

## FOR BOARD ACTION

Agenda Item # 4

Meeting Date:

6/29/10

**SUBJECT:** First Amendment to 2002 Venture Systems Antenna Site Agreement  
By Midwest Wireless (Country Club and Willow High Level Water Tower Sites)

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

ITEM DESCRIPTION:

A request has been received from Midwest Wireless Communications, L.L.C to amend the above-referenced Site Agreement. The City entered into a Site Agreement with Venture Systems, Inc., on January 24, 2002 for wireless internet installations at the Country Club High Level and Willow High Level Water Tower Sites. That Site Agreement was assigned to Midwest Wireless Holdings, L.L.C. on November 14, 2003. Midwest Wireless was acquired by Verizon during 2009 but retains its separate corporate entity. Midwest Wireless wishes to amend the 2002 Site Agreement as follows:

- 1) Shift from annually renewable terms to successive five-year terms;
- 2) Implement a single one-time rent increase at the beginning of each five-year term rather than the current annual adjustment of the rent amount based on the change in the preceding year's Consumer Price Index for All Urban Consumers (CPI-U); and
- 3) Terminate the right granted in the 2002 Site Agreement to install a wireless internet installation at the Willow High Water Tower Site.

No changes to existing equipment at the Country Club High Level Water Tower Site are proposed.

The 2010 rent for this installation is \$9,085.42. The initial five-year term would begin on January 1, 2011. The rent amount for each year of that five-year period would be 115% of the 2010 rent amount which would be equivalent to a 4.86% annual rent increase. The rent for each year of two optional successive five-year periods would increase by 115% of the preceding five-year rent period. Each party would have the right to terminate the Site Agreement at the end of a five-year period by providing such notice at least 360 days prior to the expiration of the five-year period.

The proposed Amendment has been reviewed by the City Attorney. RPU staff will provide additional information related to the proposed change in method for determining Site Agreement rent amounts.

FOR CAPITAL PURCHASES/BIDS/MAJOR PROJECTS:

Not Applicable

UTILITY BOARD ACTION REQUESTED:

Management recommends the Utility Board approve the proposed Midwest Wireless Communications, L.L.C., Memorandum of Site Agreement and First Amendment to the 2002 Venture Systems Site Agreement, and request the Mayor and City Clerk to execute the Amendment.

  
General Manager

  
Date

**ROCHESTER PUBLIC UTILITIES**

**DRAFTED BY**

**AND RETURN TO:**

Moss & Barnett (JDL)

4800 Wells Fargo Building

90 South Seventh Street

Minneapolis, MN 55402-4129

(Site Name: **Rochester-Country Club Manor**)

(Prepared by Anthony Dorland, Telephone No. (612) 877-5258)

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(Space above this line for Registrar of Titles use.)

**MEMORANDUM OF SITE AGREEMENT AND  
FIRST AMENDMENT TO SITE AGREEMENT**

THIS MEMORANDUM OF SITE AGREEMENT AND FIRST AMENDMENT TO SITE AGREEMENT ("Memorandum") dated \_\_\_\_\_, 20\_\_\_\_, was entered into by and between City of Rochester, a Minnesota municipal corporation, with its address for notice located at c/o Rochester Public Utilities, 4000 East River Road N.E., Rochester, Minnesota 55905 ("CITY"), and Midwest Wireless Communications L.L.C., a Delaware limited liability company, with its address for notice located at 180 Washington Valley Road, Bedminster, New Jersey 07921 ("LESSEE").

This Memorandum evidences that CITY and LESSEE, or their predecessors in interest, originally entered into a Site Agreement dated January 24, 2002, as amended by First Amendment to Site Agreement ("Amendment") dated \_\_\_\_\_, 20\_\_\_\_ for certain real property located in the City of Rochester, County of Olmsted, State of Minnesota, within the property of the CITY described on Exhibit "A" attached hereto and made a part hereof together with a right of access and to install and maintain utilities. The Amendment provides for one (1) five (5) year period commencing on January 1, 2011, and two (2) additional five (5) year option periods along with other additional/modified provisions.

