

Memo

To: Honorable Mayor and City Council
From: Joe Kohlmann, City Administrator
Date: February 26, 2013
Re: Antenna Lease Amendment

Staff received the proposed antenna lease renewal from Cellnet. The proposed amendment to our existing lease would extend our lease with Cellnet three years from 2/28/13. They would make annual payments beginning on March 1st.

The amendment would continue payments where they left off adding 5% to the last payment and each annual payment after that.

Staff is recommending the amendment to the lease.

Council Action Requested:

Motion to approve the amendment to the Cellnet agreement and allow the Mayor and Administrator to enter into the agreement.

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AMENDMENT NO. 1 TO LEASE AGREEMENT

This Amendment No. 1 (this "**Amendment No. 1**") to the Site Lease Agreement dated March 1, 1998, (the "**Lease**") by and between Cellnet Data Services (MSP), Inc. (n/k/a "**Landis+Gyr Technology, Inc.**") hereinafter referred to as "**Tenant**") and City of Tonka Bay ("**Landlord**") is made and entered into as of the last date set forth below.

RECITALS:

WHEREAS, Tenant and Landlord desire amend the Lease to extend the term as set forth herein.

NOW, THEREFORE, the parties hereby agree as follows:

1. Defined Terms.

Capitalized terms used in this Amendment No.1 and not defined herein shall have the meanings assigned to such terms in the Lease.

2. Rent.

Landlord and Tenant hereby agree to amend Section 3(a) (Amount and Adjustments) of the Lease by deleting the existing language and replacing it with the following:

"Each 12-month period commencing on March 1 and concluding on the last day of the following February during the term of this Lease is referred to in this Paragraph as a "Lease Year". The rent under this Lease shall be as follows: (i) for Initial Term Lease Year 1, \$ 8,315.72; and (ii) for the Initial Term Lease Year 2, \$ 8,731.50; and (iii) for Initial Term Lease Year 3, \$ 9,168.07. For any Renewal Term, the rent shall be the amount equal to the rent for the immediately preceding Lease Year plus five percent (5%). Tenant shall pay Landlord in advance on a yearly basis the rent amount. If this Lease is terminated pursuant to the terms of this Lease prior to the end of the Initial Term or any Renewal Term, rent under this Lease shall be prorated, and Landlord shall promptly refund to Tenant any prepaid any unearned rent."

3. Term.

Landlord and Tenant hereby agree to amend Section 5 (Term and Renewals) of the Lease by deleting the existing language and replacing it with the following:

The term of this Lease ("Initial Term") shall be three (3) years commencing on March 1, 2013 (the "Commencement Date"). At the expiration of the Initial Term, this Lease will automatically renew for successive one (1) year periods (each a "Renewal Term" and collectively with the Initial Term, the "Term") unless a party provides the other party with written notice of its intent not to renew the Agreement at least ninety (90) days prior to the expiration of the then current term."

4. Miscellaneous

Except as expressly amended or modified by the terms of this Amendment No.1, the terms and conditions of the Lease remain unchanged.

IN WITNESS WHEREOF, the parties have caused this Amendment No. 1 to be executed by their duly authorized representatives.

Landis+Gyr Technology, Inc.:

City of Tonka Bay

By: _____

By: _____

Name: _____

Name: _____

Title: _____

Title: _____

Date: _____

Date: _____

SITE LEASE AGREEMENT

THIS SITE LEASE AGREEMENT (this "Lease"), is made this 1st day of March, 1998, between CITY OF TONKA BAY, a Minnesota municipal corporation ("Landlord"), and CELLNET DATA SERVICES (MSP), INC., a Delaware corporation ("Tenant").

RECITALS

A. Landlord is the owner of the real property commonly known as 5605 Manitou Road, County of Hennepin, State of Minnesota and legally described on Exhibit A attached hereto (the "Site"). The improvements on the Site include a communications tower (the "Tower").

