

OTAY WATER DISTRICT
FINANCE, ADMINISTRATION AND COMMUNICATIONS
COMMITTEE MEETING
and
SPECIAL MEETING OF THE BOARD OF DIRECTORS

2554 SWEETWATER SPRINGS BOULEVARD
SPRING VALLEY, CALIFORNIA
BOARDROOM

TUESDAY
July 23, 2013
11:30 A.M.

This is a District Committee meeting. This meeting is being posted as a special meeting in order to comply with the Brown Act (Government Code Section §54954.2) in the event that a quorum of the Board is present. Items will be deliberated, however, no formal board actions will be taken at this meeting. The committee makes recommendations to the full board for its consideration and formal action.

AGENDA

1. ROLL CALL
2. PUBLIC PARTICIPATION – OPPORTUNITY FOR MEMBERS OF THE PUBLIC TO SPEAK TO THE BOARD ON ANY SUBJECT MATTER WITHIN THE BOARD'S JURISDICTION BUT NOT AN ITEM ON TODAY'S AGENDA

DISCUSSION ITEMS

3. APPROVE TWO (2) AGREEMENTS WITH BMB TOWER HOLDINGS, LLC, AN OKLAHOMA LIMITED LIABILITY COMPANY, FOR THE INSTALLATION OF A COMMUNICATIONS FACILITY AT THE 485-1 AND 458-1 RESERVOIR SITES (MARTIN) [5 minutes]
4. DECLARE THE IDENTIFIED VEHICLES AND EQUIPMENT AS SURPLUS TO THE DISTRICT'S NEEDS (SARNO) [5 minutes]
5. APPROVE A ONE-YEAR FIXED WITH FOUR OPTION YEAR RENEWALS (FIVE-YEAR TERM) AGREEMENT WITH PAYMENTUS TO PROVIDE PHONE PAYMENT SERVICES IN AN AMOUNT NOT-TO-EXCEED \$250,000 (\$50,000 ANNUALLY) (CAREY) [5 minutes]
6. ADJOURNMENT

BOARD MEMBERS ATTENDING:

David Gonzalez
Jose Lopez

AGENDA ITEM 3



STAFF REPORT

TYPE MEETING:	Regular Board	MEETING DATE:	August 7, 2013
SUBMITTED BY:	Dan Martin Engineering Manager	PROJECT/ SUBPROJECT:	AS588- DIV. NO. 2, CS0001 4 & AS588- CS0002
APPROVED BY:	<input checked="" type="checkbox"/> Rod Posada, Chief, Engineering <input checked="" type="checkbox"/> German Alvarez, Assistant General Manager <input checked="" type="checkbox"/> Mark Watton, General Manager		
SUBJECT:	Request to Approve Two (2) Agreements with BMB Tower Holdings, LLC, an Oklahoma Limited Liability Company, for the Installation of a Communications Facility at the 485-1 & 458-1 Reservoir Sites		

GENERAL MANAGER'S RECOMMENDATION:

That the Otay Water District (District) Board of Directors (Board) authorize the General Manager to execute two (2) agreements with BMB Tower Holdings, LLC, an Oklahoma Limited Liability Company, (BMB) for the installation of a communications facility at the 485-1 & 458-1 Reservoir Sites (see Exhibit A for Project location).

COMMITTEE ACTION:

See Attachment A.

PURPOSE:

To obtain Board approval authorizing the General Manager to execute two (2) agreements (see Attachments B-1 and B-2) with BMB that allows the installation of a communications facility at the 485-1 & 458-1 Reservoir Sites. The agreement will grant BMB the right to use approximately 177 square feet of leased area at the 458-1 Reservoir Site and approximately 147 square feet of leased area at the 485-1 Reservoir Site.

ANALYSIS:

The District currently has two lease agreements with BMB, as reflected in Exhibit A:

1. Point Barrow Drive (458-1 Reservoir)
2. East H Street (485-1 Reservoir)

The original leases for the sites were signed in September 2006 between the District and Cricket Communications (Cricket). Subsequently, in April 2011 the leases were assigned from Cricket to Global Tower Partners, LLC (GTP). Lastly, in June 2011, the leases were assigned from GTP to BMB.

In June 2012, the District was made aware that BMB was subleasing both the Point Barrow Drive site and the East H Street site back to Cricket. The agreements that BMB assumed under the assignment specifically prohibit subleasing of the sites without the District's prior written consent. As a result, letters were sent to BMB notifying them of the default of the agreement for each site along with a request to cure.

As a requirement to cure the agreements, the District has requested that BMB enter into new lease agreements for the both sites. The new agreements will memorialize the change in ownership, provide for a sublease only to Cricket, and strengthen the terms of the existing leases with language that reflects the current District lease terms.

The language in the proposed lease agreements includes terms for the following:

- Security Deposit equal to the sum of two months' rent.
- Elimination of pro-rating language to simplify the billing process.
- 20 percent penalties for late payment.
- Non-curable Event of Default for failure to pay rent.
- Magnetic mount or other non-destructive alternative attachment requirement.
- Utilities and back-up power provisions.
- New Assignment of Lease requirement to assist in documenting change of ownership.
- Assessment of a one-time payment of \$1,000.00.

As part of the lease agreements, the Rent shall be increased on each calendar anniversary of the Commencement Date at a rate of four percent (4%) per annum. At the beginning of an extension term or

additional term the rent will be adjusted to the rate of four percent (4%) per annum or the annual Consumer Price Index change ("CPI"), whichever is greater.

The lease agreements also include a non-refundable administrative fee of \$4,500 for each amendment that will be due within (30) days of the date of execution of the lease agreements by both parties to reimburse the District for administrative expenses and costs related to the District's supervision and assistance of the lease default cure.

FISCAL IMPACT: Joseph Beachem, Chief Financial Officer

The District will continue to receive rent which will now be subject to an annual inflation adjustment of four percent effective upon the execution of the lease agreements.

STRATEGIC GOAL:

The District ensures its continued financial health through long-term financial planning, formalized financial policies, enhanced budget controls, fair pricing, debt planning, and improved financial reporting.

LEGAL IMPACT:

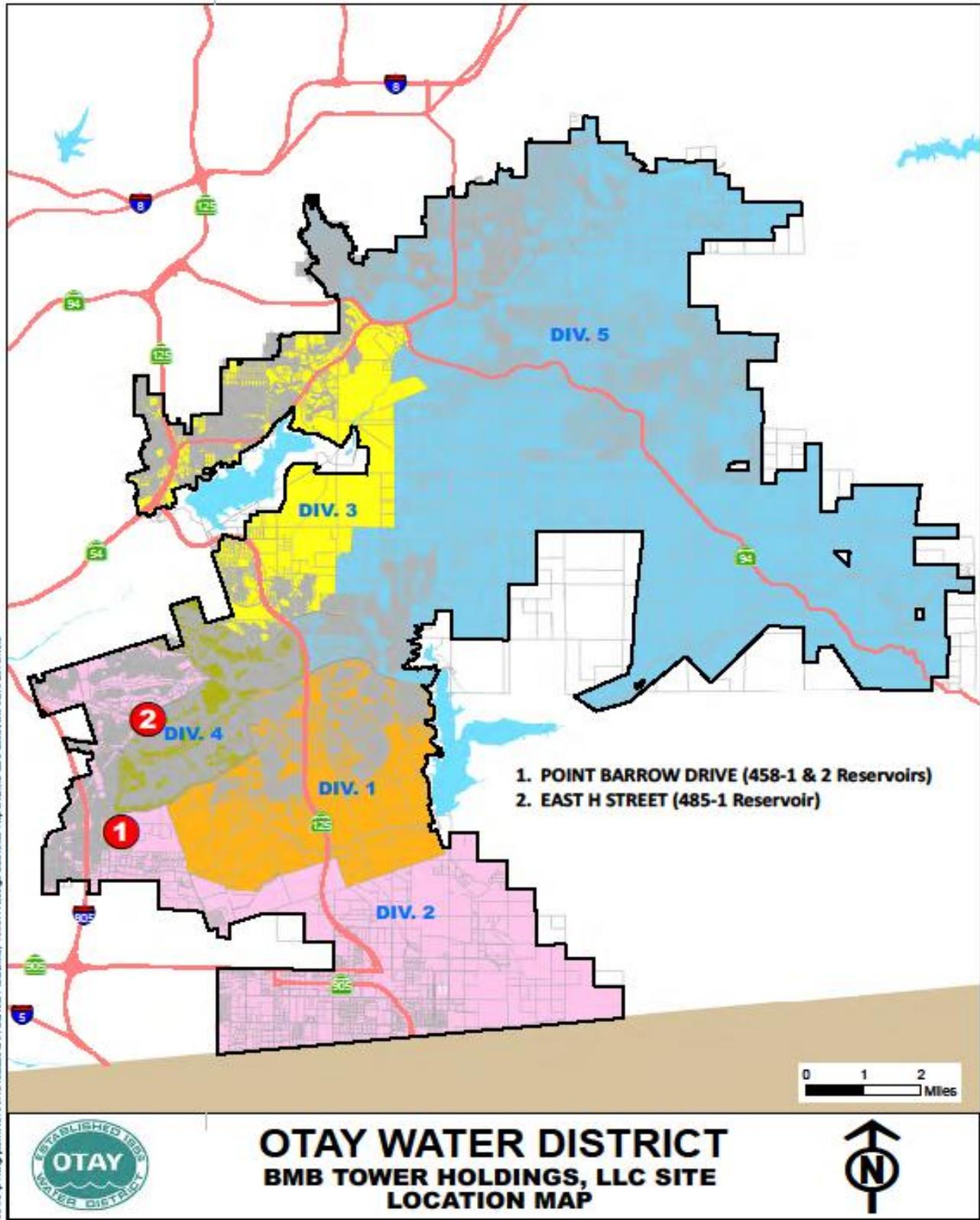
The agreement has been reviewed and approved by District General Counsel for content and form.

DJM/RP:jf

P:\WORKING\CELLULAR LEASE FILE\BMB, Tower Holdings LLC\Staff Report\BD 08-07-13\BD 08-07-13, Staff Report, BMB @ 485-1 and 458-1 Res Sites, (DM).docx

Attachments: Exhibit A - Location Map
 Attachment A - Committee Action
 Attachment B-1 - 458-1 Reservoir Agreement
 Attachment B-2 - 485-1 Reservoir Agreement

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OTAY WATER DISTRICT
BMB TOWER HOLDINGS, LLC SITE
LOCATION MAP

EXHIBIT A



ATTACHMENT A

SUBJECT/PROJECT: AS588-CS0001 AS588-CS0002	Request to Approve Two (2) Agreements with BMB Tower Holdings, LLC, an Oklahoma Limited Liability Company, for the Installation of a Communications Facility at the 485-1 & 458-1 Reservoir Sites
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COMMITTEE ACTION:

The Finance, Administration, and Communications Committee (Committee) reviewed this item at a meeting held on July 23, 2013. The Committee supported Staff's recommendation.

NOTE:

The "Committee Action" is written in anticipation of the Committee moving the item forward for Board approval. This report will be sent to the Board as a Committee approved item, or modified to reflect any discussion or changes as directed from the Committee prior to presentation to the full Board.

AGREEMENT BETWEEN BMB TOWER HOLDINGS,
 LLC AND OTAY WATER DISTRICT TO LOCATE A
 COMMUNICATIONS FACILITY AT OTAY'S 458-1
 RESERVOIR SITE
 (651 Pt. Barrows Drive, Chula Vista CA, 91911)

This Telecommunication Facility Agreement (the "Agreement") is entered into and effective on the date specified in the signature page (the "Commencement Date"), by and between the Otay Water District, a municipal water district organized and operated pursuant to the Water Code Section 71000, et seq. ("Otay"), and BMB Tower Holdings, LLC ("Tenant"). Special terms and conditions are set forth on Exhibit A.

R E C I T A L S

A. Otay owns a site on which it has constructed water facilities known as the "458-1 RESERVOIR SITE," as depicted on Attachment A to Exhibit B (the "Reservoir Site").

B. On September 14, 2006, Otay entered into that certain lease agreement (the "Original Lease") with Cricket Communications, Inc., a Delaware corporation for the Reservoir Site.

C. On or about April 14, 2011 Otay consented to an assignment of the Original Lease from Cricket Communications Inc. to Global Tower Partners, LLC ("GTP").

D. On or about June 6, 2011 Otay consented to an assignment of the Original Lease from GTP Communications Inc. to BMB Tower Holdings, LLC ("BMB").

E. On or before April 19, 2012 BMB subleased of a portion of the Original Lease space without Otay's consent and failed to pay rent in a timely manner in violation of the terms of the Original Lease and subsequent assignments.

F. Tenant has cured the Original Lease defaults including a one-time payment to Otay of \$1,000.00.

G. Tenant has requested Otay to allow it to continue the use of the Property for location of a communications facility and transmitting and receiving antennas at the Reservoir Site pursuant to the terms and conditions set forth herein.

H. Otay is willing to allow Tenant to locate the Facilities (defined below) at the Reservoir Sites pursuant to the terms and conditions set forth herein.

A G R E E M E N T

For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Otay and Tenant agree as follows:

1. Premises. Otay owns the real property described in Attachment B to Exhibit B (the "Property"). Otay agrees to lease to Tenant, for the installation of antennas and related telecommunications equipment within the Property, as more particularly described on Attachment C to Exhibit B (the "Premises").

2. Grant of Non-Exclusive Trench and Utility Easement(s). Upon written request from Tenant, Otay agrees to grant a non-exclusive easement, as legally described and depicted in Exhibit C to this Agreement (the "Easement"), for certain agreed-upon portions of the Property for the purpose of trenching and for the installation and maintenance of the Otay approved utilities needed by Tenant for the Facilities. It is expressly agreed that any such Easement shall

only be valid if signed by the parties and, if so, it shall run concurrently with this Agreement and shall terminate automatically if this Agreement is terminated or ceases to exist for any reason. Tenant agrees, holding Otay harmless for any cost or expense, to return any such Easement and any portions of the Property disturbed in connection with the Facilities or any Tenant activity to their original condition, or any other condition acceptable to Otay, as evidenced in advance of the work in a writing signed by Otay representatives.

Tenant acknowledges that the Property is used in connection with Otay's storage and delivery of water and other services to the public, and agrees that such uses by Otay are superior in all respects to all uses by Tenant. Upon six-months written notice from Otay (or less if six-months notice cannot be reasonably given), Tenant shall at its sole expense relocate its Easement to another mutually agreeable location within the Property. Otay and Tenant shall reasonably cooperate in such relocation, however if no such suitable location can be agreed-upon, either party may terminate this Agreement without further liability to the other party.

Non-exclusive means, in connection with the Easement described and defined in this Section 2, that Otay or any person or entity authorized by Otay may utilize the easement area for any purpose which does not interfere with Tenant's use, including a purpose similar to Tenant's. Otay shall provide Tenant with advance notice of any intention to use, or authorize a third party to use, the easement area.

3. Use of the Premises. The Premises may be used by Tenant only for the purpose of installing, constructing, housing, operating, maintaining and repairing its own, Otay-approved telecommunication equipment, including appurtenant antennas and electronic equipment, as further described and conditioned in this Agreement (collectively, the "Facilities"), for the lawful provision of communication services. Tenant may not sublease, sublicense or permit another entity any use of space at the Premises or the Facilities, except as provided in Section 12, below.

