

**RESOLUTION NO. 20-**

**BE IT RESOLVED** by the City Council of the City of Huntsville, Alabama, that the Mayor be, and is hereby authorized, to enter into an agreement between the City of Huntsville and William H. Johnston, Jr. d/b/a Capshaw Tower on behalf of the City of Huntsville, a municipal corporation in the State of Alabama, which said agreement is substantially in words and figures similar to that document attached hereto and identified as "Radio Tower Lease Agreement" consisting of a total of ten (10) pages and the date of June 11, 2020, appearing on the margin of the first page, together with the signature of the President or President Pro Tem of the City Council, and an executed copy of said document being permanently kept on file in the Office of the City Clerk of the City of Huntsville, Alabama.

**ADOPTED** this the 11<sup>th</sup> day of June, 2020.

\_\_\_\_\_  
President of the City Council of  
the City of Huntsville, Alabama

**APPROVED** this the 11<sup>th</sup> day of June, 2020.

\_\_\_\_\_  
Mayor of the City of Huntsville,  
Alabama

## RADIO TOWER LEASE AGREEMENT

KNOW ALL MEN BY THESE PRESENTS, THAT:

This Radio Tower Lease Agreement, hereinafter referred to as "Lease" is made and entered into this 11th day of June, 2020, between William H, Johnston, Jr. d/b/a Capshaw Tower, and his assigns hereinafter referred to as "Landlord," and the City of Huntsville, Alabama, 308 Fountain Circle, Huntsville, Alabama 35801, hereinafter referred to as "Tenant."

WITNESSETH:

1. Premises. Tenant has been located on the Capshaw Tower pursuant to a sublease by and between Sharp Communication, Inc. ("Sharp") and the City of Huntsville since December 3, 2009. Sharp and Landlord have or will mutually terminate their Lease Agreement dated June 1, 2009. The Tenant desires to continue leasing space on the Capshaw Tower. Therefore, Landlord hereby leases to Tenant and Tenant hereby leases from Landlord, space on a radio tower structure and on associated real property leased and operated by Landlord, hereinafter referred to as "Leased Premises", more particularly described below. Said Leased Premises being located at 19-1 Capshaw Mountain Road, City of Madison, County of Madison, State of Alabama, tower coordinates: Latitude 34-49-8N, Longitude 086-44-19W.

A tract of land lying in the Southwest Quarter (SW ¼) of the Southeast Quarter (SE ¼) of Section 33, Township 2, Range 2 West, which said tract is on top of Capshaw Mountain and is in the form of a circle with a 300 foot radius, the center of which shall be a United States Geodetic bench marker which was placed there in 1924 and known as Capshaw Marker Number Three and further being that said tower and site formerly leased and operated by Decatur Telecable Corporation. Specifically, to include one (1) Rohn Tower Model No. 55-G 300 ft. – 36" triangle base – complete with lights

2. Communications Equipment. Landlord hereby grants permission to Tenant to install and operate the equipment on or in the Leased Premises as shown on Attachment 1, Equipment Specifications, which shall include a description, make and model number, serial number and location of equipment.

For the purposes of this agreement, all of Tenant's equipment, building, panels, generator, cables, wires, antennas, microwave dishes and accessories referred to in Attachment 1 herein shall hereinafter collectively be referred to as "Communications Equipment" or "Communications Center."

Tenant agrees that all of Tenant's property to be installed or maintained upon the Tower site and all frequencies utilized by Licensee pursuant to this Agreement will be in exact accordance with that specified above. Tenant agrees that it will not make any alterations or additions to the above approved equipment without the prior written consent of Landlord in each case obtained. An amendment to this agreement shall be prepared to reflect each addition or modification to Tenant's equipment from time to time to which Landlord has given its written consent.

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President of the City Council of the City  
of Huntsville, AL  
Date: June 11, 2020

3. Use. Tenant will use the Leased Premises for the purpose of operating a Communications system used to deliver performance data and malfunctions from various pump stations throughout the City of Huntsville back to Water Pollution Control's communications hub. Tenant will abide by all local, State and Federal Laws and obtain all permits and licenses necessary to operate its system. Tenant shall use the Leased Premises for no other purpose without the prior written consent of Landlord.

