

# **City of Scottsbluff, Nebraska**

**Monday, November 16, 2015**

**Regular Meeting**

## **Item Reports3**

**Council to consider a tower lease agreement with Nex-Tech Wireless, LLC to lease space on the Coke water tower located at 17th Street and 21st Ave., and authorize the Mayor to execute the agreement.**

**Staff Contact: Nathan Johnson, Assistant City Manager**

**TOWER SPACE LEASE AGREEMENT  
(Water Tower)**

THIS TOWER SPACE LEASE (the "Lease") is entered into as of the \_\_\_ day of \_\_\_\_\_, 2015, by and between City of Scottsbluff, 2525 Circle Drive, Scottsbluff NEBRASKA (hereinafter referred to as "Lessor"), and Nex-Tech Wireless, LLC, 3001 New Way, Hays, Kansas 67601, a Kansas limited liability company (hereinafter referred to as "Lessee").

**RECITALS**

A. Lessor owns a water tower located on real property located in the City of Scottsbluff, State of Nebraska (the "Property"), which Property is more particularly described in Exhibit A attached hereto.

B. Lessee desires to lease from Lessor certain portions of such tower to place certain equipment in connection with its telecommunications business and Lessor is willing to rent such space to Lessee on the terms and conditions set forth herein.

**AGREEMENT**

In consideration of the mutual covenants, terms and conditions contained in this Lease, the Parties agree as follows:

1. **Lease.** Lessor hereby leases to Lessee, and Lessee hereby leases from Lessor a portion of the tower set forth in Exhibit A for the sole purpose of installing, maintaining and operating the radio communications equipment (collectively, the "Equipment"), which is more particularly described in Exhibit B attached hereto.

2. **Term of Lease.** (a) Initial Term. The initial term (the "Initial Term") of this Lease shall be five (5) years commencing upon the execution of this Lease by the Parties, and upon payment of the applicable fees and rent described in paragraph 3 (the "Commencement Date"), and shall expire on the date which is five (5) years thereafter, unless renewed in accordance with the renewal provisions herein.

b. Renewal Term. Following expiration of the Initial Term, the Lease shall automatically renew for five (5) years on the last day of the fifth year of the previous term, for up to three (3) consecutive five-year terms ("Renewal Term(s)") unless written notice of non-renewal is given by the Lessee to the Lessor no less than ninety (90) days prior to the expiration of the preceding term. In the event Lessee sends written notice of non-renewal, Lessee agrees to remove its Equipment from the Property within thirty (30) days of the notice. If the Equipment is not removed by Lessee within that time, Lessor may remove the Equipment and either store or dispose of the Equipment as determined by Lessor in its sole discretion. Lessee shall pay Lessor the costs incurred in removing the Equipment within thirty (30) days of written notice sent to the address list in this Lease.

3. **Rent and Cost.** (a) Rent. The first monthly payment of Rent (the “Initial Payment”) in the amount of three hundred doallars, (\$300.00), shall be payable within thirty (30) days of the Commencement Date, prorated as appropriate. Subsequent monthly payments shall be payable on or before the 1st of each month. Thereafter, upon the exercising of renewal option, the Rent shall be increased by five percent (5%) of the Rent in effect for the last day of the previous lease period.

b. Late Payment. If payment of Rent is past due by ten (10) days, a late fee equal to five percent (5%) of the past due amount shall be paid each month on the outstanding balance until paid in full.

c. Property Taxes. Lessee shall pay as additional rent, any increase in property taxes directly attributable to its use of the Property upon the Lessor’s furnishing of proof of such increase.

d. Contact Information. The Rent Payments shall be mailed (or sent via electronic methods as agreed to by the Parties in writing) All payments due under this Lease shall be sent to Lessor’s address indicated under Exhibit C. All Rent payments shall be non-refundable.

4. **Access.** To the extent Lessor may lawfully grant such access, Lessor agrees that Lessee shall have reasonable, non-exclusive access to the Property and the tower during the term of this Lease for the purpose of installing, maintaining and operating the Equipment. The rights of Lessee under this section shall be limited to authorized employees of Lessee, Federal Communications Commission (“FCC”) inspectors, or persons under the direct supervision of either. Lessor shall either give Lessee a key for the gate/access ladder, or allow Lessee to use its own lock on the gate in such a manner as to allow both Parties access to the site, and both Parties shall keep such gate closed at all times upon entering and/or leaving the Property. Provided, Lessee agrees to give Lessor reasonable notice when it intends to access the Property.