4. Access. Subject to compliance with the conditions set forth below, Otay agrees to provide access over pre-identified portions of the Property to the Premises to Tenant, Tenant's employees, agents, contractors and subcontractors (collectively, "Tenant Parties"), 24 hours a day, seven days a week, at no additional charge to Tenant. Neither Tenant nor Tenant Parties shall wander off into other portions of the Property or attempt to use or access any Otay facility. If access to the Premises is available without or with minimum intrusion into any portion of the Property, such access shall be the preferred route and Otay may require the Tenant, at the Tenant's cost, to fence the Facilities so as to separate them from the rest of the Property and all other improvements.

a. Ingress and Egress. Otay hereby grants to Tenant and Tenant Parties such rights of ingress and egress over the Property as may be necessary and consistent with the authorized use of the Premises as outlined by Otay Operations; provided, however, that such access shall at all times be in compliance with and subject to Otay's rules, policies and regulations and shall not, at any time, interfere with Otay operations or cause or threaten to cause any contamination of Otay facilities or the Property.

b. Parking by Tenant. Subject to the foregoing, Otay agrees to permit Tenant and Tenant Parties to park vehicles on the Property as necessary and consistent with the authorized use of the Premises. No vehicle or trailer of any type shall be left unattended at any time or parked overnight, by Tenant or Tenant Parties, on any portion of the Property, including the Premises. Upon Otay's request, Tenant shall immediately cause to be relocated any vehicle,

trailer, or any other blockage of any type (other than Otay-approved Facilities), belonging to Tenant or any Tenant Party.

c. Maintenance of Access. Otay shall, at its expense, maintain all access roadways or driveways from the nearest public roadway to the Property, in a manner reasonably sufficient to allow access. Otay may assess a charge on Tenant to reimburse Otay for the full cost of any damage or excessive wear caused by Tenant and Tenant Parties.

d. Additional Access. Tenant is responsible for, at no cost to Otay, obtaining and maintaining all permits, licenses or easements from the owners of any affected real property (whether adjacent to the Property or not), as may be necessary for Tenant to have any and all access to and from the Property required in connection with this Agreement and the Facilities. Tenant shall provide copies of these documents to Otay prior to the start of construction.

5. Term. The term of this Agreement shall be five (5) years (the "Initial Term"), commencing on the Commencement Date. Tenant shall have the right to extend the term of the Agreement for three (3) additional terms of five (5) years each (each, an "Extension Term") by giving Otay written notice of its intention to do so at least 120 days prior to the date that the then current term would otherwise end. Failure to give such notice entitles Otay to, at its option, terminate this Agreement at the end of the then current Initial Term or Extension Term. In addition, so long as Tenant is in full compliance with the terms and conditions of this Agreement, Tenant may request up to two (2) additional extensions of five (5) years each, which Otay may grant or deny at its sole discretion (each, an "Additional Term" and together with the Initial Term and Extension Term, or individually, as the context requires, the "Term"); such request(s) shall be in writing and received by Otay no less than 120 days prior to the expiration of the then current Extension Term or Additional Term, as applicable.

6. Payment of Costs; Deposit and Administrative Fees. Tenant agrees to pay all costs and expenses incurred by Otay in connection with the Facilities and this Agreement, including negotiation and processing hereof, plan checking and inspection of Tenant facilities, costs of inspection, repairs or replacement of any Otay facilities affected or damaged, and all other costs or expenses of Otay attributable to the matters herein contemplated, plus a reasonable amount for Otay's overhead costs in connection therewith.

a. Deposit. Tenant has made a deposit, concurrent with its application, and has agreed to make any additional deposits required in connection with Otay's review of the application, negotiation of this Agreement, including legal review, site visits, review of drawings and other costs relating such matters incurred by Otay up to the time this Agreement is executed. Tenant forfeits any claim to such deposits except to the extent Otay determines after this Agreement is executed that amounts in excess of the District's costs and expenses have been paid. Any such excess amounts may, at the sole discretion of the District, be credited toward administrative fees or any other costs then due by Tenant, if any. If no amounts are due, excess deposits will be reimbursed to Tenant.

b. Administrative Fees. An initial administrative fee of \$4,500 shall be paid to Otay on or prior to the date of execution of this Agreement to defray costs relating to review and processing of Tenant's conditional use permits, inspection of the Facilities during construction and other related costs. In addition, administrative fees may be charged at Otay's discretion during the Term to recover costs and expenses incurred by Otay, including attorneys and consultant's fees, if any, in connection with any Tenant activity that requires Otay staff to spend time in supervision, inspection, investigation or other review; such costs include but are

not limited to any amendments to this Agreement, any default or any failure of Tenant to secure or renew any permit, approval, license or easement and any investigation Otay deems reasonably required in connection with the Premises or the Facilities, including without limitation any investigation of a potential contamination of any portion of the Property due to any Tenant activity or improvement.

c. Security Deposit. Concurrently upon execution of this Agreement, Tenant shall pay to Otay a sum equal to two months' rent as a deposit ("Security Deposit") to secure the Tenant's performance of the covenants contained herein. Tenant shall maintain the Security Deposit balance equal to the amount established herein over the life of the agreement. If Otay applies any portion of the Security Deposit, Tenant shall within 30 days after demand by Otay, deposit an amount sufficient to restore the Security Deposit to its original amount. No part of the Security Deposit is to be considered as an advance payment of rent, including last months' rent, nor is it to be used or refunded prior to the leased premises being permanently and totally vacated by the Tenant. After the Tenant has vacated the premises, Otay shall furnish Tenant with an itemized written statement of the basis for, and the amount of, any of the security deposit retained by Otay. Otay may withhold that portion of Tenant's security deposit necessary (a) to remedy any default by Tenant in the payment of rent or any other provision of this Agreement, (b) to repair damages to the premises or any expense, loss, or damage that Otay may suffer because of Tenant's default, (c) to restore the premises to meet Otay's standards, (d) any amount that Otay may incur or become obligated to spend in exercising Otay's rights under this Agreement or available at law. The unused portion of this deposit shall be returned to the Tenant without interest no later than 60 days after termination of this Agreement.

Tenant waives the provisions of California Civil Code §1950.7, and all other provisions of law now in force or that become in force after the date of execution of this Agreement, that provide that Otay may claim from a security deposit only those sums reasonably necessary to remedy defaults in the payment of accrued Rent, to repair damage caused by Tenant, or to clean the Premises. Otay and Tenant agree that Otay may, in addition, claim those sums reasonably necessary to compensate Otay for any other foreseeable or unforeseeable loss or damage caused by the act or omission of Tenant or Tenant's officers, agents, employees, Independent contractors, or invitees, including future rent payments.

d. None of the deposits or other payment of costs or administrative fees constitutes or shall be considered Rent (defined below).

7. Rent. Beginning on the Commencement Date, Tenant shall pay Otay as rent the sum of \$2,705.72 per month ("Rent") payable on the first day of each month in advance. If the Commencement Date is prior to the fifteenth day of the month of commencement, the full month's Rent will be due on the Commencement Date. If the Commencement Date is on or after the fifteenth day of the month of commencement, payment of Rent will begin the first day of the following month.

Tenant may make Rent payments up to 5 days past due date without penalty, unless continual late payments for two consecutive months occur. A fee shall be imposed after the 5th day and shall be 20% of the amount currently due. Failure to pay Rent within ten (10) calendar days of the first of the month shall be an Event of Default as provided by Section 17. Failure to pay Rent on the due date for more than two (2) consecutive months or four (4) times over any twelve (12) month period shall be a non-curable Event of Default without the necessity of any notice or cure period. At District's sole discretion, immediately following such a non-curable Event of Default, District may terminate the Agreement and seek any remedy available by this

Agreement or at law. If Tenant tenders a check, which is dishonored by a banking institution, than the Tenant shall tender cash or cashier's check only for all future payments, which shall continue until such time as written consent is obtained from Otay. In addition, Tenant shall be liable in the sum of \$25 for each dishonored check that is returned to Otay.

a. Rent Increases. The rent shall be increased on each calendar anniversary of the Commencement Date at a rate of four percent (4%) per annum. However, at the beginning of each Extension Term or Additional Term, if any, Otay may, at its sole and absolute discretion, choose to adjust the annual rent, effective on the first year of said Extension Term or Additional Term, by an amount equal to the greater of: (i) four percent (4%); or (ii) the amount necessary to ensure that the rent equals the amount it would have been if each annual increase during the previous Term had been calculated based on the average percentage increases in the consumer price index published by the United States Department of Labor, Bureau of Labor Statistics (1982-1984 = 100) (the "CPI") for "All Items - All Urban Consumers" for the San Diego Metropolitan Statistical Area for the immediately preceding 5 year period. If the publication of the Consumer Price Index is discontinued, or if the Consumer Price Index is altered in some material manner, including changing the name of the index, the geographic area covered, the consumers or workers so included, or the base year, the Parties must use their reasonable best efforts to agree on a substitute index or procedure that reasonably reflects and monitors consumer prices in the greater San Diego metropolitan area. After such an adjustment, the rent shall increase at a rate of four percent (4%) per annum for the rest of the applicable Extension Term or Additional Term, if any. Otay shall also have the discretion to adjust the base rent to then current market rent in the Additional Term if said market rent is greater than the CPI increase provided for in the above formula. The "then current market rent" shall be defined as the most recent rent transaction entered into by Otay with other similar tenants for the same or similar purposes.

8. Environmental. Otay represents that to the best of its knowledge the Premises have not been used for the generation, storage, treatment or disposal of hazardous materials other than those materials normally used by Otay for its usual purposes and that there is no known hazardous waste on the Premises. Tenant shall not bring any hazardous materials onto the Premises except for those contained in its back-up power facilities (e.g. sealed batteries and diesel fuel) and properly stored, reasonable quantities of common materials used in telecommunications operations (e.g. cleaning solvents); provided that Tenant shall use best efforts to ensure that NONE of any such contaminants come into contact with ANY soil on the Premises or the Property or with any portion or any Otay facilities. Tenant shall handle, store and dispose of all hazardous materials it brings onto the Premises in accordance with all federal, state and local laws and regulations ("Laws"). "Hazardous materials" means any substance, chemical, pollutant or waste that is identified, at the time the contamination or spill occurs, as hazardous, toxic or dangerous under any applicable federal, state or local law or regulation and specifically includes, but is not limited to asbestos and asbestos containing materials, polychlorinated biphenyl's (PCBs) and petroleum or other fuels (including crude oil or any fraction or derivative thereof). Tenant shall indemnify, defend (with counsel acceptable to Otay) and hold Otay, its directors, officers, employees, agents, consultants, successors attorneys and assigns (each an "Otay Party" and collectively, "Otay Parties") harmless for any damages, claims, liabilities, suits, actions or proceedings of any kind arising in connection with Tenant's use or storage of hazardous materials.

a. Remediation. If Tenant, Tenant activities or Tenant Facilities in any way cause contamination of any portion of the Property or any Otay equipment or facility, Tenant shall immediately notify Otay and, without cost or expense to Otay, Tenant shall completely remediate and shall cause the legal removal and disposal all contaminants and any contaminated soil and materials within 24 hours of notice from Otay. If remediation cannot be completed within such time, it must be commenced and diligently pursued to Otay's satisfaction to avoid a default hereunder. Tenant shall also, holding Otay harmless for any cost or expense, immediately cause the repair of any and all damage arising from the contamination or the remediation. Any and all contractors or workers associated with the removal of the hazardous materials and clean-up of contaminated soils or facilities must be certified the Contractors State License Board ("HAZ" Certification) pursuant to Business and Professions Code 7058.7 et seq. and proof of the required certification, insurance, and a business license is demanded and required. All remediation activities must be performed with Otay's representative(s) present.

b. Indemnity for Contamination. Tenant shall hold Otay and Otay Parties harmless from any and all costs, expenses, losses, claims, fines, penalties, forfeitures, liabilities, expenses and damages, whether constitutional, statutory, in contract, tort or strict liability (including but not limited to personal injury, death at any time and property damage), incurred, arising from or any way related to any such contamination or remediation, including without limitation all costs and expenses relating to the clean-up or replacement, by or at Otay's direction by persons or entities acceptable to Otay, of any contaminated soil, water and/or facilities and including without limitation defending Otay and Otay Parties (with legal counsel, investigators and subject matter experts acceptable to Otay) in any administrative or criminal proceeding, claim, action or litigation arising from or related to such contamination, payment of any and all fines imposed on Otay or Otay Parties, and payment of any awards or settlements. Tenant agrees to reimburse Otay for its cost relating to such remediation pursuant to Section 6.b of this Agreement.

c. Tenant's obligation to remediate and indemnify Otay for any such contamination and remediation shall survive the termination of this Agreement for any cause.

9. Installation and Maintenance of Facilities. Tenant is authorized to install, maintain and operate on the Premises only the Facilities described and depicted on Attachment A to Exhibit D; provided that all permits and zoning approvals shall have first been obtained by Tenant and shall at all times while the Facilities operate remain in full force and effect.

a. Installation of the Facilities. Tenant's design and installation of all portions of the Facilities shall be done, at no cost to Otay, according to plans approved by Otay, provided that such approval shall not be unreasonably withheld. Tenant shall not locate or attach any antennas or other equipment to any of Otay's facilities without the prior written approval of Otay of the method of attachment at Otay's sole discretion. If such Facilities are to be attached or mounted to a water tank, Tenant shall use an installation method such as a magnetic mount or other, non-destructive alternative. The Tenant shall be responsible for painting its antennas and/or equipment to match Otay's facility. Otay will provide Tenant with specifications regarding paint type, color and application method to accomplish this requirement. Painting/coating submittals shall be provided to Otay by the Tenant prior to receiving permission to begin painting. Otay may specify a camouflage design if not inconsistent with requirements of the city or county within which the Facilities are located. These camouflage designs may include but are not limited to faux palm trees, pine trees, cypress trees, broadleaf trees, and flag poles, unipoles, and other camouflaged antenna and antenna supports.

b. *Record Drawings.* Within thirty (30) days after completion of the Facilities, Tenant shall provide Otay with "record" (also called "as-built") drawings of the Facilities showing and identifying all the equipment and improvements installed on the Premises. Said drawings shall be accompanied by a complete and detailed inventory of all equipment, including without limitation all personal property and antennas located on the Premises and any such property of Tenant located in the Easement. No property of Tenant other than such identified property shall be located on the Premises or the Property at any time. Upon acceptance by Otay of Tenant's record drawings, in form and content satisfactory to Otay, such drawings shall replace and supersede any similar drawings contained in any exhibit attached hereto.

c. *Alterations.* Tenant shall not alter or change its Facilities in a material manner without the prior approval of Otay, such approval not to be unreasonably withheld. "Material" refers to any physical change that could affect the building structure, antenna support, interconnecting facilities or its appearance or any change that requires access to the Premises for installation of new equipment, removal of old equipment, trenching or digging or that could disrupt Otay's workplace or communications in any way or any change that requires a renewed or amended easement, permit or approval. All of Tenant's construction and installation work shall be performed at Tenant's sole cost and expense in a good and workmanlike manner and fully compliant with all government permit and code requirements. Tenant shall have the right to remove all facilities it installs at its sole expense on or before the expiration or termination of this Agreement, but must at such time restore the ground and surface underlying the removed facilities to its pre-installation condition, wear and tear excepted, and to the reasonable satisfaction of Otay.

d. *Improvements to Facilities / Additional Space.* If, at any time during the Term, Tenant requests permission from Otay to add improvements requiring construction to its then existing Facilities, the then current Administrative Fees shall be paid to Otay before any such changes are negotiated. In addition, if the requested Tenant improvements include additional area, a new agreement or, at Otay's discretion, an amendment for the additional lease space must be executed prior to start of construction and Tenant shall comply with Otay's requirements then in effect, including payment of additional rent, if any, for the additional area.

e. *Permits and Compliance with Applicable Laws.* During the Term, and prior to commencing any construction or installation of any improvements or equipment, as applicable, Tenant shall obtain all necessary approvals, permits and access easements or licenses, all of which shall be maintained in full force and effect at all times in accordance with all applicable laws, rules and regulations.

