



ERIE COUNTY WATER AUTHORITY
INTEROFFICE MEMORANDUM

September 29, 2020

To: Jerome D. Schad, Chair
Mark S. Carney, Vice Chair
Peggy A. LaGree, Treasurer

Cc: Russell J. Stoll, Chief Operating Officer
Karen A. Prendergast, Chief Financial Officer
Margaret A. Murphy, General Counsel
Leonard F. Kowalski, Executive Engineer
Scott A. Aiple, Electrical Engineer
Jacqueline Mattina, Associate Attorney
Katherine A. Gillette, Associate Attorney

From: Terrence D. McCracken, Secretary

Subject: Cheektowaga Police Department's Request for Access to Wehrle Tank
for Radio Transmitting Equipment

At the February 13, 2020 Board meeting, I presented a [staff item](#) regarding the Cheektowaga Police Department's ("CPD") proposal to install radio equipment on the Authority's Wehrle Tank in order to improve its radio communications for public safety purposes. The CPD proposal also sought to use equipment and fixtures abandoned by Cricket Wireless ("Cricket") on the tank in 2017. The Legal Department determined that the abandoned equipment and fixtures became the property of the Authority when Cricket failed to remove them from the structure following its termination of its lease agreement with the Authority.

Initially, the Authority proposed CPD would provide fingerprint-based criminal background checks for future Authority job applicants in consideration for its use of the space, equipment and fixtures on the Wehrle Tank. After reviewing the Use and Dissemination Agreement between the State Division of Criminal Justice Services and CPD, the proposed service-based compensation plan proved unworkable.

The Authority and CPD have continued its negotiations and have reached a tentative agreement subject to the approval of this Board and the Cheektowaga Town Board. The proposed agreement would be for five years with two successive

LEASE OF WEHRLE TANK SPACE FOR WIRELESS COMMUNICATIONS

THIS LEASE AGREEMENT is effective as of October 7, 2020 (“Effective Date”), by and between

ERIE COUNTY WATER AUTHORITY

295 Main Street, Room 350
Buffalo, New York 14203

hereinafter referred to as the “Authority,” and

TOWN OF CHEEKTOWAGA

3301 Broadway Street
Cheektowaga, New York 14227

hereinafter referred to as the “Town.”

This Lease Agreement (“Agreement”) is for the leasing of space by the Town on or around a water tank owned by the Authority, located at 450 Wehrle Drive, Amherst, New York 14225 (“Wehrle Tank”), necessary to enhance the wireless public safety emergency communication abilities for the Town of Cheektowaga, the ability of Town of Cheektowaga police and fire fighters to communicate with other area first responders during natural disasters and improve the safety of police and firefighters in the region.

In consideration of mutual promises set forth in this Lease Agreement, the Authority and the Town agree as follows:

ARTICLE 1 – DEFINITIONS

- 1.1** “Agreement” shall mean this Lease Agreement.
- 1.2** “Authority” means the Erie County Water Authority, a body corporate and politic constituting a public benefit corporation of the State of New York, whose formation and powers are set forth in Public Authorities Law §§ 1050-1073.
- 1.3** “Authority Installations” include all Authority owned installations and equipment owned by the Authority including abandoned installations formerly owned and installed by Cricket Wireless, which shall always remain the property of the Authority.
- 1.4** “Effective Date” is the date that this Agreement has approved by the Authority’s Board of Commissioners.
- 1.5** “Electrical Engineer” shall mean the person(s) designated by the Authority as the Electrical Engineer of the Authority.

- 1.6** “Leased Premises” shall mean the real and personal property leased to the Town by the Authority pursuant to Article 2 of this Agreement.
- 1.7** “Premises” shall mean the designated leased area located on or near the Wehrle Tank, 450 Wehrle Drive in the Town of Amherst as shown on the tax map of the Town of Amherst identified as SBL number 80.15-1-50.11, subject to all existing easements, covenants, conditions and restrictions of record.
- 1.8** “Security Officer” shall mean the person(s) designated by the Authority as the Security Officer of the Authority.
- 1.9** “Town” means the Town of Cheektowaga, a municipal corporation under the laws of the State of New York. For purposes of this Agreement, the “Town” includes its employees, agents, contractors and subcontractors working under its authority and control.
- 1.10** “Town Installations” include all equipment, switches, power supplies, batteries, Communications shelter, generator, generator shelter, accessories, and necessary appurtenances owned by the Town necessary for the installation, maintenance and operation for the wireless communication proposed by the Town and approved by the Electrical Engineer. Such installations will remain the property of the Town unless deemed abandoned under the terms of this Agreement.

