

FOR BOARD ACTION

Agenda Item # 4

Meeting Date:

10/26/10

SUBJECT: Agreement for Installation of Fiber Communications Services
(Zayo Bandwidth LLC) – Nine Water Storage Facility Sites

PREPARED BY: Doug Rovang, Senior Civil Engineer

ITEM DESCRIPTION:

A request has been received from Zayo Bandwidth, LLC (Zayo, hereafter) for approval to install a fiber communications service at each of nine municipal water storage facility sites. The installation generally consists of an underground duct with fiber extending from the street right-of-way to the T-Mobile cellular phone facility at each of the nine sites listed below.

Baihly Tower Site SW
Country Club Tower NW
Golden Hill Tower SW
John Adams Tower NW
North Park Tower NW
Northern Heights Standpipe NE
Rose Harbor Tower SE
Saint Marys Tower SW
Viola Tower NE

The street attachment will be to a fiber loop planned for installation around the City by Arvig Communications Systems (ACS) as brought before the Utility Board for pole attachment approval last month. This service would seem to be potentially available to other cell phone companies and wireless internet providers at each of these sites in the future, as well.

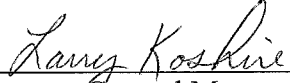
Staff has prepared the attached proposed Site Agreement for the requested Zayo installations. The proposed 2011 annual rent would be \$2,300 per site. Annual rent thereafter would increase by 4.5% per year. The Agreement would continue thereafter with terms corresponding to the T-Mobile Site Agreement terms for each site or until Zayo provides written notice of intention to terminate.

FOR CAPITAL PURCHASES/BIDS/MAJOR PROJECTS:

Not Applicable

UTILITY BOARD ACTION REQUESTED:

Management recommends that the Utility Board approve the proposed Site Agreement with Zayo Bandwidth LLC, for installation of fiber communications services at the nine municipal water storage facilities with terms and rent as shown, and request the Mayor and City Clerk to execute the Site Agreement.



General Manager

10-21-10
Date

SITE AGREEMENT

This Site Agreement ("Agreement") is made as of this ___ day of _____, 2010, by and between City of Rochester, a Minnesota municipal corporation, ("CITY"), whose address is 4000 East River Road NE, Rochester, Minnesota 55905 and Zayo Bandwidth LLC, a Delaware limited liability company, ("LESSEE"), whose address is 400 Centennial Parkway, Suite 200, Louisville, CO 80027, for the leasing of certain property interests:

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

<u>Baihly Tower Site</u> , located at 2225 Baihly Summit Dr SW	(Zayo Site A1Q0512A)
<u>Country Club Tower Site</u> , located at 4403 Meadow Lakes Dr NW	(Zayo Site A1Q0614A)
<u>Golden Hill Tower Site</u> , located at 500 23 rd St SW	(Zayo Site A1Q0080A)
<u>John Adams Tower Site</u> , located at 3110 18 th Ave NW	(Zayo Site A1Q0431A)
<u>North Park Tower Site</u> , located at SE 6380 Fairway Dr NW	(Zayo Site A1Q0765A)
<u>Northern Heights Standpipe Site</u> , located at 1206 Northern Heights Dr NE	(Zayo Site A1Q0152A)
<u>Rose Harbor Tower Site</u> , located at 3213 Harbor Heights Ct SE	(Zayo Site A1Q0800A)
<u>Saint Marys Tower Site</u> , located at 901 4 th St SW	(Zayo Site A1Q0501A)
<u>Viola Tower Site</u> , located at 3180 Viola Rd NE	(Zayo Site A1Q0421A)

2. TERM. The term of this Agreement shall commence on or about December 1, 2010, and shall continue at each individual Site consistent with the same option terms of the T-Mobile Site Agreement currently in existence for that Site. Should either the CITY or T-Mobile terminate the T-Mobile Site Agreement at a particular Site as permitted by the conditions of the T-Mobile Site Agreement currently in existence for that Site, CITY shall have the right to also terminate this Agreement as it pertains to that particular Site.