i. Prior to commencing construction, Tenant shall deliver to Otay copies of all executed licenses, approvals and permits required by local, state or federal agency in connection with the Facilities, which permits shall be attached hereto as Attachment B to Exhibit D.

ii. From time to time, as required by law or regulation in connection with the normal operation of the Facilities or as needed due to improvements or alterations to the same, Tenant shall provide Otay with updated permits, licenses and/or approvals, including without limitation written evidence, satisfactory to Otay, of all FCC approvals and other governmental permits and approvals, including but not limited to compliance with the FCC's electromagnetic radiation rules, set forth at 47 C.F.R. § 1.1307 et seq. and FCC Office of Engineering and Technology Bulletin 65, each as hereafter amended.

iii. Otay agrees, at no expense to Otay, to reasonably cooperate with Tenant in making application for and obtaining all governmental licenses, permits and approvals that may be required for Tenant's intended use of the Premises.

f. *Utilities.* Tenant shall be authorized to install utilities for the Premises and the Facilities at Tenant's expense and to improve the present utilities on or near the Premises (including, but not limited to the installation of an emergency back-up power) subject to Otay's approval of the location, route, design and capacity, which approval shall not be unreasonably withheld. Tenant shall fully and promptly pay for all utilities furnished to the Premises for the use, operation and maintenance of Tenant's facilities. If inadequate electrical power is available to provide for the Facilities, or additional electrical power is required to be installed on the Premises by Otay in its sole discretion, such installation shall be at Tenant's sole expense. The location, route, design and capacity of the additional power facility shall be approved by Otay, which shall not be unreasonably withheld.

g. *Repair of Otay's Improvements/Systems.* Any damage done to the Property or to any Otay improvement, facility or system in connection with the construction, installation, maintenance, repair, improvement, replacement or operation of the Facilities shall be repaired or replaced immediately at Tenant's expense and to Otay's reasonable satisfaction by Otay staff or contractors approved by Otay. Tenant shall not locate or attach any antennas or other equipment to any of Otay's facilities without the prior written approval of Otay. Tenant shall pay all costs and expenses in relation to maintaining the integrity of Otay's facilities, improvements and systems affected in any way by Tenant's Facilities or its use of the Property or the Premises.

h. *Maintenance and Repair.* At all time during the Term, Tenant shall maintain the Premises and the Facilities in a manner acceptable to Otay. Tenant's use of its facilities shall not at any time or in any way adversely impact, impede or interfere with Otay's access to, use or operation of, its improvements, equipment or systems.

i. *Liens.* Tenant shall not encumber or allow the Premises or the Property to be encumbered in any manner other than as expressly authorized herein.

j. *Security.* Tenant recognizes and agrees that the Premises and the Reservoir Site are a sensitive area and that Otay's operations and services are highly sensitive and regulated. Tenant shall provide for the proper supervision of all Tenant Parties assigned or allowed by Tenant to enter and do work at the Premises. Tenant also agrees, holding Otay harmless for any cost or expense, to comply with any and all security measures instituted by Otay from time to time.

10. Maintenance, Repair or Replacement of Otay's Improvements. At any time while this Agreement remains in effect, Otay may, at its option and upon One Hundred Twenty (120) days prior written notice to Tenant, remove or cause Tenant to remove all or any portion of its Facilities at Tenant's expense, in order for Otay to paint, repair, or make replacements to any or all its improvements on the Premises (the "Maintenance or Replacement Work"), as deemed necessary by Otay in its sole discretion. Tenant agrees to fully cooperate with Otay's efforts in connection with any Maintenance or Replacement Work, including without limitation timely, and at Tenant's cost, removing and re-installing any portion of the Facilities, as requested by Otay.

a. *Temporary Facilities.* During the Maintenance or Replacement Work, Tenant may, holding Otay harmless from any cost or expense, install temporary antennas on the Premises subject to Otay's approval of the location and type of replacement facilities, such

approval shall not be unreasonably withheld or delayed. Once the Maintenance or Replacement Work is completed by Otay, Tenant agrees to promptly dismantle any temporary facilities and to relocate the facilities to their original location or to any other location approved by Otay. All work related to the removal of any portion of the Facilities, installation of temporary facilities, dismantling, relocation to their original location and any related work, shall be done at Tenant's sole cost and expense and in good and workmanlike manner.

b. *Repair of damage.* Tenant shall repair any damage caused by Tenant in connection with the installation, maintenance, operation or removal of any temporary facilities or the Facilities, and Tenant shall restore any distributed portions of the Property to their condition immediately prior to the installation of the temporary facilities.

c. *Otay's option to remove temporary facilities.* If any temporary facilities are not removed within thirty (30) days from the date the Maintenance or Replacement Work is completed, Otay shall have the right, but not the duty, to remove the temporary facilities at Tenant's cost and expense.

d. *Painting of the Facilities.* If the Maintenance or Replacement Work includes the painting, or any work affecting the surface of Otay's improvements, the Tenant shall be responsible for repainting or performing other surface treatment of its antennas and equipment to match Otay's. Otay will provide specifications to the Tenant regarding the treatment, paint type, color and application method to accomplish this requirement. The Tenant shall be required to obtain approval of specifications from Otay prior to commencing work on this requirement. Subject to Otay's prior written consent, Tenant may substitute an alternate treatment, paint type and application method if it reasonably determines that Otay's selection will adversely affect or otherwise degrade Tenant's wireless signal from the Reservoir Site.

11. Co-Location by Otay. Tenant agrees that Otay may enter into leases or other types of agreements with other communication carriers, wireless communications carriers and other utilities for use of any portion of the "Reservoir Site" as long as said leases do not result in unreasonable interference with Tenant's use of or access to the Premises. Tenant shall reasonably cooperate with Otay's efforts in this regard including, at Otay's request, the relocation of, or changes to, the Facilities; provided that any alterations or relocation needed to accommodate the new carrier or utility shall be performed at the expense of Otay or the new carrier or utility.

12. Co-Location by Tenant - Subleasing/Encumbrance. Tenant shall not sub-lease or sub-license or otherwise encumber the Premises or any portion of the Facilities without Otay's prior written consent, which may be granted or denied at Otay's sole discretion. Any sub-lease or other encumbrance shall require an amendment to this Agreement and shall specify the terms and conditions, including making provision for rent and increases thereto for the sub-lease or other encumbrance.

13. Condition of the Property at Expiration or Termination. Upon the expiration or termination of this Agreement as herein provided, Tenant shall, holding Otay harmless for any cost or expense, surrender the Premises, and any Easements granted by Otay in connection with this Agreement, to Otay in good and broom-clean condition, with all portions of the Facilities, including but not limited to equipment, supplies, buried conduits, and structures removed along with subterranean foundations to a depth of three feet below grade; or as otherwise agreed to by Otay in writing. All telecommunication traffic and all use of the Facilities and the Premises shall

cease immediately upon notice of termination or upon the expiration of the applicable term, whichever is earlier.

14. Interference. Tenant shall not use, nor shall Tenant permit any Tenant Party or sub-lessee to use any portion of the Premises in a manner which interferes with Otay's use of the Reservoir Site for its intended purpose including communications facilities relating to Otay's operation, now existing or hereafter installed. This limitation on Tenant's use does not apply to interference with communication facilities of a tenant of Otay whose use did not "pre-exist" this Agreement; except as to communications facilities agreed to by Tenant in connection with the co-location of any subsequent tenant's facilities. If Tenant's operation in any way interferes with Otay's communications facilities, Tenant will have five (5) business days to correct the problem after notice from Otay, except as to interference with Otay's telemetry radio equipment which must be corrected within one (1) calendar day after notice from Otay. Tenant acknowledges that interference that continues beyond the number of days specified in this Section may cause irreparable injury to Otay and, therefore, Otay has the right, without further liability, to terminate the Agreement immediately upon notice to Tenant of failure to correct the problem within the specified time.

15. Taxes. During the term of this Agreement, Tenant shall pay before delinquency all taxes, assessments, license fees, and any other charge of any type whatsoever that are levied, assessed, charged, or imposed on or against Tenant's personal property installed or located in or on the leased premises and that become payable during the term of this Agreement.

16. Termination.

(a) This Agreement may be terminated by Tenant without further liability if:

(i) Tenant delivers to Otay 30-day written notice at any time prior to commencing any work at the Premises in connection with the installation of any Facilities, for any reason or no reason;

(ii) Tenant gives Otay sixty (60) days notice of Tenant's determination that a governmental or non-governmental license, permit, consent, approval, easement or waiver necessary to enable Tenant to construct, install or operate the Facilities cannot be obtained or renewed at reasonable expense or in reasonable time period for wireless sites at water reservoirs in metropolitan areas within San Diego County. If this notice is given, Tenant must immediately cease any and all transmissions through and from the Premises and shall promptly remove, within a period of time not to exceed ten (10) business days, any and all Tenant's personal property and improvements from the Property. This Agreement and any related easements shall automatically expire upon the earlier of removal of the Tenant's improvements or the 60th day from the notice; excepting only Tenant's indemnities and liabilities hereunder, including the obligation to pay Rent for any holdover period. Tenant agrees that Otay may, without any liability or recourse against Otay, commit to re-let the Premises to other parties immediately upon receipt of the notice herein contemplated.

(iii) Tenant determines at any time after the Commencement Date that the Premises are not appropriate or suitable for its operations for economic, environmental or technological reasons, including without limitation, any ruling or directive of the FCC or other governmental or regulatory agency, or problems with signal strength or interference not encompassed by subsection (iv) below; provided that the right to terminate under this subsection (iii) is exercisable only upon payment by Tenant, as a termination fee, of the lesser of twelve monthly installments of rent or the balance of the rent due for the then current Initial Term,

Extension Term or Additional Term, as applicable; and Tenant agrees that Otay may, without any liability or recourse against Otay, commit to re-let the Premises to other parties immediately upon receipt of the notice herein contemplated;

(iv) Otay commits a default under this Agreement and fails to cure pursuant to Section 17, below;

(v) The Property or the Premises are totally or partially destroyed by fire or other casualty (not caused by Tenant) so as to hinder Tenant's normal operations and Otay does not provide to Tenant within thirty (30) days after the casualty occurs a suitable temporary relocation site for Tenant's facility pending repair and restoration of the Premises; or

(vi) If Tenant and Otay cannot reasonably agree on the location of a replacement Easement pursuant to Section 2 herein.

(b) This Agreement may be terminated by Otay without further liability if:

(i) Tenant commits a default under this Agreement and fails to cure such default pursuant to Section 17, below;

(ii) Otay determines that continuing the Agreement or continuing to allow the Tenant to construct, install, maintain or operate the Facilities in any way violates a law, rule or regulation; or

(iii) If Tenant and Otay cannot reasonably agree on the location of a replacement Easement pursuant to Section 2 herein.

17. Default.

a. *Event of Default.* The parties covenant and agree that a default or breach of this Agreement (an "Event of Default") shall occur and be deemed to exist if, after notice and opportunity to cure as provided below:

(i) Tenant shall default in the payment of Rent, or any other amounts due Otay hereunder, and said default shall continue for ten (10) days after the same becomes due; or

(ii) Either party shall default in the performance or observance of any other covenant or condition of this Agreement to be performed or observed if such failure persists for a period of thirty (30) days after the non-defaulting party provides written notice of the default to the defaulting party.

b. *Rights upon Default.* Upon the occurrence of an Event of Default, in addition to any other rights or remedies available to the non-defaulting party under any law, the non-defaulting party shall have the right to terminate the Agreement.

c. *Cure Rights.* An Event of Default shall not exist unless written notice has been given in accordance with this Agreement, and the defaulting party has had the opportunity to cure as provided herein. The defaulting party shall cure the alleged default within the manner provided herein; provided however, that if the nature of an alleged default is such that it cannot reasonably be cured within such thirty (30) day period, the defaulting party shall not be in breach of this Agreement if it diligently commences a cure within such period, and thereafter diligently proceeds with the actions necessary to complete such cure.

18. Destruction of Premises or Property. If the Premises or the Property is destroyed or damaged in a manner that prevents their use for economic, environmental or technological

reasons, Tenant may elect to terminate this Agreement as of the date of the damage or destruction by so notifying Otay no more than thirty (30) days following the date of destruction damage, provided Otay does not provide to Tenant, within such thirty (30) days period, a suitable temporary relocation site for the Facilities pending repair and restoration of the Premises and the Property. If the Property or Otay's improvements thereon are destroyed, Otay may terminate this Agreement by providing Tenant up to sixty (60) days notice, as reasonably prudent under the circumstances.

19. Condemnation. If the condemning authority takes all the Property or a portion which in Tenant's opinion is sufficient to render the Premises unsuitable for Tenant's use, then this Agreement shall terminate as of the date when possession is delivered to the condemning authority. In the event of any taking under the power of eminent domain, Tenant shall not be entitled to any portion of the award paid for the taking and Otay shall receive the full amount of such award except as provided herein. Tenant hereby expressly waives any right or claim to any portion of a condemnation award, except for relocation benefits and goodwill. All other damages, whether awarded as compensation for diminution in value of the leasehold or to the fee of the Premises, shall belong to Otay.

20. Insurance. Tenant shall maintain the following insurance:

- a. Commercial general liability with limits of \$5,000,000 per occurrence which may be satisfied by a primary policy with a limit of no less than \$2,000,000 and an umbrella policy of excess liability in the amount of no less than \$5,000,000;
- b. Automobile liability with the combined single limit of \$1,000,000 per accident;
- c. Worker's compensation, as required by law;
- d. Employer's liability with limits of \$1,000,000 per occurrence.

Tenant shall name Otay as an additional insured on each of the aforementioned insurance policies and the policies shall state that they are primary and that any policies Otay maintains shall be noncontributory. Tenant shall provide Otay with written certificates of insurance evidencing such coverage. Said policies shall expressly provide that the policies shall not be canceled or altered without at least thirty (30) days prior written notice to Otay. Said policies shall be with insurance companies with an A.M. Best rating of AVII or better. Each policy limit herein shall be increased by Tenant, upon request by Otay, to the amount Otay increases its policy limits for other contracts.

Otay takes no responsibility for the protection of Tenant's property from acts of vandalism by third parties. The insurance requirements may be changed by Otay upon giving of notice to Tenant; provided that the requirements set forth above shall be the minimum insurance requirements during the Term.

21. Indemnity. Tenant specifically agrees that it shall hold harmless, defend (with counsel, and if needed experts, reasonably acceptable to Otay), indemnify and otherwise protect Otay and each Otay Party, from and against all claims, suits or actions of any kind and description relating to (a) Tenant's obligations under this Agreement and any amendment hereto or (b) Tenant or Tenant Parties use of, and access to, the Premises, the Facilities or the Property. These obligations extend to and include without limitation any and all costs and expenses (including attorneys fees and court costs) incurred by Otay or the Otay Parties in connection with (i) damage to property (including the Premises, the Property or any personal property of Otay or

any third party), (ii) any action or proceeding (including an enforcement action or criminal proceeding) related in any way to any permit (governmental or otherwise), approval or easement obtained by or required of Tenant in connection with this Agreement or the Facilities; and (iii) personal injury or death, except to the extent that such claims, suits or actions directly arise from the gross negligence or willful misconduct of Otay or an Otay Party. This indemnification clause in no way limits any other specific indemnities given by Tenant under other provisions of this Agreement.

Nothing contained herein shall prohibit Otay, in its sole discretion, from participating in the defense of any demand, claim, action, proceeding, or litigation. In no event shall Otay's participation in the defense of any demand claim, action, proceeding, or litigation affect the obligations imposed upon Tenant herein.

This and all other Tenant indemnities shall survive the termination of this Agreement and shall remain in effect for as long as the underlying claim or action remains viable.