4. Term. The primary term of this Lease shall be for the period beginning on the Commencement Date and ending May 31, 2025. (the "Primary Term") and shall commence on June 11, 2020 (the "Commencement Date") and terminates on the day before May 31, 2025, subject to extensions as set forth in Section 6 below.

5. Rent. Tenant shall pay annual rent in advance on the first day of each year beginning upon the Commencement Date. If the Commencement Date is not the first day of a calendar month, the monthly rent for the first partial month shall be prorated on a daily basis. Tenant shall pay Landlord at the address designated in Section 8 of this Lease, an amount equal to Six Thousand Dollars (\$6,000.00) for the first year's rent. In the event this Lease is extended beyond the Primary Term, as hereinafter provided, the yearly rental rate shall be adjusted in accordance with Section 6 below.

6. Extensions. Tenant shall have an option to renew this Lease for additional five-year terms. In the event Tenant exercises an option to then renew this Lease, the rental amount shall be adjusted at the end of each renewal period and each adjustment shall be based on a 5% increase over the prior term's rent.

7. Utilities. Tenant shall be solely responsible for and promptly pay all charges for utilities used or consumed by Tenant on the Leased Premises.

8. Notice. Any notice shall be in writing and shall be delivered by hand or sent by United States Registered or Certified Mail, postage prepaid addressed as follows:

Tenant:

CITY OF HUNTSVILLE  
WATER POLLUTION CONTROL  
1800 VERMONT ROAD  
HUNTSVILLE, AL 35802  
Attn: SHANE COOK  
Phone No: (256) 883-3719

Landlord:

\_\_\_\_\_

\_\_\_\_\_

Attn.: \_\_\_\_\_

Phone No: \_\_\_\_\_

Either party hereto may change its address to which said notice shall be delivered or mailed by giving notice of such change as provided above. Notice shall be deemed given when delivered (if delivered by hand) or when postmarked (if sent properly by mail).

9. Liability and Indemnity. Tenant agrees to indemnify and save the Landlord harmless from all claims (including costs and expenses of defending against such claims) arising or alleged to arise from any negligence or willful misconduct of Tenant or Tenant's agents, employees or contractors occurring during the Primary Term or any Renewal Term of this Lease in or about the Leased Premises. Landlord agrees to indemnify and save Tenant harmless from all claims (including costs and expenses of defending against such claims) arising or alleged to arise from any negligence or willful misconduct of Landlord or Landlord's agents, employees, contractors or other tenants of Landlord occurring during the Primary Term or any Renewal Term of this Lease. Tenant's liability under this paragraph is subject to the limitation on municipal liability contained in *Alabama Code §11-93-2*.

10. Environmental Indemnification: Tenant shall defend, indemnify and hold harmless Landlord from and against any and all losses, expenses (including reasonable legal expenses) of whatever kind and nature resulting from any accident, occurrence or condition caused by the release by Tenant of any toxic or hazardous substance or waste in, on, under, about or affecting the Leased Premises which results in any injury or death of any person or damage to any property or which requires the removal or treatment of such hazardous or toxic substance or waste or any other remedial action or fine under the terms of any properly constituted law, regulation, rule or directive of any Federal, state or local governmental authority. Such "release by Tenant" shall be demonstrated by clear and convincing evidence. Tenant's liability under this paragraph is subject to the limitation on municipal liability contained in *Alabama Code §11-93-2*.

Landlord shall defend, indemnify and hold harmless Tenant from and against any and all losses, claims, liabilities, damages, demands, fines, costs and expenses (including reasonable legal expenses) of whatever kind and nature resulting from any accident, occurrence or condition caused by the release by Landlord or any third party of any toxic or hazardous substance or waste in, on, under, about or affecting the Leased Premises, or arising from the condition of the Leased Premises prior to occupancy of same by Tenant, including without limitation, the existence, removal, remediation, leaking of and spills and overfills related to underground storage tanks on or under the Leased Premises, which results in any injury or death to any person or damage to any property or which requires the removal or treatment of such hazardous or toxic substance or waste or underground storage tanks (including without limitation, removal, remediation, leaking, spills or overfills related to underground storage tanks), or any other remedial action or fine under the terms of any properly constituted law, regulation, rule or directive of any Federal, state or local governmental authority.

