

In The
**United States Court Of Appeals
For The Ninth Circuit**

THE CITY OF PORTLAND, OREGON,
Petitioner,

v.

**FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA,**
Respondents.

SPRINT CORPORATION,
Petitioner,

v.

**FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA,**
Respondents.

ON APPEAL FROM THE FEDERAL COMMUNICATIONS COMMISSION

**AMICUS BRIEF OF MISSOURI BASIN MUNICIPAL POWER AGENCY SUPPORTING THE
POSITION OF THE AMERICAN PUBLIC POWER ASSOCIATION SEEKING REVERSAL
(CASE NO. 19-70339)**

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Identity and Interest of Amicus Curiae

Missouri Basin Municipal Power Agency is a body corporate and politic organized under the laws of the State of Iowa and existing under the inter-governmental cooperation laws of the States of Iowa, Minnesota, North Dakota, and South Dakota. It is a not-for-profit governmental subdivision and does business as Missouri River Energy Services (“MRES”). (Roos Aff. ¶ 2.)¹ MRES has 61 municipal members, mostly smaller towns, who own and operate retail electric distribution systems, through which they sell electricity to their residents. (*Id.* ¶ 3.) MRES enters into long-term power sale agreements with its members to deliver electric power, energy, and transmission service. (*Id.* ¶ 4.) As publicly-owned electric utilities, MRES members are directly affected by the Federal Communication Commission’s Declaratory Ruling and Third Report and Order adopted September 27, 2018. MRES members have not experienced or created the issues described in the FCC’s Order. To the contrary, their experience with collocation of small wireless facilities does not support the FCC’s Order and affirms that the issue should be left to state and local control, as has been repeatedly acknowledged by Congress, the FCC, and states that have addressed this issue. Under Fed. R. App. P. 29(a)(2), all parties have consented to this filing.

¹ The Affidavit of Brad Roos is included as an exhibit to this brief.

Authorship

Counsel for MRES authored this brief without financial contribution from any party, any party's counsel, or any other person.

Summary of the Argument

MRES offers this amicus brief to support the arguments of the American Public Power Association. MRES and all of its member communities are members of the APPA. This brief makes three points: (1) that the recent experience of Marshall, Minnesota, one MRES member, in negotiating a master lease agreement for the location of small cell facilities contradicts the need for FCC action and affirms the propriety of local control over this activity, as recognized by Congress in 47 U.S.C. § 224; (2) that MRES members as municipal utilities act in a proprietary capacity in all that they do, suggesting that the FCC's understanding of federal preemption is at best inapplicable to municipal utilities; and (3) that two of the states where MRES members exist have recently regulated the issue of small cell facility location, but the legislation has exempted municipal utilities, thereby recognizing, like Congress did in 47 U.S.C. § 224, that federal regulation of municipal utilities is unnecessary with respect to the deployment of small cell facilities.

Argument

1. **The experience of Marshall, Minnesota, contradicts the need for FCC action.**

MRES is a body corporate and politic organized under Chapter 28E of the Iowa Code. Because it has members in Iowa, Minnesota, North Dakota, and South Dakota, it exists under the intergovernmental cooperation laws of all four states. The members of MRES are 61 municipally-owned electric utilities, all of which serve small or mid-sized towns or cities by providing power to their residents. (Roos Aff. ¶ 3.) Most of these members have operated municipal electric systems for more than 100 years. (*Id.*) MRES is an extension of its members, helping them work together to plan for future power supply needs and solve other mutual problems related to the provision of power. MRES and all of its members are members of the American Public Power Association.

Most MRES members obtain an allocation of hydroelectric power produced from the dams on the Missouri River and marketed by the Western Area Power Administration, which provides transmission lines and associated substation facilities. On average, this allocation meets about 40% of member needs. (*Id.* ¶ 4.) Through long-term contracts, MRES supplements the power needs of its members by selling them power, energy, and transmission services. MRES obtains power from a variety of generation sources, including its own interests in power plants

generated by fossil fuels, wind farms, nuclear power, hydroelectric power, and solar energy. (*Id.*)

Marshall Municipal Utilities (“MMU”) is a member of MRES and is the largest purchaser of power and energy from MRES. MMU serves the City of Marshall, Minnesota, which has approximately 14,000 residents. (*Id.* ¶¶ 5-6.) MMU is governed by a five-member commission whose members are appointed by the mayor and confirmed by the city council. (*Id.* ¶ 7.)

In July 2018, MMU entered into a master lease agreement with Alltel Communications, LLC, d/b/a/ Verizon Wireless. The agreement allows Verizon to install, maintain, and operate communications equipment necessary for a 5G network on utility poles owned by MMU. (*Id.* ¶¶ 8-9.) MMU negotiated the agreement on its own behalf, while Verizon was represented by counsel and a third-party negotiator. (*Id.* ¶ 8.) Under the agreement, Verizon may locate certain communications equipment on MMU’s poles for a period of ten years, at a negotiated rental rate of \$1,200 per pole. (*Id.* ¶ 10.) According to the agreement, the rent is no less favorable than the rent charged to other providers for substantially the same tenancies. (*Id.*) Verizon’s equipment was too heavy for MMU’s existing utility poles, so MMU’s poles must be replaced at Verizon’s expense. (*Id.* ¶ 14.) The MMU Commission approved the master lease agreement, which does not require approval from the City of Marshall. (*Id.* ¶ 16.) In

negotiating the agreement, MMU acted to facilitate the development of 5G services in Marshall. (*Id.* ¶ 17.) MMU does not have regulations or zoning requirements specifically related to small cell installations on its utility poles. (*Id.* ¶ 18.) MMU does not control access to the public right of way, which is determined by the City of Marshall. (*Id.* ¶ 19.)

The fact of the master lease agreement, the process of negotiation, and the agreement's terms all contradict the need for FCC action. Marshall is a small town in a rural state, both areas where the FCC unjustifiably concludes that 5G development may not occur without its order. (FCC Small Cell Order ¶ 28.)² The agreement and the process do not reveal hostility to collocation of 5G communications equipment on municipal utility poles, the need for a shot clock, or the need for a per-pole lease rate below what MMU and one telecommunications company negotiated as appropriate to the situation. MMU's experience demonstrates the effectiveness of traditional negotiation, cooperation, and a mutual interest in developing a 5G network. Its experience also demonstrates the appropriate reasons for local control, which allows MMU to negotiate for its community's best interest in deploying 5G technology within the confines of aesthetic, safety, and other technical concerns. MMU's experience establishes that

² All references to the FCC's Order are to the Declaratory Ruling and Third Report and Order adopted September 26, 2018.

the FCC's one-size-fits-all order is unnecessary and would be ineffective in similar situations.

2. Under state law, municipal utilities act in a proprietary, not regulatory, capacity.

The FCC's Order recognizes a traditional distinction between the governmental and proprietary roles of local governments, but ultimately concludes that Sections 253(a) and 332(c)(7) of the Telecommunications Act of 1996 permit no "leeway for states and localities acting in their proprietary role." (FCC Order ¶¶ 94-96.) This conclusion, aside from whether it is supported by facts, disregards the status and role of municipal utilities.

The courts in three of the four states where MRES members are located recognize that municipal utilities by their nature act in a proprietary capacity. The Minnesota courts "have long recognized that cities engage in a variety of proprietary activities," including "the provision of utility services to residents." *County of Washington v. City of Oak Park Heights*, 802 N.W.2d 767, 769 (Minn. Ct. App. 2011), *rev'd on other grounds*, 818 N.W.2d 533 (Minn. 2012). The Iowa Supreme Court held in 1922 that the Iowa Legislature "has conferred upon cities and towns the power to act in a proprietary capacity in respect to the establishment, maintenance, and operation of electric light plants." *Incorporated Town of Sibley v. Ocheyedon Electric Co.*, 187 N.W. 560, 562 (Iowa 1922). The South Dakota Supreme Court has held that "[w]hen a municipal corporation owns or operates a

public utility, it is engaged in a proprietary capacity and not a governmental capacity.” *Owens v. City of Beresford*, 201 N.W.2d 890, 892 (S.D. 1972). In the fourth state, the North Dakota Supreme Court has rejected the distinction between governmental and proprietary conduct, and so has not decided whether a municipal electric utility acts in a proprietary capacity. *City of Fargo v. Harwood Twp. Bd. of Supervisors*, 256 N.W.2d 694, 698 (N.D. 1977).