22. Estoppel Certificate. Tenant shall, at any time and from time to time upon not less than thirty (30) days prior request by Otay, deliver to Otay a statement in writing certifying that (a) this Agreement is unmodified and in full force, or if there have been modifications, that the Agreement is in full force as modified and identifying the modifications; (b) the dates to which rent and other charges have been paid; (c) as far as the person making the certificate knows, Otay is or is not in default under any provisions of the Agreement; and (d) such other matters as Otay may reasonably request.

23. Assignment. Tenant shall not assign this Agreement or any portion of its rights or obligations hereunder without Otay's prior written consent, except to an affiliated parent entity, subsidiary, purchaser of at least 50% of the aggregate of the assets of Tenant ("assets" means and includes without limitation any and all real, personal or financial property or thing owned or controlled by Tenant or over which Tenant has an interest) or holder of Tenant's FCC license.

a. If during the Term hereof, Tenant requests the written consent of Otay to any assignment, and upon demonstration satisfactory to Otay of the proposed assignee's legal, financial, and technical qualifications to assume all of the Tenant's duties and obligations herein, Otay's consent thereto shall not unreasonably be withheld. Consent to one assignment shall not be deemed consent to any subsequent assignment.

b. Any attempted assignment not permitted under the first paragraph of this Section 23, without Otay's prior consent as set forth in Section 23(a), shall be void and, at Otay's option, shall constitute a termination of this Agreement for which a termination fee as described in Section 16(iii) shall be immediately due.

c. Any assignment of this Agreement shall require an executed "Assignment of Lease" whether or not the Consent of Otay is required pursuant to this section 23 or any other provision of this Agreement. A sample form of the "Assignment of Lease" is attached to this Agreement as Exhibit F which may be amended or modified in Otay's sole discretion.

24. Memorandum of Agreement. If requested by Tenant, Otay agrees to promptly execute and deliver to Tenant a recordable Memorandum of Agreement substantially in the form of Exhibit E.

25. Bankruptcy. Otay and the Tenant hereby expressly agree and acknowledge that it is the intention of both parties that in the event that during the term of this Lease, either party shall become a debtor in any voluntary or involuntary bankruptcy proceeding (a Proceeding)

under the United States Bankruptcy Code, 11 U.S.C. 101, et seq. (the Code), this Lease is and shall be treated as an unexpired lease of nonresidential real property for purposes of Section 365 of the Code, 11 U.S.C. 365 (as may be amended), and, accordingly, shall be subject to the provisions of subsections (d)(3) and (d)(4) of said Section 365 (as may be amended).

26. Choice of Law and Venue; Resolution of Disputes.

a. This Agreement shall be interpreted in accordance with the laws of the State of California, without regard to its conflict of laws principles.

b. Any disputes not subject to resolution via arbitration, shall be referred to a court of competent jurisdiction in San Diego County, California. It is the intent of the parties, however, that all controversies or claims arising out of or relating to this Agreement shall be resolved by submission to final and binding arbitration, in accordance with then current rules, at the offices of the American Arbitration Association ("AAA") located in San Diego, California.

27. Attorney's Fees. In the event that either party commences any legal action or proceeding, including an action for declaratory relief, against the other by reason of the alleged failure of the other to perform or keep any term, covenant, or condition of this Agreement, the party prevailing in said action or proceeding shall be entitled to recover, in addition to court or arbitration costs, reasonable attorneys' fees to be fixed by the court or arbitration official.

28. No Liability of Public Officials. No elected official, officer, employee, agent, or volunteer of Otay shall be personally liable for any default or liability whatsoever under this Agreement.

29. Public Document. Tenant acknowledges that this Agreement and all documents relating hereto are "public records" (as defined in Section 6252(e) of the California Government Code), except for any documents relating to Tenant's financial condition or otherwise exempt from such status pursuant to law, and that public records, with limited exemptions, are subject to public disclosure pursuant to the provisions of California Government Code, commencing with Section 6250.

30. Entire Agreement. This Agreement contains all agreements, promises and understandings between Otay and Tenant and no verbal or oral agreements, promises or understandings shall or will be binding upon either Otay or Tenant and any addition, variation or modification to this Agreement shall be in effect unless made in writing and signed by the parties hereto.

31. Incorporation of Exhibits and Recitals. All exhibits and attachments attached to this Agreement and all Recitals above are incorporated and made a part hereof as if fully set forth herein.

32. Survival. Terms and conditions of this Agreement which by their sense and context survive the termination or expiration of this Lease Agreement will so survive.

33. Severability. If any term or condition of this Agreement is found unenforceable, the remaining terms and conditions shall remain binding upon the parties as though said unenforceable provision were not contained herein. However, if the invalid, illegal or unenforceable provision materially affects this Agreement then the Agreement may be terminated by either party on ten (10) days prior written notice to the other party hereto.

34. Waiver. Waiver of any provision or term of this Agreement, or of any breach or default hereunder, shall not constitute a waiver of any other term, condition, breach or default, or

of a subsequent applicability of a term or condition, or a waiver of a subsequent breach or default, nor shall it constitute an amendment to the term, condition or provision that is waived.

35. Notice. All notices, requests, demands and communications hereunder will be given by first class certified or registered mail, return receipt requested, or by a nationally recognized overnight courier, postage prepaid, to be effective when properly sent and received, refused or returned undelivered. Notices may be given by facsimile or email and shall be effective when sent if proof of transmission is retained and duplicate notices are sent by one of the other methods herein described. Notices shall be sent to the addresses set forth below:

OTAY: Otay Water District
 Attn: General Manager
 2554 Sweetwater Springs Boulevard
 Spring Valley, CA 91978-2096
 Fax: (619) 660-0829

TENANT: Bms Tower Holdings
 Attn : _____
 Re: Cell Site #: _____
 Cell Site Name: _____
 Fixed Asset No: _____

With a copy sent concurrently to Tenant's legal department, or counsel, as follows:

Attn : _____
Re: Cell Site #: _____
Cell Site Name: _____
Fixed Asset No: _____

Otay or Tenant may from time to time designate any other addressees and addresses and fax telephone numbers for notices or deliveries by written notice to the other party.

36. Corporate Authority. The persons executing this Agreement on behalf of the Tenant warrant that (i) Tenant is duly organized and legally existing, (ii) he/she/they are duly authorized to execute and deliver this Agreement on behalf of Tenant, (iii) by so executing this Agreement, Tenant is formally bound to the provisions hereof, and (iv) entering into this Agreement does not violate any provision of any other Agreement to which Tenant is bound.

[THE REMAINDER OF THIS PAGE IS INTENTIONALLY LEFT BLANK. THE SIGNATURE PAGE FOLLOWS.]

IN WITNESS WHEREOF, the parties have executed this Agreement as of the 18 day of June, 2013. This date is referred to as the Commencement Date in the Agreement.
(Tenant's Legal Name)

By: 
Name: John S. Maguire
Its: _____

Approved as to Form:

Tenant's Counsel

OTAY WATER DISTRICT
2554 Sweetwater Springs Blvd.
Spring Valley, CA 91979

By: _____
Name: _____
Its: _____

Approved as to Form:

Otay's General Counsel

ALL-PURPOSE ACKNOWLEDGMENT

State of Oklahoma

County of Oklahoma

On June 18 2013 before me, Linda J. Hodges
DATE NAME OF NOTARY PUBLIC

personally appeared John S Maguire
NAME(S) OF SIGNER(S)

personally known to me OR proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.



WITNESS my hand and official seal.

Place Notary Seal or Stamp Here

Linda J. Hodges
SIGNATURE OF NOTARY

ATTENTION NOTARY: Although the information requested below is OPTIONAL, it may prove valuable to persons relying on this Acknowledgment and could prevent fraudulent reattachment of this certificate to another document.

DESCRIPTION OF ATTACHED DOCUMENT

**THIS CERTIFICATE
MUST BE ATTACHED
TO THE DOCUMENT
DESCRIBED AT RIGHT**

Communications Tower Site Lease
TITLE OR TYPE OF DOCUMENT

17
NUMBER OF PAGES

June 2013
DATE OF DOCUMENT

Otay Water District
SIGNER(S) OTHER THAN NAMED ABOVE

EXHIBIT A
SPECIAL TERMS AND CONDITIONS ADDED TO
AGREEMENT BETWEEN _____ AND
OTAY TO LOCATE COMMUNICATION FACILITIES AT
OTAY'S _____ RESERVOIR SITE, DATED
_____, _____ (THE "AGREEMENT")

If any terms or conditions set forth herein contradict terms or conditions of the Agreement to which this Exhibit is attached, as described above, the terms and conditions of this Exhibit shall control.

SPECIAL TERMS AND CONDITIONS

1. **Landscaping and Maintenance.** The installation, permitting, maintenance and upkeep, and all expenses or other obligations related thereto, in connection with any and all landscaping and irrigation systems mandated by the permitting agencies shall be the sole responsibility of the Tenant. Otay Water District makes no commitment for delivery of water to the Premises or Facilities, except if Tenant obtains a water meter for the Premises and pays for water use.

2. **Rent.** At Tenant's election, subject to prior written notice as set forth in the Agreement, Tenant may pay rent annually, in advance during each of the five-years of the Initial Term or during each of the five years in any Extension Term. Once the Initial Term or Extension Term, as applicable, has commenced, Tenant may not alter its election to pay monthly or annually.

3. **Tenant's Financing.** Notwithstanding anything to the contrary contained in this Agreement, Tenant may assign, mortgage, pledge, hypothecate or otherwise transfer without prior notice or consent its interest in this Agreement to any financing entity, or agent on behalf of any financing entity to whom Tenant (i) has obligations for borrowed money or in respect of guaranties thereof, (ii) has obligations evidenced by bonds, debentures, notes or similar instruments, or (iii) has obligations under or with respect to letters of credit, bankers acceptances and similar facilities or in respect of guaranties thereof; provided that no such assignment shall become binding on Otay until written notification is given by Tenant to Otay as provided in the Agreement. A "financing entity" as used herein, does not include any entity which primary business is not that of banking, finance, lending or investing funds and does also does not include any entity whose primary business is the provision of telecommunications; or telecommunications site ownership; or telecommunications site management.

a. **Waiver of Otay's Lien.** With respect to any such financing entity, Otay waives any lien rights it may have concerning the Facilities, which is deemed Tenant's personal property and not fixtures attached to the Property and Tenant or, if appropriate, the financing entity has the right to remove the same at any time without Otay's consent; provided that Tenant's obligation to pay rent shall not terminate unless, upon removal of the Facilities, Otay elects to terminate the Agreement in which case, Tenant shall pay Otay the termination fee specified in Section 16(iii) of the Agreement. The financing entity shall not have the right to

operate the Facilities without Otay's prior written consent, which may be denied at Otay's discretion for any reason or no reason.

- b. **Collateral.** Tenant may enter into a financing arrangement including promissory notes and financial and security agreements for the financing of the Facilities ("Collateral") with a third party financing entity (and may in the future enter into additional financing arrangements with other financing entities). In connection therewith, Otay (i) consents to the installation of the Collateral in compliance with all requirements of the Agreement; (ii) disclaims any interest in the Collateral, as fixtures or otherwise; and (iii) agrees that the Collateral shall be exempt from execution, foreclosure, sale, levy, attachment, or distress for any Rent due or to become due and that such Collateral may be removed at any time without recourse to legal proceedings; except as set forth in paragraph (a) above.
- c. **Disposition of Collateral.** Notwithstanding paragraphs a. and b., above, if Tenant fails to remove the Collateral, or any component thereof, within five (5) days of the termination of this Agreement, said failure shall constitute abandonment. If thereafter, Tenant or any holder of Collateral, lender or assignee, whether or not notification was provided to Otay, fails to claim and remove the same, within thirty (30) calendar days of the date of termination of this Agreement, Otay is hereby specifically authorized to remove and dispose of the Collateral, or any component thereof, so abandoned at Tenant's sole cost and expense and without incurring any liability to Tenant, or any lender or any other party with any interest in all or any part of the Collateral or the Agreement. Tenant shall pay Otay, upon demand, the termination fee specified in Section 16(iii) of the Agreement.
- d. **No privity or obligation.** Otay does not have privity with any financing entity and specifically disclaims any obligation to any such entity, including any obligation to provide copies of any notices of default or right to cure under the Agreement.

EXHIBIT B

**TO AGREEMENT BETWEEN _____ AND
OTAY TO LOCATE COMMUNICATION FACILITIES AT
OTAY'S _____ RESERVOIR SITE, DATED
_____, _____ (THE "AGREEMENT")**

List of Attachments to Exhibit B:

- ATTACHMENT A. DEPICTION OF RESERVOIR FACILITIES
- ATTACHMENT B. LEGAL DESCRIPTION OF THE PROPERTY
- ATTACHMENT C. LEGAL DESCRIPTION OF THE PREMISES

EXHIBIT C
TO AGREEMENT BETWEEN _____ AND
OTAY TO LOCATE COMMUNICATION FACILITIES AT
OTAY'S _____ RESERVOIR SITE, DATED
_____, _____ (THE "AGREEMENT")

DEPICTION AND LEGAL DESCRIPTION OF EASEMENT

Easement Requested? Yes No
Easement Granted? Yes No

If Easement granted, complete the following information (if recording requested, format appropriately and attach copy of instrument of record):

For good and valuable consideration, receipt of which is hereby acknowledged, the Otay Water District, as Grantor, hereby grants to _____, a [_____] [corporation] [limited liability company]], as Tenant, an Easement to excavate, remove dirt and do any act necessary to install, operate and maintain power lines and connection lines as required in connection with the communications facilities and the antenna to be located on the Premises. The legal description of the land subject to the Easement is as follows:

[Insert Description][See Attachment A]

A drawing depicting the Easement is attached hereto as **Attachment []**. Tenant may not sell, transfer or assign the Easement herein granted to Tenant. Tenant's rights under the Easement are specifically limited to the installation, maintenance and operation of such power lines, transmission lines and other communications lines and accessories as required to efficiently operate Tenant's communication facilities on the Premises as previously approved by Grantor. Following initial installation, Tenant shall not have a right to trench or excavate to repair, modify or replace any approved items without Grantor's prior written consent.

The Easement shall **automatically terminate** on the earlier of **thirty (30) years** from the date hereof **or the day the Agreement is terminated for any reason**. On such date, the Easement shall become unenforceable and, for all purposes, terminate, whether or not a termination or quitclaim is recorded.

Grantor reserves the right to use the lands that are subject to the Easement in any manner and for any purpose that does not materially interfere with Tenant's use thereof.

Grantor retains the right to remove, at Tenant's expense, from the surface of the Easement any item, structure improvement or portion thereof that interferes or conflicts with Grantor's use of the Property.

Tenant shall defend, indemnify and hold Grantor and its elected and appointed officials, officers, agents, employees, and volunteers free and harmless from and against any and all losses, claims, liabilities, damages, actions, causes of action, costs and expenses including attorney's fees and costs of court, and injuries, including personal injuries or death (collectively or individually, "Losses") arising out of or in connection with Tenant's access to, installation, occupation, use, operation, maintenance or repair of its Facilities at the Premises, except Losses directly resulting from the willful act or misconduct of Grantor. This indemnity provision shall survive the expiration, cancellation or expiration of this Easement.

EXHIBIT D

**TO AGREEMENT BETWEEN _____ AND
OTAY TO LOCATE COMMUNICATION FACILITIES AT
OTAY'S _____ RESERVOIR SITE, DATED
_____, _____ (THE "AGREEMENT")**

List of Attachments to Exhibit D:

Attachment A. Depiction of the Telecommunication Facilities

Attachment B. Permits

EXHIBIT E

**TO AGREEMENT BETWEEN _____ AND OTAY
TO LOCATE COMMUNICATION FACILITIES AT
OTAY'S _____ RESERVOIR SITE, DATED
_____, _____ (THE "AGREEMENT")**

Memorandum of Agreement

Check one option.

