

**FOR BOARD ACTION**

Agenda Item # 9.c.

Meeting Date: 4/27/04

**SUBJECT:** AGREEMENT FOR ANTENNAS ON NORTH PARK WATER TOWER  
(Rapid Web LLP)

**PREPARED BY:** Doug Rovang, Senior Civil Engineer *DR*

ITEM DESCRIPTION:

A request has been received from Rapid Web, LLP, for approval to install a wireless internet communications facility at the North Park Water Tower NW site. The installation would consist of equipment taking up no more than eight (8) square feet in the base of the water tower, three (3) 10" wide by 10" inch high antennas for railing mounting, and three (3) connecting 1/4-inch CAT5 cable runs.

Rapid Web is proposing that the rental terms for this Site Agreement be identical to its 2003 Site Agreement with the City which would call for 2004 rent of \$7,792.21 with annual adjustments to reflect changes in the CPI-U. The 2003 Site Agreement permits Rapid Web to have similar wireless internet installations at the following water tower locations:

- 1) Willow Heights High Level SW
- 2) Country Club Manor High Level SW
- 3) Arnolds NW

The 2004 RPU site rent for a three-antenna-equivalent cellular phone installation would be \$9,684.

In justifying less rent for wireless internet providers (Venture Systems and Rapid Web being the two previous examples), the Utility Board stated (as recommended by the City Attorney) the following reasons which were included in the Venture Systems and Rapid Web Site Agreements:

*"M. The parties acknowledge that the rent for this Site Agreement differs from the terms of other related agreements for the following reasons:*

- *The short guaranteed term of the Agreement.*
- *The small amount of (interior) ground space required for the proposed installation.*
- *The potential for use of the . . . Water Tower site that has been of no interest to other wireless communications providers to date."*

The City Attorney noted at that time by law we must give similar treatment to those in similar situations. The Board could create a new category of businesses to include Venture Computer and others similarly situated. However, once the Board created this precedent in allowing Venture Computer (and others similarly situated) to use city property at a reduced rate, the Board would have to continue to abide by

*Tony Koshin*  
\_\_\_\_\_  
General Manager

*4-22-04*  
\_\_\_\_\_  
Date

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the precedent in future cases. It was the City Attorney’s experience that the “exception” door, once it was opened, was difficult to close.

Based on experience with the Venture Systems and Rapid Web wireless internet installations, staff recommends the Board approve the attached proposed Rapid Web Site Agreement calling for prorated 2004 rent of \$7,792.21 for the North Park Water Tower site. The recommended rent reflects the short guaranteed term of the Agreement (one year), the small amount of interior ground space, dry riser tube area, and antenna space required for the proposed installation, and the minimal impact of the wireless internet installation frequencies on wireless phone and paging communications providers co-locating on the site. (See paragraph M of Section 17 of the proposed Site Agreement which reflects these conditions). Staff considers the proposed 2004 rent to appropriately reflect the scope of the City’s obligations under this Agreement compared to other Site Agreements currently in effect.

Rapid Web Managing Partner Chris Mullen will be attending the Utility Board meeting to answer any Board related questions.

UTILITY BOARD ACTION REQUESTED:

Staff requests the Utility Board approve the proposed Site Agreement with Rapid Web LLP for a wireless internet communications facility at the North Park water tower site, and request the Mayor and City Clerk to execute the document.

\_\_\_\_\_

General Manager

\_\_\_\_\_

Date

## SITE AGREEMENT

This Site Agreement ("Agreement") is made as of this \_\_\_\_ day of \_\_\_\_\_, 2004, by and between City of Rochester, a Minnesota municipal corporation, ("CITY"), acting by and through its Rochester Public Utility Board, whose address is 4000 East River Road NE, Rochester, Minnesota 55905 and Rapid Web LLP, a Minnesota Limited Partnership, ("LESSEE"), whose address is 220 South Broadway, Suite E, Rochester, Minnesota, 55904, for the leasing of certain property interests:

1. PROPERTY. The property interests hereby leased (collectively, the "Leased Premises") and granted by CITY include the following:

North Park Water Tower Site NW: City is owner of a parcel of land (the "Land") and a water tower (the "Structure") located at 6008 Fairway Drive NW, Rochester, Minnesota (Land and Structure are collectively referred to as the "Property"). The property interests hereby leased (collectively, the "Leased Premises") and granted by CITY are described as follows: that portion of the Land comprised of approximately eight (8) square feet of ground space within the water tower base for equipment; Structure exterior space for attachment of three (3) antennas (approximately 10 inch wide by 10 inch high operating at 5.7 GHz) to the tank railing; and space required for three (3) ¼-inch CAT5 cable runs to connect equipment and antennas. The Land is legally described and Leased Premises are shown in relationship to Land in Exhibit "A" attached hereto, and the locations of the equipment and antennas on the Structure are depicted in Exhibit "B" attached hereto.

2. TERM. The initial term of this agreement shall commence on or about June 1, 2004 (the "Commencement Date"), and shall terminate on December 31, 2004 (the "Initial Term"). The Agreement shall then continue on a yearly calendar basis unless either party terminates as provided in the Agreement. CITY will provide LESSEE written notice of intention to terminate no later than Three-Hundred-Sixty (360) days prior to expiration of a yearly lease period.
3. RENT. LESSEE shall pay City first year prorated rent equivalent to an annual rent of seven-thousand-seven-hundred-ninety-two dollars and twenty-one cents (\$7,792.21) for the year 2004 ("Rent"). CITY will issue an invoice for each subsequent year's Rent on or about March 1. The rental year shall run from January 1 to December 31 of each year. The amount of Rent shall be adjusted annually based on the Consumer Price Index for All Urban Customers (CPI-U). Rent prorations shall be based on the number of days in the calculation period. If this Agreement is terminated for any reason other than LESSEE's default, any prepaid rents for the

period after termination shall be refunded to LESSEE (or credited against any termination fee payable by LESSEE pursuant to Section 11 below).

4. USE. LESSEE may use the Leased Premises for the purpose of installing, removing, replacing, maintaining, modifying, altering and operating its communication fixtures and related equipment, antennas, cables, accessories and improvements (collectively, the "Communications Facility"). The manner in which the communications equipment may be located on and attached to the Leased Premises shall be documented in Exhibits "A" and "B" and any subsequent documents as needed, and is subject to the prior approval by CITY, such approval not to be unreasonably withheld, conditioned, or delayed (and in no event delayed beyond sixty (60) days). Any proposed modifications or alterations to the Structure that may affect its structural integrity shall be included in the documentation provided by the LESSEE and shall include plans and drawings signed by a professional structural engineer licensed in the State of Minnesota. CITY shall provide LESSEE with twenty-four (24) hour, seven (7) day a week year round access to the Leased Premises. LESSEE will pay all personal property taxes (if any) assessed against its Communications Facility. LESSEE will not allow any mechanics' or materialmens' liens to be placed on the Leased Premises as a result of its work on the Leased Premises.
5. DUE DILIGENCE. LESSEE, its agents and contractors, are hereby granted the right, at its sole cost and expense, to enter upon the Property and conduct such studies as LESSEE deems necessary to determine the Leased Premises' suitability for the Communications Facility. These studies may include surveys, soil tests, environmental evaluations, radio wave propagation measurements, field strength tests and such other analyses and studies as LESSEE deems necessary or desirable. Upon LESSEE's request, CITY agrees to provide to LESSEE copies of all plans, specifications, surveys and tower maps for the Land and Structure. The tower map shall include the elevation of all antennas on the Structure and the frequencies upon which each operates as they may be available.
6. UTILITIES. The LESSEE shall take electrical service from Tower electrical panel and shall make an annual payment to CITY reflecting electrical usage. LESSEE shall establish accounts for telephone, or other utility services as needed and shall pay all costs associated with installation and service. CITY acknowledges and warrants that electric and telephone services are available and will continue to be made available to the Leased Premises during the term of this Agreement except for reasons beyond CITY's control. In the event of a power failure or other emergency, LESSEE shall have the right to use a standby generator for LESSEE's exclusive use.
7. REMOVAL OF COMMUNICATIONS FACILITY. All personal property, trade fixtures, and improvements installed by LESSEE shall remain LESSEE's personal property and are not fixtures. The Communication Facility shall be removed, at no cost to CITY, by LESSEE at any time on or before expiration or termination of this Agreement, but in no event later than 60 days following termination of this Agreement.
8. INSURANCE. LESSEE shall maintain commercial general liability insurance acceptable to the CITY, insuring LESSEE against liability for personal injury, death or damage to personal property arising out of use of the Leased Premises by LESSEE, with combined single limits of One Million and No/100 Dollars (\$1,000,000). LESSEE shall also maintain fire and extended coverage insurance insuring LESSEE's building and personal property for its full insurable value (subject to reasonable deductibles). LESSEE shall list CITY as an additional insured on the commercial general liability policy to the extent allowed under paragraph 12, Indemnity, of this Agreement. LESSEE will be allowed to self-insure for the amounts and types of insurance required herein. LESSEE shall provide a certificate of insurance (or self-insurance) prior to commencement of operations. CITY and LESSEE release each other and their respective principals, employees, representatives and agents, from any claims for damage to any person or to the Property and Leased Premises or to the Communications Facility thereon caused by, or that result from, risks insured against under any insurance policies carried by the parties and in force at the time of any such damage.
9. CONDITION OF PROPERTY. CITY represents that the Property is in as-is condition. If, in the CITY's judgment, the Property or Structure become unusable for its water utility related purpose due to condition or other factors, the CITY retains the right to cancel the Agreement with three-hundred-sixty (360) days written notice to the LESSEE, notwithstanding any provisions herein to the contrary.