This distinction between governmental and proprietary conduct is evident in the exemption of municipal utilities from, for example, rate regulation at the state level. In South Dakota, municipal utilities set their own rates, which are not subject to regulation by the South Dakota Public Utilities Commission. SDCL § 9-39-23 (giving municipal utility boards the power to fix rates); *id.* § 49-34A-1 (exempting electric utilities owned by a municipality from the definition of “public utility” for purposes of SDCL Ch. 49-34A, governing gas and electric utilities regulation). In Minnesota, the legislature made specific findings exempting municipal utilities from regulation. “Because municipal utilities are presently effectively regulated by the residents of the municipalities which own and operate them, . . . it is deemed unnecessary to subject such utilities to regulation under this chapter except as specifically provided herein.” Minn. Stat. Ann. § 216B.01. A municipal utility is subject to regulation by the public utilities commission only if it elects to become subject to rate regulation under Minn. Stat. Ann. § 216B.02,

subdivision 5. In Iowa, a municipality is broadly exempted from regulation by the state. Iowa Code Ann. § 476.1B. Other courts have similarly characterized municipal utilities. *See, e.g., United Water New Mexico v. New Mexico Public Utility Com’n*, 910 P.2d 906, 911-12 (N.M. 1996) (legislature excluded municipalities from the definition of public utilities and exempted municipally owned and operated utilities from rate and service regulation because “municipalities were fully capable of protecting the interests of citizens served by a municipal utility both inside and outside the municipalities’ borders without the need for PUC oversight”). Municipal utilities are exempt because they are different in character and operation; they are “effectively regulated by the residents of the municipalities which own and operate them.” Minn. Stat. Ann. § 216B.01.

The federal courts recognize this distinction between governmental and proprietary conduct in the preemption context. *See Bldg. & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R.I. Inc.*, 507 U.S. 218, 231-32 (1993); *Oglala Sioux Tribe v. State of South Dakota*, 770 F.2d 730, 735 (8th Cir. 1985) (jurisdictional disclaimer in State Enabling Act did not preempt state-court jurisdiction over consolidation of county exclusively located on reservation because disclaimer dealt with a proprietary rather than a governmental interest). The distinction at work in the market-participant doctrine, between states acting as market participants and states acting as market regulators,

Reeves, Inc. v. Stake, 447 U.S. 429, 437 (1980), applies especially to municipal electric utilities.

The FCC, however, took a jaundiced view of the proprietary nature of municipal utilities. Its Small Cell Order concluded that under Section 253(c), “Congress did not intend to permit states and localities to rely on their ownership of property within the ROW as a pretext to advance regulatory objectives that prohibit or have the effect of prohibiting the provision of covered services, and thus that such conduct is preempted.” (FCC Order ¶ 97.) This interpretation, which injudiciously accuses states and localities of “using their proprietary roles to effectuate a general municipal policy disfavoring wireless deployment in public ROW” (*id.*), is strikingly at odds with a state-law understanding of the different ways in which local governments function, the existence of municipal utilities, and the reality of MRES as an association of long-time municipal electric utilities. Having been in the business for in many cases over 100 years of providing residents of their communities with electric power, including maintaining the infrastructure necessary for that service, MRES members are not posturing merely for the sake of creating regulatory obstacles to the implementation of 5G wireless service. Their existence is inherently proprietary. Moreover, negotiating terms and conditions, including price, with a telecommunications carrier for the placement of certain equipment on a municipal utility pole is not traditional

regulatory conduct. By ignoring the proprietary nature of municipal utilities, the FCC's interpretation of Sections 253 and 332 is unsupportable.

3. State exemptions from regulation do not support the FCC's Order.

In addition to disregarding the proprietary role of municipal utilities and the role of free markets in addressing the issues on which it ultimately legislated through its Order, the FCC justifies its Order because even though “[s]ome state and local governments have acted to facilitate the deployment of 5G and other next-gen infrastructure,” not all state and local governments have acted the way the FCC thinks they should, and so “outlier conduct persists.” (FCC Order ¶ 25.) But apart from the FCC's limited discussion of state and local regulation, many states have acted to regulate small cell communications deployment by imposing fee limits and time restrictions like those in the FCC's Order. (*See* Brief of American Public Power Association at 52-53.) Importantly, however, this legislation recognizes the different status of municipal utilities.

Two of the states where MRES members operate have legislated on the subject of collocating small wireless facilities on utility poles. Both have exempted municipal utilities from their rules. In Iowa, the Iowa Cell Siting Act became effective July 1, 2015. Iowa Code Ann. § 8C.1. Most recently, the Legislature adopted uniform rules for permitting small wireless facilities. *Id.* § 8C.7. The chapter, however, does not apply to “[a]ny entities, including

municipally owned utilities established under [state statute] that do not have zoning or permitting jurisdiction.” *Id.* § 8C.2(3)(c). In Minnesota, the Legislature found that it was in the state’s interest that “the use and regulation of public rights-of-way be carried on in a fair, efficient, competitively neutral, and substantially uniform manner.” Minn. Stat. § 237.163, subdivision 1. The statute provides that a local government must act on a small wireless facility permit application within 90 days after it is filed, and the fee charged to occupy space on a wireless support structure may not exceed \$150 per year. *Id.* § 237.163, subdivision 3c(b); § 237.163, subdivision 6(g)(1). The statute specifically exempts, however, “a wireless support structure owned, operated, maintained, or served by a municipal electric utility.” *Id.* § 237.163, subdivision 10. Neither South Dakota nor North Dakota has adopted similar legislation regulating the location of small wireless facilities.

The fact of the legislation counters the FCC’s Order in two ways. First, Minnesota and Iowa recognize the issue as a proper subject for state regulation, which is consistent with 47 U.S.C. § 224. Second, the exemption for municipal electric utilities recognizes that they are different in character and have not presented an obstacle to the development of 5G infrastructure. Indeed, local municipal electric utilities are uniquely and effectively positioned to facilitate 5G deployment while also addressing important associated issues, such as safety, reliability, maintenance, feasibility, and aesthetics.

The legislative judgment of states exempting municipal utilities from state regulation is consistent with the experience of Marshall Municipal Utilities and the supportive role that municipal utilities play in their communities. The members of MRES are service providers, not regulators. They are ultimately close to the people they serve and their directors and managers are subject to normal and vigorous democratic processes at the local level. The mayors who appoint the directors of municipal utilities, the city council members who approve their appointments, and the directors of the municipal utilities all pay the rates the utilities establish and face the direct consequences of their other decisions. They are close to the voters. They will hear about unpopular decisions at morning coffee in the local café, on Friday nights at the VFW and the American Legion, or in church on Sunday morning. They operate in a world not recognizable in the FCC's Order. Heavy-handed regulatory control is unwarranted.

Conclusion

With respect to municipal electric utilities, like the members of MRES, the FCC's Order is a solution in search of a problem. As the example of Marshall Municipal Utilities and its market-oriented negotiation with Verizon demonstrates, a one-size-fits-all order is unnecessary and the issue of locating small cell facilities is best left to state and local control. Congress recognized this in 47 U.S.C. § 224, many states have recognized it in exempting municipal utilities from state

regulation, and the proprietary nature of municipal utilities warrants it. MRES supports APPA's request that the FCC's Small Cell Order be reversed.

