluntarily or otherwise) from time to time. This Guaranty is absolutely unlimited in amount. Payment hereunder may be required on any number of occasions. Notwithstanding anything to the contrary in this Guaranty, the Guaranty shall expire on December 31, 2014.
2. **Guaranty Not Impaired.** The Guarantor expressly agrees that the validity of this Guaranty and the obligations of the Guarantor under this Guaranty shall not be terminated or in any way affected or impaired by reason of: (i) any amendment to the Agreement; (ii) the assertion by OpenCape against the Operator of any of the rights or remedies reserved to OpenCape pursuant to the provisions of the Agreement; (iii) the waiver or failure by OpenCape to enforce any of the terms, covenants or conditions of the Agreement, this Guaranty, or any other guaranty of the Agreement (if any), or by reason of the granting of any indulgence or extension to the Operator or any permitted successor or assignee of the Operator, or Guarantor, or to any other guarantor (if any), all of which may be given or done by OpenCape from time to time without notice to the Guarantor; or (iv) any relief of the Operator from CapeNet’s obligations under the Agreement by operation of law or otherwise, including without limitation, in connection with proceedings under bankruptcy or other laws now in effect or hereafter enacted.
3. **Guarantor Waivers.** To the fullest extent permitted by applicable law, the Guarantor hereby waives: (i) notice of non-payment of License Fees and Revenue Sharing Fees (as such terms are defined in the Agreement), additional charges, or any other amounts to be paid by the Operator under the Agreement; (ii) notice of default or non-performance of any of the Operator’s other covenants, conditions and agreements contained in the Agreement; and (iii) any and all legal, equitable and/or surety defenses whatsoever to which Guarantor might otherwise be entitled.

4. **Joint and Several Liability.** The Guarantor agrees that its liability under this Guaranty shall be primary and joint and several with the Operator and any other party liable for the Operator's obligations under the Agreement, and that in any right of action which shall accrue to OpenCape under the Agreement, OpenCape may, at its option, proceed against the Guarantor without having commenced any action or having obtained any judgment against xxxxxx or any other party liable for the Operator's obligations under the Agreement.
5. **Financial Interest.** The Guarantor represents and warrants to OpenCape that the Guarantor has a financial interest in the Operator and will derive some benefit in connection with the Agreement, and that the expectation of such benefit has induced the Guarantor to give this Guaranty.
6. **Authority.** The Guarantor represents and warrants to OpenCape that the undersigned individuals are duly authorized to execute and deliver this Guaranty on behalf of Guarantor, that this Guaranty is a valid and binding obligation of Guarantor, and that this Guaranty violates no law, rule, regulation, agreement or contract applicable to or binding on Guarantor.
7. **Subordination of Guarantor Claims.** In order further to induce OpenCape to enter into and execute the Agreement, Guarantor agrees that any and all claims of any nature which Guarantor may now or hereafter have against the Operator are hereby subordinated to the full and final cash payment to OpenCape of all obligations under the Agreement and under this Guaranty. Without limiting the generality of the foregoing, prior to the full and final cash payment to OpenCape of all obligations under the Agreement and under this Guaranty, Guarantor shall not: (i) make any claim of liability of the Operator to Guarantor or assert any set-off or counterclaim against the Operator whether by reason of paying any sum due or recoverable under the Agreement, or by any other means or on any other ground; or (ii) attempt to prove in competition with OpenCape any claim regarding any payment made under this Guaranty or under the Agreement; or (iii) have the benefit of any counterclaim or proof of claim or dividend or payment by or on behalf of the Operator or the benefit of any other security for any obligation. Guarantor waives any rights of subrogation, any rights to enforce any right or remedy of OpenCape against the Operator, and any right to participate in any collateral held or payment received by OpenCape.
8. **Disgorgement.** In the event of avoidance, disgorgement, reduction, reconveyance or recovery of any payment from the Operator to OpenCape as a preference under any laws relating to the bankruptcy, reorganization or liquidation of debtors, or as a so-called fraudulent conveyance, or under any other applicable law, OpenCape shall be entitled to recover on demand the amount of such payment from Guarantor as if such payment had never been made by the Operator.
9. **Further Assurances.** In order to carry out the terms and intent of this Guaranty more effectively, Guarantor agrees to do all acts necessary or convenient to preserve for OpenCape the benefits of this Guaranty and will promptly execute all agreements and instruments which OpenCape may from time to time reasonably request for that purpose, and Guarantor hereby assigns, transfers and sets over to OpenCape all claims against the Operator which Guarantor now has or Guarantor hereafter may have ("**Guarantor's Claims**") and, without imposing upon OpenCape any duty with respect to preservation, protection or enforcement of Guarantor's Claims, constitutes and appoints OpenCape the true and lawful attorney of Guarantor for the purposes of collecting and/or proving Guarantor's Claims, of accepting or rejecting to the extent of which Guarantor otherwise would be entitled to accept or reject, any plan or reorganization or arrangement in any proceedings affecting the Operator.
10. **Guarantor To Indemnify OpenCape and Pay OpenCape's Costs.** The Guarantor agrees to pay, and to indemnify OpenCape against, all costs, fees and expenses incurred by OpenCape in: (i) collection of any indebtedness under the Agreement or this Guaranty; (ii) the enforcement of any of OpenCape's rights or remedies with respect to the Agreement or this Guaranty; or (iii) any and all inspections, appraisals and investigative expenses; attorneys' reasonable fees and expenses; and costs and expenses imposed by law, all in connection with any of the foregoing, whether or not suit is instituted in connection therewith (collectively, "**Costs**"), and to pay interest on such Costs

