

City of Seward, NE

Tuesday, March 1, 2016

Regular Session

Item G9

CONSIDERATION OF AN AGREEMENT WITH EARTH NETWORKS, INC FOR PLACEMENT OF A WEATHER CAMERA, WEATHER STATION, AND RELATED HARDWARE AND SOFTWARE ON THE WATER TOWER- Tim Richtig

Administrative Report: Legal Counsel has reviewed the agreement. Following review and discussion, a motion to approve the agreement would be in order.

Staff Contact:

HOSTING AGREEMENT
by and between
Earth Networks, Inc.
And
City of Seward

This HOSTING AGREEMENT (the “Agreement”) is made effective as of the last signed date by and between Earth Networks, Inc. a Delaware corporation with principal offices at 12410 Milestone Center Drive, Suite 300, Germantown MD 20876 (“EN”), and City of Seward, 537 Main Street, Seward, NE 68434 (“HOST”).

WHEREAS, EN manufactures and deploys WeatherBug Weather Stations, each such system being comprised of a weather sensor suite, a master control unit, a digital display, a communications device, and a sensor shelter, or optional equipment such as a camera, weather server and computer (referred herein as the “Hardware”), and computer programs for collection, display and dissemination of real-time and historical data via an Intranet or the Internet (referred herein as the “Software”);

WHEREAS, EN desires to install 1 HD Pan/Tilt/Zoom camera and weather station, related Hardware and Software (if applicable) at designated locations owned or controlled by HOST for continued collection and dissemination of local weather information;

WHEREAS, both parties agree that it is of mutual benefit to have the HOST participate in this program;

THEREFORE, the parties agree to the following terms and conditions:

1. **Weather Systems.** EN will place at designated HOST facilities, at no cost to the HOST, 1 HD Pan/Tilt/Zoom camera and weather station, including Hardware and Software, (as determined by EN), to collect and report real-time and historical weather data and/or digital camera images via the Internet as described herein.
2. **Term and Termination.** This Agreement shall have a term of one year, with automatic yearly extensions unless either party opts out of such extension with notice at least 30 days prior to the expiration of either the original or any renewal term, as applicable.
3. **Rights and Licenses.** EN retains all rights to the design of the Earth Networks Weather Stations and Cameras, Hardware, Software, and ownership of the Systems, the data generated by the Systems (including weather data measured directly by System components, calculated data from the Software, and video imagery from cameras), which rights the HOST and each participating site hereby acknowledges and agrees not to assert or claim any interest in, save and except only as otherwise expressly granted in paragraph 4.
4. **Data Rights**
 - (1) EN grants to the HOST a royalty-free license for the term of the Agreement to use data generated by Earth Networks Weather Stations solely and exclusively for educational, research and internal operational purposes within the HOST network, which the parties agree includes all subsidiary and affiliated companies of HOST.
 - (2) Except as noted in (1) above, the HOST may not, without express permission of EN, provide the data generated by HOST sites to any party, including other government agencies. HOST may, however, provide and/or allow links to data pages created pursuant to this Agreement.
 - (3) Except as otherwise stated herein, EN has the exclusive right to resell, provide, or otherwise use the data generated by the Systems.
5. **Installation and Maintenance.** The installation and maintenance of the Earth Networks system provided to HOST under this Agreement is the responsibility of EN. Installation and maintenance shall be in accordance with EN standard specifications, which includes but is not limited to the requirement for multiple small building penetrations where agreed and directed by the HOST in order to affix the system to the building structure and the running of data

cable to an internal termination point. In this regard, mast installation may require drilled holes for bracket support and cable access may require new building penetrating conduit. HOST shall allow the previously described work to be completed, shall provide the site and power supply (described in #8 below) for the Systems and Hardware. HOST shall keep the systems powered up and connected to an "always-on" Internet connection configured to EN' specifications (described in #8 below) regarding firewall and port security required to allow live data to transmit at all times. EN shall provide a toll-free technical support service line as well as online technical support to assist such maintenance

6. **Delivery and Shipment Costs.** The HOST will provide EN the delivery address for each site where a system is to be installed. EN shall pay all shipping costs including optional equipment and software.
7. **Disposal.** EN reserves the right to remove the Earth Networks system upon termination of the agreement. EN shall ensure that the removal is done with minimal damage to the HOST building and further agrees to pay for any costs necessary to ensure the building is in the same condition, excepting only normal wear and tear, as it was prior to the installation.
8. **HOST Requirements.** The HOST shall provide for each participating site the following site related requirements (minimum specifications are indicated): (1) electrical power sufficient for operation of the Systems which includes two 120V outlets within 5 feet of where the indoor equipment is to be located; (2) direct, high speed "always on" Internet connection (ISDN, T-1, T-3, or equivalent) where port 9500 UDP/TCP outbound and port 80 TCP are open. Earth Networks will provide a technical support service line as well as online technical support to assist with such efforts. HOST shall allow EN access to the Hardware, upon reasonable notice, for the purpose of supplying necessary maintenance and/or the installation of additional sensor equipment.
9. **Indemnification.** Subject to Paragraph 10 below, each Party shall 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 other Party, or its employees, contractors or agents.
10. **Insurance.**
 - a. Notwithstanding the indemnity in section 10, 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 either the Host or EN's 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 Host or EN's property shall waive the insurer's right of subrogation against the other Party.
 - b. EN will maintain at its own cost;
 - i. Commercial General Liability insurance with limits not less than \$1,000,000 for injury to or death of one or more persons in any one occurrence and \$500,000 for damage or destruction to property in any one occurrence
 - ii. Commercial Auto Liability insurance on all owned, non-owned and hired automobiles with a minimum combined limit of not less than one million (\$1,000,000) per occurrence
 - iii. Workers Compensation insurance providing the statutory benefits and not less than one million (\$1,000,000) of Employers Liability coverage.