Dated this 17th day of June, 2019.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ James E. Moore

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Municipal Power Agency

d/b/a Missouri River Energy Services

Exhibit 1

Case Nos. 18-72689 & 19-70123 (and consolidated cases)

**IN THE UNITED STATES COURT OF APPEALS
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**THE CITY OF PORTLAND, OREGON,
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On Petitions for Review of an Order
of the Federal Communications Commission

**Affidavit of Brad Roos
(Case No. 19-70339)**

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Counsel for Missouri River Energy Services

STATE OF MINNESOTA)
 : SS
COUNTY OF LYON)

Brad Roos, being first duly sworn on oath, states:

1. I am the General Manager of Marshall Municipal Utilities (“MMU”).

I have personal knowledge of the facts stated in this affidavit.

2. I am also a member of the board of directors of Missouri Basin Municipal Power Agency, doing business as Missouri River Energy Services (“MRES”). MRES is a not-for-profit governmental subdivision existing under the inter-governmental cooperation laws of the States of Iowa, Minnesota, North Dakota, and South Dakota.

3. MRES has 61 municipal members, most of which are smaller towns, who own or operate municipal electric systems, meaning that they sell electricity to their members. Most of MRES’s members have operated municipal electric utilities for more than 100 years.

4. MRES enters into long-term power sale agreements with its members to deliver electric power, energy, and transmission service. MRES members obtain an allocation of hydroelectric power produced from the dams on the Missouri River and marketed by the Western Area Power Administration. This allocation meets about 40% of member needs. MRES supplements their power supply from a variety of sources, including its own interest in power plants

generated by fossil fuels, wind farms, nuclear power, hydroelectric power, and solar energy.

5. MMU is a municipal utility providing electricity and water utility services to residents of the City of Marshall, Minnesota. Marshall has approximately 14,000 residents. MMU serves over 6,600 customers.

6. The City of Marshall is a member of Missouri River Energy Services. Since July 1, 2016, MMU has purchased the bulk of its supplemental power and energy requirements from MRES. Marshall is currently the largest purchaser of power and energy from MRES.

7. MMU is governed by a five-member commission whose members are appointed by the Mayor of the City of Marshall and confirmed by the City Council. Responsibilities of the commission include setting electric and water rates for customers.

8. On behalf of MMU, I negotiated a master lease agreement with Alltel Communications, LLC, d/b/a Verizon Wireless. Verizon was represented in the negotiation by legal counsel and by a third-party negotiator, who initiated the discussion with MMU culminating in the agreement. The process was collegial.

9. The master lease agreement allows Verizon to install, maintain, and operate communications equipment necessary for a 5G network on utility poles

owned by MMU. A copy of the agreement, which is dated July 3, 2018, is attached as Exhibit A.

10. In general, the agreement provides Verizon the right to locate certain communications equipment on utility poles owned by MMU for a period of ten years. The negotiated annual rental rate is \$1,200 per pole. (Ex. A ¶ 3(a).) The agreement provides that the rent is no less favorable than the rent charged to other providers for substantially the same tenancies or licenses, and that if anytime during the term of the agreement MMU offers more favorable rent or terms to another party, Verizon will be offered the same terms. (Ex. A ¶ 29.)

12. Included in the agreement is MMU's obligation to provide its electrical service to the utility poles. (Ex. A ¶ 4.) Verizon must also secure from another provider dark fiber service.

13. Most of MMU's distribution lines are located underground for reasons related to maintenance, safety, and aesthetics. Thus, the location of the poles chosen by Verizon was limited to the location of poles for street lights.

14. In the course of negotiations, Verizon determined that their communications equipment was too heavy for existing utility poles, so each pole must be replaced with a pole approved by MMU and Verizon. Verizon is responsible for the cost of the poles and the cost to set the poles.

15. Verizon determined the locations where it wanted to locate communications equipment.

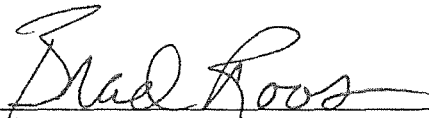
16. The agreement was approved by the MMU Commission. No further approval or permitting was required by the City of Marshall with respect to the master lease agreement.

17. In negotiating on behalf of MMU, I understood that the deployment of 5G services in the City of Marshall was in the best interest of residents of Marshall, and I did not intend to obstruct the ability of Verizon to locate its communications equipment in the Marshall. No one on behalf of Verizon told me during the negotiation that MMU's positions were an unreasonable obstruction to deployment of 5G communications equipment or that the rental rate was excessive.

18. MMU does not have regulations or zoning requirements specifically governing small cell installations on its utility poles.

19. MMU does not control access to the public right of way, which is determined by the City of Marshall.

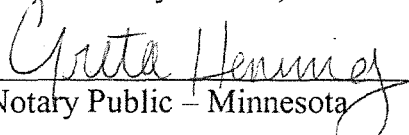
Dated this 13th day of June, 2019.



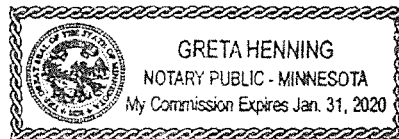
Brad Roos

Subscribed and sworn to before me

This 13th day of June, 2019.



Notary Public – Minnesota



MASTER LEASE AGREEMENT

This Master Lease Agreement (the "**Agreement**") made this 3rd day of July, 2018 between Marshall Municipal Utilities, with its principal offices located at 113 South 4th Street, Marshall, Minnesota 56258, hereinafter designated **LESSOR**, and Alltel Communications, LLC d/b/a Verizon Wireless, with its principal offices located at One Verizon Way, Mail Stop 4AW100, Basking Ridge, New Jersey 07920 (telephone number 866-862-4404), hereinafter designated **LESSEE**. LESSOR and LESSEE are at times collectively referred to hereinafter as the "**Parties**" or individually as the "**Party**."

RECITALS

WHEREAS, LESSOR is the owner of, or holds a leasehold or other possessory interest in, certain properties, utility poles and/or facilities, which are located within the geographic area of a license held by LESSEE to provide wireless services issued by the Federal Communications Commission (the "**FCC License**"); and

WHEREAS, LESSEE desires to install, maintain and operate communications equipment on certain of LESSOR's properties, utility poles and/or facilities; and

WHEREAS, LESSOR and LESSEE desire to enter into this Agreement to define the general terms and conditions which would govern their relationship with respect to particular sites at which LESSOR may wish to permit LESSEE to install, maintain, and operate communications equipment; and

WHEREAS, LESSOR and LESSEE acknowledge that they will enter into a lease supplement ("**Supplement**"), in substantially the form attached hereto as **Exhibit A**, with respect to each particular location or site on which the LESSOR agrees to allow LESSEE to install, maintain, and operate communications equipment; and

WHEREAS, the Parties acknowledge that different related entities may operate or conduct the business of LESSOR and LESSEE in different geographic areas, and as a result, each Supplement may be signed by LESSEE and LESSOR's affiliated entities as further described herein, as appropriate based upon the ownership or other interest in the subject property, utility poles or facility, in the case of LESSOR, and the entity holding the FCC License in the subject geographic location, in the case of LESSEE.

