

Windstream – Rochester Agreement

This Agreement Concerning a Rochester Office Lease (“Agreement”) is made as of November __, 2011, by and between the City of Rochester, a municipal corporation, with its principal offices at City Hall, 30 Church Street, Rochester, New York 14614 (“City”) and Windstream Corporation, with its principal place of business at 4001 Rodney Parham Road, Little Rock, Arkansas 72212 (“Windstream”). The City and Windstream may be referred to herein individually as “Party” or collectively as “Parties”.

WHEREAS, the City owns certain real property located at 245 East Main Street, Rochester, New York, commonly referred to as the “Midtown Site”;

WHEREAS, The City, PAETEC Realty, LLC (“PAETEC Realty”) and PAETEC Communications are parties to a Land Disposition Agreement, dated December 28, 2010 (“LDA”), regarding PAETEC Realty purchasing a certain parcel located at the Midtown Site for possible construction of a corporate headquarters building;

WHEREAS, on July 31, 2011, PAETEC Holding Corp., the parent company of PAETEC Realty and PAETEC Communications, and Windstream entered into an Agreement and Plan of Merger whereby PAETEC Holding Corp., will merge with a wholly-owned Windstream subsidiary and Windstream will acquire PAETEC Holding Corp., and its subsidiaries (the “Merger”); and

WHEREAS, Windstream and the City have engaged in discussions regarding Windstream maintaining a significant corporate presence at the Midtown Site or in the City’s Central Business District; and

WHEREAS, in reliance on this Agreement and the substantial benefits it will provide the City, the City will withdraw its objections to the Merger in matters pending before the New York State Public Service Commission and the Federal Communications Commission; and

WHEREAS, the City intends to assign its interest in that portion of the Midtown Site formerly known as the Seneca Building (the “Building”) to an owner (“Owner”) for the purpose of developing the Building.

NOW, THEREFORE, in consideration of the promises and mutual covenants and conditions contained herein, the City and Windstream agree as follows:

1. Premises.

A. Windstream will cause its wholly-owned subsidiary to enter into a lease (the “Lease”), with a guaranty from Windstream, for 66,667 usable square feet of Class A office space consisting of two (2) full floors in the Building (the “Premises”), which Building to be constructed by the City or the Owner of the Premises. The Premises shall contain sufficient general office space for the occupancy and general commercial office use of no fewer than 335 employees.

B. The City represents that the Midtown Site is currently owned by the City, receives (or shall receive) full municipal utility services (water, sewer and street lighting by the City; gas and electricity delivery services by Rochester Gas and Electric Corporation; and heating services by the Rochester District Heating Cooperative) and contains all relevant zoning and entitlements to permit the City or the Owner to construct or complete the Building. The City covenants that the Building will be designed with primary access to Clinton Avenue and that additional redevelopment activity at the Midtown Site will not adversely affect Windstream's quiet enjoyment of the Premises.

C. For purposes of this Agreement, Class A office space shall be equivalent to the finish, signage and floor plan prepared by Bergman Associates for PAETEC. Moreover, the Lease shall provide that the Building shall be maintained in similar fashion to comparable Class A office space within the City's Central Business District, including but not limited to, snow removal, landscaping, upkeep of common areas and other building maintenance services, throughout the Term, also defined herein, and any renewal term.

D. The Lease shall provide a "turnkey" build-out of the Premises, including all Class A tenant improvements within the Premises for Windstream ("Turnkey Package"). Windstream's expected and only cost related to its initial occupancy will be the installation of its furniture and workstations, the related cabling and wiring, security system installation and the relocation/moving costs. The Turnkey Package will include the installation of restrooms on the floors that comprise the Premises, and all common area mechanical installations, plus life safety systems for the Building.

E. The Lease shall provide that the City or the Owner shall construct, at its sole cost, the Building, the Premises and the Turnkey Package based upon a mutually agreeable space plan. The Premises will be finished to "building standard" for Class A space as defined above. All architectural, engineering and other planning costs will be the responsibility of the City or Owner. The City shall cause the Owner to deliver and be responsible for the Building and the Premises being in compliance with all state and federal laws and regulations, including but not limited to the Americans with Disabilities Act.