The provisions of this Section 10 shall survive the termination or expiration of this Lease and the surrender of the Leased Premises by Tenant.

11. Termination. In addition to other rights of termination Landlord may have under this Lease, Landlord shall have the right to terminate this Lease at any time upon Tenant's failure to pay rent as outlined in the agreement.

In addition to other rights of termination Tenant may have under this Lease, Tenant shall have the right to terminate this Lease at any time upon any of the following events:

(a) If the approval of any agency, board, court, or other governmental authority necessary for the construction and or operation of the Communications Equipment cannot be obtained, or is revoked, or if Tenant in its sole discretion determines the cost of obtaining such approval is prohibitive.

(b) If the Leased Premises is damaged or destroyed to the extent, in Tenant's sole discretion, it is not practicable for Tenant to use or rebuild.

Tenant will give Landlord thirty (30) days prior written notice of termination of this Lease under the terms of subparagraphs (a) and (b) of this Section 11. Upon termination, neither party will owe any further obligation under the terms of this Lease except for Tenant's responsibility of removing all of its Communications Equipment from the Leased Premises and restoring the areas occupied by Tenant to as near as practicable to its original condition, save and except normal wear and tear, damage due to casualty and acts beyond Tenant's control.

12. Defaults and Remedies. Notwithstanding anything in this Lease to the contrary, Tenant shall not be in default under this Lease until thirty (30) days after receipt of written notice thereof from Landlord, provided, however, that if any such default cannot reasonably be cured within thirty (30) days, Tenant shall not be deemed to be in default under the Lease if Tenant commences to cure such default within said thirty (30) day period and thereafter diligently pursues such cure to completion.

In the event of Tenant's default as provided above, Landlord may, at its option, terminate this Lease without affecting its right to sue for all past due rentals, and any other damages to which the Landlord may be entitled. Should Landlord be entitled to collect rentals or damages and be forced to do so through its attorney, or by other legal procedures, Landlord shall, upon receipt of a favorable ruling, be entitled to its reasonable costs and attorney fees thereby incurred upon said collection. Landlord shall be obligated to mitigate its damages notwithstanding its rights and remedies hereunder and/or at law.

If Landlord defaults in the observance or performance of any material term or covenant in this Lease, including, without limitation, Landlord's obligation to make repairs under Section 20, and does not cure said default within thirty (30) days after receipt of written notice from Tenant, or within twenty-four (24) hours after a reasonable attempt (under the circumstances) by Tenant to contact Landlord if the default relates to a bona fide emergency, Tenant shall have the right (in addition to, and without limitation of, such other rights as Tenant may have at law or in equity), but shall not be obliged to, remedy such default. All sums expended or obligations incurred by Tenant in connection therewith shall be paid by Landlord to Tenant upon demand, and if Landlord fails to reimburse Tenant promptly, Tenant shall have the right, in addition to any other right or remedy that Tenant may have under this Lease, at law or in equity, to set-off or deduct such amounts from subsequent installments of rent and/or other amounts from which time to time become due to Landlord.

13. Taxes. While the Leased Premises may not be subject to property tax, Tenant shall pay an amount equal to any increase in real estate taxes that may be attributable to any improvement to the Leased Premises made by Tenant. If such tax is paid by Landlord, Tenant shall reimburse Landlord for the amount of any such tax payment within sixty (60) days of receipt of sufficient documentation indicating the amount paid and the calculation of Tenant's pro-rata share. Landlord shall furnish to Tenant evidence of payment of all taxes.