10. **TERMINATION.** This Agreement may be terminated by LESSEE at any time in its sole discretion by giving written notice thereof to CITY, which termination shall not constitute a waiver of LESSEE's rights under the Default paragraph of this Agreement. In the event this Agreement is terminated by LESSEE for any reason other than default by CITY under this Termination paragraph, LESSEE agrees to pay to CITY six (6) months additional Rent as liquidated damages for early termination calculated from the date of termination pursuant to this section. LESSEE's election not to extend any term pursuant to Paragraph 3 above shall not be considered termination pursuant to this Paragraph 10. Termination pursuant to Paragraph 13 below shall not require LESSEE to pay liquidated damages.
11. **INDEMNITY.** CITY and LESSEE each indemnify the other against, and hold the other harmless from, any and all costs (including reasonable attorneys' fees and expenses) and claims, actions, damages, obligations, liabilities and liens which arise out of (a) the breach of this Agreement by the indemnifying party; and (b) the use and/or occupancy of the Leased Premises or the Property by such indemnifying party. This indemnity shall not apply to any claims, actions, damages, obligations, liabilities and liens arising from any negligence or intentional misconduct of the indemnified party and shall survive the termination of this Agreement.
12. **HAZARDOUS SUBSTANCES.** CITY represents that CITY has no knowledge of any substance, chemical, or waste on the Property that is identified as hazardous, toxic or dangerous in any applicable federal, state or local law or regulation. CITY shall hold LESSEE harmless from and indemnify LESSEE against any damage, loss, expense, response costs, or liability, including consultant fees and attorneys' fees resulting from the presence of hazardous substances on, under or around the Property or resulting from hazardous substances being generated, stored, disposed of, or transported to, on, under, or around CITY's Property as long as the hazardous substances were not generated, stored, disposed of, or transported by LESSEE or its employees, agents or contractors. LESSEE shall hold CITY harmless from and indemnify CITY against any damage, loss, expense, response costs, or liability, including consultant fees and attorneys' fees resulting from the presence of hazardous substances on, under or around the Property or resulting from hazardous substances being generated, stored, disposed of, or transported to, on, under, or around the Property provided that the hazardous substances were generated, stored, disposed of, or transported by LESSEE or its employees, agents or contractors.
13. **CASUALTY.** If any portion of the Property or the Communications Facility is damaged by any casualty and such damage adversely affects LESSEE's use of the Leased Premises, this Agreement shall terminate as of the date of the casualty if LESSEE gives CITY written notice of the same within thirty (30) days after LESSEE receives notice of such casualty, and any prepaid rent shall be refunded to LESSEE. If LESSEE chooses not to terminate this Agreement pursuant to this Paragraph, Rent shall be reduced or abated in proportion to the actual reduction or abatement of use of the Leased Premises caused by such damage.
14. **WARRANTY OF TITLE AND QUIET ENJOYMENT.** CITY warrants that (i) CITY owns the Property in fee simple and has rights of access thereto and the Property is free and clear of all liens, encumbrances and restrictions; and (ii) LESSEE, upon performance of its obligations hereunder, shall peaceably and quietly have, hold and enjoy the Leased Premises. CITY agrees to indemnify and hold harmless LESSEE from any and all claims on LESSEE's leasehold interest. CITY shall not cause or permit any use of the Property that interferes with or impairs (a) the integrity of the Communications Facility and/or the Structure to which it is attached, or (b) the quality of the communication services being rendered by LESSEE from the Leased Premises. LESSEE shall not cause or permit any use of CITY's Property that interferes with or impairs (a) the integrity of the Property and/or the Structure to which it is attached, or (b) the use of the Structure for its water utility related purpose.
15. **DEFAULT.** Except as expressly limited hereby, CITY and LESSEE shall each have such remedies for the default of the other party hereto as may be provided at law or equity following written notice of such default and failure to cure the same within thirty (30) days.
16. **INTERFERENCE.** LESSEE's equipment shall be installed and operated in a manner, which does not cause interference to existing equipment. Should any such interference occur, LESSEE shall diligently pursue a cure to remove or satisfactorily attenuate such interference. If such interference to the existing equipment cannot be cured or satisfactorily attenuated, LESSEE agrees to immediately stop using its equipment if so demanded in