B. Tenant wishes to lease a portion of the Site for the purpose of installing, removing, replacing, maintaining and operating on a continuous basis certain communications equipment.

AGREEMENT

NOW, THEREFORE, in consideration of the covenants contained herein and other good and valuable consideration, the parties agree as follows:

1. **Leased Premises.** Subject to the terms and conditions of this Lease, Landlord hereby leases to Tenant, and Tenant hereby leases from Landlord, (a) an area adjacent to the base of the Tower (the "Equipment Storage Area") and (b) space on the Tower located approximately one hundred eighty (180) feet from the base of the Tower and such additional space on the Tower as necessary to operate Tenant's Equipment (as defined in Paragraph 2 of this Lease) (the "Tower Space"). The Equipment Storage Area is depicted on Exhibit B, and the Tower Space is depicted on Exhibit C, both attached hereto. The Equipment Storage Area and the Tower Space are leased to Tenant for the purpose of installing, removing, replacing, maintaining and operating the Equipment on a continuous basis, subject to the terms and conditions specified in this Lease. The Equipment Storage Area and the Tower Space are referred to herein collectively as the "Leased Premises."
2. **Equipment.** The communications equipment to be installed on the Leased Premises includes all transmitters, receivers, antennas, cables, power supplies, control devices and related enclosures, fixtures and equipment used to transmit or receive electromagnetic signals of any frequency for any purpose, together with all ancillary wiring, cabling, fastenings, mounting hardware, utility connections, meters, circuit breakers and other ordinary and necessary hardware (collectively, the "Equipment").

contemplated herein will not interfere with any existing communications facilities upon the Site (the "Interference Study"). Either party may terminate this Lease in accordance with Subparagraph (c) if the Interference Study fails to show that Tenant's use contemplated herein will not interfere with any existing communications facilities upon the Site.

(c) Notice of Termination. Notice of an exercise of a right to terminate in accordance with this Paragraph shall be given in writing by certified mail, return receipt requested, and shall be effective upon receipt of such notice by Landlord as evidenced by the return receipt. Upon such termination, this Lease shall become null and void and the parties shall have no further obligations to each other.

5. Term and Renewals. The "Initial Term" of this Lease shall be five (5) years and shall commence on March 1, 1998 (the "Commencement Date") and shall terminate on February 28, 2003. Subject to the terms and conditions of this Lease, Tenant shall have the right to extend this Lease for two (2) additional five (5) year renewal periods ("Renewal Terms") commencing on the March 1 immediately following the expiration date of the Initial Term or of any subsequent Renewal Term. This Lease shall automatically be extended for each successive Renewal Term unless Tenant notifies Landlord of its intention not to renew prior to commencement of the succeeding Renewal Term in accordance with Paragraph 13(a)(i). Tenant's election not to renew the Lease under this Paragraph shall be deemed a termination of the Lease.

6. Tenant's Use. Tenant may use the Leased Premises to install, remove, replace, maintain, and operate the Equipment subject to such modifications and alterations as may result from changes or improvements in technology. Prior to Tenant installing, subsequently modifying, or removing the Equipment, it shall provide written notice to Landlord, along with copies of the plans and specifications for the work. Landlord will not in any way be responsible for the Equipment or any personal property actually placed on the Site.

(a) Purposes. Tenant shall use the Leased Premises only for the purpose of installing, maintaining, and operating the Equipment and uses incidental thereto for providing radio and wireless telecommunication services which Tenant is legally authorized to provide. This use shall be nonexclusive; Landlord specifically reserves the right to allow the Tower to be used by other parties in accordance with this Lease and to make additions, deletions, or maintenance modifications to its own facilities on the Site. Tenant shall comply with all applicable ordinances, statutes and regulations of local, state and federal government agencies.