ARTICLE 2 – LEASED PREMISES

- 2.1** Subject to the Agreement terms and conditions, the Authority leases to the Town both the Premises and the Authority Installations located on or near the Wehrle Tank.
- 2.2** The actual location and orientation of space of the leased Premises shall be depicted on drawings submitted by the Town for Authority approval pursuant to § 5.4 of this Agreement.
- 2.3** The Town may use the Authority Installations as part of the Town Installations that shall be depicted on drawings submitted by the Town for Authority approval pursuant to § 5.4 of this Agreement.

ARTICLE 3 – TERM

- 3.1** The initial term (“Initial Term”) of this Agreement shall be five (5) years from the Effective Date. The parties may elect to renew this Agreement for two (2) successive five (5) year additional periods (“Renewal Terms”) upon mutual agreement of both parties.
- 3.2** This Agreement may be terminated by either party pursuant to the Termination provisions of Article 7 of this Agreement.

ARTICLE 4 – CONSIDERATION

- 4.1** The Town agrees to pay the Authority the amount of One Thousand Dollars (\$1,000.00) per month while this Agreement remains in effect. Payments should be made to the “Erie County Water Authority,” Office of the Comptroller, 295 Main Street, Room 350, Buffalo, New York 14203, or such other address as designated in writing by the Authority. Such payment should be received by the Authority by the 15th day of each month.

ARTICLE 5 – APPROVAL AND INSTALLATION OF WIRELESS SYSTEM

5.1 *Purposes:*

The Town shall use the Premises only for the purpose of installing, maintaining and operating a wireless communication system, approved by the Authority and installed by the Town.

5.2 *Operation:*

- A. The Authority agrees to give the Town exclusive use of the Authority Installations.
- B. The Town agrees and understands that the Authority has given the Town a non-exclusive right to use the Premises. The Town agrees not to infringe upon the use of the Premises by others to whom the Authority has given permission to enter or to use the Premises.
- C. The Town shall have the right, at its sole cost and expense, to operate and maintain Town Installations on the Premises in accordance with good engineering principles and with all applicable FCC rules and regulations.
- D. Town Installations shall be done according to plans pre-approved by the Authority, which approval shall not be unreasonably withheld.
- E. Any damage done to the Premises or other Authority property during installation or during operations shall be repaired at the Town’s expense within thirty (30) days after notification of damage.
- F. Town Installations shall remain the exclusive property of the Town, unless otherwise provided in this Lease.

5.3 *Maintenance Improvement Expense:*

All modifications to the Premises and all improvements made for the Town’s benefit shall be at the Town’s expense and such improvements, including antennas, facilities and equipment, shall be secured and maintained in a good state of repair and at least equal to the Authority’s standards for the maintenance on or adjacent to the Premises.

5.4 Drawings:

- A. The Town shall provide to the Authority a structural review of the proposed installation(s) including any Authority Installations to be used by the Town, for review and approval by the Electrical Engineer or other designated personnel prior to any installation.
- B. The Town shall provide to the Authority a complete set of drawings for the entire proposed installation(s) including any Authority Installations to be used by the Town for review and approval by the Electrical Engineer or other designated personnel prior to any installation.
- C. The Town shall provide the Authority with as-built drawings of the equipment and improvements installed on the Premises, showing the actual location of all Town Installations. The drawings shall be accompanied by a complete and detailed inventory of all equipment, personal property, and antenna facilities placed on the Premises. All drawings shall be approved by the Authority's Electrical Engineer or other designated personnel.

5.5 No Interference:

The Town shall, at its own expense, maintain any equipment on or attached to the Premises in a safe condition, in good repair, and in a manner suitable to the Authority so as not to conflict with the use of the surrounding premises by the Authority. The Town shall not reasonably interfere with the operations of any other tenant using the Premises and shall not interfere with the working use of the water storage facilities thereon or to be placed thereon by the Authority.