3. RENT. The rental year shall run from January 1 to December 31 of each year, and LESSEE shall pay the annual rent on or before January 1 of each year. Annual rent for 2011 shall be two-thousand-three-hundred dollars (\$2,300) per site. Annual rent for each site for each succeeding year thereafter shall increase by 4.5% per year. If any site or this Agreement is terminated for any reason other than LESSEE's default, any prepaid rent for the period after termination shall be refunded to LESSEE (or credited against any termination fee payable by LESSEE pursuant to Section 10 below).
4. USE. LESSEE may use the Leased Premises for the purpose of installing, removing, replacing, maintaining, modifying, altering and operating LESSEE's conduit, cables and related equipment ("Communications Equipment") to provide communications services to CITY, tenants, residents, licensees, customers or users at the sites listed in paragraph 1 above. The manner in which the Communications Equipment may be located on and attached to the Leased Premises shall be documented in Exhibits "A", "B", "C", "D", "E", "F", "G", "H" and "I" 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 CITY's 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) hours, seven (7) days a week year round access to the Leased Premises. LESSEE will pay all personal property taxes (if any) assessed against LESSEE's Communications Equipment. 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. City waives any lien rights it may have, statutory or otherwise, regarding Lessee's Communications Equipment, all of which shall be deemed personal property, whether considered real or personal property under applicable state laws.
5. DUE DILIGENCE. LESSEE, its agents and contractors, are hereby granted the right, at its sole cost and expense, to enter upon the CITY's Property and conduct such studies as LESSEE deems necessary to determine the Leased Premises' suitability for the Communications Equipment. 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. The LESSEE shall operate its Communications Equipment on a separately metered electrical circuit. LESSEE shall establish accounts for electrical, telephone, or other utility services as needed and shall pay all costs associated with installation and service.
7. REMOVAL OF COMMUNICATIONS EQUIPMENT. All personal property, trade fixtures, and improvements installed by LESSEE shall remain LESSEE's property and shall be removed, at no cost to CITY, by LESSEE within sixty (60) days of the 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 Communication Equipment for its full insurable value (subject to reasonable deductibles). LESSEE will 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.
9. CONDITION OF PROPERTY. CITY represents that CITY's Property is in as-is condition. If, in the CITY's judgment, the CITY's Properties or Structures become unusable for their intended purpose of potable water storage or other function due to condition or other factors, the CITY retains the right to cancel the contract with Three Hundred Sixty (360) Days written notice to the LESSEE, notwithstanding any provisions herein to the contrary.
10. TERMINATION. (A) This Agreement may be terminated by LESSEE for any Site, without terminating this Agreement with regard to the remaining Sites, by giving written notice thereof to CITY. In the event such Site termination occurs, the parties agree that the CITY will incur damages. However, the parties agree that the amount of damages incurred by the CITY following termination cannot be determined or measured by ordinary rules. For the purpose of liquidating the amount of damages, and not as a penalty, it is agreed that in the case of termination occurring pursuant to section 10(A),

the damages caused shall be and are fixed, liquidated and determined in the sum of six (6) months additional rent to be paid by LESSEE to the CITY for that Site calculated from the date of termination.

(B) This Agreement may also 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, the parties agree that the CITY will incur damages. However, the parties agree that the amount of damages incurred by the CITY following termination cannot be determined or measured by ordinary rules. For the purpose of liquidating the amount of damages, and not as a penalty, it is agreed that in the case of termination occurring pursuant to section 10(B), the damages caused shall be and are fixed, liquidated and determined in the sum of six (6) months additional rent to be paid by LESSEE to the CITY calculated from the date of termination.

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 CITY's 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, its employees, agents or contractors, 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 CITY's 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 reasonable consultant fees and reasonable attorneys' fees resulting from the presence of hazardous substances on, under or around CITY's 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.
13. LESSEE shall hold CITY harmless from and indemnify CITY against any damage, loss, expense, response costs, or liability, including reasonable consultant fees and reasonable attorneys' fees resulting from the presence of hazardous substances on, under or around CITY's Property or resulting from hazardous substances being generated, stored, disposed of, or transported to, on, under, or around CITY's Property provided that the hazardous substances were generated, stored, disposed of, or transported by LESSEE or its employees, agents or contractors.
14. CASUALTY. If any portion of CITY's Property or the Communications Equipment 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 written notice of the same within thirty (30) days after LESSEE receives notice of such casualty.
15. QUIET ENJOYMENT. LESSEE, upon performance of its obligations hereunder, shall peaceably and quietly have, hold and enjoy the Leased Premises. CITY shall not cause or permit any use of CITY's Property that interferes with or impairs (a) the integrity of the Communications Equipment and/or the Structures to which they are 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 CITY's Property and/or the Structure to which it is attached, or (b) the use of the Structure for its intended purpose of potable water storage.
16. 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, provided, however, that neither party will be in non-monetary default under this Agreement if it commences curing any such non-monetary default within such 30-day period and thereafter diligently prosecutes the cure to completion.
17. INTERFERENCE. LESSEE's Communications 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 CITY's Property.