## 5. **Obligations of Lessee.**

### a. **Equipment.**

Lessee agrees that it’s Equipment and the installation, operation and maintenance thereof will not damage the tower, interfere with the maintenance of the tower or the tower lighting system, or interfere with the operation of the Lessor’s equipment or the equipment of other existing users, all of which is in place on the effective date of this Agreement. In the event there is interference, for any reason other than the operation of defective Lessor equipment or defective equipment of any other existing users, Lessee shall take all necessary steps to correct and eliminate such interference, at its sole expense. The Lessor shall cooperate with Lessee to identify the source of any interference to Lessee to the same extent to which Lessee is obligated to cooperate with the Lessor. Lessor and Lessee will each keep its equipment within current Federal Communications Commission (“FCC”) and manufacturer’s technical specifications. Lessee shall pay all costs associated with identifying and correcting the source of any interference caused by Lessee. If said interference cannot be eliminated within a reasonable period of time, which for the purposes of this Lease shall be fourteen (14) days from when Lessee is notified of the interference, Lessee

agrees to remove its Equipment from Lessor's Property and this Lease shall terminate without further obligation on either party, except as otherwise specified herein. Any interference that occurs due to a change in equipment by either Lessor or another of Lessor's existing users shall be eliminated at the expense of the user changing such equipment. Lessee shall maintain the Equipment placed by it on or around the tower in a satisfactory condition as to safety and appearance.

**b. Insurance.**

1. Insurance Requirements. Lessee shall acquire and maintain, during the term of this Lease, including any renewals of the term, statutory workers' comprehensive insurance coverage, commercial general liability insurance coverage and automobile liability insurance, in the minimum amounts set forth below:

- (a) Workers compensation insurance: Worker's Compensation limits as required by the State of Nebraska & Employer's Liability Limits of \$1,000,000 each accident/ \$1,000,000 Disease Policy Limit and \$1,000,000 Disease each Employee.
- (b) Commercial General Liability Insurance: in the minimum amount of one million dollars (\$1,000,000.00) combined single limit Bodily Injury and Property Damage, each occurrence; and one million dollars (\$1,000,000.00) Personal & Advertising Injury, two million dollars (\$2,000,000) General Aggregate and two Million dollars (\$2,000,000.00) Products – Completed Operations Aggregate.
- (c) Automobile liability insurance: in the minimum amount of one million dollars (\$1,000,000.00) for bodily injury and property damage, covering all owned, hired and non-owned automobiles.

2. Certificate of Insurance. Prior to the Commencement Date of this Lease, Lessee shall furnish the Lessor with a certificate or certificates evidencing the policies required by this paragraph, as well as the amounts of coverage for the respective types of coverage. If Lessee subcontracts any work for the Site, said subcontractor(s) shall be required to furnish certificates evidencing statutory worker's compensation insurance and comprehensive general liability insurance coverage in amounts satisfactory to the Lessor and Lessee. If the coverage required under this paragraph expires during the term of this Lease, including any renewals thereof, Lessee shall provide replacement certificate(s) evidencing the continuation of the required policies.

**c. Taxes.**

Lessee shall be responsible for and shall pay all personal property or other taxes, licensing fees or any other charges assessed or imposed against Lessee's Equipment or material located on the leased Property. Upon demand, Lessee shall furnish Lessor with reasonable evidence of Lessee's compliance with this section. To the extent any such property of Lessee shall be assessed together with real or personal property of Lessor, Lessee shall reimburse Lessor for any taxes paid by Lessor attributable to such assessment upon demand by Lessor, which demand shall be accompanied by reasonable documentation of such assessment.

**d. Maintenance.**

Lessee shall be responsible for and shall pay for all necessary maintenance and repairs to Lessee's Equipment, except such maintenance and repairs as may be necessitated by or as a result of the negligence of Lessor, any agent of Lessor, or other existing user of the tower, in which case the costs of such reasonable repairs shall be charged to and paid by Lessor.

**e. Utilities.**

Lessor represents that utilities adequate for Lessee's intended use are presently available. Further, if necessary, Lessee shall have the right to install utilities, to be separately metered at Lessee's expense, and to improve present utilities (including but not limited to the installation of emergency power generators). Lessee shall be responsible for all utility connection charges, and all utility use charges, for electricity or any other utility used by Lessee.

**6. Obligations of Lessor.**

a. Lessor shall be responsible for and shall pay all taxes which may be assessed against the tower located on the Property, except as set forth in paragraph 3.c. above.

b. Lessor shall maintain the tower in proper working condition, with the cost of lighting, painting, repairing and maintaining the tower and property to be borne by Lessor.

c. During the term of this Lease, Lessor shall not grant a radio lease to any other party if such grant would in any way materially adversely affect or interfere with Lessee's Equipment.