5.6 Access:

The Town, during the Initial Term and any Renewal Terms of this Agreement shall have access to the Premises to install, operate, and maintain the Town Installations. Prior to accessing the Premises, the Town agrees to notify the Security Officer at least twenty-four (24) hours prior to entering the Premises. In the case of an emergency, the Town agrees to provide immediate notice to the Security Officer prior to entering the Premises. The Town agrees to provide the Security Officer such information necessary to protect and secure the Premises and the health and safety of the public. The Security Officer's approval shall not be unreasonably withheld or delayed.

5.7 Utilities Cost:

The Town shall be solely responsible for and promptly pay all charges for gas, electricity, telephone service, or any other utility used or consumed by Town on the Premises. If necessary, the Town shall have an electrical current meter and gas meter installed at the

Premises for the Town's electrical usage, and gas usage respectively and the cost of such meter(s) for installation, maintenance, upgrade and repair shall be paid by the Town.

5.8 *Tank and Property Maintenance:*

- A. The Authority will give the Town at least sixty (60) days' written notice of its intention to do any maintenance on the Wehrle Tank which might interfere with the Town's operation and shall cooperate with the Town to enable the Town to protect the Town Installations. The Town may place temporary radio equipment/reception facilities on Authority property and shall be granted temporary easements by the Authority to continue its operations throughout the time required for maintenance or repairs.
- B. If painting the Wehrle Tank, the Authority will give the Town at least six (6) months' notice prior to the painting of the Wehrle Tank. The Town shall temporarily remove and/or relocate its equipment during painting at least ten (10) days prior to the start date specified in the painting contract. If the Town shall fail to remove and/or relocate its equipment, then the Town shall become responsible for any additional painting cost incurred as a result.

ARTICLE 6 – OTHER CONDITIONS AND PROVISIONS

- 6.1** The Authority and the Town shall comply with all applicable federal, state or local laws and regulations and all applicable Authority policies and procedures.
- 6.2** The Authority warrants that it owns the Premises in fee simple and has rights of access to the Premises and that no zoning violations exist on the Premises on the Effective Date of this Agreement.
- 6.3** The Authority will provide to the Town all Authority policies and procedures applicable to this Agreement and the Town agrees to comply with such policies and procedures.
- 6.4** The Town will obtain and pay all expenses for licenses and permits required for the construction, maintenance, replacement and operation of Town's Installations.
- 6.5** The Authority will cooperate with the Town in its efforts to obtain all necessary licenses and permits required under this Agreement. A Consent of Owner is attached to this Agreement as Appendix A.
- 6.6** All Town equipment will be installed pursuant to accepted engineering practices. All mounts or similar structures affixing the Town's equipment to the Authority's facilities shall be structurally sound and meet or exceed generally accepted engineering practices and standards.

- 6.7** The Town's employees and representatives will comply with the specific applicable security and access rules established by the Authority's Security Officer while on Authority property.
- 6.8** The Town will make the Premises available for inspection by the Authority or its agents, employees, or representatives as it may designate.

ARTICLE 7 – TERMINATION

- 7.1** The Town has the right to terminate the Agreement at any time upon any of the following events:
- A. For any reason or no reason, with at least six (6) months' written notice to the Authority;
 - B. If the approval of any agency, board, court, or other governmental authority necessary for the construction and/or operation of the Town Installations cannot be obtained, or is revoked, or if the Town determines the cost of obtaining such an approval is prohibited, upon thirty (30) days' notice; or
 - C. If the Town determines that the Premises is not appropriate for locating the wireless communication system for technological reasons, including but not limited to signal interference, upon thirty (30) days' notice.
- 7.2** The Authority has the right to terminate this Agreement upon any of the following events:
- A. For any reason or no reason, with at least six (6) months' notice to the Town;
 - B. If the Authority, in its sole discretion, based on sound engineering principles, determines the Tank has become structurally unsound, upon thirty (30) days' notice to the Town and with subsequent notice to remove the Town Installations within ninety (90) days or such installations will be deemed abandoned by the Authority;
 - C. If the Authority, in its sole discretion based on sound fiscal and engineering principles determines that the Wehrle Tank should be replaced or torn down as a water storage facility, upon ninety (90) days' notice to the Town and with subsequent notice to remove the Town Installations within ninety (90) days or such installations will be deemed abandoned by the Authority ; or
 - D. If the Authority, in its sole discretion based on sound engineering principles determines that the Tank has become hazardous or dangerous to persons or property due to an Act of God, upon reasonable notice to the Town.