F. Additionally, the Lease shall provide that the Owner will deliver the Premises with all partition walls completed; HVAC units and ductwork in place; floor coverings in place; electricity distributed within the Premises, and the drop ceiling grid (with ceiling tiles installed) at a 11' height (or agreed upon height based upon the existing Seneca Building) with parabolic or energy-efficient lighting. Electrical and HVAC systems shall be designed to accommodate an occupancy load of no fewer than 335 employees.

G. Subject to local City ordinances, and any necessary Zoning Board of Appeals or Planning Commission approvals, Windstream will be permitted to place signage on top of or on the Building and/or monument signage on the perimeter of the Building, if applicable.

H. Subject to local City ordinances, Zoning Board of Appeals or Planning Commission approvals Windstream will be permitted to install its fiberoptic services at the Premises at its cost and expense and shall have, and the City shall approve, the right to install communication

equipment (antenna mast, satellite and/or microwave dish) on the roof, inclusive of cabling (taking into account any "line of sight" requirements and any required setbacks by the City).

I. Windstream shall have the exclusive rights to be the communications provider at the Premises.

2. Term, Lease Rate, Renewal Options and Lease Terms.

A. Windstream agrees to lease the Premises for a term of fifteen (15) years commencing no later than August 1, 2013 (the "Term") and at a base rent, including property taxes, of \$17.25 per square foot for the entire Term (the "Base Lease Rate"). There will be no escalation of the Base Lease Rate during the Term. Furthermore, the City agrees, and shall cause the Owner to agree, that all operational costs, including without limitation, management and maintenance fees, insurance, pass-through costs and utilities, are estimated to be approximately \$4.50 per square foot. The Lease shall (i) provide that Windstream and the Owner will use all reasonable efforts to keep the operational costs at or below \$4.50 per square foot for the Term; and (ii) shall include a provision identifying each cost to be included in operational costs and how each such cost shall be calculated and each cost to be excluded from operational costs consistent with Exhibit A.

B. Windstream will have two (2) five (5) year options to renew the Lease, each option exercisable on twelve (12) months' prior written notice to the Owner, pursuant to renewal terms to be set forth in the Lease. The lease rates for the renewal term(s) shall be at market rates, to be defined by Windstream and the Owner in the Lease, for similar Class A office space in the City's Central Business District at the time of each renewal.

C. The Lease shall provide that Windstream may not sub-let more than 10% of the Premises without the approval of the Owner, which approval shall not be unreasonably withheld.

D. The Parties agree that the City or Owner will provide a draft Lease for review within ten (10) business days after the execution of this Agreement, and that Windstream and the Owner will finalize and execute the Lease by December 31, 2011, or within 5 business days after the closing of the merger, whichever is later. The Parties shall, and the City shall cause the Owner to, work in good faith and not unreasonably withhold approval of any term or condition of the Lease. The Lease shall contain terms consistent with the terms set forth in this Agreement and all other customary lease terms consistent with a lease for Class A office space, including but not limited to terms regarding insurance, maintenance and repairs at the Premises, improvements and fixtures, including tenant's rights to improvements, fire and casualty loss, eminent domain, default, indemnification, hazardous materials and building services.

3. Parking.

Ninety (90) days before Windstream takes possession of the Premises, the City and Windstream shall enter into a Parking Agreement with a term of fifteen (15) years to commence on the date Windstream takes possession of the Premises. Windstream shall be issued a number of parking passes for the South Avenue, Mortimer Street or Midtown parking facilities that is equal to the

number of Windstream employees working at the Premises up to a maximum of 335 parking passes. Windstream shall pay fifty dollars (\$50.00) per month for each parking pass. The parking passes shall be for the use of Windstream personnel and shall not be assigned or transferred. Beginning January 1, 2014, or as soon thereafter as reasonably possible, the parking passes issued by the City to Windstream subject to the Parking Agreement shall be at Midtown.

4. Alternative Premises.

A. Windstream's obligations to lease the Premises shall be conditioned upon receipt by Windstream no later than April 30, 2012 of sufficient evidence that the City or Owner has obtained fully-committed financing to construct the Building, the Premises and the Turnkey Package (the "Financing Condition"). If the Financing Condition is not met, but the City's obligations set forth in Section 6, the general conditions in Section 7 have been satisfied and the LDA has been terminated and the release executed in accordance with Section 5, Windstream agrees to lease alternative premises of up to 67,000 square feet of office space within the City's Central Business District for a term ending March 31, 2021 at the then prevailing fair market value lease rates for the alternative premises secured, for the occupancy and general commercial office use of no fewer than 335 employees. Windstream, at its sole discretion, may waive the Financing Condition. Time is of the essence regarding the Financing Condition.

