

BEFORE THE BOARD OF COUNTY COMMISSIONERS
FOR MULTNOMAH COUNTY, OREGON

RESOLUTION NO. 07-177

Approving Amendment to Real Property Lease and Authorizing County Chair to Execute Further Lease Amendments with Tower Acquisitions LLC for the Rocky Butte Communication Facility, 2600 NE Rocky Butte Road, Portland, Oregon, 97220

The Multnomah County Board of Commissioners Finds:

- a. In 1985 the Board approved a lease of property known as the Rocky Butte Communication Facility located at 2600 NE Rocky Butte Road, Portland, Oregon, 97220 (Property Lease).
- b. The Rocky Butte Communications Facility is a tower designed for the installation and operation of communication antennas and small building that houses equipment necessary for the operation of the antennas constructed on a small parcel of County owned land located at the above noted address.
- c. Tower Acquisitions LLC, of Lee, Massachusetts (TAL) is the proposed new Lessee to replace the previous Lessee: Western Tele-Communications, Inc.
- d. The County and TAL have negotiated the attached lease amendment in settlement of their dispute regarding issues raised in a bankruptcy proceeding involving the tower facility and the Property Lease.
- e. It is in the best interests of the County to amend the Property Lease on the terms and conditions set forth in the attached lease amendment.

The Multnomah County Board of Commissioners Resolves:

1. The Board approves the attached lease amendment in settlement of the issues raised in the bankruptcy proceeding. The County Chair is authorized to execute an amendment to the Property Lease substantially in the form attached to this Resolution.
2. The County Chair is authorized to execute future amendments to the Property Lease without further Board action.

ADOPTED this 8th day of November, 2007



BOARD OF COUNTY COMMISSIONERS
FOR MULTNOMAH COUNTY, OREGON


Ted Wheeler, Chair

REVIEWED:

AGNES SOWLE, COUNTY ATTORNEY
FOR MULTNOMAH COUNTY, OREGON

By 
Matthew O. Ryan, Assistant County Attorney

SUBMITTED BY:

Agnes Sowle, Multnomah County Attorney

FIRST AMENDMENT TO LEASE AGREEMENT

This First Amendment to Ground Lease Agreement ("First Amendment") by and between Multnomah County, a political subdivision of the State of Oregon, with a mailing address of: 501 SE Hawthorne Blvd, Suite 500, Portland, Oregon 97214; hereinafter designated LESSOR and Tower Acquisition LLC, a Delaware series limited liability company with its principal office located at 190 Housatonic Street, Lee, MA hereinafter designated LESSEE is made and entered into effective as of the date the last party hereto executes this First Amendment as indicated below. Lessor and Lessee are sometimes referred to herein as the "Parties".

RECITAL

WHEREAS, Lessor and Lessee entered into and executed that certain Lease Agreement dated April 24, 1985 (the "**Lease Agreement**" or "**Lease**" or "**Agreement**"), whereby Lessor leased to Lessee a portion of that certain property commonly known as "The Rocky Butte Tower Communication Facility", more particularly described in the Lease Agreement and as shown on the Tax Map of Multnomah County as Tax Lot 204, Map 2480, Section 28, Township 1 North, Range 1 East, Willamette Meridian, Multnomah County, State of Oregon (the "**Premises**"); and

WHEREAS, Lessor and Lessee desire to amend and modify certain terms and conditions of the Agreement;

WHEREAS, for purposes of this Lease pursuant to that certain Intergovernmental Agreement ("IGA") executed in 1993 between the City of Portland ("City") and Lessor, to provide for the shared use of the both Jurisdictions' communication facilities the City has the right to use the Premises for the uses allowed under the 1993 IGA, the rights and uses of the Lessor under this First Amendment shall apply to the City to the same extent as to the Lessor.

NOW THEREFORE, in consideration of the mutual covenants and conditions contained herein and for other good and valuable consideration, the receipt and sufficiency which are hereby acknowledged, Lessor and Lessee, intending to be legally bound, do hereby covenant and agree as follows:

Paragraph 4 of the Agreement and the Exhibit B referenced therein and attached to the Agreement shall be and is hereby deleted in its entirety and replaced with the following:

4. A. Lessor leases the Premises to Lessee for the purpose of enabling Lessee to construct, repair, maintain, and operate in, on and upon the Premises a communications facility including a tower not to exceed one-hundred fifty (150) feet in height and the equipment building/shelter and related equipment currently existing at the Premises. The area is presently enclosed by a chain link security fence.