- E. If the Authority determines that Town's use of the property under this Lease (including Town's operations of its antennas or equipment) is interfering with the rights of other tenants currently on the Tank, upon reasonable notice to the Town.

7.3 *Notice of Termination:*

Any notices required by this Agreement or otherwise shall be delivered by United States Postal mail or personal delivery upon the address indicated on the first paragraph of this Agreement. Any changes in such address shall be required to be in writing to the other party.

7.4 *Site Restoration:*

Except as otherwise stated in this Agreement, the Town shall have sixty (60) days from the termination or expiration date to remove the Town Installations and related equipment from the Premises, repair the site and restore the surface of the Wehrle Tank. If the Town's Installations, and related equipment are not removed to the reasonable satisfaction of the Authority, they shall be deemed abandoned and become the property of the Authority and Town shall have no further rights to them.

ARTICLE 8 – CO-LOCATION AND INTERFERENCE

- 8.1 The Authority will provide the Town with a list of all current tenants and will obtain, upon request, information as to radio frequency of other tenants to allow the Town to evaluate the potential for interference.
- 8.2 The Town warrants that its use of the Premises will not interfere with prior radio frequency of other tenants so long as such tenant operates continuously within its frequencies and in accordance with all applicable laws and regulations.
- 8.3 The Authority may enter into lease agreements with additional wireless companies. The Authority will not grant, a lease, license or any other right to any third party for the use of the Premises, if such use may in any way adversely affect or interfere with the Town's wireless communication system. The Authority will notify the Town and receive the Town's written approval prior to granting any third party the right to install and operate communications equipment on the Premises.
- 8.4 The Authority will not use, or permit its employees, licensees, invitees or agents to use, any portion of the Premises in any way which interferes with the operations of the Town or the rights of the Town under this Agreement.
- 8.5 In the event any such interference does not cease within twenty-four (24) hours then the parties acknowledge that Town will have the right, as its sole remedy, to terminate the Agreement upon notice to the Authority.

ARTICLE 9 – GENERAL PROVISIONS

9.1 *Sublease and Assignments:*

The Town shall not sublease space or assign its rights under this Agreement without the express written consent of the Authority. The Authority and the Town bind themselves and their successors, administrators and assigns to the terms of this Agreement.

9.2 *Amendments:*

No modification or variation from the terms of this Agreement shall be effective unless it is in writing and authorized by a resolution of the Board of Commissioners of the Authority and signed by all parties.

9.3 *Default:*

In the event there is a breach by the Town with respect to any of the provisions of this Agreement or its obligations under it, the Authority shall give the Town written notice of the breach. Upon receipt of notice, the Town shall have thirty (30) days in which to cure the breach, unless the nature of the cure will reasonably require a longer time and the Town begins the cure within the 30 day period and diligently pursues the cure to completion within a reasonable period of time. The Authority at any time thereafter may give written notice to the Town specifying such event of default or events of default and stating that this Lease Agreement shall expire and terminate 30 days after the giving of such notice. This Agreement shall terminate on the date specified in the notice.

9.4 *Indemnification:*

- A. To the fullest extent permitted by law, the Town agrees to indemnify and hold the Authority harmless from all third party claims, liabilities, damages and costs (including all reasonable attorney's fees, and cost of defense) to which the Authority, its officers, directors and employees may be subject to, arising out of the death or bodily injury to any person or the destruction or damage to any property to the extent caused by the negligent acts, errors or omissions, or willful misconduct of the Town under this Lease Agreement and those of its subcontractors or anyone for whom the Town is legally liable.
- B. To the fullest extent permitted by law, the Authority agrees to indemnify and hold the Town harmless from all third party claims, liabilities, damages and costs (including all reasonable attorney's fees and cost of defense) to the extent caused by the negligent acts, errors or omissions of the Authority, its contractors, consultants or anyone for whom the Authority is legally liable.

9.5 *Environmental Matters:*

The Town agrees to indemnify, defend, and hold the Authority and the Authority's officers, directors, employees, agents, successors and assigns harmless from any claims, damages, fines, penalties, losses, judgments, costs and liabilities resulting from Town's operations on the Premises resulting in any violation of any Environmental Law by Town.