14. Insurance. Landlord understands and agrees that Tenant is a self-insured municipality.

15. Tower Analysis. Landlord agrees to furnish Tenant, within ten (10) days of Tenant's request, true copies of all tower analyses performed on Landlord's tower within the last two (2) years. In absence of a

tower analysis or if the most recent analysis is insufficient for Tenant's needs, Tenant shall be responsible for coordinating the tower analysis and the cost for the analysis. Notwithstanding the foregoing, in the event it is determined after reviewing the tower analysis that Landlord's tower is not structurally appropriate for Tenant's needs, Tenant may, at Tenant's option, either terminate this Lease or pay the additional cost of reinforcing or otherwise making the tower structurally sound for Tenant's use. If Tenant terminates pursuant to this paragraph, Tenant shall have no further liability under this Lease Agreement.

16. Tests. Tenant is hereby given the right to survey, soil test, radio coverage test, and conduct any other investigations needed to determine if the surface and location of the Leased Premises is suitable for construction and installation of its Communications Equipment prior to commencement and throughout the term of this Lease, and Tenant shall have the right to terminate its obligations under this Agreement pursuant to the provisions of Section 11 hereof.

17. Fixtures. Landlord covenants and agrees that no part of the improvements constructed, erected or placed by Tenant on the Leased Premises or other real property owned by Landlord shall be or become, or be considered as being, affixed to or a part of Landlord's real property and any and all provisions and principles of law to the contrary notwithstanding, it being the specific intention of Landlord to covenant and agree that all improvements of every kind and nature constructed, erected or placed by Tenant on the Leased Premises or other real property owned or leased by Landlord shall be and remain the property of the Tenant which Tenant may replace or remove from the Leased Premises at any time.

18. Assignment and Subletting. Tenant may not assign or sublet the Leased Premises or any part thereof without the prior written consent of Landlord. Upon sale of the Tower, Landlord may assign this Lease to the new Owner subject to its terms.

19. Memorandum of Lease. Following the execution of this Lease, Tenant, at its sole expense, shall have the right to file a Memorandum of Lease of record in the County where the Leased Premises is located.

20. Other Conditions.

(a) Landlord acknowledges that following the execution of this Lease, if applicable, Tenant will be contacting the appropriate local governmental agencies for the purpose of obtaining all building permits and approvals, zoning changes and/or approvals, variances, use permits and other governmental permits and approvals necessary for the construction, operation and maintenance of the Communications Equipment and related antennas, cables, conduits, wires and electronic and other equipment on the Leased Premises ("Local Permits"). Landlord agrees to fully cooperate with Tenant in obtaining the Local Permits and, without limiting the generality of the foregoing, to execute any applications, maps, certificates or other documents that may be required in connection with the Local Permits.

(b) Whenever under the Lease the consent or approval of either party is required or a determination must be made by either party no such consent or approval shall be unreasonably withheld or delayed, and all such determinations shall be made on a reasonable basis and in a reasonable manner.

(c) Landlord covenants that the Tenant shall, upon paying the rent and observing the other covenants and conditions herein upon its part to be observed, peaceably and quietly hold and enjoy the Leased Premises during the term of this Lease or as it may be extended without hindrance, ejection or molestation by the Landlord, any person or persons claiming by, through or under the Landlord or any other Tenant of the Landlord.