(b) Operation. Tenant shall have the right, at its sole cost and expense, to operate and maintain the Equipment on the Leased Premises in accordance with good engineering practices and all applicable FCC rules and regulations. Tenant's installation, operation, maintenance, modifications, and removal of the Equipment shall not damage or interfere in any way with the Site or Landlord's operations or related repair and maintenance activities. If the activities of Tenant, or those of its

- (h) Payment of Utilities. Tenant shall provide all electricity and other utilities associated with its use of the Leased Premises at no expense to Landlord and shall promptly pay all costs associated therewith. Tenant shall not be required to install separate metering equipment.
7. Emergency Facilities. If at any time during the term of this Lease Tenant's Equipment fails to operate properly for any reason, Tenant shall be permitted to place on the Site a mobile trailer containing Tenant's temporary equipment, including a mobile tower. With respect to any single operational failure, the placement of such temporary equipment on the Site shall not exceed ninety (90) days unless Tenant obtains written approval from Landlord.
8. Additional Maintenance Expenses. Upon notice from Landlord, Tenant shall promptly pay its pro rata share with other tenants to Landlord of all additional Landlord expenses incurred in maintaining the Leased Premises, the Tower, and snowplowing or other maintenance of the Site that is caused by Tenant's occupancy of the Leased Premises.
9. Additional Buildings. Tenant acknowledges that Landlord may permit additional buildings to be constructed on the Site. At such time as this may occur, Tenant will permit said buildings to be placed immediately adjacent to Tenant's Equipment Storage Area and will allow "attachments" so as to give the appearance that all buildings are a connected facility. Said attachments will be made at no cost to Tenant and will not compromise the utility of Tenant's Equipment Storage Area.
10. Defense and Indemnification.
- (a) General. Tenant and Landlord each indemnify and hold harmless the other and their respective elected officials, officers, employees, agents, and representatives, from and against any and all claims, costs, losses, expenses, demands, actions, or causes of action, including reasonable attorneys' fees and other costs and expenses of litigation arising out of the use and occupancy of the Leased Premises by Tenant, which may be asserted against or incurred by either party or for which either party may be liable in the performance of this Lease, except those to the extent that the same arise from the negligence, willful misconduct, or other fault of either party.
- (b) Hazardous Substances. Tenant agrees that it will not use, generate, store or dispose of any Hazardous Material (as defined below) on, under, about or within the Leased Premises in violation of any law or regulation. Landlord represents, warrants and agrees (1) that neither Landlord nor, to Landlord's knowledge, any third party has used, generated, stored or disposed of, or permitted the use, generation, storage or disposal of, any Hazardous Material on, under, about or within the Site in violation of any law or regulation, and (2) that Landlord will not, and will not permit any third party to use, generate, store or dispose of any Hazardous Material on, under, about or within the Site in violation of any law or regulation. Landlord and Tenant each agree to defend, indemnify and hold

- (b) General Liability. Tenant must maintain an occurrence form comprehensive general liability coverage. Such coverage shall include, but not be limited to, bodily injury, property damage - broad form, and personal injury, for the hazards of Premises/Operation. Tenant must maintain and name Landlord as an additional Insured under the aforementioned comprehensive general liability coverage with limits of liability not less than \$1,000,000 each occurrence; \$1,000,000 personal injury; \$1,000,000 general aggregate. These limits may be satisfied by the comprehensive general liability coverage or, in combination with an Umbrella or Excess Liability Policy, provided coverage afforded by the Umbrella or Excess Liability Policy are no less than the underlying comprehensive general liability coverages.
- (c) Automobile Liability. Tenant must carry Automobile Liability coverage. Coverage shall afford total liability limits for Bodily Injury Liability and Property Damage Liability in the amount of \$1,000,000 per accident. The liability limits may be afforded under the Commercial Policy or; combination with an Umbrella or Excess Liability Policy provided coverages afforded by the Umbrella Excess Policy are no less than the underlying Commercial Automobile Liability coverage. Coverage shall be provided for Bodily Injury and Property Damage for the ownership, use, maintenance or operation of all owned, non owned and hired automobiles. The Commercial Automobile Policy shall include at least statutory personal injury protection, uninsured motorists and underinsured motorists coverages.
- (d) Tenant Property Insurance. Tenant must keep in force during the Initial Term and any Renewal Terms a policy covering damages to the Equipment and any personal property at the Leased Premises. The amount of coverage shall be sufficient to replace the damaged property, loss of use and comply with any ordinance or law requirements.