B. Lessor's primary use is the operation of "essential communications" as that term is commonly used to identify emergency, police and fire

communications as well as other local government communications. At the present time Lessor's use of these functions occupies a radio frequency band below 1,000 MHZ.

C. Lessee shall have the right to sub-lease or sub-license any portion of the Premises not used, occupied, or allowed to be used or occupied, by Lessor as provided for herein and shall have the right to grant access and use to any and all easements and rights of access and utilities to third parties, in Lessee's sole and absolute discretion, and without the consent of Lessor subject to the following conditions:

1. Notwithstanding any provision in this agreement to the contrary, Lessee shall not install and shall not allow any third party to install any equipment at the Premises of a type and frequency which will cause harmful interference to the equipment of Lessor installed at the Premises, provided Lessor is operating such equipment within Lessor's assigned frequencies and within the technical parameters specified by its manufacturer and/or as defined by the Federal Communications Commission.

2. Lessee acknowledges that there will not be an adequate remedy at law for noncompliance with the provisions of this paragraph and therefore, Lessor shall have the right to equitable remedies, such as, without limitation, injunctive relief and specific performance.

3. Notwithstanding Sub-Sections 4.C.1 and 4.C.2.; and upon notice from Lessor either orally or in writing, Lessee shall be responsible at no expense to Lessor for promptly taking such steps as may reasonably be necessary to prevent any harmful interference with Lessor's communication uses caused by Lessee's, or any sublessee's or sublicensee's of Lessee, activities. In the event such harmful interference occurs:

- a. To the extent such interference is with non-essential communications of Lessor; Lessee shall cease or require any sublessee/sublicensee of Lessee operating at the Premises to cease causing such harmful interference as soon as practicable but no later than 24 hours of written notice of same to Lessee or sublessee/sublicensee of Lessee. Lessee or any sublessee/sublicensee of Lessee shall be allowed to conduct intermittent testing and/or power down its equipment to allow such third party to eliminate such harmful interference.

- b. To the extent such interference is with essential communications as described in Sub-section 4. B., Lessee shall cease immediately or cause any sublessee/sublicensee of Lessee to cease immediately such harmful interference. Provided there is no interference with essential communications, the Lessee or any sublessee/sublicensee of Lessee shall be allowed to conduct intermittent testing

and/or power down its equipment to allow such third party to eliminate such harmful interference.

D. Lessee, and any sublessee/sublicensee of Lessee, shall have the right of access to the Premises at all times (i.e., twenty-four hours a day, seven days a week) during the term of this Lease.

2. Paragraph 9 of the Agreement shall be and is hereby amended to include the following revisions:

a. The first sentence shall be amended with the insertion of the following: "indemnify,"

immediately before the phrase: "save and hold harmless" in that sentence.

b. The addition of the following provision:

"Subject to the Conditions of the Oregon Tort Claims Act (ORS 30.260-30.300) and specifically within the financial limits of ORS 30.270; Lessor agrees to indemnify, save and hold harmless Lessee from any and all liability and claims whatsoever arising out of Lessor's gross negligence in the use of the Premises, except in cases arising from the negligent or other tortuous misconduct of Lessee or any sublessees of Lessee or their employees, agents, or business visitors."

3. That portion of Paragraph 9 stating "(1) \$500,000.00 combined single occurrence to each person and property" shall be and is hereby deleted and replaced with the following:

"(1) \$1,000,000.00 combined single occurrence to each person and property, which amount shall be adjusted over time consistent with best commercial practices for insuring comparable improvements."