EN will include Host as an additional insured on the Commercial General Liability and Auto Liability policies.

- c. Host will maintain at its own cost commercial general liability insurance with limits not less than \$1,000,000 for injury to or death of one or more persons in any one occurrence and \$500,000 for damage or destruction to property in any one occurrence. Host will include EN as an additional insured.
 - d. In addition, Host shall obtain and keep in force during the Term a policy or policies insuring against loss or damage to the Host's property where EN's camera and weather station will be installed with a commercially reasonable valuation, as the same shall exist from time to time without a coinsurance feature. Host's policy or policies shall insure against all risks of direct physical loss or damage (except the perils of flood and earthquake unless required by a lender or included in the base premium), including coverage for any additional costs resulting from debris removal and reasonable amounts of coverage for the enforcement of any ordinance or law regulating the reconstruction or replacement of any undamaged sections of the Host's property required to be demolished or removed by reason of the enforcement of any building, zoning, safety or land use laws as the result of a covered loss, but not including plate glass insurance.
11. **Extraordinary Circumstances.** Except for obligations of payment, neither EN nor the HOST shall be liable for nonperformance caused by circumstances beyond their control, including but not limited to, work stoppages, floods, lightning and all other acts of God. In the event of the loss of any weather station hardware at any installed HOST site, the replacement of such hardware shall be at the sole discretion and cost of EN.
12. **Necessary Maintenance by EN.** HOST will provide upon reasonable notice by EN access to the system(s) for the purpose of supplying necessary maintenance and/or the installation of additional sensor equipment.
13. **Non-Waiver of Rights.** The failure of EN or the HOST to insist upon strict performance of the terms and conditions of this Agreement or to exercise any rights or remedies, shall not be construed as a waiver of its rights to assert any of the same rights or to rely on any such terms or conditions at any time thereafter.
14. **Governing Law.** This Agreement shall be governed by the laws of the State of Nebraska without reference to its conflict of laws rules.
15. **Breach.** Either party may terminate this Agreement on breach by the other party of any material term or condition hereof 30 days after written notice is given to the breaching party by the non-breaching party if such breach is not cured.
16. **Business Relationship.** Nothing contained herein shall create or be deemed to create any association, partnership, joint venture, the relation of principal and agent, or the relationship of employee and employer between the parties herein.
17. **Notices.** All notices given under any of the provisions of this Agreement shall be deemed to have been duly given when made in writing and either delivered via overnight express delivery requiring the signature of the accepting party's representative or three days after the date of mailing via U.S. Postal Service, certified mail, return receipt requested, to the addresses of the parties set forth in this Agreement as the principal offices or to other such addresses as such party shall specify in writing to the other party.
18. **Severability.** If any provision of this Agreement shall be held to be invalid or unenforceable, the remainder of this Agreement shall not be affected thereby and shall remain valid and enforceable.
19. **Assignment.** Neither party may assign this Agreement or any of its rights and obligations hereunder to any person, firm, or corporation, without the prior written consent of the other, which consent shall not be unreasonably withheld,

provided that either party may, on notice to the other, assign this Agreement to a subsidiary or to any party that acquires or succeeds to all or substantially all of such party's business or assets. This Agreement shall bind and inure to the benefit of each party's successors and permitted assigns.

20. **Modification.** No provision of this Agreement may be changed, waived, discharged or terminated orally, but only by an instrument of equal formality signed by duly authorized representatives of the parties hereof.
21. **Entire Agreement.** This Agreement embodies the entire understanding of the parties and there are no further or other agreements or understandings, written or oral, in effect between the parties relating to the subject matter hereof. The division of the Agreement into paragraphs is only a matter of convenience for reference and shall not define or limit any of the terms or provisions hereof. Any term used in the singular shall be deemed to include the plural when the context of its use is so required. The fact that the wording of this Agreement has been provided by one party or the other shall not be taken into consideration in the construction or interpretation of this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused their duly authorized representatives to execute this Agreement.

Earth Networks, Inc.

HOST

Name/Title

Name/Title

Date

Date