13. Lease Termination.

- (a) In addition to any other termination rights under this Lease, this Lease may be terminated pursuant to any of the following provisions:
 - (i) By Notice. Tenant may elect to terminate this Lease, without cause, as of the end of the Initial Term or any subsequent Renewal Term by giving notice to Landlord at least ninety (90) days prior to the expiration of the Initial Term or any subsequent Renewal Term.
 - (ii) By Default. Either party may terminate this Lease as described in this Paragraph. If Landlord or Tenant fails to perform any covenant of this Lease and does not cure or reasonably commence and proceed diligently to cure such failure within sixty (60) days after receipt of notice thereof from the other party (or within thirty (30) days in the event of Tenant's failure to pay, pursuant to Paragraph 14(a)(i)), the other party may at any

reasonably commence and proceed diligently to cure such failure within sixty (60) days after receipt of notice thereof from Landlord; or

(iii) **Bankruptcy.** If during the term of this Lease: (i) Tenant makes an assignment for the benefit of creditors; (ii) Tenant files a voluntary petition under the Bankruptcy Code of the United States or any state statute similar thereto, or Tenant is adjudged insolvent or bankrupt pursuant to an involuntary petition; (iii) a receiver or trustee is appointed for the property of Tenant by reason of insolvency of Tenant and such receiver or trustee is not discharged within 60 days; (iv) any department of the state or federal government, or any officer thereof duly authorized, takes possession of the business or property of Tenant by reason of the insolvency of Tenant; (v) Tenant continues in possession without the appointment of a receiver or trustee under Chapter 11 of the Bankruptcy Code; or (vi) Tenant is the subject of any petition or proceeding related to relief from creditors, and such proceeding has not been dismissed within sixty (60) days.

(b) **Remedies on Default.** If an Event of Default occurs, Landlord may at any time thereafter:

(i) Terminate this Lease pursuant to Section 10 above; and/or

(ii) Pursue any other available remedies at law or in equity that may appear necessary or desirable to enforce performance and observance of any obligation, agreement, or covenant of this Lease.

15. **Limitation of Landlord's Liability.** If Landlord terminates this Lease other than as of right as provided in this Lease, or if Landlord causes interruption of the business of Tenant or for any other Landlord breach of this Lease, Landlord's liability for damages to Tenant shall be limited to the actual and direct costs of equipment removal, relocation or repair.

16. **Temporary Interruptions of Service.** If the FCC determines that continued operation of the Equipment would cause or contribute to an immediate threat to public health and/or safety (except for issues associated with human exposure to radio frequency emissions, which is regulated by the federal government), Landlord may order Tenant to discontinue its operation. Tenant shall immediately comply with such order. Pursuant to such order, such disconnection shall continue only for a period that the immediate threat exists. Landlord shall not be liable to Tenant or any other party for any interruption of Tenant's operation at the Leased Premises, except as may be occasioned by the willful misconduct of Landlord, its employees or agents. A temporary interruption or discontinuance of Tenant's operations at the Leased Premises resulting from some occurrence beyond the reasonable control of Landlord shall not constitute a default under this Lease, if the length of such interruption or discontinuance is commensurate with the seriousness of the event that caused the interruption or discontinuance.

obligations evidenced by bonds, debentures, notes or similar instruments, or (iii) has obligations under or with respect to letters of credit, bankers acceptances and similar facilities or in respect of guaranties thereof.