NOW THEREFORE, in consideration of the mutual covenants contained herein, and intending to be legally bound hereby, the Parties agree as follows:

1. **PREMISES.** Pursuant to all of the terms and conditions of this Agreement and the applicable Supplement, LESSOR agrees to lease to LESSEE certain space described in the applicable Supplement upon LESSOR's utility poles (the "**Poles**") and/or surrounding real and/or personal property (LESSOR's Poles, personal property and surrounding real property are hereinafter sometimes collectively referred to as the "**Property**"), for the installation, operation and maintenance of communications equipment; together with the non-exclusive right of ingress and egress from a public right-of-way, seven (7) days a week, twenty four (24) hours a day, over, under and through the Property to and from the Premises (as hereinafter defined) for the purpose of installation, operation and maintenance of LESSEE's

communications facility. The space leased by LESSOR to LESSEE described in the applicable Supplement is hereinafter collectively referred to as the "**Premises**". The Premises may include, without limitation, certain space on the ground (the "**Equipment Space**") on the Property, and space on the Pole sufficient for the installation, operation and maintenance of antennas and other equipment (the "**Antenna Space**") as described in the Supplement. Notwithstanding anything in any Supplement to the contrary, the Premises under each Supplement shall include such additional space necessary for the installation, operation and maintenance of wires, cables, conduits, and pipes (the "**Cabling Space**") running between and among the various portions of the Premises and to all necessary electrical and telephone utility, cable, and fiber sources located within the Property.

2. CONDITION OF PROPERTY. LESSOR shall deliver the Premises to LESSEE in an "as-is" condition ready for LESSEE's construction of its improvements. LESSOR represents and warrants to LESSEE that as of the Effective Date of each Supplement, and continuing throughout the Term (as hereinafter defined) of each Supplement: (a) the Poles are in good condition and structurally sound; (b) the Property is in compliance with all Laws (as defined in **Paragraph 23** below), including any applicable building codes, regulations, or ordinances that may exist with regard to the Poles, or any part thereof; and (c) LESSOR will facilitate LESSEE's investigation of the Property to determine whether or not lead-based paint, asbestos, or other hazardous substances (as that term may be defined under any applicable federal, state or local law) are present on the Premises. If a breach of the representations and warranties contained in this **Paragraph 2** is discovered at any time during the Term of a particular Supplement, LESSOR shall, promptly after receipt of written notice from LESSEE setting forth a description of the breach, rectify the non-compliance at LESSOR's expense.

3. TERM; RENTAL.

(a) This Agreement shall be for a term of ten (10) years commencing upon the execution hereof by both Parties. Each Supplement shall be effective as of the date of execution by both Parties (the "**Effective Date**"), provided however, the initial term of each Supplement shall be for five (5) years and shall commence on the first day of the month following the day that LESSEE commences installation of its equipment on the Premises (the "**Commencement Date**"), at which time rental payments shall commence and be due at a total annual rental of \$1,200.00 per Pole, to be paid in advance annually on the Commencement Date and on each anniversary of the Commencement Date, to the payee designated by LESSOR in the Supplement, or to such other person, firm or place as LESSOR may, from time to time, designate in writing at least ninety (90) days in advance of any rental payment date by notice given in accordance with **Paragraph 17** below. LESSOR and LESSEE acknowledge and agree that the initial rental payment for each Supplement may not actually be sent by LESSEE until ninety (90) days after the Commencement Date. LESSOR and LESSEE agree that they shall acknowledge in writing the Commencement Date of each Supplement.

(b) Upon agreement of the Parties, LESSEE may pay rent by electronic funds transfer and in that event, LESSOR agrees to provide to LESSEE bank routing information for that purpose upon request of LESSEE.

(c) For any Party to whom rental payments are to be made, LESSOR or any successor in interest of LESSOR hereby agrees to provide to LESSEE (i) a completed, current version of Internal Revenue Service Form W-9, or equivalent; (ii) complete and fully executed state and local withholding forms, if required; and (iii) other documentation to verify LESSOR's or such other Party's

right to receive rental as is reasonably requested by LESSEE. Rental shall accrue in accordance with this Agreement, but LESSEE shall have no obligation to deliver rental payments until the requested documentation has been received by LESSEE. Upon receipt of the requested documentation, LESSEE shall deliver the accrued rental payments as directed by LESSOR.

4. ELECTRICAL.

(a) LESSOR shall, consistent with LESSOR's policies and at all times during the Term of each Supplement, provide electrical service and fiber provider access within the Premises. In consideration for the electrical service usage by LESSEE, a flat fee charge for electrical service shall be paid by LESSEE in accordance with the terms of the applicable Supplement, which shall set forth the mutually approved annual charge payable to LESSOR under the Supplement in addition to the annual rent payable thereunder. LESSEE and LESSOR hereby agree that the annual power charge to be paid under the applicable Supplement shall be calculated based upon the annual electrical service draw for the equipment to be installed by LESSEE multiplied by the then-applicable per kWh rate. By way of illustration, if the annual flat fee power charge to be paid under a Supplement, where LESSEE is installing a single-radio node, at a then rate of \$0.103/kWh, and the power draw is demonstrated to be 460 Watts, the annual flat fee power charge would be calculated as follows:

$$(460 \text{ W / node with 1 radio}) * (720 \text{ hrs / month}) * (12 \text{ months / 1 year}) = 3,974 \text{ kWh / year}$$

$$\text{Thus, } (3,974 \text{ kWh / year}) * (\$0.103 / \text{kWh}) = \$409 \text{ plus } \$45 = \$454 \text{ per year.}$$

In the event LESSEE proposes equipment modifications which would decrease or increase its expected electrical service usage, the Parties shall recalculate the annual power charge and amend the applicable Supplement.

(b) Upon prior notification to LESSOR, LESSEE shall be permitted at any time during the Term (as defined herein) of each Supplement, to install, maintain, and/or provide access to and use of, as necessary (during any power interruption at the Premises), a temporary power source and a temporary installation of any other services and equipment required to keep LESSEE's communications facility operational, along with all related equipment and appurtenances within the Premises, or elsewhere on the Property in such locations as reasonably approved by LESSOR. LESSEE shall have the right to install conduits connecting the temporary power source, and the temporary installation of any other services and equipment required to keep LESSEE's communications facility operational and related appurtenances to the Premises.

(c) The Parties acknowledge and agree that the electricity rate in the formula in **Paragraph 4(a)**, above, assumes that the host street light circuit is able to accommodate the power requirements of LESSEE's equipment. In the event LESSOR has to run a separate metered power circuit of the applicable Pole, the applicable electricity rate would be at the Commercial rate then in effect.

5. EXTENSIONS. Each Supplement shall have its initial five (5) year term automatically extended for one (1) additional five (5) year terms unless LESSEE terminates it at the end of the initial term by giving LESSOR written notice of the intent to terminate at least three (3) months prior to the end of such term. If at the end of the five (5) year extension term the Supplement has not been terminated by either Party by giving to the other written notice of an intention to terminate it at least

three (3) months prior to the end of such extension term, the Supplement shall continue in force upon the same covenants, terms and conditions for a further term of one (1) year and for one (1) year terms thereafter until terminated by either Party by giving to the other written notice of its intention to so terminate at least three (3) months prior to the end of the then current term. The initial term and all extensions under a Supplement shall be collectively referred to herein as the "Term". Notwithstanding anything herein, after the expiration of this Agreement, its terms and conditions shall survive and govern with respect to any remaining Supplements in effect until their expiration or termination.