Rochester-Country Club Manor

Memorandum of Site Agreement and First Amendment to Site Agreement

IN WITNESS WHEREOF, CITY and LESSEE have duly executed this Memorandum as of the day and year written below.

**CITY:**

City of Rochester, a Minnesota municipal corporation

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

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

Title: Mayor

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

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

Title: City Clerk

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

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

Title: General Manager, Rochester Public Utilities

Approved as to form: \_\_\_\_\_

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

Title: City Attorney

Date: \_\_\_\_\_

**LESSEE:**

Midwest Wireless Communications L.L.C., a Delaware limited liability company

By: Beth Ann Drohan

Beth Ann Drohan

Its Area Vice President Network

Date: 5/21/10

**CITY ACKNOWLEDGMENT**

STATE OF MINNESOTA     )  
  ) ss.  
COUNTY OF OLMSTED     )

Before me, the undersigned Notary Public, personally appeared \_\_\_\_\_,  
\_\_\_\_\_ and upon oath acknowledged that they are the Mayor, City  
Clerk, City Attorney and General Manager of Public Utilities, respectively, of the City of Rochester,  
Minnesota, and that being duly authorized, they executed the foregoing instrument on behalf of the City, for  
the purposes contained therein.

WITNESS my hand and official seal, this \_\_\_\_ day of \_\_\_\_\_, 2010.

My commission expires:

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

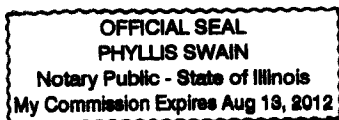
[SEAL]

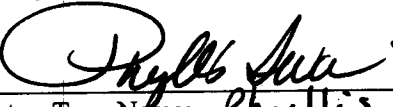
**LESSEE ACKNOWLEDGMENT**

STATE OF ILLINOIS     )  
  ) ss.  
COUNTY OF COOK     )

On this 21 day of MAY, 2010, before me, the undersigned, a Notary Public in and  
for the State of Illinois, duly commissioned and sworn, personally appeared Beth Ann Drohan, to me known to  
be the Area Vice President Network of Midwest Wireless Communications L.L.C., a Delaware limited liability  
company, that executed the foregoing instrument, and acknowledged said instrument to be the free and  
voluntary act and deed of Midwest Wireless Communications L.L.C., a Delaware limited liability company, for  
the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year  
first above written.



  
Print or Type Name: Phyllis Swain  
Notary Public in and for the State of Illinois  
My appointment expires: \_\_\_\_\_

Rochester-Country Club Manor  
Memorandum of Site Agreement and First Amendment to Site Agreement

**Exhibit "A"**

**(Legal Description)**

**Page 1 of 1**

Lot One (1), Block Five (5), Manor Woods First Subdivision, in the City of Rochester, Minnesota, according to the Plat thereof on file and of record in the office of the Registrar of Titles in and for said County.

And

Beginning at the Northeast corner of Lot One (1), Block Five (5), of Manor Woods First Subdivision as platted in the City of Rochester, Olmsted County, Minnesota; thence South  $0^{\circ} 10' 00''$  West along the East line of said Lot One (1), a distance of 145.92 feet to the southeast corner of said Lot One (1); thence South  $89^{\circ} 32' 30''$  East on a prolongation of the South line of said Lot One (1), a distance of 66.00 feet; thence North  $0^{\circ} 10' 00''$  East, parallel with the East line of said Lot One (1), a distance of 145.92 feet to the North line of the Southwest Quarter of the Southeast Quarter of Section 32, Township 107, Range 14 West; thence North  $89^{\circ} 32' 30''$  West, along said North line, a distance of 66.00 feet to the point of beginning.

Torrens Property.