- (b) The parties acknowledge that this is a nonexclusive lease. Except as otherwise provided in this Lease, nothing in this Lease shall preclude Landlord from leasing other space for communication equipment to any person or entity which may be in competition with Tenant, or any other party, subject to the conditions set forth in this Lease.
- (c) Landlord may freely assign its rights and delegate its duties under this Lease to joint powers organizations of which it is now a member or becomes a member during the term of this Lease, subject to the assignee assuming all of Landlord's obligations herein.

19. **Condemnation.** In the event the whole of the Leased Premises is taken by eminent domain, this Lease shall terminate as of the date title to the Leased Premises vests in the condemning authority. In the event a portion of the Leased Premises is taken by eminent domain, either party shall have the right to terminate this Lease as of said date of the title transfer by giving thirty (30) days' written notice to the other party. In the event of any taking under the power of eminent domain, Tenant shall not be entitled to any portion of the reward paid for the taking, and Landlord shall receive the full amount of such award. Tenant hereby expressly waives any right or claim to any portion thereof. Although all damages, whether awarded as compensation for diminution in value of the leasehold or to the fee of the Leased Premises, shall belong to Landlord, Tenant shall have the right to claim and recover from the condemning authority, but not from Landlord, such compensation as may be separately awarded or recoverable by Tenant on account of any and all damage to Tenant's business and any costs or expenses incurred by Tenant in moving/removing its Equipment, personal property and leasehold improvements.

20. **Notices.** All notices hereunder must be in writing and shall be deemed validly given if delivered personally or if sent by certified mail, return receipt requested, addressed as follows (or any other address that the party to be notified may have designated to the sender by like notice):

If to Tenant:

CellNet Data Services (MSP), Inc.
414 Nicollet Mall
Minneapolis, MN 55401
Attn: Administration Manager

If to Landlord:

City of Tonka Bay
4901 Manitou Road
Tonka Bay, MN 55331

21. **Authority.** Each of the individuals executing this Lease on behalf of Tenant or Landlord represents to the other party that such individual is authorized to do so by requisite action of the party to this Lease.

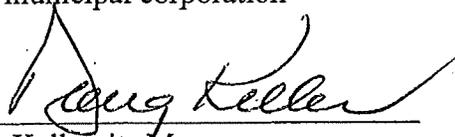
IN WITNESS WHEREOF, the parties hereto have set their hands and affixed their respective seals the day and year first above written.

LANDLORD:

TENANT:

CITY OF TONKA BAY, a
Minnesota municipal corporation

CELLNET DATA SERVICES (MSP), INC.,
a Delaware corporation

By: 
Doug Keller, its Mayor

By: 