writing by CITY. CITY hereby covenants to use reasonable effort to afford LESSEE similar protection from interference which may be caused by the operations of subsequent additional users of the Property or other City water storage structures.

17. MISCELLANEOUS.

- A. LESSEE and CITY each acknowledge and represent that it is duly organized, validly existing and in good standing and has all rights, power and authority to enter into this Agreement and bind itself hereto through the party set forth as signatory for the party below. LESSEE agrees to provide a signed and notarized Acknowledgment of Authorized Signature as a part of this Agreement, indicating that the person signing the Agreement is an officer of LESSEE or is authorized by LESSEE's Board of Governors to bind LESSEE to this Agreement.
- B. This Agreement supersedes all prior discussions, negotiations and agreements. All agreements and understandings between CITY and LESSEE are included herein. This Agreement may only be amended in writing signed by all parties. All Exhibits referenced herein are incorporated into this Agreement by reference.
- C. This Agreement may be signed in counterparts by the parties hereto.
- D. CITY and LESSEE shall comply with all federal, state, and local laws, ordinances, rules, and regulations otherwise governing the placement, operation, or maintenance of its equipment.
- E. The terms and conditions of this Agreement shall run with the land and shall extend to and bind the heirs, personal representatives, successors and assigns of the respective parties.
- F. LESSEE may assign this Agreement at any time with prior written approval by CITY which approval shall not be unreasonably withheld, delayed or denied. Any assignee of this Agreement shall be fully responsible for any and all responsibilities and obligations provided herein to the LESSEE. LESSEE may assign this Agreement to its affiliates without the prior written approval of CITY. As used herein, the term "affiliates" shall mean an entity that controls, is controlled by or is under common control with LESSEE. Notwithstanding anything to the contrary contained in this Agreement, LESSEE may assign, mortgage, pledge, hypothecate or otherwise transfer without consent its interest in this Agreement to any financing entity, or agent on behalf of any financing entity to whom LESSEE (i) has obligations for borrowed money or in respect of guaranties thereof, (ii) has obligations evidenced by bonds, debentures, notes or similar instruments, or (iii) has obligations under or with respect to letters of credit, bankers acceptances and similar facilities or in respect of guaranties thereof.
- G. Notices shall be in writing and sent by United States Mail, postage prepaid, certified or registered with return receipt requested or by courier service to the address set forth beneath the signature of each party below, and shall be deemed effective one (1) day following deposit or delivery.
- H. LESSEE may obtain title insurance on its interest in the Leased Premises.
- I. This Agreement shall be construed in accordance with the laws of the State of Minnesota.
- J. If any term of this Agreement is found to be void or invalid, such invalidity shall not affect the remaining terms of this Agreement, which shall continue in full force and effect.
- K. In any case where the approval or consent of one party hereto is required, requested or otherwise to be given under this Agreement, such party shall not unreasonably delay or withhold its approval or consent.
- L. In the event of a breach or any of the covenants or agreements set forth in this Agreement, the parties shall be entitled to any and all remedies available at law or in equity. The parties hereto agree that in the event it becomes necessary for any party to defend or institute legal proceedings as a result of the failure of either

party to comply with the terms, covenants, agreements and/or conditions of this Agreement, it is understood and agreed upon that the prevailing party in such litigation shall be entitled to be reimbursed for all costs incurred or expended in connection therewith, including, but not limited to, reasonable attorney's fee, including appellate fees, and court costs.