B. Windstream's obligations to lease the Premises are further conditioned upon the City or Owner delivering the Premises to Windstream ready for occupancy on or before July 31, 2013 (the "Delivery Condition"). If the Delivery Condition is not met, the Parties' obligations hereunder shall be completely discharged. Windstream, in its sole discretion, may waive the Delivery Condition. Time is of the essence regarding the Delivery Condition.

5. Land Disposition Agreement.

The Parties agree, and Windstream agrees to cause PAETEC Realty and PAETEC Communications, promptly upon the later of the execution of the Lease or the closing of the Merger, to terminate the LDA and enter into a mutual release of any and all known and unknown claims with respect to the LDA with said form to be agreed upon by Windstream, the City, PAETEC Realty and PAETEC Communications.

6. Obligations of the City with Regard to the Merger.

In consideration of the foregoing covenants, the City agrees to (1) immediately withdraw its objections to the Merger from both the Federal Communications Commission and the New York Public Service Commission and (2) support Windstream's efforts to obtain regulatory approval, without conditions, from the Federal Communications Commission no later than November 30, 2011, and the New York Public Service Commission at its November 17, 2011 session.

7. General Conditions to Windstream's Obligations.

Windstream's performance of its covenants and agreements provided herein is subject to the fulfillment to Windstream's satisfaction of each of the following conditions:

- (a) Receipt of regulatory approvals, with no conditions relating to issues previously raised by the City in its letters of objection to the Merger, from the Federal Communications Commission no later than November 30, 2011, and the New York Public Service Commission no later than November 17, 2011; and
- (b) The successful closing of the Merger.
- (c) The City's fulfillment of its covenants and agreements set forth herein.

8. Miscellaneous Provisions.

A. **Authority:** Windstream represents and warrants that it has full power and authority to execute and carry out the terms of this Agreement, and each of the persons signing on behalf of Windstream has full power and authority to bind such Party to this Agreement. Rochester City Council approval is required before the City has full power and authority to execute and carry out the terms of this Agreement, and, upon receipt of said City Council approval, the person signing on behalf of the City shall have full power and authority to bind such City to this Agreement. If the Rochester City Council does not approve this Agreement by December 31, 2011, this Agreement shall terminate.

B. **General:** This Agreement contains the entire understanding of the Parties. No delay on the part of any Party in the exercise of any right, power or remedy shall operate as a waiver thereof, nor shall any single or partial exercise by any Party of any right, power or remedy preclude other or further exercise thereof, or the exercise of any other right, power or remedy of such Party. No amendment, modification or waiver of, or consent with respect to, any provision of this Agreement by any Party shall be effective unless the same is in writing and signed by the other Party. The captions herein are for reference only and in no way define, describe or limit the scope or intent of this Agreement or any of its provisions.

C. **Counterparts:** This Agreement may be executed at different times and in any number of counterparts, each of which when so executed will be deemed to be an original and all of which taken together will constitute one and the same agreement.

D. **Assignment/Survival:** This Agreement will be binding upon and will inure to the benefit of the Parties and their respective successors and assigns. Other than the City assigning its obligations in regards to construction, delivery and role as landlord of the Premises, all as set forth above, to the Owner, neither Party may assign its interest in this Agreement without the prior written consent of other Party. The provisions that are (either expressly or by necessary implication) continuing obligations and all warranties and representations contained herein will survive any termination of this Agreement.

E. **Severability.** If any provision of this Agreement is held to be illegal, invalid or unenforceable to any extent, (i) the legality, validity and enforceability of the remainder of this Agreement shall not be affected thereby, (ii) said provision shall be modified by the court to the extent necessary to render it not illegal, invalid or unenforceable, and (iii) this Agreement shall continue in full force and effect as modified and shall be enforced to the greatest extent permitted by law.

F. **Governing Law.** This Agreement and all rights and obligations of the Parties are governed by, and are to be construed and interpreted in accordance with, the laws of the State of New York, including all matters of enforcement, validity and performance, and without giving effect to the principles of conflict of laws to the contrary. Each of the Parties consents to the exclusive jurisdiction of state and federal courts situated in the State of New York in any such action or proceeding and waives any objection to venue laid therein. Any action or proceeding regarding this agreement shall be brought in the Supreme Court of New York State, in the Seventh Judicial District.

