

FOR BOARD ACTION

Agenda Item # 5

Meeting Date: 2/28/06

SUBJECT: Agreement for Antennas on Rose Harbor Water Tower
(T-Mobile Central LLC)

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

ITEM DESCRIPTION:

A request has been received from T-Mobile Central LLC (T-Mobile, hereafter) for approval to install a wireless communications facility at the Rose Harbor Water Tower SE site.

The installation consists of equipment taking up approximately three-hundred (300) square feet of exterior ground space, water tower exterior space for up to twelve (12) antenna equivalents (six di-mode antennas), space required for twelve (12) 2" cable runs to connect equipment and antennas, and non-exclusive easements for cable runs and site access.

Staff has prepared the attached proposed Site Agreement for the requested T-Mobile installation. The proposed annual rent would be \$14,320 for 2006 (pro-rated to reflect the April 1, 2006 commencement date) with annual adjustments thereafter based on the CPI-U to reflect future inflation. The initial term of the contract would extend through 12/31/15. Two additional five-year option periods are included, subject to termination notice by either the City or T-Mobile.

The proposed rent amount is larger than for a typical twelve (12) antenna equivalent Site Agreement because T-Mobile is adamant about having a ten year initial term, rather than the typical Site Agreement five or six year term. The larger rental amount reflects the reduced flexibility RPU incurs related to being able to respond at the end of a five or six year term to future wireless communications antenna location market conditions or other pertinent factors at that time. The methodology for determining the increased rent amount for the longer initial term is identical to that used to determine the rent amount for a similar North Park Water Tower Site Agreement with VoiceStream Minneapolis (now T-Mobile) in early 2005.

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 T-Mobile Central LLC for a wireless communications facility at the Rose Harbor Water Tower site, and request the Mayor and City Clerk to execute the Site Agreement.

Reviewed 2-23-06 WNP

Larry Koskin

General Manager

2/23/06

Date

SITE AGREEMENT

This Site Agreement ("Agreement") is made as of this ____ day of _____, 2006, by and between City of Rochester, a Minnesota municipal corporation, ("CITY"), whose address is 4000 East River Road NE, Rochester, Minnesota 55905 and T-Mobile Central LLC, a Delaware limited liability company ("LESSEE"), whose address is c/o T-Mobile Central LLC, 8550 W. Bryn Mawr Ave., Suite 100, Chicago, IL 60631 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:

Rose Harbor Water Tower Site: Located at 3213 harbor Heights Ct SE, Rochester, Minnesota. Real property comprised of approximately three-hundred (300) square feet of exterior land space, water tower ("Structure") exterior space for attachment of up to twelve (12) antenna equivalents (six di-mode antennas), space required for twelve cable runs (not to exceed 2" diameter) to connect equipment and antennas, non-exclusive easements required to run utility lines/cables, a non-exclusive easement across CITY's Property (hereinafter defined) for access in or upon the CITY's real property ("CITY's Property"). 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 the Structure are depicted in Exhibit "B" attached hereto. (An "antenna equivalent" is defined as follows: a single transmit/receive antenna, a single transmit antenna, or a single receive antenna is considered an antenna equivalent. For example, a di-mode antenna is two antenna equivalents and a tri-mode antenna is three antenna equivalents.)

2. **TERM.** The initial term of this Agreement shall commence on or about April 1, 2006, and shall terminate on December 31, 2015.
3. **OPTION TERMS.** LESSEE may extend the term of the Agreement for two (2) additional five (5) year option periods . Unless (a) CITY delivers to LESSEE written notice of non-renewal to LESSEE no later than Ninety (90) days prior to the expiration of the Initial Term or applicable Option Period, or (b) LESSEE gives CITY written notice of its intention not to extend at least Ninety (90) days prior to the expiration of the then-current term, the applicable Option Period shall be deemed effective.