6. USE; GOVERNMENTAL APPROVALS. LESSEE shall use the Premises for the purpose of constructing, maintaining, repairing and operating a communications facility and uses incidental thereto. LESSEE shall have the right, without any increase in rent, to replace, repair, add or otherwise modify its utilities, fiber or cable, equipment, antennas and/or conduits or any portion thereof, and the frequencies over which the equipment operates, whether the equipment, antennas, conduits or frequencies are specified or not on any exhibit attached to a Supplement, during the Term. It is understood and agreed that LESSEE's ability to use the Premises is contingent upon LESSEE obtaining after the execution date of each Supplement all of the certificates, permits and other approvals (collectively the "Governmental Approvals") that may be required by any Federal, State or Local authorities, as well as a satisfactory Pole structural analysis that will permit LESSEE use of the Premises as set forth above. LESSOR shall cooperate with LESSEE in its effort to obtain the Governmental Approvals. LESSEE shall have the right to terminate the applicable Supplement if: (i) any of the applications for Governmental Approvals is finally rejected; (ii) any Governmental Approval issued to LESSEE is canceled, expires, lapses, or is otherwise withdrawn or terminated by governmental authority; (iii) LESSEE determines that the Governmental Approvals may not be obtained in a timely manner; (iv) LESSEE determines that the Premises is no longer technically compatible for its use; or (v) LESSEE, in its sole discretion, determines that the use of the Premises is obsolete or unnecessary. Notice of LESSEE's exercise of its right to terminate shall be given to LESSOR in accordance with the notice provisions set forth in **Paragraph 17** and shall be effective upon the mailing of that notice by LESSEE, or upon such later date as designated by LESSEE. All rentals paid to the termination date shall be retained by LESSOR. Upon such termination, the applicable Supplement shall be of no further force or effect except to the extent of the representations, warranties, and indemnities made by each Party to the other thereunder. Otherwise, the LESSEE shall have no further obligations for the payment of rent to LESSOR for the terminated Supplement.

7. INDEMNIFICATION. Subject to **Paragraph 8** below, to the extent allowed by law, each Party shall defend, indemnify and hold the other harmless against any claim of liability or loss from personal injury or property damage resulting from or arising out of the negligence or willful misconduct of the indemnifying Party, its employees, contractors or agents, except to the extent such claims or damages may be due to, or caused by, the negligence or willful misconduct of the indemnified Party, or its employees, contractors or agents. The indemnified Party will provide the indemnifying Party with prompt, written notice of any written claim covered by this indemnification; provided that any failure of the indemnified Party to provide any such notice, or to provide it promptly, shall not relieve the indemnifying Party from its indemnification obligations in respect of such claim, except to the extent the indemnifying Party can establish actual prejudice and direct damages as a result thereof. The indemnified Party will cooperate appropriately with the indemnifying Party in connection with the indemnifying Party's defense of such claim. The indemnifying Party shall defend any indemnified Party, at the indemnified Party's request, against any claim with counsel reasonably satisfactory to the

indemnified Party. The indemnifying Party shall not settle or compromise any such claim or consent to the entry of any judgment without the prior written consent of each indemnified Party and without an unconditional release of all claims by each claimant or plaintiff in favor of each indemnified Party.

8. INSURANCE.

(a) To the extent allowed by law, the Parties hereby waive and release any and all rights of action for negligence against the other which may hereafter arise on account of damage to the Premises or to the Property, resulting from any fire, or other casualty of the kind covered by standard fire insurance policies with extended coverage, regardless of whether or not, or in what amounts, such insurance is now or hereafter carried by the Parties, or either of them. These waivers and releases shall apply between the Parties and they shall also apply to any claims under or through either Party as a result of any asserted right of subrogation. All such policies of insurance obtained by either Party concerning the Premises or the Property shall waive the insurer's right of subrogation against the other Party.

(b) LESSEE agrees that at its own cost and expense, it will maintain commercial general liability insurance with limits of \$2,000,000.00 per occurrence for bodily injury (including death) and for damage or destruction to property. LESSEE will include the LESSOR as an additional insured as its interest may appear under this Agreement.

(c) LESSOR will maintain Commercial General Liability insurance at the liability limits specified in Minn. Stat. § 466.04, as amended from time to time. LESSOR will include LESSEE as an additional insured as its interest may appear under this Agreement.

9. LIMITATION OF LIABILITY. Except for indemnification pursuant to **Paragraphs 7 and 21**, or a violation of law, neither Party shall be liable to the other, or any of their respective agents, representatives, employees for any lost revenue, lost profits, loss of technology, rights or services, incidental, punitive, indirect, special or consequential damages, loss of data, or interruption or loss of use of service, even if advised of the possibility of such damages, whether under theory of contract, tort (including negligence), strict liability or otherwise.

10. ANNUAL TERMINATION. Notwithstanding anything to the contrary contained herein, provided LESSEE is not in default hereunder beyond applicable notice and cure periods, LESSEE shall have the right to terminate each Supplement upon the annual anniversary of the Commencement Date, provided that three (3) months prior notice is given to LESSOR.

11. INTERFERENCE. LESSEE agrees to install equipment of the type and frequency which will not cause harmful interference which is measurable in accordance with then existing industry standards to any equipment of LESSOR or other tenants of the Property which existed on the Property prior to the date the applicable Supplement is executed by the Parties. In the event any after-installed LESSEE's equipment causes such interference, and after LESSOR has notified LESSEE of such interference by a written communication and a call to LESSEE's Network Operations Center at ((800) 264-6620), LESSEE will take all commercially reasonable steps necessary to correct and eliminate the interference, including but not limited to, at LESSEE's option, powering down such interfering equipment and later powering up such interfering equipment for intermittent testing. If the interference continues for a period in excess of 48 hours following such notification, LESSOR shall have the right to require LESSEE to

reduce power, and/or cease operations until such time LESSEE can effect repairs to the interfering equipment. In no event will LESSOR be entitled to terminate a Supplement or relocate the equipment as long as LESSEE is making a good faith effort to remedy the interference issue. LESSOR agrees that LESSOR and/or any other users of the Property who currently have or in the future take possession of the Property will be permitted to install only such equipment that is of the type and frequency which will not cause harmful interference which is measurable in accordance with then existing industry standards to the then existing equipment of LESSEE. If LESSEE determines, in its reasonable discretion, that LESSOR's equipment or any other user's equipment permitted by LESSOR is causing interference, LESSOR shall, upon written communication and a call from LESSEE to LESSOR's General Manager at (507) 537-7005 take all steps necessary to correct and eliminate the interference, including causing other users causing such interference to correct and eliminate the interference. If the interference continues for a period in excess of 48 hours following the notification, LESSOR shall, or shall require any other user to, reduce power and/or cease operations until such time as LESSOR, or the other user, can effect repairs to the interfering equipment. The Parties acknowledge that there will not be an adequate remedy at law for noncompliance with the provisions of this Paragraph and therefore, either Party shall have the right to equitable remedies, such as, without limitation, injunctive relief and specific performance.

12. REMOVAL AT END OF TERM. LESSEE shall, within ninety (90) days after expiration of the Term, or any earlier termination of a Supplement, remove its equipment, conduits, fixtures and all personal property and restore the Premises to its original condition, reasonable wear and tear and casualty damage excepted. LESSOR agrees and acknowledges that all of the equipment, conduits, fixtures and personal property of LESSEE shall remain the personal property of LESSEE and LESSEE shall have the right to remove the same at any time during the Term, whether or not said items are considered fixtures and attachments to real property under applicable laws. If the time for removal causes LESSEE to remain on the Premises after termination of the Supplement, LESSEE shall pay rent at the then-existing monthly rate, or on the existing monthly pro-rata basis if based upon a longer payment term, until such time as the removal of the antenna structure, fixtures and all personal property are completed.

13. Intentionally Omitted.

14. RIGHTS UPON SALE. If, at any time during the Term of any Supplement, LESSOR decides: (i) to sell or transfer all or any part of a Property or the Poles thereon to a purchaser other than LESSEE, or (ii) to grant to a third party by easement or other legal instrument an interest in that portion of the Property occupied by LESSEE, or a larger portion thereof, for the purpose of operating and maintaining communications facilities or the management thereof, that sale or grant of an easement or interest therein shall be subject to the Supplement, and any such purchaser or transferee must recognize LESSEE's rights hereunder and under the terms of the affected Supplement(s). If LESSOR completes any such sale, transfer, or grant described in this Paragraph without executing an assignment of the Supplement in which the third party agrees in writing to assume all obligations of LESSOR under the Supplement, then LESSOR shall not be released from its obligations to LESSEE under the Supplement, and LESSEE shall have the right to look to LESSOR and the third party for the full performance of the Supplement.