G. **Waiver of Jury Trial.** THE PARTIES MUTUALLY, EXPRESSLY, IRREVOCABLY AND UNCONDITIONALLY WAIVE TRIAL BY JURY FOR ANY PROCEEDINGS ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT OR ANY CONDUCT RELATING TO THIS AGREEMENT, INCLUDING WITH REGARD TO ANY COUNTERCLAIMS, CAUSES OF ACTION, AND DEFENSES WHETHER BASED IN CONTRACT OR TORT OR OTHERWISE. THE PARTIES AGREE TO THIS WAIVER IN THE INTEREST OF AVOIDING DELAYS AND EXPENSES ASSOCIATED WITH JURY TRIALS.

H. **Notice.** Any notice pursuant to this Agreement must be given in writing by (a) personal delivery or (b) expedited, recognized delivery service with proof of delivery (i.e. overnight delivery) sent to the intended addressee at the address set forth below, or to such other address or to the attention of such other person as the addressee designates by written notice sent in accordance with this provision, and will be deemed to have been given either at the time of personal delivery, or, in the case of expedited delivery service, as of the date of first attempted delivery at the address and in the manner provided herein:

If to Windstream Corporation:

Windstream Corporation
4001 Rodney Parham Road
Little Rock, Arkansas 72212
Attention: John Fletcher, General Counsel

If to City of Rochester:

Department of Neighborhood and Business Development
City Hall, Room 223B
30 Church Street
Rochester, New York 14614
Attn. Commissioner

WITH A COPY TO:

Corporation Counsel
City of Rochester – Department of Law
City Hall, Room 400A
30 Church Street
Rochester, New York 14614

I. **Expenses.** Unless otherwise provided herein, each Party will pay all of its own costs and expenses incurred in connection with this Agreement.

J. **Further Assurances.** Each of the Parties agrees to execute and deliver such other documents or agreements and take such other actions as may reasonably be necessary or desirable for consummation of the transactions contemplated by this Agreement or for the purposes of this Agreement.

CITY OF ROCHESTER, NEW YORK

By: _____
Printed Name: _____
Title: _____

WINDSTREAM CORPORATION

By: *John P. Fletcher*
Printed Name: John P. Fletcher
Title: General Counsel

Exhibit A**Excluded Costs.**

Notwithstanding the foregoing or anything to the contrary contained herein, the following costs and expenses shall not be included as operational costs or otherwise passed-through to Tenant:

- (1) Executives' salaries above the grade of building manager;
- (2) Cost of repairs or replacements incurred by reason of fire or other casualty or condemnation;
- (3) Advertising and promotional expenditures;
- (4) Depreciation costs;
- (5) Brokerage commissions;
- (6) The Owner's income taxes or any franchise taxes or estate taxes;
- (7) Refinancing costs, mortgage interest and amortization;
- (8) Legal or consulting fees of any kind;
- (9) Costs incurred in selling, syndicating, financing, mortgaging or hypothecating any of the Owner's interests in the building;
- (10) Costs incurred in removing toxic or hazardous materials from the Building, Premises or the Midtown Site;
- (11) Debt service payments;
- (12) Costs associated with remedying any latent defects in the original construction of the Building, Premises or the Turnkey Package;
- (13) Costs, fines or penalties imposed upon the Owner for violating any law, rule or regulation, or for breaching its obligations under any lease;
- (14) Costs, fines or penalties imposed upon the Owner as a result of late or delinquent payments (unless such costs, fines or penalties are imposed as a result of Tenant's failure to perform its obligations hereunder);
- (15) Cost of structural improvements or other capital improvements;
- (16) Cost of any maintenance, repair, alteration or other service provided to any tenant space other than the Premises.

Landlord agrees to keep and maintain books and records reflecting the operational costs in accordance with sound accounting principles consistently applied. Tenant shall have the right, upon at least ten (10) days advance written notice to Landlord and at Tenant's sole expense, to audit Landlord's books and records in order to verify actual expenses. Any such audit shall be performed during Landlord's normal business hours. Landlord shall have the right to dispute the result of any such audit.