None.

See Attached.

EXHIBIT F

ASSIGNMENT OF LEASE

THIS ASSIGNMENT OF LEASE ("Assignment") is made this _____ day of _____, 20__, by and between _____, (hereinafter referred to as "Assignor"), ___ and _____, (hereinafter referred to as "Assignee").

WHEREAS, Assignor is the holder of the tenant's interest under that certain Telecommunication Facility Agreement (the "Lease") dated _____, 20__, and all other documents pertaining thereto between ("Otay") and Assignor covering the land located at _____, City of _____, County of _____, California and more particularly described in the Lease attached hereto and incorporated herein by this reference; and

WHEREAS, Assignor desires to transfer, assign and set over to Assignee and Assignee desires to acquire all of Assignor's right, title and interest in, to and under the Lease.

NOW THEREFORE, for valuable consideration, receipt of which is hereby acknowledged, the parties hereby mutually consent as follows:

1. Assignor hereby sells, transfers and assigns to Assignee all of Assignor's right, title and interest in and to the Lease including, without limitation, the deposit(s), if any, held by Otay.
2. Assignee hereby accepts the foregoing assignment and transfer and specifically assumes and agrees to pay, perform and observe each and every covenant, agreement and condition to be paid, performed or observed by the lessee pursuant to the Lease.

IN WITNESS WHEREOF, the parties hereto have duly executed this Assignment as of the day and year first hereinabove written. This instrument may be executed in any number of counterpart copies, each of which counterpart copy shall be deemed an original for all purposes.

ASSIGNOR: _____

OTAY's Consent: Required
 Not Required

ASSIGNEE: _____

OTAY WATER DISTRICT
2554 Sweetwater Springs Blvd.
Spring Valley, CA 91979

By: _____
Name: _____
Its: _____

[Add Notary Acknowledgement]

AGREEMENT BETWEEN BMB TOWER HOLDINGS,
LLC AND OTAY WATER DISTRICT TO LOCATE A
COMMUNICATIONS FACILITY AT OTAY'S 485-1
RESERVOIR SITE
(996 East H Street, Chula Vista, CA 91910)

This Telecommunication Facility Agreement (the "Agreement") is entered into and effective on the date specified in the signature page (the "Commencement Date"), by and between the Otay Water District, a municipal water district organized and operated pursuant to the Water Code Section 71000, et seq. ("Otay"), and BMB Tower Holdings, LLC ("Tenant"). Special terms and conditions are set forth on Exhibit A.

R E C I T A L S

- A. Otay owns a site on which it has constructed water facilities known as the "485-1 RESERVOIR SITE," as depicted on Attachment A to Exhibit B (the "Reservoir Site").
- B. On September 14, 2006, Otay entered into that certain lease agreement (the "Original Lease") with Cricket Communications, Inc., a Delaware corporation for the Reservoir Site.
- C. On or about April 14, 2011 Otay consented to an assignment of the Original Lease from Cricket Communications Inc. to Global Tower Partners, LLC ("GTP").
- D. On or about June 6, 2011 Otay consented to an assignment of the Original Lease from GTP Communications Inc. to BMB Tower Holdings, LLC ("BMB").
- E. On or before April 19, 2012 BMB subleased of a portion of the Original Lease space without Otay's consent and failed to pay rent in a timely manner in violation of the terms of the Original Lease and subsequent assignments.
- F. Tenant has cured the Original Lease defaults including a one-time payment to Otay of \$1,000.00.
- G. Tenant has requested Otay to allow it to continue the use of the Property for location of a communications facility and transmitting and receiving antennas at the Reservoir Site pursuant to the terms and conditions set forth herein.
- H. Otay is willing to allow Tenant to locate the Facilities (defined below) at the Reservoir Sites pursuant to the terms and conditions set forth herein.

A G R E E M E N T

For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Otay and Tenant agree as follows:

1. Premises. Otay owns the real property described in Attachment B to Exhibit B (the "Property"). Otay agrees to lease to Tenant, for the installation of antennas and related telecommunications equipment within the Property, as more particularly described on Attachment C to Exhibit B (the "Premises").
2. Grant of Non-Exclusive Trench and Utility Easement(s). Upon written request from Tenant, Otay agrees to grant a non-exclusive easement, as legally described and depicted in Exhibit C to this Agreement (the "Easement"), for certain agreed-upon portions of the Property for the purpose of trenching and for the installation and maintenance of the Otay approved utilities needed by Tenant for the Facilities. It is expressly agreed that any such Easement shall

only be valid if signed by the parties and, if so, it shall run concurrently with this Agreement and shall terminate automatically if this Agreement is terminated or ceases to exist for any reason. Tenant agrees, holding Otay harmless for any cost or expense, to return any such Easement and any portions of the Property disturbed in connection with the Facilities or any Tenant activity to their original condition, or any other condition acceptable to Otay, as evidenced in advance of the work in a writing signed by Otay representatives.

Tenant acknowledges that the Property is used in connection with Otay's storage and delivery of water and other services to the public, and agrees that such uses by Otay are superior in all respects to all uses by Tenant. Upon six-months written notice from Otay (or less if six-months notice cannot be reasonably given), Tenant shall at its sole expense relocate its Easement to another mutually agreeable location within the Property. Otay and Tenant shall reasonably cooperate in such relocation, however if no such suitable location can be agreed-upon, either party may terminate this Agreement without further liability to the other party.

Non-exclusive means, in connection with the Easement described and defined in this Section 2, that Otay or any person or entity authorized by Otay may utilize the easement area for any purpose which does not interfere with Tenant's use, including a purpose similar to Tenant's. Otay shall provide Tenant with advance notice of any intention to use, or authorize a third party to use, the easement area.

3. Use of the Premises. The Premises may be used by Tenant only for the purpose of installing, constructing, housing, operating, maintaining and repairing its own, Otay-approved telecommunication equipment, including appurtenant antennas and electronic equipment, as further described and conditioned in this Agreement (collectively, the "Facilities"), for the lawful provision of communication services. Tenant may not sublease, sublicense or permit another entity any use of space at the Premises or the Facilities, except as provided in Section 12, below.

4. Access. Subject to compliance with the conditions set forth below, Otay agrees to provide access over pre-identified portions of the Property to the Premises to Tenant, Tenant's employees, agents, contractors and subcontractors (collectively, "Tenant Parties"), 24 hours a day, seven days a week, at no additional charge to Tenant. Neither Tenant nor Tenant Parties shall wander off into other portions of the Property or attempt to use or access any Otay facility. If access to the Premises is available without or with minimum intrusion into any portion of the Property, such access shall be the preferred route and Otay may require the Tenant, at the Tenant's cost, to fence the Facilities so as to separate them from the rest of the Property and all other improvements.

a. Ingress and Egress. Otay hereby grants to Tenant and Tenant Parties such rights of ingress and egress over the Property as may be necessary and consistent with the authorized use of the Premises as outlined by Otay Operations; provided, however, that such access shall at all times be in compliance with and subject to Otay's rules, policies and regulations and shall not, at any time, interfere with Otay operations or cause or threaten to cause any contamination of Otay facilities or the Property.

b. Parking by Tenant. Subject to the foregoing, Otay agrees to permit Tenant and Tenant Parties to park vehicles on the Property as necessary and consistent with the authorized use of the Premises. No vehicle or trailer of any type shall be left unattended at any time or parked overnight, by Tenant or Tenant Parties, on any portion of the Property, including the Premises. Upon Otay's request, Tenant shall immediately cause to be relocated any vehicle,

trailer, or any other blockage of any type (other than Otay-approved Facilities), belonging to Tenant or any Tenant Party.

c. Maintenance of Access. Otay shall, at its expense, maintain all access roadways or driveways from the nearest public roadway to the Property, in a manner reasonably sufficient to allow access. Otay may assess a charge on Tenant to reimburse Otay for the full cost of any damage or excessive wear caused by Tenant and Tenant Parties.

d. Additional Access. Tenant is responsible for, at no cost to Otay, obtaining and maintaining all permits, licenses or easements from the owners of any affected real property (whether adjacent to the Property or not), as may be necessary for Tenant to have any and all access to and from the Property required in connection with this Agreement and the Facilities. Tenant shall provide copies of these documents to Otay prior to the start of construction.

5. Term. The term of this Agreement shall be five (5) years (the "Initial Term"), commencing on the Commencement Date. Tenant shall have the right to extend the term of the Agreement for three (3) additional terms of five (5) years each (each, an "Extension Term") by giving Otay written notice of its intention to do so at least 120 days prior to the date that the then current term would otherwise end. Failure to give such notice entitles Otay to, at its option, terminate this Agreement at the end of the then current Initial Term or Extension Term. In addition, so long as Tenant is in full compliance with the terms and conditions of this Agreement, Tenant may request up to two (2) additional extensions of five (5) years each, which Otay may grant or deny at its sole discretion (each, an "Additional Term" and together with the Initial Term and Extension Term, or individually, as the context requires, the "Term"); such request(s) shall be in writing and received by Otay no less than 120 days prior to the expiration of the then current Extension Term or Additional Term, as applicable.

6. Payment of Costs; Deposit and Administrative Fees. Tenant agrees to pay all costs and expenses incurred by Otay in connection with the Facilities and this Agreement, including negotiation and processing hereof, plan checking and inspection of Tenant facilities, costs of inspection, repairs or replacement of any Otay facilities affected or damaged, and all other costs or expenses of Otay attributable to the matters herein contemplated, plus a reasonable amount for Otay's overhead costs in connection therewith.

a. Deposit. Tenant has made a deposit, concurrent with its application, and has agreed to make any additional deposits required in connection with Otay's review of the application, negotiation of this Agreement, including legal review, site visits, review of drawings and other costs relating such matters incurred by Otay up to the time this Agreement is executed. Tenant forfeits any claim to such deposits except to the extent Otay determines after this Agreement is executed that amounts in excess of the District's costs and expenses have been paid. Any such excess amounts may, at the sole discretion of the District, be credited toward administrative fees or any other costs then due by Tenant, if any. If no amounts are due, excess deposits will be reimbursed to Tenant.

b. Administrative Fees. An initial administrative fee of \$4,500 shall be paid to Otay on or prior to the date of execution of this Agreement to defray costs relating to review and processing of Tenant's conditional use permits, inspection of the Facilities during construction and other related costs. In addition, administrative fees may be charged at Otay's discretion during the Term to recover costs and expenses incurred by Otay, including attorneys and consultant's fees, if any, in connection with any Tenant activity that requires Otay staff to spend time in supervision, inspection, investigation or other review; such costs include but are

not limited to any amendments to this Agreement, any default or any failure of Tenant to secure or renew any permit, approval, license or easement and any investigation Otay deems reasonably required in connection with the Premises or the Facilities, including without limitation any investigation of a potential contamination of any portion of the Property due to any Tenant activity or improvement.

c. Security Deposit. Concurrently upon execution of this Agreement, Tenant shall pay to Otay a sum equal to two months' rent as a deposit ("Security Deposit") to secure the Tenant's performance of the covenants contained herein. Tenant shall maintain the Security Deposit balance equal to the amount established herein over the life of the agreement. If Otay applies any portion of the Security Deposit, Tenant shall within 30 days after demand by Otay, deposit an amount sufficient to restore the Security Deposit to its original amount. No part of the Security Deposit is to be considered as an advance payment of rent, including last months' rent, nor is it to be used or refunded prior to the leased premises being permanently and totally vacated by the Tenant. After the Tenant has vacated the premises, Otay shall furnish Tenant with an itemized written statement of the basis for, and the amount of, any of the security deposit retained by Otay. Otay may withhold that portion of Tenant's security deposit necessary (a) to remedy any default by Tenant in the payment of rent or any other provision of this Agreement, (b) to repair damages to the premises or any expense, loss, or damage that Otay may suffer because of Tenant's default, (c) to restore the premises to meet Otay's standards, (d) any amount that Otay may incur or become obligated to spend in exercising Otay's rights under this Agreement or available at law. The unused portion of this deposit shall be returned to the Tenant without interest no later than 60 days after termination of this Agreement.

Tenant waives the provisions of California Civil Code §1950.7, and all other provisions of law now in force or that become in force after the date of execution of this Agreement, that provide that Otay may claim from a security deposit only those sums reasonably necessary to remedy defaults in the payment of accrued Rent, to repair damage caused by Tenant, or to clean the Premises. Otay and Tenant agree that Otay may, in addition, claim those sums reasonably necessary to compensate Otay for any other foreseeable or unforeseeable loss or damage caused by the act or omission of Tenant or Tenant's officers, agents, employees, Independent contractors, or invitees, including future rent payments.

d. None of the deposits or other payment of costs or administrative fees constitutes or shall be considered Rent (defined below).

7. Rent. Beginning on the Commencement Date, Tenant shall pay Otay as rent the sum of \$2,705.72 per month ("Rent") payable on the first day of each month in advance. If the Commencement Date is prior to the fifteenth day of the month of commencement, the full month's Rent will be due on the Commencement Date. If the Commencement Date is on or after the fifteenth day of the month of commencement, payment of Rent will begin the first day of the following month.

Tenant may make Rent payments up to 5 days past due date without penalty, unless continual late payments for two consecutive months occur. A fee shall be imposed after the 5th day and shall be 20% of the amount currently due. Failure to pay Rent within ten (10) calendar days of the first of the month shall be an Event of Default as provided by Section 17. Failure to pay Rent on the due date for more than two (2) consecutive months or four (4) times over any twelve (12) month period shall be a non-curable Event of Default without the necessity of any notice or cure period. At District's sole discretion, immediately following such a non-curable Event of Default, District may terminate the Agreement and seek any remedy available by this

Agreement or at law. If Tenant tenders a check, which is dishonored by a banking institution, than the Tenant shall tender cash or cashier's check only for all future payments, which shall continue until such time as written consent is obtained from Otay. In addition, Tenant shall be liable in the sum of \$25 for each dishonored check that is returned to Otay.

a. Rent Increases. The rent shall be increased on each calendar anniversary of the Commencement Date at a rate of four percent (4%) per annum. However, at the beginning of each Extension Term or Additional Term, if any, Otay may, at its sole and absolute discretion, choose to adjust the annual rent, effective on the first year of said Extension Term or Additional Term, by an amount equal to the greater of: (i) four percent (4%); or (ii) the amount necessary to ensure that the rent equals the amount it would have been if each annual increase during the previous Term had been calculated based on the average percentage increases in the consumer price index published by the United States Department of Labor, Bureau of Labor Statistics (1982-1984 = 100) (the "CPI") for "All Items - All Urban Consumers" for the San Diego Metropolitan Statistical Area for the immediately preceding 5 year period. If the publication of the Consumer Price Index is discontinued, or if the Consumer Price Index is altered in some material manner, including changing the name of the index, the geographic area covered, the consumers or workers so included, or the base year, the Parties must use their reasonable best efforts to agree on a substitute index or procedure that reasonably reflects and monitors consumer prices in the greater San Diego metropolitan area. After such an adjustment, the rent shall increase at a rate of four percent (4%) per annum for the rest of the applicable Extension Term or Additional Term, if any. Otay shall also have the discretion to adjust the base rent to then current market rent in the Additional Term if said market rent is greater than the CPI increase provided for in the above formula. The "then current market rent" shall be defined as the most recent rent transaction entered into by Otay with other similar tenants for the same or similar purposes.