M. The parties acknowledge that the rent for this Site Agreement differs from the terms of other related agreements for the following reasons:

- 1) The short guaranteed term of the Agreement;
- 2) The small amount of (interior) ground space, dry riser tube area, and tank exterior space required for the proposed wireless internet installation;
- 3) The minimal impact of such wireless internet installations on wireless phone and paging communications providers co-locating on the site.

18. MAINTENANCE, IMPROVEMENT EXPENSES. After initial installation, LESSEE shall obtain written approval prior to undertaking any modification of the Communications facility other than repairs to LESSEE's existing equipment, which approval shall not be unreasonably denied. Notwithstanding the foregoing, LESSEE shall be allowed to replace and upgrade any of its existing equipment upon fifteen (15) days prior written notice to CITY, as long as any such replacement or upgrade equipment does not exceed in size or number LESSEE's equipment as described and depicted on the attached exhibits. All modifications to the Leased Premises and all improvements made for LESSEE's benefit shall be at LESSEE's expense and such improvements, including the Communications Facility and equipment, shall be maintained in a good state of repair at least equal to the standard of maintenance of the surrounding CITY's Property on or adjacent to the Leased Premises and shall be secured by LESSEE. LESSEE's antenna color shall at all times be that selected by CITY. Ground located equipment shall be appropriately screened by plantings furnished by LESSEE. In the event CITY's reasonable maintenance of the Property affects areas involving the Leased Premises, LESSEE agrees to protect its equipment from such repairs at LESSEE's sole cost and expense.

19. ARBITRATION. Any claim, controversy or dispute arising out of this Agreement shall be settled by arbitration in accordance with the applicable rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. The arbitration shall be conducted in Olmsted County, Minnesota. There shall be no discovery other than the exchange of information provided to the arbitrator by the parties. The arbitrator shall have the authority only to award compensatory damages and shall not have authority to award punitive damages or other non-compensatory damages; the parties hereby waive all rights to and claims for monetary awards other than compensatory damages.

20. LAND USE REQUIREMENTS. CITY's obligations under this Agreement are contingent upon and subject to the LESSEE's successful attainment of any and all land use or zoning certificates, permits or approvals which are required in order to implement this Agreement. Nothing in this Agreement shall bind the CITY's City Council to grant any land use or zoning certificate, permit or approval which is required to implement this Agreement. Instead, the CITY's City Council shall reasonably and in good faith apply the relevant ordinance criteria when it processes LESSEE's application for any land use or zoning certificate, permit or approval.

21. WAIVER OF LESSOR'S LIEN. CITY waives any lien rights it may have concerning the Communications Facility which is deemed LESSEE's personal property and not fixtures, and LESSEE has the right to remove the same at any time without CITY's consent. CITY acknowledges that LESSEE may have entered into a financing arrangement including promissory notes and financial and security agreements for the financing of the Communication Facility (the "Collateral") with a third party financing entity (and may in the future enter into additional financing arrangements with other financing entities). In connection therewith, CITY (i) consents to the installation of the Collateral; (ii) disclaims any interest in the Collateral, as fixtures or otherwise; and (iii) agrees that the Collateral shall be exempt from execution, foreclosure, sale, levy, attachment, or distress for any Rent due or to become due and that such Collateral may be removed at any time without recourse to legal proceedings.

22. TOWER MARKING AND LIGHTING REQUIREMENTS. CITY and LESSEE acknowledge that each shall be responsible for compliance with all marking and lighting requirements of the Federal Aviation Administration ("FAA") and the FCC for their respective facilities.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the day and year first above written.