15. QUIET ENJOYMENT AND REPRESENTATIONS. LESSOR covenants that LESSEE, on paying the rent and performing the covenants herein and in a Supplement, shall peaceably and quietly have, hold and enjoy the Premises. LESSOR represents and warrants to LESSEE as of the execution date of each Supplement, and covenants during the Term, that LESSOR is seized of good and sufficient title and interest to the Property, and has full authority to enter into and execute the Supplement. LESSOR further covenants during the Term that there are no liens, judgments or impediments of title on the Property, or affecting LESSOR's title to the same and that there are no covenants, easements or restrictions that prevent or adversely affect the use or occupancy of the Premises by LESSEE as provided in this Agreement and in the applicable Supplement(s).

16. ASSIGNMENT. This Agreement and each Supplement under it may be sold, assigned or transferred by the LESSEE without any approval or consent of the LESSOR to the LESSEE's principal, affiliates, subsidiaries of its principal, or to any entity which acquires all or substantially all of LESSEE's assets in the market defined by the FCC in which the Property is located by reason of a merger, acquisition or other business reorganization. As to other parties, this Agreement and each Supplement may not be sold, assigned or transferred without the written consent of the LESSOR, which consent will not be unreasonably withheld, delayed or conditioned. No change of stock ownership, partnership interest or control of LESSEE or transfer upon partnership or corporate dissolution of LESSEE shall constitute an assignment hereunder.

17. NOTICES. All notices hereunder must be in writing and are validly given if sent by certified mail, return receipt requested or by commercial courier, provided the courier's regular business is delivery service and provided further that it guarantees delivery to the addressee by the end of the next business day following the courier's receipt from the sender, addressed as follows (or to any other address that the Party to be notified may have designated to the sender by like notice):

LESSOR: Marshall Municipal Utilities
113 South 4th Street
Marshall, Minnesota 56258
Attention: General Manager

LESSEE: Alltel Communications, LLC
d/b/a Verizon Wireless
Attention: Network Real Estate
180 Washington Valley Road
Bedminster, New Jersey 07921

Notice shall be effective upon actual receipt or refusal as shown on the receipt obtained pursuant to the foregoing.

18. RECORDING. LESSOR agrees to execute a Memorandum of each Supplement which LESSEE may record with the appropriate recording officer. The date set forth in the Memorandum of Lease is for recording purposes only and bears no reference to commencement of either the Term or rental payments.

19. DEFAULT. If there is a breach by a Party with respect to any of the provisions of this Agreement, or under the provisions of an individual Supplement, the non-breaching Party shall give the

breaching Party written notice of that breach. After receipt of the written notice, the breaching Party shall have thirty (30) days in which to cure the breach, provided the breaching Party shall have such extended period as may be required beyond the thirty (30) days if the breaching Party commences the cure within the thirty (30) day period and thereafter continuously and diligently pursues the cure to completion, but in no event more than ninety (90) calendar days after receipt of written notice. The non-breaching Party may not maintain any action or effect any remedies for default against the breaching Party unless and until the breaching Party has failed to cure the breach within the time periods provided in this Paragraph. Notwithstanding the foregoing to the contrary, it shall be a default under this Agreement, or under an individual Supplement if LESSOR fails, within five (5) days after receipt of written notice of such breach, to perform an obligation required to be performed by LESSOR, and if the failure to perform that obligation interferes with LESSEE's ability to conduct its business in the Premises; provided, however, that if the nature of LESSOR's obligation is such that more than five (5) days after notice is reasonably required for its performance, then it shall not be a default under this Agreement or the applicable Supplement if performance is commenced within such five (5) day period and thereafter diligently pursued to completion, but in no event more than fifteen (15) calendar days after receipt of written notice. LESSOR and LESSEE agree that a default under an individual Supplement does not constitute a default under this Agreement

20. REMEDIES. In the event of a default by either Party with respect to a material provision of this Agreement, without limiting the non-defaulting Party in the exercise of any right or remedy which the non-defaulting Party may have by reason of that default, the non-defaulting Party may terminate the applicable Supplement and/or pursue any remedy now or hereafter available to the non-defaulting Party under the Laws or judicial decisions of the state in which the Premises are located. Further, upon a default, the non-defaulting Party may at its option (but without obligation to do so), perform the defaulting Party's duty or obligation on the defaulting Party's behalf, including but not limited to the obtaining of reasonably required insurance policies. The costs and expenses of any such performance by the non-defaulting Party shall be due and payable by the defaulting Party upon invoice therefor. If LESSEE undertakes any such performance on LESSOR's behalf and LESSOR does not pay LESSEE the full undisputed amount within thirty (30) days of its receipt of an invoice setting forth the amount due, LESSEE may offset the full undisputed amount due against all fees due and owing to LESSOR under the applicable Supplement until the full undisputed amount is fully reimbursed to LESSEE.

21. ENVIRONMENTAL. LESSEE shall conduct its business in compliance with all applicable laws governing the protection of the environment or employee health and safety ("**EH&S Laws**"). LESSEE shall indemnify and hold harmless the LESSOR from claims to the extent resulting from LESSEE's violation of any applicable EH&S Laws or to the extent that LESSEE causes a release of any regulated substance to the environment. LESSOR shall indemnify and hold harmless LESSEE from all claims resulting from the violation of any applicable EH&S Laws or a release of any regulated substance to the environment except to the extent resulting from the activities of LESSEE. The Parties recognize that LESSEE is only leasing a small portion of space on LESSOR's Property and/or Poles, and that LESSEE shall not be responsible for any environmental condition or issue except to the extent resulting from LESSEE's specific activities and responsibilities. In the event that LESSEE encounters any hazardous substances that do not result from its activities, LESSEE may relocate its facilities to avoid such hazardous substances to a mutually agreeable location or, if LESSEE desires to remove at its own cost all or some of the hazardous substances or materials (such as soil) containing those hazardous substances, LESSOR

agrees to sign any necessary waste manifest associated with the removal, transportation and/or disposal of such substances.

22. CASUALTY. In the event of damage by fire or other casualty to the Pole or the Premises that cannot reasonably be expected to be repaired within forty-five (45) days following same or, if the Property is damaged by fire or other casualty so that such damage may reasonably be expected to disrupt LESSEE's operations at the Premises for more than forty-five (45) days, then LESSEE may, at any time following such fire or other casualty, provided LESSOR has not completed the restoration required to permit LESSEE to resume its operation at the Premises, terminate the Supplement upon fifteen (15) days prior written notice to LESSOR. Any such notice of termination shall cause the Supplement to expire with the same force and effect as though the date set forth in such notice were the date originally set as the expiration date of the Supplement and the Parties shall make an appropriate adjustment, as of such termination date, with respect to payments due to the other under the Supplement. Notwithstanding the foregoing, the rent shall abate during the period of repair following such fire or other casualty in proportion to the degree to which LESSEE's use of the Premises is impaired.

23. APPLICABLE LAWS.

(a) During the Term, LESSOR shall maintain the Property and the Poles in compliance with all applicable laws, rules, regulations, ordinances, directives, covenants, easements, zoning and land use regulations, and restrictions of record, permits, building codes, and the requirements of any applicable fire insurance underwriter or rating bureau, now in effect or which may hereafter come into effect (including, without limitation, laws regulating hazardous substances) (collectively "Laws"). LESSEE shall, in respect to the condition of the Premises and at LESSEE's sole cost and expense, comply with: (a) all Laws relating solely to LESSEE's specific and unique nature of use of the Premises; and (b) to the extent applicable to LESSEE, all building codes requiring modifications to the Premises due to the improvements being made by LESSEE in the Premises. It shall be LESSOR's obligation to comply with all Laws relating to the Property and Poles in general, without regard to specific use (including, without limitation, modifications required to enable LESSEE to obtain all necessary building permits).