## FIRST AMENDMENT TO SITE AGREEMENT

This FIRST AMENDMENT TO SITE AGREEMENT ("Amendment") is made this \_\_\_\_\_ day of \_\_\_\_\_, 2010 by and between the City of Rochester, a Minnesota municipal corporation ("CITY") and Midwest Wireless Communications L.L.C., a Delaware limited liability company ("LESSEE"), with its principal office located at One Verizon Way, Mail Stop 4AW100, Basking Ridge, New Jersey 07920 (telephone number 866-862-4404), with reference to the facts set forth in the Recitals below:

### RECITALS

A. CITY and LESSEE, or their predecessors in interest, are parties to a Site Agreement dated January 24, 2002 ("Agreement"), whereby CITY has leased a portion of CITY's Property (as defined in the Agreement) to LESSEE for the purpose of installing, removing, replacing, maintaining, modifying, altering and operating its communication fixtures and related equipment, antennas, cable, accessories and improvements, as situated substantially as shown on Exhibits C and D attached to the Agreement. The current Term of the agreement is currently scheduled to terminate December 31, 2010.

B. CITY and LESSEE desire to (i) extend the term of the Agreement for one (1) five (5) year extension term, (ii) provide for an annual increase in the rent payable to CITY under the Agreement during such extension term; and (iii) provide for and modify additional Agreement provisions.

### AGREEMENT

NOW, THEREFORE, in consideration of the facts contained in the Recitals above, the mutual covenants and conditions below, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. Section 1. A. Willow Heights Water Tower Site is deleted in its entirety.
2. Section 2. TERM of the Agreement is hereby deleted in its entirety and replaced with the following:

2. TERM. The current one-year term of this Agreement shall terminate on December 31, 2010. The Agreement shall be extended for one (1) five (5) year period commencing on January 1, 2011 ("Extension Term"). LESSEE may extend the term of the Agreement for two (2) additional five (5) year option periods ("Option Period"). Unless (a) CITY delivers to LESSEE written notice of non-renewal to LESSEE no later than three hundred sixty (360) days prior to the expiration of the

Extension Term or applicable Option Period, or (b) LESSEE gives CITY written notice of its intention not to extend at least three hundred sixty (360) days prior to the expiration of the then-current term, the applicable Option Period shall be deemed effective.

3. Section 3. RENT of the Agreement is hereby deleted in its entirety and replaced with the following:

3. RENT. LESSEE and CITY agree that rent in the amount of Nine Thousand Eighty-five Dollars and Forty-two Cents (\$9,085.42) has been paid in full for the site for 2010. 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<sup>st</sup> of each year. Annual rent for the five (5) year term commencing January 1, 2011 shall be equal to one hundred fifteen percent (115%) of the 2010 annual rent for each year of the initial five (5) year term, and the annual rent shall be one hundred fifteen percent (115%) of the immediately preceding five (5) year term for each succeeding five (5) year term. 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 10 below).

4. NOTICE. The parties' addresses for notices pursuant to the Agreement shall be as follows:

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

LESSEE: Midwest Wireless Communications L.L.C.  
180 Washington Valley Road  
Bedminster, New Jersey 07921  
Attention: Network Real Estate

5. LEGAL DESCRIPTION OF CITY'S LAND. The legal description of the CITY's real property in Exhibit C of the Agreement is hereby changed to the following:

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

Lot One (1), Block Five (5), Manor Woods First Subdivision, in the City of Rochester, Minnesota, according to the Plat thereof on file and of record in the office of the Registrar of Titles in and for said County.

And

Beginning at the Northeast corner of Lot One (1), Block Five (5), of Manor Woods First Subdivision as platted in the City of Rochester, Olmsted County, Minnesota;

thence South 0° 10' 00" West along the East line of said Lot One (1), a distance of 145.92 feet to the southeast corner of said Lot One (1); thence South 89° 32' 30" East on a prolongation of the South line of said Lot One (1), a distance of 66.00 feet; thence North 0° 10' 00" East, parallel with the East line of said Lot One (1), a distance of 145.92 feet to the North line of the Southwest Quarter of the Southeast Quarter of Section 32, Township 107, Range 14 West; thence North 89° 32' 30" West, along said North line, a distance of 66.00 feet to the point of beginning.

Torrens Property.