(d) In addition to other duties of the Landlord set forth herein, Landlord has the sole responsibility at its sole cost and expense, of maintaining and repairing the tower lighting system and markings. This maintenance must comply with all Federal, state and local laws, ordinances, rules and regulations, and be applied in a manner consistent with standard industry practices. Such duties include, without limitation, maintaining appropriate records and notification to the FAA of any failure and repairs and correction of same. It is understood and agreed that the Landlord has the sole responsibility, at its sole cost and expense, for obtaining all of the certificates, permits and other approvals which may be required from any Federal, state or local authority and/or any easements or consents which are required from any third parties with respect to the lighting system. The Landlord represents and warrants that the installation, its lighting system and markings, are in compliance with the requirements of all authorities referenced in this provision and assumes all responsibility for any fines, levies and/or other unusual additional expenses that might be imposed as a result of noncompliance with said authorities. If any certificate, permit, license, easement or approval is canceled, or expires or lapses or is otherwise withdrawn or terminated or if due to technological changes or for any other reason, Tenant, in its sole discretion, determines that Landlord has defaulted in its obligation under this provision, then Tenant shall have the right to either take appropriate action to remedy any noncompliance and invoice Landlord for all reasonable direct costs incurred by Tenant or to immediately terminate this Lease without penalty. Landlord agrees that upon receiving notification of a lighting failure by Tenant, that Landlord will notify the appropriate Federal Aviation Administration service office within thirty (30) minutes of receiving said notice. In addition, Landlord agrees to immediately (within one hour) begin a diligent effort to repair the failed lighting and notify Tenant upon successful completion of the repair. It is understood and agreed that failure to complete repair and notify Tenant within twenty-four (24) hours, constitutes default under this provision. In such event, Tenant, at Tenant's sole option may either elect to take appropriate action to repair or replace lights and invoice Landlord for all reasonable and direct costs or terminate the Lease without penalty. Landlord agrees to indemnify and hold Tenant harmless for any fines or penalties levied against Tenant by any local, state or federal government as a result of Landlord's failure to comply with the requirements of this paragraph.

(e) Landlord covenants and agrees that, at all times by, through or during the continuance of this Lease, Tenant shall have the right to mortgage or convey by deed of trust or other instrument adequate for the purpose of securing any bona fide indebtedness or evidence thereof, this Lease or the leaseholder's interest of the Tenant created hereby, together with all of the Tenant's right, title and interest in and to improvements hereinafter constructed, erected or placed on the Leased Premises by Tenant, provided always that no such mortgage, conveyance or encumbrance, nor any foreclosure thereof, nor any purchase thereunder, shall impair or abridge the rights of the Landlord, as provided herein.

(f) In the event that Tenant expressly agrees in writing that this Lease shall be subordinate to any mortgage or deed of trust that constitutes a lien on the Leased Premises, not later than thirty (30) days after the execution of this Lease, Landlord shall deliver to Tenant a nondisturbance agreement whereby any mortgagees or lien holders agree not to disturb Tenant's possession so long as Tenant is not in default of its obligations hereunder and so long as the period for remedying such default shall not have expired. Subsequent to the date of this Lease, Landlord shall execute no mortgage or other lien or encumbrance upon the Leased Premises without first obtaining a comparable nondisturbance agreement for such mortgagee or lien holder. Landlord represents that the Leased Premises are not subject to any existing mortgages, liens or other encumbrances.

(g) Tenant covenants and agrees that Tenant's Communications Equipment, its installation, operation and maintenance will:

(i) Not irreparably damage the radio tower structure and accessories thereto.

(ii) Not interfere with the operation of Landlord's radio equipment or the radio equipment of other tenants currently on said tower. In the event there is interference by Tenant, Tenant will promptly take all steps necessary to correct and eliminate same within a reasonable period of time. If Tenant is unable to eliminate such interference caused by it within a reasonable period of time, Tenant agrees to remove its antennas from Landlord's property and this agreement shall terminate.

(iii) Comply with all applicable rules and regulations of the Federal Communications Commission and electrical codes of the City and/or State concerned.

(h) If the Leased Premises is damaged for any reason so as to render it substantially unusable for Tenant's use, rent shall abate for such period not in excess of ninety (90) days while Landlord, at its expense, restores Landlord's tower and/or building to its condition prior to such damage. Provided however, in the event Landlord fails to repair the Leased Premises within the said ninety (90) day period, Tenant shall have the right to terminate this Lease with no further obligations hereunder.

(i) During the Primary Term or any Renewal Term of this Lease, Landlord will not grant a similar lease to any other party if such grant would in any way, in Tenant's opinion, adversely affect or interfere with Tenant's use of its Communications Equipment. In the event of any interference Landlord shall take all steps necessary to correct and eliminate same within a reasonable period of time. If Landlord is unable to eliminate the interference within a reasonable period of time, Landlord shall be obligated to remove subsequent tenants' antenna(s) from Landlord's property. Tenant shall not change the frequency, power or character of its equipment without first obtaining the written consent of Landlord, which shall not be unreasonably withheld.