(b) This Agreement neither limits nor confers any rights LESSEE may have in accordance with applicable Laws to install its own poles in the public rights-of-way or to attach LESSEE's equipment to third-party poles located in the rights-of-way. This Agreement shall in no way limit or waive either Party's present or future rights under applicable Laws. If, after the date of this Agreement, the rights or obligations of either Party are materially preempted or superseded by changes in Laws, the Parties agree to amend the Agreement to reflect the change in Laws.

24. AUTHORIZED ENTITIES. This Agreement is entered into by the Parties each on its own behalf and for the benefit of: (i) any entity in which the Party directly or indirectly holds an equity or similar interest; (ii) any entity which directly or indirectly holds an equity or similar interest in the Party; or (iii) any entity directly or indirectly under common control with the Party. Each Party and each of the entities described above are referred to herein as an "Authorized Entity". No obligation is incurred or liability accepted by any Authorized Entity until that Authorized Entity enters into a site specific Supplement. Only the Party and the Authorized Entity executing a Supplement are responsible for the obligations and liabilities related thereto arising under that Supplement and this Agreement. All communications and invoices relating to a Supplement must be directed to the Authorized Entity signing

the Supplement. A default by any Authorized Entity will not constitute or serve as a basis for a default by any other Authorized Entity not a party to the applicable Supplement.

25. DISPUTE RESOLUTION AND GOVERNING LAW.

(a) The Parties agree that any dispute, controversy, claim, or disagreement arising out of or relating to this Agreement or any Supplement, or the breach, termination, validity, or enforceability of any provision thereof (each, a "Dispute") shall be negotiated between them in good faith in an attempt to reach a just and equitable solution satisfactory to both Parties for a period of thirty (30) days following written notice of such Dispute. In the event the Dispute is not resolved within said thirty (30) day period, either Party may resort to any other means of dispute resolution or litigation as available in equity or at law; subject, however, to prior compliance with the nonbinding alternative dispute resolution program as set forth in MINN STAT Section 484.76 (2017), to the extent required under said statute with regard to the Dispute at issue.

(b) This Agreement and each Supplement shall be governed by, and construed in accordance with, the laws of the State of Minnesota. Any litigation concerning any Dispute not remedied within thirty (30) days following written notice of such Dispute shall be instituted in either the United States District Court for the District of Minnesota, or if jurisdiction is not proper in such Court, then in the Minnesota State District Courts in Lyon County, Minnesota for litigation; subject, however, to prior compliance with the nonbinding alternative dispute resolution program as set forth in MINN STAT Section 484.76 (2017), to the extent required under said statute with regard to the Dispute at issue.

26. MISCELLANEOUS. This Agreement and the Supplements that may be executed from time to time hereunder contain all agreements, promises and understandings between the LESSOR and the LESSEE regarding this transaction, and no oral agreement, promises or understandings shall be binding upon either the LESSOR or the LESSEE in any dispute, controversy or proceeding. This Agreement may not be amended or varied except in a writing signed by all Parties. This Agreement shall extend to and bind the heirs, personal representatives, successors and assigns hereto. The failure of either Party to insist upon strict performance of any of the terms or conditions of this Agreement or to exercise any of its rights hereunder shall not waive such rights and such Party shall have the right to enforce such rights at any time. The performance of this Agreement via each Supplement shall be governed interpreted, construed and regulated by the laws of the state in which the Premises is located without reference to its choice of law rules.

27. PUBLIC RECORDS. LESSEE acknowledges that information submitted to the LESSOR may be open to public inspection under State Law. LESSEE may identify information, such as trade secrets, proprietary financial records, customer information or technical information, submitted to the LESSOR as confidential. LESSEE shall prominently mark any information for which it claims confidentiality with the word "Confidential" on each page of such information prior to submitting such information to the LESSOR. The LESSOR shall treat any information so marked as confidential until the LESSOR receives any request for disclosure of such information. Within 5 business days of receiving any such request, the LESSOR shall provide LESSEE with written notice of the request, including a copy of the request, at Verizon Wireless - West Territory, Attention: Real Estate Manager, 10801 Bush Lake Road, Bloomington, Minnesota 55438. LESSEE shall have 5 business days within which to provide a written response to the LESSOR, before the LESSOR will disclose any of the requested confidential information. The LESSOR retains the final discretion to determine whether to release the requested confidential information, in

accordance with applicable laws. The Parties agree the amount of rent or power charges paid to LESSOR is not considered confidential information.

28. STRUCTURE RECONDITIONING, REPAIR, REPLACEMENT, AND MAKE-READY WORK.

(a) From time to time, LESSOR paints, reconditions, or otherwise improves or repairs the Poles in a substantial way ("**Reconditioning Work**"). LESSOR shall reasonably cooperate with LESSEE to carry out Reconditioning Work activities in a manner that minimizes interference with LESSEE's approved use of the Premises.

(b) Prior to commencing Reconditioning Work, LESSOR shall provide LESSEE with not less than one hundred twenty (120) days prior written notice. Upon receiving that notice, it shall be LESSEE's sole responsibility to provide adequate measures to cover or otherwise protect LESSEE's equipment from the consequences of the Reconditioning Work, including but not limited to paint and debris fallout. LESSOR reserves the right to require LESSEE to remove all of LESSEE's equipment from the Poles and Premises during Reconditioning Work, provided the requirement to remove LESSEE's equipment is contained in the written notice required by this Paragraph.

(c) During LESSOR's Reconditioning Work, LESSEE may maintain a temporary communications facility on the Property, or after approval by LESSOR, on any land owned or controlled by LESSOR in the vicinity of the Property. If the Property will not accommodate LESSEE's temporary communications facility, or if the Parties cannot agree on a temporary location, the LESSEE, at its sole option, shall have the right to terminate the applicable Supplement upon thirty (30) days written notice to LESSOR.

(d) LESSEE may request a modification of LESSOR's procedures for carrying out Reconditioning Work in order to reduce the interference with LESSEE's use of the Premises. If LESSOR agrees to the modification, LESSEE shall be responsible for all reasonable incremental cost related to the modification.

(e) If the Poles need to be replaced ("**Replacement Work**"), LESSOR shall provide LESSEE with at least one hundred twenty (120) days' written notice to remove its equipment. LESSOR shall also promptly notify LESSEE when the Poles have been replaced and LESSEE may re-install its equipment. During LESSOR's Replacement Work, LESSEE may maintain a temporary communications facility on the Property, or after approval by LESSOR, on any land owned or controlled by LESSOR in the vicinity of the Property. If the Property will not accommodate LESSEE's temporary communications facility or if the Parties cannot agree on a temporary location, the LESSEE, at its sole option, shall have the right to terminate the applicable Supplement upon thirty (30) days written notice to LESSOR.

(f) If the Poles need to be repaired due to storm or other damage ("**Repair Work**"), LESSOR shall notify LESSEE to remove its equipment as soon as possible. In the event of an emergency, LESSOR shall contact LESSEE by telephone at LESSEE's Network Operations Center at (at (800) 264-6620) prior to removing LESSEE's equipment. Once the Poles have been replaced or repaired, LESSOR will promptly notify LESSEE it can reinstall its equipment. During LESSOR's Repair Work, LESSEE may maintain a temporary communications facility on the Property, or after approval by LESSOR, on any land owned or controlled by LESSOR in the vicinity of the Property. If the Property will not accommodate LESSEE's temporary communications facility, or if the Parties cannot agree on a temporary location, or if

the Pole(s) cannot be repaired or replaced within thirty (30) days, LESSEE, at its sole discretion, shall have the right to terminate the applicable Supplement upon thirty (30) days written notice to LESSOR. However, at LESSEE's sole option, within thirty (30) days after the casualty damage, LESSOR must provide LESSEE at LESSEE expense with a replacement Supplement to lease space at a new location upon which the Parties mutually agree. The monthly rental payable under the new replacement Supplement will not be greater than the monthly rental payable under the terminated Supplement. The new replacement Supplement shall have an initial term of five (5) years, and shall have extension terms as provided in Paragraph 5 of this Agreement.