Signature page to Site Agreement between City of Rochester, a Minnesota municipal corporation and Rapid Web, a Minnesota Limited Partnership, (North Park Water Tower).

CITY

City of Rochester, a Minnesota municipal corporation

By: \_\_\_\_\_

Print Name: \_\_\_\_\_

Its: Mayor

[MUNICIPAL SEAL]

Attest: \_\_\_\_\_

Print Name: \_\_\_\_\_

Its: City Clerk

Approved as to Form: \_\_\_\_\_

Print Name: \_\_\_\_\_

Its: City Attorney

By: \_\_\_\_\_

Print Name: \_\_\_\_\_

Its: General Manager, Rochester Public Utilities

Address: City of Rochester  
c/o Rochester Public Utilities  
4000 East River Road NE  
Rochester, MN 55905

Phone: (507) 280-1510

Federal Tax ID No. 41-6005494

STATE OF MINNESOTA)  
) ss.  
COUNTY OF OLMSTED)

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 2004, by \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_, the Mayor, City Clerk, and City Attorney and Rochester Public Utilities General Manager, respectively, of the City of Rochester, a Minnesota municipal corporation, on behalf of the corporation.

[seal]

\_\_\_\_\_  
Notary Public  
My commission expires \_\_\_\_\_

Signature page to Site Agreement between City of Rochester, a Minnesota municipal corporation and Rapid Web, a Minnesota Limited Partnership, (North Park Water Tower).

LESSEE

Rapid Web LLP,  
a Minnesota Limited Partnership

By: \_\_\_\_\_

Name: Chris Mullen

Title: Managing Partner

Address: 220 South Broadway, Suite E  
Rochester, MN 55904

STATE OF \_\_\_\_\_ )  
 )ss.  
COUNTY OF \_\_\_\_\_ )

The foregoing instrument was acknowledged before me on the \_\_\_\_ day of \_\_\_\_\_, 2004, by \_\_\_\_\_, to me personally known, who, being by me duly sworn, did say that he is the \_\_\_\_\_ of \_\_\_\_\_, d/b/a \_\_\_\_\_, the Minnesota corporation  
Title  
that executed the foregoing instrument, and on oath stated that he was authorized to execute said instrument on behalf of the corporation, and who acknowledged said instrument to be the free act and deed of said corporation.

Notary Public \_\_\_\_\_

My commission expires: \_\_\_\_\_

[Seal]

SITE NAME: North Park Water Tower Site

EXHIBIT A

LEGAL DESCRIPTION OF CITY'S PROPERTY:

Real property located in Olmsted County, Minnesota and more particularly described as follows:

That part of the Northwest Quarter of the Northeast Quarter of Section 8, Township 107 North, Range 14 West, Olmsted County, Minnesota, described as follows:

Commencing at the northwest corner of said Quarter Quarter Section; thence South 01 degree 01 minute 29 seconds West, assumed bearing, along the west line thereof, 1316.39 feet to the southwest corner of said Quarter Quarter Section; thence South 89 degrees 27 minutes 45 seconds East, along the south line of said Quarter Quarter Section, 210.00 feet for the point of beginning; thence continue South 89 degrees 27 minutes 45 seconds East, along said south line, 120.00 feet; thence North 01 degree 01 minute 29 seconds East, 150.00 feet; thence North 89 degrees 27 minutes 45 seconds West, 120.00 feet; thence South 01 degree 01 minute 29 seconds West, 150.00 feet to the point of beginning.

Containing 18,000 square feet more or less.

(FPINPAR 53926)

Description of the City's North Park Water Tower site located at 6008 Fairway Drive NWd, Rochester, Minnesota.



## RESOLUTION

BE IT RESOLVED by the Public Utility Board of the City of Rochester, Minnesota, to approve the attached Site Agreement with Rapid Web, LLP., with 2004 rent of Seven-Thousand-Seven-Hundred-Ninety-Two Dollars and Twenty-One Cents (\$7,792.21), and to request that the Mayor and the City Clerk execute the Agreement for

Installing Antennas and Appurtenant Equipment for a Wireless Internet Communications Facility  
at the North Park Water Tower NW Site

Passed by the Public Utility Board of the City of Rochester, Minnesota, this 27th day of April, 2004.

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President

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Secretary