**7. Compliance with Applicable Laws.** All installations and operations in connection with the tower and Property, either by Lessor or by Lessee, shall comply with all applicable rules and regulations of the Federal Communications Commission or any other entity having jurisdiction thereof, and the electrical codes of the City and/or state concerned.

**8. Indemnification.** Lessee hereby agrees to defend, indemnify, and hold Lessor harmless from any damages, claims or causes of action which may arise during the term of this Lease as a result of any action or negligence by Lessee, its agents, servants or employees, and to pay all reasonable costs and expenses, including, but not limited to, reasonable attorney's fees and court costs.

Lessor hereby agrees to defend, indemnify, and hold Lessee harmless from any damages, claims or causes of action which may arise during the term of this Lease as a result of any action or negligence by Lessor, its agents, servants or employees, and to pay all reasonable costs and expenses, including, but not limited to, reasonable attorney's fees and court costs.

**9. Default.** If either party is in default under this Agreement for a period of thirty (30)

days following receipt of written notice from the non-defaulting party, the non-defaulting party may pursue any remedies available to it against the defaulting party at law or in equity, including, but not limited to, the right to terminate this Agreement. If a non-monetary default cannot reasonably be cured within a thirty (30) day period, this Agreement may not be terminated if the defaulting party commences action to cure the default within the thirty (30) day period and proceeds with due diligence to fully cure the default

10. **Termination.** Except as otherwise provided, this Agreement may be terminated, without any penalty or further liability, immediately upon written notice or as otherwise provided below, as follows:

(a) By either party upon a default of any covenant or term of this Agreement by the other party which default is not cured within thirty (30) days of receipt of written notice of default without, however, limiting any other rights available to the parties pursuant to any other provisions of this Agreement; or

(b) By Lessee if it is unable to obtain or maintain any license, permit or other permits necessary to the construction and operation of the Equipment or Lessee's business or intended use of the Tower; or

(c) By Lessee or Lessor if the Tower or Equipment is damaged by casualty so as to hinder the effective use of the Equipment; or in the event that interference, whether or not Lessor's activities or any other source, to transmissions or signals from the Equipment, in Lessee's judgment, may not be adequately corrected or eliminated by Lessee; or

(d) By Lessee upon six (6) months written notice to Lessor in the event changes in network design or technology render the site obsolete or unnecessary.

If this Lease is terminated by either party, Lessee shall agree to remove its Equipment from the Property according to paragraph 2.b. above,

11. **Hazardous Materials.** Each party represents and warrants to the other party and its successors and assigns that it will not use any dangerous, toxic or hazardous pollutants, contaminants, chemicals, materials or substances as defined in or governed by the provisions of any federal, state of Nebraska or local law, statute, code, ordinance, regulation, requirement or rule relating thereto (collectively, the "Environmental Regulations") which would subject the other party or any other occupant of the Property to any damages, penalties or liabilities under any applicable environmental regulation.

12. **Holding Over.** If Lessee remains in possession of the Property after the expiration or termination of this Lease, such possession shall be deemed to be a month-to-month tenancy, terminable upon demand by either party. Such tenancy shall be upon all of the terms and conditions of this except with respect to term.

13. **Attorney's Fees.** If either party commences an action against the other party in connection with this, the prevailing party shall be entitled to recover reasonable attorney's fees

and costs, whether or not such action is brought to judgment and whether incurred before or after the filing of any such action.

14. **Assignment; Binding Effect.** Lessee shall not assign, transfer or sublet any of its privileges described herein, except to a parent or wholly owned subsidiary, without Lessor's prior consent, which consent shall not be unreasonably withheld. Subject to the foregoing, this Lease shall be binding upon, and shall inure to the benefit of the Parties hereto, their successors and permitted assigns.

15. **Waivers.** The waiver by either party of a breach or violation of, or failure of either party to enforce, any provision of this Lease shall not operate or be construed as a waiver of any subsequent breach or violation or relinquishment of any rights hereunder.

16. **Contingency.** If, after execution of this Lease, Lessee is unable to occupy Lessor's tower due to action of the FCC or due to Lessee's inability to correct interference with Lessor's operating signals or Lessor's other existing lessees, this Lease may be cancelled without further obligation on the part of either party.

17. **Headings, Exhibits.** The headings of sections in this Lease are for convenience only; they form no part of this Lease and shall not affect its interpretation. All schedules, exhibits, or attachments referred to herein shall be incorporated in and constitute a part of this Lease.

18. **Construction.** Both parties hereby acknowledge that they participated equally in the negotiation and drafting of this Lease and that, accordingly, no court construing this Lease shall construe it more stringently against one party than against the other.

19. **Integration.** This writing represents the entire agreement and understanding of the Parties with respect to the subject matter hereof and supersedes any and all previous agreements of whatever nature between the Parties with respect to the subject matter; it may not be altered or amended except by an agreement in writing signed by both Parties.