(g) LESSEE shall submit its proposed equipment configuration and loading analysis to LESSOR, and shall reimburse LESSOR for all field surveys, engineering, rearrangement, and/or transfer of existing facilities of LESSOR, replacement of a Pole, or any other modifications necessary to accommodate the installation of LESSEE's communications equipment on the applicable Pole, and any other work performed for LESSEE (collectively, the "Make-Ready Work"), based upon the full cost and expense to LESSOR for performing such work or for having such work performed on its behalf. Any required construction Make-Ready Work shall be performed following the execution of the Supplement.

29. SIMILAR TERMS AND CONDITIONS. LESSOR represents and warrants that the rent, benefits and terms and conditions granted to LESSEE by LESSOR hereunder are now and shall be, during the Term, no less favorable than the rent, benefits and terms and conditions for substantially the same or similar tenancies or licenses granted by LESSOR to other parties. If at any time during the Term LESSOR shall offer more favorable rent, benefits or terms and conditions for substantially the same or similar tenancies or licenses as those granted hereunder, then LESSOR shall, within thirty (30) days after the effective date of such offering, notify LESSEE of such fact and offer LESSEE the more favorable offering. If LESSEE chooses, the Parties shall then enter into an amendment that shall be effective retroactively to the effective date of the more favorable offering, and shall provide the same rent, benefits or terms and conditions to LESSEE. LESSEE shall have the right to decline to accept the offering. LESSOR's compliance with this requirement shall be subject, at LESSEE's option, to independent verification.

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, the Parties have executed this Agreement effective the day and year first above written.

LESSOR:

Marshall Municipal Utilities

By: Brad Roos

Printed Name: Brad Roos

Title: General Manager

Date: 2/22/2018

LESSEE:

Alltel Communications, LLC
d/b/a Verizon Wireless

By: James R. Martin

Printed Name: James R. Martin

Title: Director - Network Field Engineering

Date: 2/13/18

EXHIBIT A

LEASE SUPPLEMENT

This Lease Supplement ("Supplement") is made this ____ day of _____, 20__ between Marshall Municipal Utilities, whose principal place of business is 113 South 4th Street, Marshall, Minnesota 56258 ("Lessor"), and Alltel Communications, LLC d/b/a Verizon Wireless, whose principal place of business is One Verizon Way, Mail Stop 4AW100, Basking Ridge, New Jersey 07920 ("Lessee").

1. **Master Lease Agreement.** This Supplement is a Supplement as referenced in that certain Master Lease Agreement between Marshall Municipal Utilities and Alltel Communications, LLC d/b/a Verizon Wireless, dated _____, 201__, (the "Agreement"). All of the terms and conditions of the Agreement are incorporated herein by reference and made a part hereof without the necessity of repeating or attaching the Agreement. In the event of a contradiction, modification or inconsistency between the terms of the Agreement and this Supplement, the terms of this Supplement shall govern. Capitalized terms used in this Supplement shall have the same meaning described for them in the Agreement unless otherwise indicated herein.

2. **Premises.** Lessor hereby leases to Lessee certain spaces on and within Lessor's Property located at <INSERT SITE ADDRESS> _____, including, without limitation, approximately (____) square feet of Equipment Space, and Antenna Space on the Pole. The Equipment Space, Antenna Space and Cabling Space are as shown on Exhibit 1, attached hereto and made a part hereof.

3. **Term.** The Commencement Date and the Term of this Supplement shall be as set forth in Paragraphs 3(a) and 5 of the Agreement [*add if applicable: provided, however, that the Term of this Supplement shall be subject to the term of the Ground Lease [or Easement] (as hereinafter defined).*].

4. **Consideration.** Rent under this Supplement shall be \$1,200.00 per Pole, per year, payable to Marshall Municipal Utilities at 113 S. 4th St. Marshall, Minnesota 56258.

5. **Power Charges.** In consideration for the electrical service, for each year during the Term Lessee shall pay Lessor a flat rate of \$_____ per year for its power consumption (the "Power Charge"). The annual Power Charge shall be paid in annual installments, and shall commence and be paid concurrently with rental payments pursuant to Paragraph 4 above.

In the event Lessee proposes equipment modifications which would decrease or increase its annual electrical service usage, the Parties shall recalculate the annual Power Charge and amend this Supplement.

[6. [If Applicable] Easement. The Parties acknowledge that Lessor's rights in all or a portion of the Premises derive from a certain agreement dated _____ between Lessor and _____ ("Land Owner"), hereinafter referred to as "Easement", and attached to this Supplement as Exhibit 2. This Supplement shall not be effective until Lessee has approved the Easement, and Lessee shall be under no obligation to proceed under this Supplement unless and until

Exhibit "A"
Page 1 of 6

the form of the Easement is acceptable to Lessee. By its signature below, Lessee has reviewed and approved of the Easement.]

[7. [If applicable] Consent. The consent of the Land Owner to this Supplement [check as applicable]: ____ is NOT required; ____ is required and the executed Land Owner's Consent is attached to this Supplement as Exhibit 3.]

8. Site Specific Terms. (Include any site-specific terms)

[(a) [If Applicable] Make-Ready Work. Pursuant to Paragraph 28(g) of the Agreement, Lessee has submitted its equipment configuration and loading analysis to Lessor, and Lessor has determined the Make-Ready Work necessary to accommodate Lessee's communications equipment. Lessee shall reimburse Lessor for the cost of the Make-Ready Work in a single, lump sum payment in the amount of \$_____. The Make-Ready Work payment shall be paid by Lessee within 45 days of Lessee's receipt of Lessor's invoice for such Make-Ready Work.]

[SIGNATURE PAGE FOLLOWS]

Exhibit "A"
Page 2 of 6

IN WITNESS WHEREOF, the Lessor and the Lessee have executed this Supplement effective the day and year first above written.

LESSOR:

Marshall Municipal Utilities

By: EXHIBIT ONLY - NOT FOR EXECUTION

Printed Name: _____

Title: _____

Date: _____

LESSEE:

**Alltel Communications, LLC
d/b/a Verizon Wireless**

By: EXHIBIT ONLY - NOT FOR EXECUTION

Printed Name: _____

Title: _____

Date: _____

Exhibit "A"
Page 3 of 6

Marshall Municipal Utilities - Small Cell MLA (GL #440952)

CORE/0762186.2970/134228400.8

EXHIBIT 1

Site Plan of Premises

To include equipment space, antenna space, cabling space, as required by paragraph 1 of Master Lease Agreement. Plans not to exceed two (2) radio nodes/pole without the mutual agreement of the parties hereto.

Exhibit "A"
Page 4 of 6

Marshall Municipal Utilities - Small Cell MLA (GL #440952)

CORE/0762186.2970/134228400.8

EXHIBIT 2

Easement

[if applicable]

Exhibit "A"
Page 5 of 6

Marshall Municipal Utilities - Small Cell MLA (GL #440952)

CORE/0762186.2970/134228400.8

EXHIBIT 3

Landowner's Consent

[if applicable]

Exhibit "A"
Page 6 of 6

Certificate of Compliance

Pursuant to Fed. R. App. P. 29(a)(5), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 29(1)(5) because the brief contains 2,756 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6).

Dated this 17th day of June, 2019.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ James E. Moore

James E. Moore

Tim R. Shattuck

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Counsel for Missouri Basin

Municipal Power Agency

d/b/a Missouri River Energy Services

Certificate of Filing and Service

I hereby certify that on June 17, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated this 17th day of June, 2019.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ James E. Moore

James E. Moore

Tim R. Shattuck

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Municipal Power Agency

d/b/a Missouri River Energy Services