8. Environmental. Otay represents that to the best of its knowledge the Premises have not been used for the generation, storage, treatment or disposal of hazardous materials other than those materials normally used by Otay for its usual purposes and that there is no known hazardous waste on the Premises. Tenant shall not bring any hazardous materials onto the Premises except for those contained in its back-up power facilities (e.g. sealed batteries and diesel fuel) and properly stored, reasonable quantities of common materials used in telecommunications operations (e.g. cleaning solvents); provided that Tenant shall use best efforts to ensure that NONE of any such contaminants come into contact with ANY soil on the Premises or the Property or with any portion or any Otay facilities. Tenant shall handle, store and dispose of all hazardous materials it brings onto the Premises in accordance with all federal, state and local laws and regulations ("Laws"). "Hazardous materials" means any substance, chemical, pollutant or waste that is identified, at the time the contamination or spill occurs, as hazardous, toxic or dangerous under any applicable federal, state or local law or regulation and specifically includes, but is not limited to asbestos and asbestos containing materials, polychlorinated biphenyl's (PCBs) and petroleum or other fuels (including crude oil or any fraction or derivative thereof). Tenant shall indemnify, defend (with counsel acceptable to Otay) and hold Otay, its directors, officers, employees, agents, consultants, successors attorneys and assigns (each an "Otay Party" and collectively, "Otay Parties") harmless for any damages, claims, liabilities, suits, actions or proceedings of any kind arising in connection with Tenant's use or storage of hazardous materials.

a. Remediation. If Tenant, Tenant activities or Tenant Facilities in any way cause contamination of any portion of the Property or any Otay equipment or facility, Tenant shall immediately notify Otay and, without cost or expense to Otay, Tenant shall completely remediate and shall cause the legal removal and disposal all contaminants and any contaminated soil and materials within 24 hours of notice from Otay. If remediation cannot be completed within such time, it must be commenced and diligently pursued to Otay's satisfaction to avoid a default hereunder. Tenant shall also, holding Otay harmless for any cost or expense, immediately cause the repair of any and all damage arising from the contamination or the remediation. Any and all contractors or workers associated with the removal of the hazardous materials and clean-up of contaminated soils or facilities must be certified the Contractors State License Board ("HAZ" Certification) pursuant to Business and Professions Code 7058.7 et seq. and proof of the required certification, insurance, and a business license is demanded and required. All remediation activities must be performed with Otay's representative(s) present.

b. Indemnity for Contamination. Tenant shall hold Otay and Otay Parties harmless from any and all costs, expenses, losses, claims, fines, penalties, forfeitures, liabilities, expenses and damages, whether constitutional, statutory, in contract, tort or strict liability (including but not limited to personal injury, death at any time and property damage), incurred, arising from or any way related to any such contamination or remediation, including without limitation all costs and expenses relating to the clean-up or replacement, by or at Otay's direction by persons or entities acceptable to Otay, of any contaminated soil, water and/or facilities and including without limitation defending Otay and Otay Parties (with legal counsel, investigators and subject matter experts acceptable to Otay) in any administrative or criminal proceeding, claim, action or litigation arising from or related to such contamination, payment of any and all fines imposed on Otay or Otay Parties, and payment of any awards or settlements. Tenant agrees to reimburse Otay for its cost relating to such remediation pursuant to Section 6.b of this Agreement.

c. Tenant's obligation to remediate and indemnify Otay for any such contamination and remediation shall survive the termination of this Agreement for any cause.

9. Installation and Maintenance of Facilities. Tenant is authorized to install, maintain and operate on the Premises only the Facilities described and depicted on Attachment A to Exhibit D; provided that all permits and zoning approvals shall have first been obtained by Tenant and shall at all times while the Facilities operate remain in full force and effect.

a. Installation of the Facilities. Tenant's design and installation of all portions of the Facilities shall be done, at no cost to Otay, according to plans approved by Otay, provided that such approval shall not be unreasonably withheld. Tenant shall not locate or attach any antennas or other equipment to any of Otay's facilities without the prior written approval of Otay of the method of attachment at Otay's sole discretion. If such Facilities are to be attached or mounted to a water tank, Tenant shall use an installation method such as a magnetic mount or other, non-destructive alternative. The Tenant shall be responsible for painting its antennas and/or equipment to match Otay's facility. Otay will provide Tenant with specifications regarding paint type, color and application method to accomplish this requirement. Painting/coating submittals shall be provided to Otay by the Tenant prior to receiving permission to begin painting. Otay may specify a camouflage design if not inconsistent with requirements of the city or county within which the Facilities are located. These camouflage designs may include but are not limited to faux palm trees, pine trees, cypress trees, broadleaf trees, and flag poles, unipoles, and other camouflaged antenna and antenna supports.

b. *Record Drawings.* Within thirty (30) days after completion of the Facilities, Tenant shall provide Otay with "record" (also called "as-built") drawings of the Facilities showing and identifying all the equipment and improvements installed on the Premises. Said drawings shall be accompanied by a complete and detailed inventory of all equipment, including without limitation all personal property and antennas located on the Premises and any such property of Tenant located in the Easement. No property of Tenant other than such identified property shall be located on the Premises or the Property at any time. Upon acceptance by Otay of Tenant's record drawings, in form and content satisfactory to Otay, such drawings shall replace and supersede any similar drawings contained in any exhibit attached hereto.

c. *Alterations.* Tenant shall not alter or change its Facilities in a material manner without the prior approval of Otay, such approval not to be unreasonably withheld. "Material" refers to any physical change that could affect the building structure, antenna support, interconnecting facilities or its appearance or any change that requires access to the Premises for installation of new equipment, removal of old equipment, trenching or digging or that could disrupt Otay's workplace or communications in any way or any change that requires a renewed or amended easement, permit or approval. All of Tenant's construction and installation work shall be performed at Tenant's sole cost and expense in a good and workmanlike manner and fully compliant with all government permit and code requirements. Tenant shall have the right to remove all facilities it installs at its sole expense on or before the expiration or termination of this Agreement, but must at such time restore the ground and surface underlying the removed facilities to its pre-installation condition, wear and tear excepted, and to the reasonable satisfaction of Otay.

d. *Improvements to Facilities / Additional Space.* If, at any time during the Term, Tenant requests permission from Otay to add improvements requiring construction to its then existing Facilities, the then current Administrative Fees shall be paid to Otay before any such changes are negotiated. In addition, if the requested Tenant improvements include additional area, a new agreement or, at Otay's discretion, an amendment for the additional lease space must be executed prior to start of construction and Tenant shall comply with Otay's requirements then in effect, including payment of additional rent, if any, for the additional area.

e. *Permits and Compliance with Applicable Laws.* During the Term, and prior to commencing any construction or installation of any improvements or equipment, as applicable, Tenant shall obtain all necessary approvals, permits and access easements or licenses, all of which shall be maintained in full force and effect at all times in accordance with all applicable laws, rules and regulations.

i. Prior to commencing construction, Tenant shall deliver to Otay copies of all executed licenses, approvals and permits required by local, state or federal agency in connection with the Facilities, which permits shall be attached hereto as Attachment B to Exhibit D.

ii. From time to time, as required by law or regulation in connection with the normal operation of the Facilities or as needed due to improvements or alterations to the same, Tenant shall provide Otay with updated permits, licenses and/or approvals, including without limitation written evidence, satisfactory to Otay, of all FCC approvals and other governmental permits and approvals, including but not limited to compliance with the FCC's electromagnetic radiation rules, set forth at 47 C.F.R. § 1.1307 et seq. and FCC Office of Engineering and Technology Bulletin 65, each as hereafter amended.

iii. Otay agrees, at no expense to Otay, to reasonably cooperate with Tenant in making application for and obtaining all governmental licenses, permits and approvals that may be required for Tenant's intended use of the Premises.

f. *Utilities.* Tenant shall be authorized to install utilities for the Premises and the Facilities at Tenant's expense and to improve the present utilities on or near the Premises (including, but not limited to the installation of an emergency back-up power) subject to Otay's approval of the location, route, design and capacity, which approval shall not be unreasonably withheld. Tenant shall fully and promptly pay for all utilities furnished to the Premises for the use, operation and maintenance of Tenant's facilities. If inadequate electrical power is available to provide for the Facilities, or additional electrical power is required to be installed on the Premises by Otay in its sole discretion, such installation shall be at Tenant's sole expense. The location, route, design and capacity of the additional power facility shall be approved by Otay, which shall not be unreasonably withheld.

g. *Repair of Otay's Improvements/Systems.* Any damage done to the Property or to any Otay improvement, facility or system in connection with the construction, installation, maintenance, repair, improvement, replacement or operation of the Facilities shall be repaired or replaced immediately at Tenant's expense and to Otay's reasonable satisfaction by Otay staff or contractors approved by Otay. Tenant shall not locate or attach any antennas or other equipment to any of Otay's facilities without the prior written approval of Otay. Tenant shall pay all costs and expenses in relation to maintaining the integrity of Otay's facilities, improvements and systems affected in any way by Tenant's Facilities or its use of the Property or the Premises.

h. *Maintenance and Repair.* At all time during the Term, Tenant shall maintain the Premises and the Facilities in a manner acceptable to Otay. Tenant's use of its facilities shall not at any time or in any way adversely impact, impede or interfere with Otay's access to, use or operation of, its improvements, equipment or systems.

i. *Liens.* Tenant shall not encumber or allow the Premises or the Property to be encumbered in any manner other than as expressly authorized herein.

j. *Security.* Tenant recognizes and agrees that the Premises and the Reservoir Site are a sensitive area and that Otay's operations and services are highly sensitive and regulated. Tenant shall provide for the proper supervision of all Tenant Parties assigned or allowed by Tenant to enter and do work at the Premises. Tenant also agrees, holding Otay harmless for any cost or expense, to comply with any and all security measures instituted by Otay from time to time.

10. Maintenance, Repair or Replacement of Otay's Improvements. At any time while this Agreement remains in effect, Otay may, at its option and upon One Hundred Twenty (120) days prior written notice to Tenant, remove or cause Tenant to remove all or any portion of its Facilities at Tenant's expense, in order for Otay to paint, repair, or make replacements to any or all its improvements on the Premises (the "Maintenance or Replacement Work"), as deemed necessary by Otay in its sole discretion. Tenant agrees to fully cooperate with Otay's efforts in connection with any Maintenance or Replacement Work, including without limitation timely, and at Tenant's cost, removing and re-installing any portion of the Facilities, as requested by Otay.

a. *Temporary Facilities.* During the Maintenance or Replacement Work, Tenant may, holding Otay harmless from any cost or expense, install temporary antennas on the Premises subject to Otay's approval of the location and type of replacement facilities, such

approval shall not be unreasonably withheld or delayed. Once the Maintenance or Replacement Work is completed by Otay, Tenant agrees to promptly dismantle any temporary facilities and to relocate the facilities to their original location or to any other location approved by Otay. All work related to the removal of any portion of the Facilities, installation of temporary facilities, dismantling, relocation to their original location and any related work, shall be done at Tenant's sole cost and expense and in good and workmanlike manner.

b. *Repair of damage.* Tenant shall repair any damage caused by Tenant in connection with the installation, maintenance, operation or removal of any temporary facilities or the Facilities, and Tenant shall restore any distributed portions of the Property to their condition immediately prior to the installation of the temporary facilities.

c. *Otay's option to remove temporary facilities.* If any temporary facilities are not removed within thirty (30) days from the date the Maintenance or Replacement Work is completed, Otay shall have the right, but not the duty, to remove the temporary facilities at Tenant's cost and expense.

d. *Painting of the Facilities.* If the Maintenance or Replacement Work includes the painting, or any work affecting the surface of Otay's improvements, the Tenant shall be responsible for repainting or performing other surface treatment of its antennas and equipment to match Otay's. Otay will provide specifications to the Tenant regarding the treatment, paint type, color and application method to accomplish this requirement. The Tenant shall be required to obtain approval of specifications from Otay prior to commencing work on this requirement. Subject to Otay's prior written consent, Tenant may substitute an alternate treatment, paint type and application method if it reasonably determines that Otay's selection will adversely affect or otherwise degrade Tenant's wireless signal from the Reservoir Site.

11. Co-Location by Otay. Tenant agrees that Otay may enter into leases or other types of agreements with other communication carriers, wireless communications carriers and other utilities for use of any portion of the "Reservoir Site" as long as said leases do not result in unreasonable interference with Tenant's use of or access to the Premises. Tenant shall reasonably cooperate with Otay's efforts in this regard including, at Otay's request, the relocation of, or changes to, the Facilities; provided that any alterations or relocation needed to accommodate the new carrier or utility shall be performed at the expense of Otay or the new carrier or utility.

12. Co-Location by Tenant - Subleasing/Encumbrance. Tenant shall not sub-lease or sub-license or otherwise encumber the Premises or any portion of the Facilities without Otay's prior written consent, which may be granted or denied at Otay's sole discretion. Any sub-lease or other encumbrance shall require an amendment to this Agreement and shall specify the terms and conditions, including making provision for rent and increases thereto for the sub-lease or other encumbrance.

13. Condition of the Property at Expiration or Termination. Upon the expiration or termination of this Agreement as herein provided, Tenant shall, holding Otay harmless for any cost or expense, surrender the Premises, and any Easements granted by Otay in connection with this Agreement, to Otay in good and broom-clean condition, with all portions of the Facilities, including but not limited to equipment, supplies, buried conduits, and structures removed along with subterranean foundations to a depth of three feet below grade; or as otherwise agreed to by Otay in writing. All telecommunication traffic and all use of the Facilities and the Premises shall

cease immediately upon notice of termination or upon the expiration of the applicable term, whichever is earlier.

14. Interference. Tenant shall not use, nor shall Tenant permit any Tenant Party or sub-lessee to use any portion of the Premises in a manner which interferes with Otay's use of the Reservoir Site for its intended purpose including communications facilities relating to Otay's operation, now existing or hereafter installed. This limitation on Tenant's use does not apply to interference with communication facilities of a tenant of Otay whose use did not "pre-exist" this Agreement; except as to communications facilities agreed to by Tenant in connection with the co-location of any subsequent tenant's facilities. If Tenant's operation in any way interferes with Otay's communications facilities, Tenant will have five (5) business days to correct the problem after notice from Otay, except as to interference with Otay's telemetry radio equipment which must be corrected within one (1) calendar day after notice from Otay. Tenant acknowledges that interference that continues beyond the number of days specified in this Section may cause irreparable injury to Otay and, therefore, Otay has the right, without further liability, to terminate the Agreement immediately upon notice to Tenant of failure to correct the problem within the specified time.

15. Taxes. During the term of this Agreement, Tenant shall pay before delinquency all taxes, assessments, license fees, and any other charge of any type whatsoever that are levied, assessed, charged, or imposed on or against Tenant's personal property installed or located in or on the leased premises and that become payable during the term of this Agreement.

16. Termination.

(a) This Agreement may be terminated by Tenant without further liability if:

(i) Tenant delivers to Otay 30-day written notice at any time prior to commencing any work at the Premises in connection with the installation of any Facilities, for any reason or no reason;

(ii) Tenant gives Otay sixty (60) days notice of Tenant's determination that a governmental or non-governmental license, permit, consent, approval, easement or waiver necessary to enable Tenant to construct, install or operate the Facilities cannot be obtained or renewed at reasonable expense or in reasonable time period for wireless sites at water reservoirs in metropolitan areas within San Diego County. If this notice is given, Tenant must immediately cease any and all transmissions through and from the Premises and shall promptly remove, within a period of time not to exceed ten (10) business days, any and all Tenant's personal property and improvements from the Property. This Agreement and any related easements shall automatically expire upon the earlier of removal of the Tenant's improvements or the 60th day from the notice; excepting only Tenant's indemnities and liabilities hereunder, including the obligation to pay Rent for any holdover period. Tenant agrees that Otay may, without any liability or recourse against Otay, commit to re-let the Premises to other parties immediately upon receipt of the notice herein contemplated.