4. Paragraph 13 is amended as follows:

The First sentence is deleted, and the following sentences are added:

Lessee shall not sell, assign, or otherwise transfer the whole of this Lease, unless or until it receives the written consent of Lessor, which consent shall not be unreasonably withheld, conditioned or delayed. Upon Lessor's receipt of Lessee's written request to sell, assign, or otherwise transfer the whole of this Lease, Lessor shall have thirty (30) days with which to reasonably object to such sale, assignment or other transfer of the whole of this Lease by Lessee. In the event Lessor fails to provide such written objection within said thirty (30) days; the proposed sale, assignment or other transfer shall be deemed to be automatically approved and consented to by Lessor and Lessor shall be deemed to have waived any and all rights to further object. Upon such sale, assignment or other transfer, Lessee shall be relieved of any and all obligations and liabilities to Lessor under this Agreement.

5. Exhibit A to the Agreement shall be and is hereby deleted in its entirety and replaced with the attached "Exhibit A, Revised" and all references in

the Agreement to "Exhibit A" shall be deemed to be a reference to the attached "Exhibit A, Revised."

6. Lessee's and Lessor's addresses identified in Paragraph 21 of the Agreement is hereby deleted and replaced with the following:

"To Lessee: Tower Acquisition LLC
190 Housatonic Street
Lee, Massachusetts 01238"

"To Lessor: Multnomah County, Oregon
Attn: Asset Management, Facilities & Property Management
401 N. Dixon Street, Portland, Oregon 97227"

7. Paragraph 22 of the Agreement is further amended by adding the word "telephone" between the words "gas" and "electricity" in the first line of Paragraph 22.

Paragraph 22 of the Agreement is hereby further amended to include the following sentence:

"Lessor shall promptly pay for all gas, telephone, electricity, and water used by it on the Premises during the term hereof, all of which shall be measured through proper and sufficient meters, to be installed and maintained by Lessor."

8. To the extent that there is any conflict between the terms of this First Amendment and the terms of the Agreement, the terms of this First Amendment shall control. Capitalized terms set forth in this First Amendment shall have the same meanings as the capitalized terms set forth in the Agreement, except as modified by this First Amendment.
9. Except as herein expressly modified and amended, the Agreement shall remain in full force and effect pursuant to each and every of its terms and conditions.
10. The Parties hereby affirm, restate and ratify the Agreement being amended by this Amendment. Lessor hereby recognizes Lessee as the successor in interest to the Agreement and waives any and all rights it may have to dispute and/or challenge any prior assignment of the Agreement to the Lessee and Lessee's predecessor's in interest.

[SIGNATURES APPEAR ON FOLLOWING PAGE]

IN WITNESS WHEREOF, Lessor and Lessee have executed this First Amendment as of the date the last party hereto executes this First Amendment as indicated below.

LESSOR: Multnomah County, a political subdivision of the State of Oregon

By: _____

Name:

Title:

Date: _____

LESSEE: TOWER ACQUISITION LLC
a Delaware series limited liability company

By: _____

Name:

Title:

Date: _____

Exhibit A, Revised

1. Lessor, during the term of the Agreement, shall be entitled to occupy that existing 12' x 28' section of Lessee's shelter currently located at the Premises and which is currently being occupied by Lessor.
2. a. Subject to the conditions set forth in this Exhibit A, Revised Lessor, during the term of the Agreement, shall be entitled to install and operate, without charge and/or lease fee to Lessee only the following five (5) antennas (the "Approved Equipment") on Lessee's tower located at the Premises. Such right shall exist whether or not such equipment is physically located on the tower on the effective date of this First Amendment at the below identified antenna center line ("ACL") of the tower, as follows:

| Type | Model | Dimensions | ACL | Frequency |
|--------------|-------|---------------------------------------------------------------------|-----|-----------|
| a. Omni | TBD | x 20' | | |
| b. Omni | TBD | x 20' | | |
| c. Omni | TBD | x 20' | | |
| d. Omni | TBD | x 20' | | |
| e. microwave | | x 6' (reserved as provided for in and subject to Section 2c. below) | | |

b. Subject to the provisions of Subsection 6 of this Exhibit A Revised, Lessor shall have the right, at its own expense, to make such alteration, modification or replacement of Lessor's Approved Equipment in or on the Premises as its operations may require as determined in its reasonable discretion, including the renovation or replacement of its antennas or other equipment.

c. Notwithstanding anything in this Agreement to the contrary, in the event the Additional Equipment as defined below is removed, Lessor shall have the right to add a microwave dish up to a diameter of six (6) feet or utilize one (1) existing microwave antenna identified in Section 3a. below not to exceed six (6) feet in diameter without charge and or fee to Lessee. The Parties agree that the addition of said microwave dish or the utilization of an existing microwave antenna as allowed under this Sub-section 2.c. shall not be deemed an "Antenna Modification" under Section 6 herein.