20. **Counterparts.** This Lease may be executed and delivered in counterparts, all of which taken together shall constitute a single instrument.

21. **Severability.** If any part of any provision of this Lease is invalid or unenforceable under applicable law, the provision shall be ineffective only to the extent of such invalidity or unenforceability without in any way affecting the remaining parts of the provision or this Lease.

22. **Governing Law.** Any claim arising out of this Agreement shall be governed by the laws of the State of Nebraska, without regard to its choice of law provisions.

IN WITNESS WHEREOF, the Parties hereto have set their hands on the date set forth below.

**LESSEE**

Nex-Tech Wireless, LLC  
3001 New Way  
Hays, Kansas 67601  
785 621 3600

By: *Nathan G. Sutter*  
Name: Nathan G. Sutter  
Title: Director of Network Operations  
Date: 11/11/15

**LESSOR**

Name: City of Scottsbluff  
Street: 2525 Circle Drive  
City: Scottsbluff, Nebraska 69361  
Phone: (785) 257-3359

By: \_\_\_\_\_  
Name: Randy Meininger  
Title: Mayor  
Date: \_\_\_\_\_



**ACKNOWLEDGMENT**

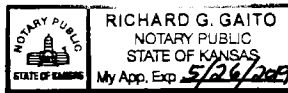
STATE OF KANSAS            )  
  ) SS:  
COUNTY OF ELLIS         )

This instrument was acknowledged before me on this 11 day of November 2015, Nathan G. Sutter of Nex-Tech Wireless, LLC, as Director of Network Operations, a Kansas limited liability company, for and on behalf of said Company.

*Richard G. Gaito*  
Notary Public

My Appointment Expires:

5/26/2019



**ACKNOWLEDGMENT**

STATE OF NEBRASKA        )  
  ) SS:  
COUNTY OF SCOTTSBLUFF )

This instrument was acknowledged before me on this \_\_\_ day of \_\_\_\_\_, 2015, by Randy Meininger in the capacity as Mayor of the City of Scottsbluff, Nebraska, a Municipal Corporation, being the Lessor as identified and defined herein.

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

My Appointment Expires:

\_\_\_\_\_

**EXHIBIT A**  
**TOWER INFORMATION**

City Nearest applicable Tower: Scottsbluff

Type of Tower to be occupied: Water Tower

Height of Tower (AGL): 126'

Height above mean sea level (AMSL): 3883

Geographic Coordinates (NAD 83):

Latitude: 41.862329

Longitude: -103.637081

FAA File Number: N/A

Copy of FAA study attached: N/A

Legal description of the property on which the Tower is located:

A tract of land in Scotts Bluff County, Nebraska,

**EXHIBIT B**  
**LESSEE'S EQUIPMENT**

The following described radio communications Equipment to wit:

1. Up to Three (3) Antenna, to be attached at the 110' level;
2. Up to Three (3) Remote Radio Units to be attached at the 110' level; and
3. Up to One (1) Surge Protector to be attached at the 110' level; and
4. Up to One (1) runs cable.
5. Radio transmitter, receiver and accessories to be located in Lessee's building located at ground level, consisting of approximately 100 square feet.

## Exhibit C

### CONTACT INFORMATION

#### NOTICES

A. Any notices pursuant to this Lease shall be validly given or served only if in writing and sent by certified mail, postage prepaid, to the following addresses:

If to Lessor: City of Scottsbluff  
2525 Circle Drive  
Scottsbluff, Nebraska 69361  
Attention: City Manager

If to Lessee: Nex-Tech Wireless, LLC  
3001 New Way  
Hays, Kansas 67601  
Attn: Director of Network Operations

with a copy to: Nex-Tech Wireless, LLC  
3001 New Way  
Hays, Kansas 67601  
Attn: Site Acquisition

or to such other addresses as either party may designate to the other in writing. Delivery of any notice shall be deemed to be effective on the date set forth on the receipt of certified mail.

B. All invoices sent by Lessor to Lessee for billing should be addressed as follows:

Nex-Tech Wireless, LLC  
3001 New Way  
Hays, Kansas 67601  
Attn: Accounts Payable

C. All payments sent by Lessee to Lessor for billings should be addressed as follows:

City of Scottsbluff  
2525 Circle Drive  
Scottsbluff, Nebraska 69361  
Attention: City Manager

Lessee expressly states that it has full knowledge of the water tower and the dangers inherent in going upon said water tower, and assumes full responsibility and liability for its personnel, contractors, subcontractors and agents herby indemnify and agrees to hold Lessor harmless from any and all claims which may arise from during the term of the Lease.