18. MISCELLANEOUS.

- A. LESSEE agrees to provide a signed and notarized Acknowledgment of Corporation Authorized Signature as a part of this Agreement, indicating that the person signing the Agreement is an officer of the corporation or is authorized by the corporation's Board of Directors to bind the LESSEE to the Agreement.
- B. This Agreement supersedes all prior discussions, negotiations, agreements and understandings of the parties with respect to the subject matter of this Agreement between CITY and LESSEE. This Agreement may only be amended in writing signed by all parties. Exhibits referenced herein are incorporated into this Agreement by reference. No provision of this Agreement will be deemed waived by either party unless expressly waived in writing by the waiving party. No waiver shall be implied by delay or any other act or omission of either party. No waiver by either party of any provisions of this Agreement shall be deemed a waiver of such provision with respect to any subsequent matter relating to such provision.
- C. This Agreement may be signed in counterparts by the parties hereto.
- D. The 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 LESSEE; provided, however, that LESSEE may assign this Agreement at any time with prior written approval by CITY which approval shall not be unreasonably 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, including any entity that merges or consolidates with Lessee or its parent or purchases or otherwise acquires all or substantially all of Lessee's stock or assets.
- F. 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.
- G. This Agreement shall be construed in accordance with the laws of the State of Minnesota.
- H. 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.
- I. LESSEE represents that with the exception of FMHC Corporation (whose compensation is solely LESSEE's responsibility), LESSEE has not been represented by a real estate broker or other listing agent in connection with this Agreement in this transaction for purposes of commission, fee or other payment to such broker or any other leasing agent claiming to have represented LESSEE. If CITY is represented by any broker or listing agent, CITY is responsible for any commission, fee or other payment to such agent.
- J. Either party will, at any time upon fifteen (15) days prior written notice from the other, execute, acknowledge and deliver to the other a recordable Memorandum of Lease. Either party may record this memorandum at any time, at its absolute discretion.

19. MAINTENANCE, IMPROVEMENT EXPENSES. After initial installation, LESSEE shall obtain written approval prior to undertaking any modification of its Communications 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 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. Ground located equipment shall be appropriately screened by plantings furnished by LESSEE and approved by CITY. In the event CITY's reasonable maintenance of CITY's Property affects areas involving the Leased Premises, LESSEE agrees to protect its equipment from such repairs at LESSEE's sole cost and expense.

20. DISPUTE RESOLUTION. The parties shall endeavor to resolve any claim, controversy or dispute arising out of this Agreement by mediation in accordance with the Minnesota Civil Mediation Act, Minn. Stat. §572.31. et. Seq. A request for mediation shall be made in writing, delivered to the other party to the Agreement, and filed with the person or entity administering the mediation. The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in Rochester, Minnesota unless the parties agree otherwise. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction. If mediation is unsuccessful, the claim, controversy or dispute may be resolved by way of any legal proceeding venued in Olmsted County, Minnesota.
21. CONSEQUENTIAL DAMAGES. Except for liability arising out of a Party's indemnity or confidentiality obligations, or liability due to such Party's gross negligence or willful misconduct, neither Party shall be liable to the other Party for any punitive, special, indirect or consequential damages or lost revenues, rent or profits arising out of this Agreement, even if the Parties have been informed of the possibility of such damages.

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

Signature page to 2010 Site Agreement between City of Rochester, a Minnesota municipal corporation and Zayo Bandwidth, LLC.

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) 280-1500

Federal Tax ID No.: 41-6005494

STATE OF MINNESOTA)
)SS
COUNTY OF OLMSTED)

The foregoing instrument was acknowledged before me this _____ day of _____, 2010, 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 _____



RESOLUTION

BE IT RESOLVED by the Public Utility Board of the City of Rochester, Minnesota, to approve the attached Site Agreement with Zayo Bandwidth LLC with 2011 rent of Two-Thousand-Three-Hundred and No/100 Dollars (\$2,300.00) per site, and to request that the Mayor and the City Clerk execute the Site Agreement for

Installing and Maintaining a Fiber Communications Service at each of the following Municipal Water Storage Facility Sites:

Baihly Tower NW
Country Club Tower NW
Golden Hill Tower SW
John Adams Tower NW
North Park Tower NW
Northern Heights Standpipe NE
Rose Harbor Tower SE
Saint Marys Tower SW
Viola Tower Site NE

Passed by the Public Utility Board of the City of Rochester, Minnesota, this 26th day of October, 2010.

President

Secretary