3. a. Subject to the conditions set forth in this Exhibit A, Revised, Lessor, during the term of the Agreement, shall be entitled to install and operate the following additional five (5) antenna (the "Additional Equipment") on Lessee's tower located at the Premises at the below identified antenna center line of the tower for an annual fee of Six Thousand and xx/100 dollars (\$6,000.00) (the "Additional Equipment Fee") to be paid to Lessee in equal monthly installments:

| Type | Model | Dimensions | ACL | Frequency |
|------|-------|------------|-----|-----------|
| 1. | | | | |
| 2. | | | | |
| 3. | | | | |
| 4. | | | | |

5.

b. The first monthly payment obligation under this Section 3, shall be due and payable on the first day of the month following the full execution of this Lease (the "Commencement Date") and the monthly obligation shall thereafter be due and payable on the first day of each month thereafter until the end of the term.

4. Lessor shall have the right to install and operate the Additional Equipment for an initial term of two (2) years and for four (4) five (5) year renewal terms thereafter. On the first anniversary of the Commencement Date and for each year thereafter, the Additional Equipment Fee shall increase by three percent (3%) over the immediately prior year's fee. The renewal terms shall automatically be renewed unless Lessor provides Lessee written notice of its intent not to renew within ninety (90) days of the then applicable renewal term. The Additional Equipment Fee and the aforementioned initial term shall commence on the first day of the month following the date the Amendment is fully executed by the Parties. . After the initial term, Lessor shall have the right to remove the Additional Equipment upon providing Lessee with sixty (60) days written notice of its intent to do so. Upon removal of the Additional Equipment, Lessor's obligation to pay the Additional Equipment Fee shall cease.
5. Lessor shall have the right to assign its right to install and operate the Additional Equipment to the City of Portland provided the City of Portland agrees to assume all of Lessor's obligations under the Agreement as amended by this First Amendment including but not limited to the payment of the Additional Equipment Fee.
6. a. All installation, use, operation and maintenance of Approved Equipment and Additional Equipment shall be performed by Lessor at Lessor's sole cost and expense and shall be done in accordance with sound engineering principals, practices and standards, including, but not necessarily limited, to those prescribed by; the Federal Communications Commission (hereinafter "FCC"), the American National Standards Institute (hereinafter "ANSI"), the Electronics Industry Alliance and Telecommunications Industry Association (hereinafter "EIA/TIA") and the Institute of Electrical and Electronic Engineers (hereinafter "IEEE") to the extent all such cited codes and provisions have been adopted or have application in the State of Oregon. Without limiting the provisions of this Section 6, Lessor shall not commence installation of any Approved Equipment until final Site Drawings have been attached hereto as Exhibit B and Lessee has approved the same and has issued a written notice to proceed and has attached it to Exhibit B; Lessee shall not unreasonably withhold said approval. Unless Lessee has notified Lessor to the contrary within fifteen (15) days of Lessee's receipt of the final Site Drawings, Lessee shall be deemed to have approved the same and Lessor may commence installation of the Approved Equipment and/or the Additional Equipment as the case may be. The procedure set forth in this Section 6 shall not apply to any subsequent replacement of Approved Equipment and/or Additional Antennas (of the same or like kind, provided no additional or increased loading upon the communications tower results) due to routine and/or corrective maintenance activities. Any installation of additional equipment or any equipment which increases the physical space occupied and/or the structural loading upon the tower

at the Premises (an "Antenna Modification") shall have the prior written consent of Lessee, which such consent may not be unreasonably withheld but which may be reasonably conditioned by Lessee, including those conditions specifically identified in Section 6b. below.