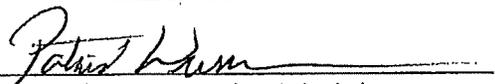
Its: Program Manager

Date: 4-17-98

Date: 22 April 98

Tax ID # 41-6008060

Tax ID # 94-3244010

By: 
Patrick Wussow, its Administrator

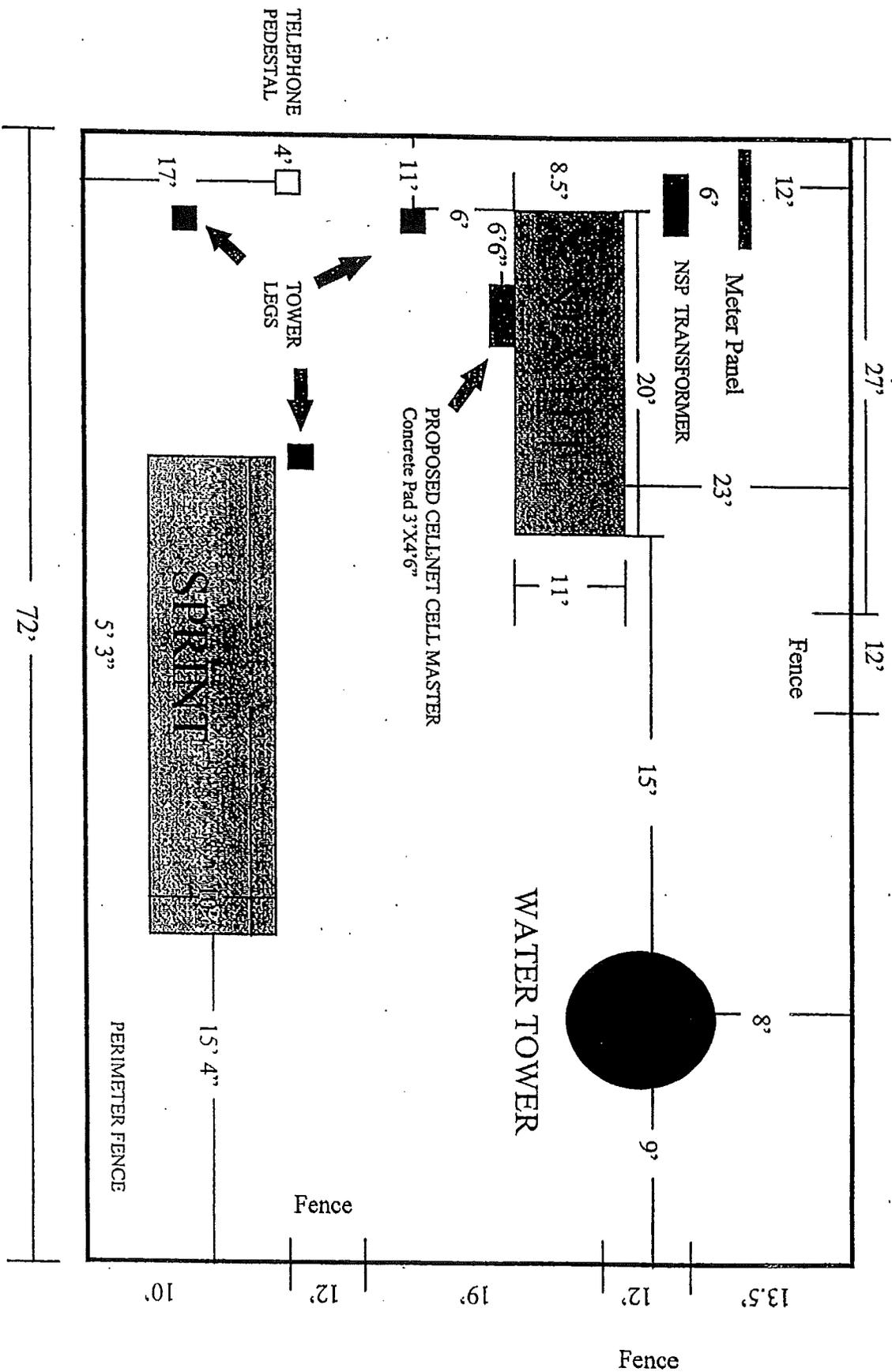
Date: 4-17-98

Tax ID # 41-6008060

EXHIBIT B

EQUIPMENT STORAGE AREA

Proposed Ground Installation
TONKA BAY COMMUNICATIONS TOWER



NOT TO SCALE

EXHIBIT D

RENT FOR TONKA BAY/CELLNET LEASE

<u>Initial Term</u>	<u>First Renewal Term</u>	<u>Second Renewal Term</u>
\$ 4,000.00	\$ 5,105.13	\$ 6,515.59
4,200.00	5,360.39	6,841.37
4,410.00	5,628.41	7,183.44
4,630.50	5,909.83	7,542.61
<u>4,862.03</u>	<u>6,205.32</u>	<u>7,919.74</u>
<u>\$22,102.53</u>	<u>\$28,209.08</u>	<u>\$36,002.75</u>
Total Rent: \$22,103	\$28,210	\$36,003