9.6 Insurance:

- A. The Town is self-insured for liabilities covered under Automobile, General, Police, Public Officials, Excess Liability and Workers Compensation insurance policies. The Town's comprehensive general liability insurance shall cover damages in an amount no less than a \$1,000,000 combined single limit policy covering personal injury and property damage for the benefit of both the Authority and the Town. The Town shall deem the Authority an additional insured for claims related to the Premises and comply with applicable requirements of the State of New York.
- B. The Town's self-insurance shall be effective against loss or damage to Town's Installations by reason of fire or another casualty.
- C. The Town shall provide the Authority with a copy of the applicable resolutions effecting self-insurance upon request by the Authority. Upon such a request by the Authority, the appropriate resolution shall be provided within seven (7) days.
- D. The Authority and the Town each waive any and all rights to recover against the other or against anyone claiming through them by way of subrogation or otherwise for the loss or damage to property of such waiving party arising from any cause which would be covered by any first party property insurance, whether or not such insurance is actually carried, or any other insurance is actually carried by such party. The Authority, from time to time, will cause its insurer to issue appropriate waiver of subrogation rights endorsements to all first party property policies of insurance carried in connection with the Property.

9.7 New York Law and Jurisdiction:

This Agreement shall be construed and enforced in accordance with the laws of the State of New York. Venue for actions concerning this Agreement shall be the County of Erie in the State of New York.

9.8 Entire Agreement:

This Agreement constitutes the entire understanding of the parties and no representations or agreements, oral or written, made prior to its execution shall modify its terms. This Agreement supersedes all prior contemporaneous communications, representations or

agreements, whether oral or written with respect to this subject matter and has been induced by no representations, statements or agreements other than those herein expressed. No subsequent agreement made between the parties shall be binding on either party unless reduced to writing and signed by an authorized officer of the party sought to be bound by such agreement.

9.9 Notice:

Any notices required by this Agreement or otherwise shall be delivered by United States Postal mail or personal delivery upon the addresses previously stated. Any changes in such addresses shall be required to be in writing to the other party and acknowledged as such.

ARTICLE 10 – SEVERABILITY

- 10.1** If any term of this Agreement is invalid or unenforceable, the remainder of this Agreement shall remain valid and enforceable to the fullest extent permitted by law.

ERIE COUNTY WATER AUTHORITY

By _____
Jerome D. Schad, Chair

TOWN OF CHEEKTOWAGA

By _____
Diane Benczkowski, Supervisor

STATE OF NEW YORK)
COUNTY OF ERIE) ss:

On the _____ day of _____, in the year 2020, before me personally came Jerome D. Schad, to me known, who, being by me duly sworn, did depose and say that he resides in Amherst, New York, that he is the Chair of the Board of Commissioners for the Erie County Water Authority described in the above instrument; and that he signed his name thereto by order of the Board of Commissioners.

Notary Public

STATE OF NEW YORK)
COUNTY OF ERIE) ss:

On the _____ day of _____, in the year 2020, before me personally came Diane Benczkowski, to me known, who, being by me duly sworn, did depose and say that she resides in the Cheektowaga, New York, that she is the Supervisor of the Town of Cheektowaga described in the above instrument, and she signed her name thereto by the authorization of the Town Board of the Town of Cheektowaga pursuant to a duly enacted resolution.

Notary Public

APPENDIX A

CONSENT OF OWNER

Re: PREMISES AT: Wehrle Tank, 450 Wehrle Drive, Amherst, New York 14226

The undersigned, as owner of the above property, does hereby consent that the Town of Cheektowaga, at its sole expense, may make application to the State of New York and/or any other governmental entity or agency for site plan approval, special permits, building permits, variances and any and all other regulatory applications, permits and approvals from any other governmental or regulatory body having jurisdiction, including execution of any and all such applications in the name of the undersigned, for installing, removing, replacing, maintaining and operating a personal communications service including without limitation, tower, base station, related antenna equipment and fixtures.

Dated: _____, 2020

ERIE COUNTY WATER AUTHORITY

By _____
Jerome D. Schad, Chair

five year extensions. In consideration for this agreement, Cheektowaga would compensate the Authority in the amount of One Thousand Dollars (\$1,000) per month while the agreement remains in effect.

The Executive Staff now recommends to the Board the approval of this proposed agreement. If you have any questions regarding the terms of the lease agreement, you may contact either me or the Authority's General Counsel, Margaret A. Murphy.