b. Subject to Section 6c. below, in the event Lessor desires to make an Antenna Modification which adds equipment to the tower or increases the length of any of the Omni type antennas identified in Section 2a or 3a. above or increases the diameter of any microwave dish identified in 2a. or 3a. above, the Parties specifically agree that it shall be reasonable for Lessee to charge Lessee a lease fee for such additional equipment and/or increase in length or diameter, in an amount comparable for such additional equipment and/or increase in length or diameter for commercial customers of Lessee in the applicable geographic market of the area in which the tower is located. In the event Lessor desires to make an Antenna Modification which involves an increase in the structural loading upon the tower at the Premises then the Parties specifically agree that it shall be reasonable for Lessee to condition such Lessee's written consent of any such Antenna Modification upon Lessor making corresponding structural improvements to the tower contemporaneously with such Antenna Modification (which such corresponding structural improvements shall be at no cost to Lessee) such that any increase in structural loading resulting from such Antenna Modification is completely offset by the corresponding structural improvements.

c. In the event Lessor desires to make an Antenna Modification requiring the replacement of an omni type antenna permitted in Section 2a. above with an omni type antenna of greater length and provided such Antenna Modification would not cause interference with an existing sublessee/sublicensee of Lessee, then Lessor shall be able to make such Antenna Modification without charge or fee to Lessee, if the following conditions are met: (1) the length of the replacement antenna does not exceed twenty-five feet (25') in length; and, (2) the Lessor makes corresponding structural improvements to the tower as provided for in Section 6b. above completely offsetting any increase in loading caused by such Antenna Modification.

d. Any contractors or agents of Lessor performing work on the Tower shall have valid and current worker's compensation and general liability insurance certificates on file with Lessee, naming Lessee as an additional insured. Lessor is self-insured and will provide Lessee a letter certifying self -insurance for said insurance requirements.

7. Lessor, Lessee, and any sublessee/sublicensees of Lessee shall at all times comply with all applicable laws and ordinances and all rules and regulations of municipal, state and federal governmental authorities (including, but not limited to, those of the Federal Communications Commission) relating to the installation, maintenance, location, use, operation, and removal of the Approved Equipment and/or the Additional Equipment and other alterations or improvements authorized pursuant to the provisions of this Agreement.
8. Lessor shall have the right as needed for emergency local police communications to temporarily install one omni-directional Whip or directional Yagi antenna not to exceed fifteen feet (15') in length below the 30 foot level of the tower. Lessor shall

provide notice of such temporary installation prior to such installation or, if not practical, as soon as practical after such installation.

9. Lessor, upon termination of the Agreement and/or termination of the right to install and operate the Additional Equipment, shall, within ninety (90) days, remove its ground equipment, antenna structure(s) fixtures and all personal property and otherwise restore the Premises to its original condition, reasonable wear and tear excepted.
10. Should Oregon building code standards be revised during the period when any of the "Additional Equipment" (as identified in this First Amendment) are on the tower facility; Lessor agrees to a one time only monetary contribution to the cost of a required structural upgrade of the tower facility to accommodate the installation of new equipment by Lessee or Lessee's sub-lessees/sub-licensees; provided the Lessor's contribution under this Sub-section shall not exceed 50% of the total cost or twenty thousand dollars (US\$20,000.00), whichever is the lesser amount.
11. Subject to Section 6 of this Exhibit A, Revised, it is mutually understood that advancements in communication technology may provide for a more cost effective or efficient provision of communication services and needs; all parties authorized to occupy space on the tower reserve the right to replace outdated equipment with any such new technologies.
12. Should Lessee petition for an exemption from the payment of taxes assessed under ORS 308.505 to ORS 308.665 against Lessee by the State of Oregon arising out of or relating to the Agreement as amended herein; and to the extent such exemption is available to Lessee based on Lessor's use of the Premises under this Agreement, Lessor agrees to use its best efforts to assist and support Lessee in petitioning for said exemption.
13. Each party shall maintain separate service entrances and utility meters. Subject to the provisions of this Agreement as amended herein, Lessee shall provide external basic tower and equipment building maintenance to include painting and tower lighting as required. The Lessor shall maintain the grounds.