6. RATIFICATION OF THE AGREEMENT. Except as specifically modified by this Amendment, the parties agree that all of the terms and conditions of the Agreement are in full force and effect and remain unmodified, and the parties hereby ratify and reaffirm the terms and conditions of the Agreement and agree to perform and comply with the same. In the event of a conflict between any term or provision of the Agreement and this Amendment, the terms and provisions of this Amendment shall control. In addition, except as otherwise stated in this Amendment, all initially capitalized terms will have the same respective defined meaning stated in the Agreement. All captions are for reference purposes only and shall not be used in the construction or interpretation of this Amendment.

Signatures on following page

*The remainder of this page intentionally left blank*



IN WITNESS WHEREOF, CITY and LESSEE have caused this Amendment to be executed by each party's duly authorized representative effective as of the date written below.

**CITY:**

City of Rochester, a Minnesota municipal corporation

By: \_\_\_\_\_  
Print Name: \_\_\_\_\_  
Title: Mayor

Attest: \_\_\_\_\_  
Print Name: \_\_\_\_\_  
Title: City Clerk

By: \_\_\_\_\_  
Print Name: \_\_\_\_\_  
Title: General Manager, Rochester Public Utilities

Approved as to form: \_\_\_\_\_  
Print Name: \_\_\_\_\_  
Title: City Attorney  
Date: \_\_\_\_\_

**LESSEE:**

Midwest Wireless Communications L.L.C., a Delaware limited liability company

By: Beth Ann Drohan  
Beth Ann Drohan  
Title: Area Vice President Network

Date: 5/21/10

Acknowledgments on following page

*The remainder of this page intentionally left blank*

## CITY ACKNOWLEDGMENT

STATE OF MINNESOTA     )  
                                      ) ss.  
COUNTY OF OLMSTED     )

Before me, the undersigned Notary Public, personally appeared \_\_\_\_\_,  
\_\_\_\_\_ and upon oath acknowledged that they are the Mayor, City Clerk, City Attorney and General Manager of Public Utilities, respectively, of the City of Rochester, Minnesota, and that being duly authorized, they executed the foregoing instrument on behalf of the City, for the purposes contained therein.

WITNESS my hand and official seal, this \_\_\_\_ day of \_\_\_\_\_, 2010.

My commission expires:

[SEAL]

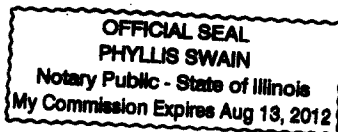
\_\_\_\_\_  
Notary Public

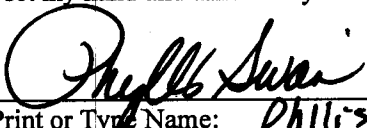
## LESSEE ACKNOWLEDGMENT

STATE OF ILLINOIS     )  
                                      ) ss.  
COUNTY OF COOK     )

On this 21 day of May, 2010 before me, the undersigned, a Notary Public in and for the State of Illinois, duly commissioned and sworn, personally appeared Beth Ann Drohan, to me known to be the Area Vice President Network of Midwest Wireless Communications L.L.C., a Delaware limited liability company, that executed the foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of Midwest Wireless Communications L.L.C., a Delaware limited liability company, for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.



  
Print or Type Name: Phyllis Swain  
Notary Public in and for the State of Illinois  
My appointment expires: \_\_\_\_\_



## RESOLUTION

BE IT RESOLVED by the Public Utility Board of the City of Rochester, Minnesota, to approve the attached Memorandum of Site Agreement and First Amendment to the 2002 Venture Systems, Inc. Site Agreement for wireless internet installations at the Country Club High Level Water Tower and Willow High Level Water Tower, and to request that the Mayor and the City Clerk execute the Memorandum and First Amendment to

- 1) Change duration of rent periods;
- 2) Change method of determining annual rent;
- 3) Terminate right to install wireless internet installation at Willow High Level Water Tower.

Passed by the Public Utility Board of the City of Rochester, Minnesota, this 29th day of June, 2010.

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President

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Secretary