(iii) Tenant determines at any time after the Commencement Date that the Premises are not appropriate or suitable for its operations for economic, environmental or technological reasons, including without limitation, any ruling or directive of the FCC or other governmental or regulatory agency, or problems with signal strength or interference not encompassed by subsection (iv) below; provided that the right to terminate under this subsection (iii) is exercisable only upon payment by Tenant, as a termination fee, of the lesser of twelve monthly installments of rent or the balance of the rent due for the then current Initial Term,

Extension Term or Additional Term, as applicable; and Tenant agrees that Otay may, without any liability or recourse against Otay, commit to re-let the Premises to other parties immediately upon receipt of the notice herein contemplated;

(iv) Otay commits a default under this Agreement and fails to cure pursuant to Section 17, below;

(v) The Property or the Premises are totally or partially destroyed by fire or other casualty (not caused by Tenant) so as to hinder Tenant's normal operations and Otay does not provide to Tenant within thirty (30) days after the casualty occurs a suitable temporary relocation site for Tenant's facility pending repair and restoration of the Premises; or

(vi) If Tenant and Otay cannot reasonably agree on the location of a replacement Easement pursuant to Section 2 herein.

(b) This Agreement may be terminated by Otay without further liability if:

(i) Tenant commits a default under this Agreement and fails to cure such default pursuant to Section 17, below;

(ii) Otay determines that continuing the Agreement or continuing to allow the Tenant to construct, install, maintain or operate the Facilities in any way violates a law, rule or regulation; or

(iii) If Tenant and Otay cannot reasonably agree on the location of a replacement Easement pursuant to Section 2 herein.

17. Default.

a. *Event of Default.* The parties covenant and agree that a default or breach of this Agreement (an "Event of Default") shall occur and be deemed to exist if, after notice and opportunity to cure as provided below:

(i) Tenant shall default in the payment of Rent, or any other amounts due Otay hereunder, and said default shall continue for ten (10) days after the same becomes due; or

(ii) Either party shall default in the performance or observance of any other covenant or condition of this Agreement to be performed or observed if such failure persists for a period of thirty (30) days after the non-defaulting party provides written notice of the default to the defaulting party.

b. *Rights upon Default.* Upon the occurrence of an Event of Default, in addition to any other rights or remedies available to the non-defaulting party under any law, the non-defaulting party shall have the right to terminate the Agreement.

c. *Cure Rights.* An Event of Default shall not exist unless written notice has been given in accordance with this Agreement, and the defaulting party has had the opportunity to cure as provided herein. The defaulting party shall cure the alleged default within the manner provided herein; provided however, that if the nature of an alleged default is such that it cannot reasonably be cured within such thirty (30) day period, the defaulting party shall not be in breach of this Agreement if it diligently commences a cure within such period, and thereafter diligently proceeds with the actions necessary to complete such cure.

18. Destruction of Premises or Property. If the Premises or the Property is destroyed or damaged in a manner that prevents their use for economic, environmental or technological

reasons, Tenant may elect to terminate this Agreement as of the date of the damage or destruction by so notifying Otay no more than thirty (30) days following the date of destruction damage, provided Otay does not provide to Tenant, within such thirty (30) days period, a suitable temporary relocation site for the Facilities pending repair and restoration of the Premises and the Property. If the Property or Otay's improvements thereon are destroyed, Otay may terminate this Agreement by providing Tenant up to sixty (60) days notice, as reasonably prudent under the circumstances.

19. Condemnation. If the condemning authority takes all the Property or a portion which in Tenant's opinion is sufficient to render the Premises unsuitable for Tenant's use, then this Agreement shall terminate as of the date when possession is delivered to the condemning authority. In the event of any taking under the power of eminent domain, Tenant shall not be entitled to any portion of the award paid for the taking and Otay shall receive the full amount of such award except as provided herein. Tenant hereby expressly waives any right or claim to any portion of a condemnation award, except for relocation benefits and goodwill. All other damages, whether awarded as compensation for diminution in value of the leasehold or to the fee of the Premises, shall belong to Otay.

20. Insurance. Tenant shall maintain the following insurance:

- a. Commercial general liability with limits of \$5,000,000 per occurrence which may be satisfied by a primary policy with a limit of no less than \$2,000,000 and an umbrella policy of excess liability in the amount of no less than \$5,000,000;
- b. Automobile liability with the combined single limit of \$1,000,000 per accident;
- c. Worker's compensation, as required by law;
- d. Employer's liability with limits of \$1,000,000 per occurrence.

Tenant shall name Otay as an additional insured on each of the aforementioned insurance policies and the policies shall state that they are primary and that any policies Otay maintains shall be noncontributory. Tenant shall provide Otay with written certificates of insurance evidencing such coverage. Said policies shall expressly provide that the policies shall not be canceled or altered without at least thirty (30) days prior written notice to Otay. Said policies shall be with insurance companies with an A.M. Best rating of AVII or better. Each policy limit herein shall be increased by Tenant, upon request by Otay, to the amount Otay increases its policy limits for other contracts.

Otay takes no responsibility for the protection of Tenant's property from acts of vandalism by third parties. The insurance requirements may be changed by Otay upon giving of notice to Tenant; provided that the requirements set forth above shall be the minimum insurance requirements during the Term.

21. Indemnity. Tenant specifically agrees that it shall hold harmless, defend (with counsel, and if needed experts, reasonably acceptable to Otay), indemnify and otherwise protect Otay and each Otay Party, from and against all claims, suits or actions of any kind and description relating to (a) Tenant's obligations under this Agreement and any amendment hereto or (b) Tenant or Tenant Parties use of, and access to, the Premises, the Facilities or the Property. These obligations extend to and include without limitation any and all costs and expenses (including attorneys fees and court costs) incurred by Otay or the Otay Parties in connection with (i) damage to property (including the Premises, the Property or any personal property of Otay or

any third party), (ii) any action or proceeding (including an enforcement action or criminal proceeding) related in any way to any permit (governmental or otherwise), approval or easement obtained by or required of Tenant in connection with this Agreement or the Facilities; and (iii) personal injury or death, except to the extent that such claims, suits or actions directly arise from the gross negligence or willful misconduct of Otay or an Otay Party. This indemnification clause in no way limits any other specific indemnities given by Tenant under other provisions of this Agreement.

Nothing contained herein shall prohibit Otay, in its sole discretion, from participating in the defense of any demand, claim, action, proceeding, or litigation. In no event shall Otay's participation in the defense of any demand claim, action, proceeding, or litigation affect the obligations imposed upon Tenant herein.

This and all other Tenant indemnities shall survive the termination of this Agreement and shall remain in effect for as long as the underlying claim or action remains viable.

22. Estoppel Certificate. Tenant shall, at any time and from time to time upon not less than thirty (30) days prior request by Otay, deliver to Otay a statement in writing certifying that (a) this Agreement is unmodified and in full force, or if there have been modifications, that the Agreement is in full force as modified and identifying the modifications; (b) the dates to which rent and other charges have been paid; (c) as far as the person making the certificate knows, Otay is or is not in default under any provisions of the Agreement; and (d) such other matters as Otay may reasonably request.

23. Assignment. Tenant shall not assign this Agreement or any portion of its rights or obligations hereunder without Otay's prior written consent, except to an affiliated parent entity, subsidiary, purchaser of at least 50% of the aggregate of the assets of Tenant ("assets" means and includes without limitation any and all real, personal or financial property or thing owned or controlled by Tenant or over which Tenant has an interest) or holder of Tenant's FCC license.

a. If during the Term hereof, Tenant requests the written consent of Otay to any assignment, and upon demonstration satisfactory to Otay of the proposed assignee's legal, financial, and technical qualifications to assume all of the Tenant's duties and obligations herein, Otay's consent thereto shall not unreasonably be withheld. Consent to one assignment shall not be deemed consent to any subsequent assignment.

b. Any attempted assignment not permitted under the first paragraph of this Section 23, without Otay's prior consent as set forth in Section 23(a), shall be void and, at Otay's option, shall constitute a termination of this Agreement for which a termination fee as described in Section 16(iii) shall be immediately due.

c. Any assignment of this Agreement shall require an executed "Assignment of Lease" whether or not the Consent of Otay is required pursuant to this section 23 or any other provision of this Agreement. A sample form of the "Assignment of Lease" is attached to this Agreement as Exhibit F which may be amended or modified in Otay's sole discretion.

24. Memorandum of Agreement. If requested by Tenant, Otay agrees to promptly execute and deliver to Tenant a recordable Memorandum of Agreement substantially in the form of Exhibit E.

25. Bankruptcy. Otay and the Tenant hereby expressly agree and acknowledge that it is the intention of both parties that in the event that during the term of this Lease, either party shall become a debtor in any voluntary or involuntary bankruptcy proceeding (a Proceeding)

under the United States Bankruptcy Code, 11 U.S.C. 101, et seq. (the Code), this Lease is and shall be treated as an unexpired lease of nonresidential real property for purposes of Section 365 of the Code, 11 U.S.C. 365 (as may be amended), and, accordingly, shall be subject to the provisions of subsections (d)(3) and (d)(4) of said Section 365 (as may be amended).

26. Choice of Law and Venue; Resolution of Disputes.

a. This Agreement shall be interpreted in accordance with the laws of the State of California, without regard to its conflict of laws principles.

b. Any disputes not subject to resolution via arbitration, shall be referred to a court of competent jurisdiction in San Diego County, California. It is the intent of the parties, however, that all controversies or claims arising out of or relating to this Agreement shall be resolved by submission to final and binding arbitration, in accordance with then current rules, at the offices of the American Arbitration Association ("AAA") located in San Diego, California.

27. Attorney's Fees. In the event that either party commences any legal action or proceeding, including an action for declaratory relief, against the other by reason of the alleged failure of the other to perform or keep any term, covenant, or condition of this Agreement, the party prevailing in said action or proceeding shall be entitled to recover, in addition to court or arbitration costs, reasonable attorneys' fees to be fixed by the court or arbitration official.

28. No Liability of Public Officials. No elected official, officer, employee, agent, or volunteer of Otay shall be personally liable for any default or liability whatsoever under this Agreement.

29. Public Document. Tenant acknowledges that this Agreement and all documents relating hereto are "public records" (as defined in Section 6252(e) of the California Government Code), except for any documents relating to Tenant's financial condition or otherwise exempt from such status pursuant to law, and that public records, with limited exemptions, are subject to public disclosure pursuant to the provisions of California Government Code, commencing with Section 6250.

30. Entire Agreement. This Agreement contains all agreements, promises and understandings between Otay and Tenant and no verbal or oral agreements, promises or understandings shall or will be binding upon either Otay or Tenant and any addition, variation or modification to this Agreement shall be in effect unless made in writing and signed by the parties hereto.

31. Incorporation of Exhibits and Recitals. All exhibits and attachments attached to this Agreement and all Recitals above are incorporated and made a part hereof as if fully set forth herein.

32. Survival. Terms and conditions of this Agreement which by their sense and context survive the termination or expiration of this Lease Agreement will so survive.

33. Severability. If any term or condition of this Agreement is found unenforceable, the remaining terms and conditions shall remain binding upon the parties as though said unenforceable provision were not contained herein. However, if the invalid, illegal or unenforceable provision materially affects this Agreement then the Agreement may be terminated by either party on ten (10) days prior written notice to the other party hereto.

34. Waiver. Waiver of any provision or term of this Agreement, or of any breach or default hereunder, shall not constitute a waiver of any other term, condition, breach or default, or

of a subsequent applicability of a term or condition, or a waiver of a subsequent breach or default, nor shall it constitute an amendment to the term, condition or provision that is waived.

35. Notice. All notices, requests, demands and communications hereunder will be given by first class certified or registered mail, return receipt requested, or by a nationally recognized overnight courier, postage prepaid, to be effective when properly sent and received, refused or returned undelivered. Notices may be given by facsimile or email and shall be effective when sent if proof of transmission is retained and duplicate notices are sent by one of the other methods herein described. Notices shall be sent to the addresses set forth below:

OTAY: Otay Water District
 Attn: General Manager
 2554 Sweetwater Springs Boulevard
 Spring Valley, CA 91978-2096
 Fax: (619) 660-0829

TENANT: _____
 Attn : _____
 Re: Cell Site #: _____
 Cell Site Name: _____
 Fixed Asset No: _____

With a copy sent concurrently to Tenant's legal department, or counsel, as follows:

Attn : _____
Re: Cell Site #: _____
Cell Site Name: _____
Fixed Asset No: _____

Otay or Tenant may from time to time designate any other addressees and addresses and fax telephone numbers for notices or deliveries by written notice to the other party.

36. Corporate Authority. The persons executing this Agreement on behalf of the Tenant warrant that (i) Tenant is duly organized and legally existing, (ii) he/she/they are duly authorized to execute and deliver this Agreement on behalf of Tenant, (iii) by so executing this Agreement, Tenant is formally bound to the provisions hereof, and (iv) entering into this Agreement does not violate any provision of any other Agreement to which Tenant is bound.

[THE REMAINDER OF THIS PAGE IS INTENTIONALLY LEFT BLANK. THE SIGNATURE PAGE FOLLOWS.]

IN, WITNESS WHEREOF, the parties have executed this Agreement as of the 18 day of June, 2013. This date is referred to as the Commencement Date in the Agreement.
(Tenant's Legal Name)

By: 
Name: JOHN S. WAGNER
Its: MANAGER

Approved as to Form:

Tenant's Counsel

OTAY WATER DISTRICT
2554 Sweetwater Springs Blvd.
Spring Valley, CA 91979

By: _____
Name: _____
Its: _____

Approved as to Form:

Otay's General Counsel

ALL-PURPOSE ACKNOWLEDGMENT

State of Oklahoma

County of Oklahoma

On June 18 2013 before me, _____
DATE

Linda J. Hodges
NAME OF NOTARY PUBLIC

personally appeared John S Maguire
NAME(S) OF SIGNER(S)

personally known to me OR proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), an that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.



WITNESS my hand and official seal.

Place Notary Seal or Stamp Here

Linda J. Hodges
SIGNATURE OF NOTARY

ATTENTION NOTARY: Although the information requested below is OPTIONAL, it may prove valuable to persons relying on this Acknowledgment and could prevent fraudulent reattachment of this certificate to another document.

DESCRIPTION OF ATTACHED DOCUMENT

**THIS CERTIFICATE
MUST BE ATTACHED
TO THE DOCUMENT
DESCRIBED AT RIGHT**

Communications Tower Site Lease
TITLE OR TYPE OF DOCUMENT

17
NUMBER OF PAGES

June 2013
DATE OF DOCUMENT

Otay Water District
SIGNER(S) OTHER THAN NAMED ABOVE

EXHIBIT A
SPECIAL TERMS AND CONDITIONS ADDED TO
AGREEMENT BETWEEN _____ AND
OTAY TO LOCATE COMMUNICATION FACILITIES AT
OTAY'S _____ RESERVOIR SITE, DATED
_____, _____ (THE "AGREEMENT")

If any terms or conditions set forth herein contradict terms or conditions of the Agreement to which this Exhibit is attached, as described above, the terms and conditions of this Exhibit shall control.

SPECIAL TERMS AND CONDITIONS

1. **Landscaping and Maintenance.** The installation, permitting, maintenance and upkeep, and all expenses or other obligations related thereto, in connection with any and all landscaping and irrigation systems mandated by the permitting agencies shall be the sole responsibility of the Tenant. Otay Water District makes no commitment for delivery of water to the Premises or Facilities, except if Tenant obtains a water meter for the Premises and pays for water use.

2. **Rent.** At Tenant's election, subject to prior written notice as set forth in the Agreement, Tenant may pay rent annually, in advance during each of the five-years of the Initial Term or during each of the five years in any Extension Term. Once the Initial Term or Extension Term, as applicable, has commenced, Tenant may not alter its election to pay monthly or annually.

