

FOR BOARD ACTION

Agenda Item # 11

Meeting Date:

12/16/04

SUBJECT: Agreement for Antennas on Country Club High Level Water Tower
(Midwest Wireless Communications)

PREPARED BY: Doug Rovang, Senior Civil Engineer

DER

ITEM DESCRIPTION:

A request has been received from Midwest Wireless Communications for approval to maintain a wireless communications facility at the Apache Water Tower site.

The installation consists of equipment taking up two-hundred-forty (185) square feet of land, water tower exterior space for sixteen (16) antenna equivalents (three di-mode antennas, two tri-mode antennas, and one quad-mode antenna), space required for sixteen (16) 7/8" 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 Midwest Wireless Communications installation with the assistance of the City Attorney. The proposed 2005 annual rent would be \$17,588.00 adjusted to reflect the 2004 change in the Consumer Price Index (CPI-U) with annual adjustments thereafter based on each year's CPI-U change to reflect future inflation. The initial term of the contract would extend through 12/31/10. Three additional six-year option periods are included, subject to termination notice by either the City or Northern PCS.

UTILITY BOARD ACTION REQUESTED:

Staff recommends the Utility Board approve the proposed Site Agreement with Midwest Wireless Communications for maintaining a wireless communications facility at the Apache Water Tower site, and request the Mayor and City Clerk to execute the Site Agreement.

Jamy Koshin
General Manager

12/13/04
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"), whose address is 4000 East River Road NE, Rochester, Minnesota 55905 and Midwest Wireless Communications, L.L.C., a Delaware Limited Liability Company ("LESSEE"), whose address is 2000 Technology Drive, PO Box 4069, Mankato, MN 56002-4069, for the leasing of certain property interests at 1200 Highway 14 West (Apache Tower Site) pursuant to the following terms:

1. **PROPERTY.** The property interests hereby leased (collectively, the "Leased Premises") and granted by CITY include the following real property comprised of approximately two hundred forty (240) square feet of land, water tower ("Structure") exterior space for attachment of three (3) di-mode antennas, two (2) tri-mode antennas, and one quad-mode antenna, the sum of which total 16 antenna equivalents (each antenna assembly approximately 12" wide x 60" high), space required for sixteen (16) cable runs (each not to exceed 7/8" 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 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, a tri-mode antenna is three antenna equivalents, and a quad-mode antenna is four antenna equivalents).

TERM. The initial term of this Agreement shall commence on January 1, 2005, and shall terminate on December 31, 2010.

2. **OPTION TERMS.** LESSEE may extend the term of the Agreement for three (3) additional six (6) year option periods. 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 Initial Term or applicable Option Period, or (b) LESSEE gives CITY written notice of its intention not to extend at least Three Hundred and Sixty (360) days prior to the expiration of the then-current term, the applicable Option Period shall be deemed effective.
3. **RENT.** LESSEE shall pay City 2005 rent on or about March 1, 2005, the amount to be seventeen-thousand-five-hundred-eighty-eight dollars (\$17,588.00) adjusted by the 2004 change in the Consumer Price Index for All Urban Customers (CPI-U). 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). Rent pro-rations 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 a communications facility. The manner in which the Communications Facility may be 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. 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 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 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.
6. **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.
7. **GROUND LOCATED COMMUNICATIONS EQUIPMENT BUILDING.** Equipment at ground level shall be located within a concrete block building located where shown in Exhibit A. LESSEE shall maintain the building entirely at LESSEE's cost. The building shall be of the concrete block type similar in exterior architecture to existing Wellhouse #25 at the Apache Tower Site, and shall comply with all related CITY and Minnesota Building Code requirements. LESSEE shall be responsible for all permits related to the building. When the building is no longer of use to LESSEE, the building shall, at the option of the CITY, either become the property of CITY, or be removed, and the property returned to its condition prior to construction of the building.
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 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 building and personal property 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 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 Agreement with One Hundred Twenty (120) Days written notice to the LESSEE, notwithstanding any provisions herein to the contrary.
11. **TERMINATION.** This Agreement may be terminated by LESSEE for any reason without penalty upon six (6) months notice to CITY.

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 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 consultant fees and 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 consultant fees and 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 and any prepaid rent shall be refunded to LESSEE.
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.
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 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, agreements and understandings between CITY and LESSEE. All agreements and understandings between CITY and LESSEE are included herein.

This Agreement may only be amended in writing signed by all parties. Exhibits referenced herein are incorporated into this Agreement by reference.

- 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.
 - 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 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 all commission, fee or other payment to such agent..
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. 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. 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 Midwest Wireless Communications, L.L.C. (Apache 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.: _____

STATE OF _____) COUNTY OF _____)

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 Midwest Wireless Communications, L.L.C. (Apache Water Tower).

LESSEE

Midwest Wireless Communications, L.L.C.

By: _____

Name: _____

Title: _____

Address: Midwest Wireless Communications, L.L.C.
 12 Civic Center Plaza #2165
 Mankato, MN 56001-7779
 Attn: Director of Engineering

STATE OF _____)
) SS
 COUNTY OF _____)

The foregoing instrument was acknowledged before me on the ____ day of _____, 2004, by _____, the _____ of _____, on behalf of the limited liability company.

Notary Public _____
 My commission expires: _____

[Seal]

SITE NAME: Apache 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 NE QUARTER OF SECTION 10 TOWNSHIP 106 RANGE 14 DESCRIBED AS: COMMENCING AT THE INTERSECTION OF THE EASTERLY RIGHT-OF-WAY LINE OF TRUNK HIGHWAY 52 AND THE SOUTHERLY RIGHT-OF-WAY LINE OF TRUNK HIGHWAY 14; THENCE SOUTHWESTERLY ALONG SAID EASTERLY LINE OF TRUNK HIGHWAY 52 A DISTANCE OF 137.37 FEET; THENCE EASTERLY 256.88 FEET; THENCE NORTHERLY 125.00 FEET TO THE SOUTHERLY LINE OF SAID TRUNK HIGHWAY 14; THENCE WESTERLY ALONG THE SOUTHERLY LINE OF SAID TRUNK HIGHWAY 14 A DISTANCE OF 200.00 FEET TO THE BEGINNING.

Description of the City's Apache Water Tower site located at 1200 Highway 14 W (Apache Mall), Rochester, Minnesota.

SITE NAME: Apache Water Tower Site

EXHIBIT A (Continued)

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

SEE ATTACHED

SITE NAME: Apache Water Tower Site

EXHIBIT B

DRAWINGS SHOWING 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 Midwest Wireless Communications, with 2005 rent of Seventeen-Thousand-Five-Hundred-Eighty-Eight and No/100 Dollars (\$17,588.00) adjusted based on the 2004 change in the CPI-U, 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 Apache Water Tower site

Passed by the Public Utility Board of the City of Rochester, Minnesota, this 16th day of December, 2004.

President

Secretary