(from the applicable dates incurred) at an annual rate equal to the lesser of eighteen percent (18%) and the maximum lawful rate.

11. **Books and Records; Copies As Evidence.** OpenCape's books and records concerning the amounts due and payable by the Operator pursuant to the Agreement shall be prima facie evidence thereof. OpenCape's photographic, microfilm or other electronic reproduction of this Guaranty (whether or not made in the regular course of business) shall be admissible in evidence as though it were the original, whether or not the original hereof is in existence.
12. **Notices.** All notices or other communications required hereunder shall be in writing and shall be deemed duly given if delivered in person (with receipt therefor), if sent by reputable overnight delivery or courier service (e.g., Federal Express) providing for receipted delivery, or if sent by certified or registered mail, return receipt requested, postage prepaid, to the addresses set forth in the preamble hereto. Receipt of notice or other communication shall be conclusively established by either (i) return of a return receipt indicating that the notice has been delivered; or (ii) return of the letter containing the notice with an indication from the courier or postal service that the addressee has refused to accept delivery of the notice. Either party may change its address for the giving of notices by notice to the other party given in accordance with this Section.
13. **Governing Law and Jurisdiction.** This Guaranty shall be governed and construed pursuant to the laws of the Commonwealth of Massachusetts. Guarantor hereby irrevocably and unconditionally submits to personal jurisdiction in The Commonwealth of Massachusetts over any suit, action or proceeding arising out of this Guaranty or out of the Agreement, and Guarantor hereby waives any right to object to personal jurisdiction within The Commonwealth of Massachusetts. The initiation of any suit, action or proceeding by OpenCape against the Guarantor or any property of the Guarantor in any other jurisdiction shall not constitute a waiver of the agreements contained herein that the law of The Commonwealth of Massachusetts shall govern the rights of OpenCape and the rights and obligations of Guarantor under this Guaranty, and that Guarantor submits to personal jurisdiction within The Commonwealth of Massachusetts.
14. **Partial Invalidity.** If any term of this Guaranty, or the application thereof to any person or circumstance, shall to any extent be invalid or unenforceable, the remainder of this Guaranty, or the application of such term to persons or circumstances other than those as to which it is invalid or unenforceable, shall not be affected thereby, and each term of this Guaranty shall be valid and enforceable to the fullest extent permitted by law.
15. **Complete Agreement, Amendments; Waivers; Enforceability.** This Guaranty sets forth the entire agreement between the Guarantor and OpenCape, and supersedes all prior or contemporaneous discussions, negotiations and agreements, oral or written, with respect to the subject matter hereof. This Guaranty is in addition to and does not supersede any prior guaranty, subordination agreement or grant of security unless expressly so stated herein. This Guaranty may be modified, waived, cancelled or discharged only by an instrument, in writing, executed with due authorization by the party to be charged. No waiver of any of OpenCape's rights and remedies on any one occasion shall constitute a continuing waiver or a waiver for any subsequent occurrence.
16. **Financial Information.** The Guarantor agrees to provide to OpenCape from time to time upon the reasonable request of OpenCape, financial information regarding the Guarantor, including updated financial statements and copies of all federal and state income tax returns. Such financial information shall be provided in such forms and with such details as OpenCape may prescribe from time to time.

Executed under seal as of the date first above set forth.

GUARANTOR:

XXXXXXXXXXXXXXXXX INC.

By:_____

Name:

Title:

By:_____

Name:

Title:

EXHIBIT B
CONSTRUCTION CONTRACT