3. **Tenant's Financing.** Notwithstanding anything to the contrary contained in this Agreement, Tenant may assign, mortgage, pledge, hypothecate or otherwise transfer without prior notice or consent its interest in this Agreement to any financing entity, or agent on behalf of any financing entity to whom Tenant (i) has obligations for borrowed money or in respect of guaranties thereof, (ii) has obligations evidenced by bonds, debentures, notes or similar instruments, or (iii) has obligations under or with respect to letters of credit, bankers acceptances and similar facilities or in respect of guaranties thereof; provided that no such assignment shall become binding on Otay until written notification is given by Tenant to Otay as provided in the Agreement. A "financing entity" as used herein, does not include any entity which primary business is not that of banking, finance, lending or investing funds and does also does not include any entity whose primary business is the provision of telecommunications; or telecommunications site ownership; or telecommunications site management.

- a. **Waiver of Otay's Lien.** With respect to any such financing entity, Otay waives any lien rights it may have concerning the Facilities, which is deemed Tenant's personal property and not fixtures attached to the Property and Tenant or, if appropriate, the financing entity has the right to remove the same at any time without Otay's consent; provided that Tenant's obligation to pay rent shall not terminate unless, upon removal of the Facilities, Otay elects to terminate the Agreement in which case, Tenant shall pay Otay the termination fee specified in Section 16(iii) of the Agreement. The financing entity shall not have the right to

operate the Facilities without Otay's prior written consent, which may be denied at Otay's discretion for any reason or no reason.

- b. **Collateral.** Tenant may enter into a financing arrangement including promissory notes and financial and security agreements for the financing of the Facilities ("Collateral") with a third party financing entity (and may in the future enter into additional financing arrangements with other financing entities). In connection therewith, Otay (i) consents to the installation of the Collateral in compliance with all requirements of the Agreement; (ii) disclaims any interest in the Collateral, as fixtures or otherwise; and (iii) agrees that the Collateral shall be exempt from execution, foreclosure, sale, levy, attachment, or distress for any Rent due or to become due and that such Collateral may be removed at any time without recourse to legal proceedings; except as set forth in paragraph (a) above.
- c. **Disposition of Collateral.** Notwithstanding paragraphs a. and b., above, if Tenant fails to remove the Collateral, or any component thereof, within five (5) days of the termination of this Agreement, said failure shall constitute abandonment. If thereafter, Tenant or any holder of Collateral, lender or assignee, whether or not notification was provided to Otay, fails to claim and remove the same, within thirty (30) calendar days of the date of termination of this Agreement, Otay is hereby specifically authorized to remove and dispose of the Collateral, or any component thereof, so abandoned at Tenant's sole cost and expense and without incurring any liability to Tenant, or any lender or any other party with any interest in all or any part of the Collateral or the Agreement. Tenant shall pay Otay, upon demand, the termination fee specified in Section 16(iii) of the Agreement.
- d. **No privity or obligation.** Otay does not have privity with any financing entity and specifically disclaims any obligation to any such entity, including any obligation to provide copies of any notices of default or right to cure under the Agreement.

EXHIBIT B

**TO AGREEMENT BETWEEN _____ AND
OTAY TO LOCATE COMMUNICATION FACILITIES AT
OTAY'S _____ RESERVOIR SITE, DATED
_____, _____ (THE "AGREEMENT")**

List of Attachments to Exhibit B:

- ATTACHMENT A. DEPICTION OF RESERVOIR FACILITIES
- ATTACHMENT B. LEGAL DESCRIPTION OF THE PROPERTY
- ATTACHMENT C. LEGAL DESCRIPTION OF THE PREMISES

EXHIBIT C
TO AGREEMENT BETWEEN _____ AND
OTAY TO LOCATE COMMUNICATION FACILITIES AT
OTAY'S _____ RESERVOIR SITE, DATED
_____, _____ (THE "AGREEMENT")

DEPICTION AND LEGAL DESCRIPTION OF EASEMENT

Easement Requested? Yes No
Easement Granted? Yes No

If Easement granted, complete the following information (if recording requested, format appropriately and attach copy of instrument of record):

For good and valuable consideration, receipt of which is hereby acknowledged, the Otay Water District, as Grantor, hereby grants to _____, a [_____] [corporation] [limited liability company]], as Tenant, an Easement to excavate, remove dirt and do any act necessary to install, operate and maintain power lines and connection lines as required in connection with the communications facilities and the antenna to be located on the Premises. The legal description of the land subject to the Easement is as follows:

[Insert Description][See Attachment A]

A drawing depicting the Easement is attached hereto as **Attachment []**. Tenant may not sell, transfer or assign the Easement herein granted to Tenant. Tenant's rights under the Easement are specifically limited to the installation, maintenance and operation of such power lines, transmission lines and other communications lines and accessories as required to efficiently operate Tenant's communication facilities on the Premises as previously approved by Grantor. Following initial installation, Tenant shall not have a right to trench or excavate to repair, modify or replace any approved items without Grantor's prior written consent.

The Easement shall **automatically terminate** on the earlier of **thirty (30) years** from the date hereof **or the day the Agreement is terminated for any reason**. On such date, the Easement shall become unenforceable and, for all purposes, terminate, whether or not a termination or quitclaim is recorded.

Grantor reserves the right to use the lands that are subject to the Easement in any manner and for any purpose that does not materially interfere with Tenant's use thereof.

Grantor retains the right to remove, at Tenant's expense, from the surface of the Easement any item, structure improvement or portion thereof that interferes or conflicts with Grantor's use of the Property.

Tenant shall defend, indemnify and hold Grantor and its elected and appointed officials, officers, agents, employees, and volunteers free and harmless from and against any and all losses, claims, liabilities, damages, actions, causes of action, costs and expenses including attorney's fees and costs of court, and injuries, including personal injuries or death (collectively or individually, "Losses") arising out of or in connection with Tenant's access to, installation, occupation, use, operation, maintenance or repair of its Facilities at the Premises, except Losses directly resulting from the willful act or misconduct of Grantor. This indemnity provision shall survive the expiration, cancellation or expiration of this Easement.

EXHIBIT D

**TO AGREEMENT BETWEEN _____ AND
OTAY TO LOCATE COMMUNICATION FACILITIES AT
OTAY'S _____ RESERVOIR SITE, DATED
_____, _____ (THE "AGREEMENT")**

List of Attachments to Exhibit D:

Attachment A. Depiction of the Telecommunication Facilities

Attachment B. Permits

EXHIBIT E

TO AGREEMENT BETWEEN _____ AND OTAY
TO LOCATE COMMUNICATION FACILITIES AT
OTAY'S _____ RESERVOIR SITE, DATED
_____, _____ (THE "AGREEMENT")

Memorandum of Agreement

Check one option.

- None.
- See Attached.

AGENDA ITEM 4



STAFF REPORT

TYPE MEETING:	Regular Board	MEETING DATE:	August 7, 2013
SUBMITTED BY:	Stephen Dobra Purchasing Manager	PROJECT:	Various DIV. NO. ALL
APPROVED BY:	<input checked="" type="checkbox"/> Rom Sarno, Chief of Administrative Services <input checked="" type="checkbox"/> German Alvarez, Assistant General Manager <input checked="" type="checkbox"/> Mark Watton, General Manager		
SUBJECT:	DECLARATION OF SURPLUS VEHICLES AND EQUIPMENT		

GENERAL MANAGER'S RECOMMENDATION:

That the Board declare the identified vehicles and equipment as surplus to the District's needs.

COMMITTEE ACTION:

See "Attachment A".

PURPOSE:

To present a list of vehicles and equipment and obtain Board declaration that the items identified on the list are surplus to the District's needs.

ANALYSIS:

Listed below are various vehicles and equipment that have been determined by the user departments to be of no use, obsolete (spare parts and service not available), beyond useful life, and/or not cost-effective to repair or operate and therefore, surplus to the District's needs.

Vehicles Identified as Surplus

<u>Item</u>	<u>Qty</u>	<u>Description</u>	<u>Reason for Declaration</u>
1	1	Unit 135, 2001 Ford Expedition, FA#8135, VIN 1FMPU16L11LB51855, 126,700 miles	No longer cost-effective to maintain and operate. Vehicle is no longer required.
2	1	Unit 134, 2002 Ford F-250 Utility Truck, FA#8134, VIN 1FTNF20L02EA58304, 51,000 miles	No longer cost-effective to maintain and operate. Vehicle is no longer required.
3	1	Unit 115, 2000 Ford Ranger Pickup Truck, FA#8115, VIN 1FTYR14X8YPA21493, 50,000 miles	No longer cost-effective to maintain and operate. Vehicle is no longer required.

Equipment Identified as Surplus

<u>Item</u>	<u>Qty</u>	<u>Description</u>	<u>Reason for Declaration</u>
4	4	Chlorinators, Pennwalt Wallace & Tiernan, SN's An-16274, AN-16299, AK-16113, AL-16304	No longer supported by the manufacturer, no longer cost-effective to maintain and operate, and is no longer required.
5	4	Chlorine Analyzers Pennwalt Wallace & Tiernan, SN's AL-28284, AK-15975, AN-16304, AN-16303	No longer supported by the manufacturer, no longer cost-effective to maintain and operate, and is no longer required.
6	1	Survey Base Station FA# 3987, consisting of Trimble 4800 receivers SN 220179258 and SN 220156335, Trimble Trimmark IIE Base and Repeater SN 220154847, Trimble TSCI Data Collector SN 220149134, and associated wires and antennas	No longer required.
7	3	GPS Receiver, Geo Explorer XT, SN's 4511E00029, 4423E00088, 4423E00179	Inoperable, no longer supported by manufacturer, and no longer serviceable.
8	3	GPS Receiver, Geo Explorer XH, SN's 4625482501, 4626483207, 4623478371	No longer required.
9	3	Right Angle Gear Drives, SN's 154977, 154975, 154974	No longer required.
10	2	Caterpillar Diesel Engines, Model	No longer supported by

		No. 3406, FA #1512, and SN 17727	manufacturer, no longer cost-effective to maintain and operate. Engines no longer meet APCD requirements.
11	1	Auto Crane Brand Truck Mounted Crane, SN 320304-228BT-0598	No longer required.
12	2	Lamson Process Air Blower, SN's 911825, 911810	Broken and inoperable and no longer required.
13	1	NEC PBX phone system, hand sets, and associated hardware and cables	No longer required, replaced.

Before vehicles and equipment (where the individual acquisition cost exceeded \$5,000) can be disposed of, the Board must first declare the items as surplus (*ref: Purchasing Manual, Section 12*).

The District's Purchasing Manual identifies the process for disposing of material, equipment, and supplies that have been declared surplus. Typically, items declared surplus are disposed of by sale through public auction.

FISCAL IMPACT: Joe Beachem, Chief Financial Officer

The salvage value and associated gain or loss on items is not determined until their disposal. Therefore, the fiscal impact of the recommended action is not known at this time.

STRATEGIC GOAL:

This action supports the District's goal to ensure financial health through efficient operations.

LEGAL IMPACT:

None.

Attachments:

Attachment A - Committee Action Report



ATTACHMENT A

SUBJECT/PROJECT:	DECLARATION OF SURPLUS VEHICLES AND EQUIPMENT
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COMMITTEE ACTION:

The Finance, Administration and Communications Committee met on July 23, 2013, to review this item. The Committee supports presentation to the full Board for their consideration.

NOTE:

The "Committee Action" is written in anticipation of the Committee moving the item forward for Board approval. This report will be sent to the Board as a committee approved item, or modified to reflect any discussion or changes as directed from the committee prior to presentation to the full Board.

AGENDA ITEM 5



STAFF REPORT

TYPE MEETING:	Regular Board	MEETING DATE:	August 7, 2013
		PROJECT:	DIV. NO. All
SUBMITTED BY:	Andrea Carey Customer Service Manager		
APPROVED BY:	<input checked="" type="checkbox"/> Joseph R. Beachem, Chief Financial Officer <input checked="" type="checkbox"/> German Alvarez, Assistant General Manager <input checked="" type="checkbox"/> Mark Watton, General Manager		
SUBJECT:	Authorize the General Manager to Negotiate and Enter into an Agreement with Paymentus for Phone Payment Services		

GENERAL MANAGER'S RECOMMENDATION:

That the Board authorize the General Manager to negotiate and enter into a one-year fixed with four option year renewals (five-year term) agreement with Paymentus to provide phone payment services in an amount not to exceed \$250,000 (\$50,000 annually).

COMMITTEE ACTION:

See Attachment A.

PURPOSE:

To authorize the General Manager to negotiate and enter into an agreement with Paymentus to provide phone payment services.

ANALYSIS:

The District accepts approximately 2,000 payments per month through the automated phone system. In 2010, the District began offering customers the option to pay by phone at no charge to the customer. Prior to that, the cost to the customer was a \$4.80 flat fee per phone payment transaction. The decision to absorb the cost of this service was made to provide a greater range of free payment methods to customers and to take advantage of credit card discount programs through Visa and MasterCard. The District receives approximately \$1,000,000 in Visa and MasterCard payments per month through the District's web payment portal, the phone payment service and the

front desk. Visa and MasterCard each offer a utility discount to qualified businesses. This discount reduces the fees charged by Visa and MasterCard to the District from an average of 1.8% to approximately 1%. In order to receive the discounted rate, the District cannot charge a convenience fee to its customers for initiating a payment through any payment portal (i.e. web, phone, front desk). The discounted rates from Visa and MasterCard save the District approximately \$8,000 per month in credit card fees; outweighing the costs incurred by the District to offer payment over the phone at no charge. In order to evaluate the cost effectiveness of our current vendor, HP Enterprises, Inc., a request for proposal (RFP) to provide phone payment services for the District was sent to seven vendors.

The District received proposals from three vendors. Evaluation criteria consisted of the vendor's ability to meet District specifications; number of years experience in this type of business with accounts similar to Otay in size; competence and customer service; on time experience in delivery of comparable goods and services; financial stability; and cost.

The phone payment services listed below are based on 30,000 credit card payments per year. This number reflects a higher average than the current 2,000 phone transactions processed monthly. This higher number reflects the historical annual increases in phone payments and the added option to pay using a bank account which is not currently available to customers.

Vendor	Annual Price
Paymentus	\$49,500
Billtrust	\$55,200
Alacriti	\$59,400

Otay is currently paying HP Enterprises, Inc. approximately \$2.40 per phone payment. With Paymentus, Otay will pay approximately \$1.65 per phone payment, resulting in a 30% cost savings to the District. The savings may be greater as the cost to the District is less if customers use their bank account or a debit card instead of credit card to pay.

Paymentus handles payment processing for over 60 utilities in California, including Sweetwater Authority. District staff contacted three current Paymentus customers and all had positive feedback on their relationship with Paymentus and the services offered.

The proposed agreement will ensure that Paymentus is unable to raise prices for five years and that the District is able to terminate for cause, at any time. Additionally, after the initial one-year period, the District will have the option not to renew should opportunities, circumstances or business practices change.

FISCAL IMPACT: Joe Beachem, Chief Financial Officer

The annual cost for Paymentus services will be approximately \$50,000 per year. Based on the current volume of payments, the expected savings will be approximately \$18,000 annually.

STRATEGIC GOAL:

Evaluate the most cost effective and efficient processes and tools to communicate service related issues to customers.

LEGAL IMPACT:

None.

Attachments:

Attachment A - Committee Action



ATTACHMENT A

SUBJECT/PROJECT:	Authorize the General Manager to Negotiate and Enter into an Agreement with Paymentus for Phone Payment Services
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COMMITTEE ACTION:

The Finance, Administration, and Communications Committee recommend that the Board authorize the General Manager to negotiate and enter into an agreement with Paymentus for phone payment services.

NOTE:

The "Committee Action" is written in anticipation of the Committee moving the item forward for board approval. This report will be sent to the Board as a committee approved item, or modified to reflect any discussion or changes as directed from the committee prior to presentation to the full board.