(j) In the event that any government or other public body shall take all or such part of the Leased Premises thereby making it physically or financially infeasible, in Tenant's sole discretion, for the Leased Premises to be used in the manner it was intended to be used by this Agreement, Tenant shall have the right to terminate this Lease effective as of the date of the taking by the condemning party and the rental shall be prorated appropriately. However, if only a portion of the Leased Premises is taken, and Tenant does not elect to terminate this Lease under this provision, then rent payments provided under this Lease shall be abated proportionally as to the portion taken which is not then usable by Tenant and this Lease shall continue.

(k) The terms of this Lease remain contingent upon clearance by Landlord of all liens, encumbrances and exceptions to property title existing as of the date of Lease execution. Landlord will be advised in writing by Tenant at the conclusion of its title investigation of any liens, encumbrances and exceptions which cannot be disposed of to Tenant's satisfaction. Rental payments shall not commence on the Leased Premises until title exceptions are investigated and determined acceptable to Tenant in its sole discretion.

21. Damages. The cost and expenses associated with any damage which is directly attributable to the acts or omissions of Tenant or Tenant's contractors shall be borne solely by the Tennant.



22. Governing Law. This agreement shall be governed by the laws of the state of Alabama. Proper venue to enforce the provisions of this Agreement shall be in the courts of Madison County, Alabama. If any provision of this Agreement is found invalid or unenforceable under judicial decree or decision, the remaining provisions of this Agreement shall remain in full force and effect. Any approval, consent, decision or election to be made or given by a party may be made or given in such Party's sole judgment and discretion unless a different standard (such as reasonableness or good faith) is provided for explicitly.

23. Excusable Delays. If either Party is unable due to causes beyond its reasonable control to carry out its obligations under this Agreement in whole or in part and if such Party gives written notice and full details of an excusable delay (including, without limitation, a force majeure event) to the other as soon as practicable after the occurrence of the event, then the obligations of the affected Party will be suspended to the extent reasonably required as a result of such event. Excusable Delay means an event that is not within the reasonable control of the affected Party, including, without limitation, war, riots, civil insurrection or acts of a common enemy, fire, flood, strikes or other labor difficulty, acts of civil or military authority, including governmental laws, orders, actions, inactions or regulations, or embargo.

24. Entire Agreement and Binding Affect. This lease and any attached exhibits signed or initialed by the parties constitute the entire agreement between Landlord and Tenant; no prior written or prior, contemporaneous or subsequent oral promises or representations shall be binding. This Lease shall not be amended or changed except by written instrument signed by both parties hereto. Paragraph captions herein are for convenience only, and neither limits nor amplifies the provisions of this Lease. The provisions of this Lease shall be binding upon and inure to the benefit of the heirs, executors, administrators, successors and assigns of the parties, but this provision shall in no way alter the restriction hereon in connection with assignment and subletting by Tenant.

IN WITNESS WHEREOF, the parties have entered their hands and seals and attest to the same with the signature of the Mayor being the official act of the said municipality in accordance with his duly constituted authority.

THE CITY OF HUNTSVILLE, ALABAMA, a municipal corporation

By: \_\_\_\_\_

ATTEST:

\_\_\_\_\_

[COH Notary]

LANDLORD: William H. Johnston, Jr. d/b/a Capshaw  
Tower

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William H. Johnston, Jr.

[Landlord Notary]

Attachment 1

Huntsville Water Pollution Control Equipment Specifications

1ea. 4lb, 96" 7dBd Gain GEMDS 97-3194A17 White Fiberglass Radome Antenna operating in the range of 902-928MHZ

1ea. 5lb. 37" 10dBd Gain Cellwave 10108-2 Aluminum Yagi operating in the range of 872-960MHz

2ea. Runs of AVA5-50A 7/8" Helix Cable

1ea. 30"x30" NEMA Enclosure mounted in equipment shelter, plumbed in to a 15A 120VAC circuit and connected to network drop via T1/DS1 with router provided by City of Huntsville/AT&T