4. RENT. The LESSEE shall pay CITY first year prorated rent equivalent to an annual rent of: Fourteen-thousand-three-hundred-twenty dollars (\$14,320) for 2006. (Rate subject to change if site quantity is modified.) The 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 rental amount shall be adjusted annually based on the Consumer Price Index for All Urban Customers (CPI-U). If 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 11 below).
5. USE. LESSEE may use the Leased Premises for the purpose of installing, removing, replacing, maintaining, modifying, altering and operating LESSEE's communications 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 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 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. City waives any lien rights it may have, statutory or otherwise, regarding Lessee's Communications Facility, all of which shall be deemed personal property, whether considered real or personal property under applicable state laws.
6. 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 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.
7. UTILITIES. The LESSEE shall operate its 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.
8. REMOVAL OF COMMUNICATIONS FACILITY. 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.
9. 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 Facilities 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.
10. CONDITION OF PROPERTY. CITY represents that CITY's Property is in as-is condition. If, in the CITY's judgment, the CITY's Property or Structure become unusable for its intended purpose of potable water storage 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.
11. 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.

12. **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.
13. **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.
14. 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.
15. **CASUALTY.** If any portion of CITY's 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 written notice of the same within thirty (30) days after LESSEE receives notice of such casualty.
16. **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 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 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.
17. **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.
18. **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 CITY's Property.
19. **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. LESSEE will specifically comply with OSHA vertical ladder clearance requirements, and will install RF safety signage in compliance with 47 CRF 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 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 KTB Consulting, Inc. (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.
20. MAINTENANCE, IMPROVEMENT EXPENSES. After initial installation, LESSEE shall obtain written approval prior to undertaking any modification of its communications facility, 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 antennas shall at all times be painted, at LESSEE's expense, the same color as the Structure. 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 it's equipment from such repairs at LESSEE's sole cost and expense.

21. **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.

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 T-Mobile Central LLC, (Rose Harbor 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) 280-1500

Federal Tax ID No.: 41-6005494

STATE OF _____)

COUNTY OF _____)

The foregoing instrument was acknowledged before me this ____ day of _____, 2006, 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 T-Mobile Central LLC (Rose Harbor Water Tower).

LESSEE

T-Mobile Central LLC
A Delaware limited liability company

By: Hossein Sepehr
Name: Hossein Sepehr

Its: Director of Engineering and Operations

Address: T-Mobile Central LLC
8550 W. Bryn Mawr Ave, Suite 100
Chicago, IL 60631
Attn: Lease Administration (Minneapolis)
With a copy to: Legal Department

Notice Address: T-Mobile USA
12920 SE 38th Street
Bellevue, WA 98006
Attn: PCS Lease Administration
With a copy to: Legal Department

STATE OF MINNESOTA)
)ss
COUNTY OF HENNEPIN)

The foregoing instrument was acknowledged before me on the 23rd day of February, 2006, by Hossein Sepehr the Director of Engineering and Operations of T-Mobile Central LLC, a Delaware limited liability company, on behalf of the limited liability company.

Notary Public Susan Mae Streets
Susan Mae Streets
My commission expires: January 31, 2010

[Seal]



Signature page to Site Agreement between City of Rochester, a Minnesota municipal corporation and T-Mobile Central LLC (Ross Harbor Water Tower).

ACKNOWLEDGEMENT OF CORPORATION
AUTHORIZED SIGNATURE

STATE OF MINNESOTA)
)ss
COUNTY OF HENNEPIN)

On this 23rd day of February, 2006, before me appeared Hossein Sepehr to me personally known, who, being by me duly sworn, did say that he is the Director of Engineering and Operations of T-Mobile Central LLC, a Delaware limited liability company; and that said instrument was executed by Hossein Sepehr who acknowledged said instrument to be the free act and deed of said limited liability company.



Notary Public Susan Mae Streets
County Hennepin Susan Mae Streets
My Commission Expires January 31, 2010

[Seal]



RESOLUTION

BE IT RESOLVED by the Public Utility Board of the City of Rochester, Minnesota, to approve the attached Site Agreement with T-Mobile Central LLC with 2006 rent of Fourteen-Thousand-Three-Hundred-Twenty and No/100 Dollars (\$14,320.00) prorated based on an April 1, 2006, commencement date, and to request that the Mayor and the City Clerk execute the Site Agreement for

Maintaining Antennas and Appurtenant Equipment for a Wireless Communications Facility
at the Rose Harbor Water Tower SE site

Passed by the Public Utility Board of the City of Rochester, Minnesota, this 28th day of February, 2006.

President

Secretary