

FOR BOARD ACTION

Agenda Item # 8.a.

Meeting Date:

9/30/08

SUBJECT: Agreement for Antennas on Saint Marys Concrete Water Tower
(American Messaging Services LLC)

PREPARED BY: Doug Rovang, Senior Civil Engineer

ITEM DESCRIPTION:

A request has been received from American Messaging Services, LLC for approval to install a wireless paging equipment installation at the Saint Marys Concrete Water Tower site.

The installation consists of approximately ten (10) square feet of interior space at the mezzanine level for equipment, structure exterior space for one (1) 12' tall non-guyed omni-directional antenna and one (1) 0.75 meter diameter satellite dish antenna, space required for two (2) cable runs (not to exceed 7/8" diameter to connect equipment and antennas, and a non-exclusive site access easement.

Staff has prepared the attached proposed Site Agreement for the requested American Messaging Services installation. The proposed 2008 annual rent (prorated to reflect installation date) would be \$10,226. Annual rent thereafter will be based on the Consumer Price Index (CPI-U) to reflect future inflation.

The Agreement would continue thereafter on a yearly calendar basis until either party provides written notice of intention to terminate.

The proposed Site Agreement has been reviewed by the City Attorney.

UTILITY BOARD ACTION REQUESTED:

Staff recommends the Utility Board approve the proposed Site Agreement with American Messaging Services, LLC, for a wireless paging equipment installation at the Saint Marys Concrete Water Tower site, and request the Mayor and City Clerk to execute the Site Agreement.


General Manager


Date

SITE AGREEMENT

This Site Agreement ("Agreement") is made as of this ___ day of _____, 2008, 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 American Messaging Services, LLC, a Delaware Corporation, ("LESSEE"), whose address is 1720 Lakepointe Drive, Suite 100, Lewisville, TX 75075, 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:

St. Marys Concrete Tower Site: Located at 901 4th Street SW, Rochester, Minnesota. Approximately ten (10) square feet of structure interior space at the mezzanine level for equipment, structure exterior space for attachment of one (1) 12' tall non-guyed omni-directional antenna and one 0.75 meter diameter satellite dish antenna, space required for two cable runs (not to exceed 7/8" diameter) to connect equipment and antennas, and a non-exclusive easement across CITY's property for access in or upon the Leased Premises. CITY's property is legally described and Leased Premises are shown in relationship to CITY's property in Exhibit "A" attached hereto, and the locations of the equipment and antennas on and within the Structure are depicted in Exhibit "B" attached hereto.

2. TERM. The initial term of this agreement shall commence on or about October 1, 2008 (the "Commencement Date"), and shall terminate on December 31, 2008 (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 ten-thousand-two-hundred-twenty-six dollars (\$10,226.00) for the year 2008 ("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 Consumers (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.

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. 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.
6. **UTILITIES.** LESSEE shall operate its equipment on a separately metered electric circuit. LESSEE shall establish accounts for electricity, telephone, and other utility services as needed and shall pay all costs associated with installation and service.
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 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 11, 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 for any reason without penalty upon six (6) months notice to CITY.
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 between CITY and LESSEE concerning the St. Marys Concrete Water Tower Site. All agreements and understandings between CITY

and LESSEE related to this Site 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. LESSEE shall install RF safety signage in compliance with 47 CFR 1.1307(b) as appropriate for the Site.
 - 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. Upon assignment, LESSEE shall have no further liability under this Agreement.
 - 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.
 - H. This Agreement shall be construed in accordance with the laws of the State of Minnesota.
 - I. 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.
 - J. 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.
 - K. 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.
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. 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. 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. **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 American Messaging Services, LLC, a Delaware Corporation , (St. Marys Water Tower).

LESSEE

American Messaging Services, LLC
a Delaware Corporation

By: [Signature]

Name: Jeff Chalmers

Title: Vice President of Operations

Address: ATTN: Site Activity
1720 Lakepointe Drive, Suite 100
Lewisville, TX 75075

STATE OF Texas)
)ss.
COUNTY OF Denton)

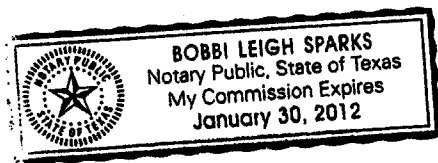
The foregoing instrument was acknowledged before me on the 24th day of Sept, 2008, by

Jeff Chalmers , to me personally known, who, being by me duly sworn, did say that he is the Vice President of Operations of American Messaging Services, LLC, the Delaware corporation 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 [Signature]

My commission expires: 1/30/2012

[Seal]



SITE NAME: St. Marys Concrete Water Tower Site

EXHIBIT A

LEGAL DESCRIPTION OF CITY'S PROPERTY:

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

All of Block 41, Head & McMahon's Addition to the City of Rochester,

CT PLAT PARCEL NO. 05 1600 33300 (FPINPAR 9735)

Located in the NW 1/4, NW 1/4, SEC 2, T106N, R14W

Legal Description of the City's St. Marys Concrete Water Tower site located at 929 4th Street SW, Rochester, Minnesota.

SITE NAME: St. Marys Concrete Water Tower Site

EXHIBIT A (Continued)

SKETCH AND DESCRIPTION OF LEASED PREMISES SHOWN IN RELATION TO CITY'S PROPERTY:

SEE ATTACHED

SITE NAME: St. Marys Concrete Water Tower Site

EXHIBIT B

DRAWINGS SHOWING EQUIPMENT INSTALLATION DETAILS AND LOCATIONS OF ANTENNAS ON THE STRUCTURE:

SEE ATTACHED



RESOLUTION

BE IT RESOLVED by the Public Utility Board of the City of Rochester, Minnesota, to approve the attached Site Agreement with American Messaging Services LLC with 2008 rent of Ten-Thousand-Two-Hundred-Twenty-Six and No/100 Dollars (\$10,226.00) prorated based on equipment installation date, and to request that the Mayor and the City Clerk execute the Site Agreements for

Maintaining Antennas and Appurtenant Equipment
for a Wireless Paging Equipment Installation
at the Saint Marys Concrete Water Tower site

Passed by the Public Utility Board of the City of Rochester, Minnesota, this 30th day of September, 2008.

President

Secretary