

**MEMORANDUM OF AGREEMENT  
BETWEEN**

**THE STATE OF MICHIGAN,  
BY AND THROUGH THE MICHIGAN STATE POLICE  
AND DEPARTMENT OF INFORMATION TECHNOLOGY**

**AND**

**THE FEDERAL COMMUNICATIONS COMMISSION'S  
WIRELESS TELECOMMUNICATIONS BUREAU AND  
ENFORCEMENT BUREAU**

**DATED AS OF  
September 17, 2003**

This Memorandum of Agreement (the "Agreement" or "MOA") dated as of September 17, 2003, is between the State of Michigan, by and through the Department of State Police and Department of Information Technology (collectively, "MSP"), the Wireless Telecommunications Bureau (the "WTB" or the "Bureau"), and the Enforcement Bureau (the "EB") of the Federal Communications Commission (the "FCC" or the "Commission"). MSP, WTB and EB (collectively the "Parties") agree and acknowledge that by signing this MOA, the Enforcement Bureau shall be deemed a Party to this MOA only with respect to Paragraph 3(b) and the general provisions in Section 4, below.

**RECITALS**

*Whereas*, the Michigan Public Safety Communications System ("MPSCS" or "System") is a statewide 800 MHz trunked emergency radio system that includes 180 sites constructed in four phases, and covers 58,000 square miles; and

*Whereas*, pursuant to the Communications Act of 1934, as amended, (the "Act") and FCC regulations, the FCC individually licensed and authorized transmitters located at each of the 180 MPSCS sites and registered all qualifying towers in the System with the FCC's Antenna Structure Registration System ("ASRS"); and

*Whereas*, in October 1992 the FCC authorized MSP to extend the deadline for construction of the MPSCS using a slow growth schedule, and the Bureau subsequently amended the slow growth schedule under FCC Rule 90.629, requiring Michigan to plan, approve, fund, purchase, construct, and place into operation the completed system by March 31, 2004; and

*Whereas*, pursuant to its authority under Sections 301, 303, 308, 309 and 312 of the Act (47 U.S.C. §§ 301, 303, 308, 309, 312), and the extended slow growth construction period granted to Michigan for the MPSCS, the FCC retains discretionary authority over the individual licenses granted to MSP for the System, including the regulatory authority necessary to ensure that licensees comply with the Act and with FCC regulations, including the Commission's environmental regulations found at 47 C.F.R. Chapter 1, Part 1, Subpart I (the "Commission's environmental regulations"); and

*Whereas*, section 7 (16 U.S.C. § 1536(a)(2)) of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, requires Federal agencies to insure their actions are not likely to jeopardize the continued existence of an ESA-listed species or result in the destruction or adverse modification of designated critical habitat, and section 9 of the ESA (16 U.S.C. § 1538) prohibits the unpermitted take of ESA-listed species; and

*Whereas*, avian species listed as migratory birds are also federally protected under the Migratory Bird Treaty Act (the "MBTA"), 16 U.S.C. §§ 703-711, and the Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668-668d; and

*Whereas*, pursuant to section 7 of the ESA, Federal agencies must formally consult with the U.S. Fish and Wildlife Service (the "Service") on any federal action that "may affect" an ESA-listed species, *see* 50 C.F.R. pt. 402; 47 C.F.R. § 1.1307(a)(3); and

*Whereas*, a Federal agency need not initiate formal consultation for federal actions that have no effect on, or, with the Service's concurrence, are not likely to adversely affect, an ESA-listed species or its designated critical habitat, 50 C.F.R. § 402.14(b); and

*Whereas*, to determine whether formal consultation is necessary, Federal agencies or their non-Federal representatives may first engage in informal consultation with the Service, 50 C.F.R. § 402.13; and

*Whereas*, there is no deadline for concluding informal consultation, although any "species list" provided by the Service for the preparation of a biological assessment must be acted upon within 90 days, or re-verified for accuracy by the Service, 50 C.F.R. § 402.12; and

*Whereas*, pending completion of its section 7 responsibilities, a Federal agency may not make any irreversible or irretrievable commitment of resources which has the effect of foreclosing the formulation or implementation of any responsible and prudent alternatives which would avoid violating section 7(a)(2), 16 U.S.C. § 1536(d); and

*Whereas*, MSP, as a non-federal representative and license applicant, initiated the section 7 informal consultation process for many of the MPSCS sites in early to mid-1998, and

thereafter, on August 24, 1998, MSP sent a letter to the Service summarizing the construction status of the MPSCS, relating measures already undertaken by MSP to avoid impacts to ESA-listed species, describing MSP's desire to minimize any further environmental impacts, and providing the locations of sites already constructed, under construction, or planned for construction in connection with Phases I-III (but not Phase IV) of the MPSCS; and

*Whereas*, the Service responded on September 30, 1998, by providing MSP a species list pursuant to 50 C.F.R. § 402.12(d), in which the Service stated that of the 117 sites (two sites were never constructed) whose location was provided by MSP in the August 24, 1998 letter, the following conditions existed: (1) the endangered Kirtland's warbler may occur near site 3604; (2) the threatened bald eagle may occur near site 7308; (3) the endangered Karner Blue Butterfly may occur near sites 6408 and 5502; (4) the endangered Piping Plover may occur near sites 7103, 7101, 7702, 7802, 7901, and any other site along the Lake Michigan, Lake Huron, Lake Erie, or Lake Superior shorelines near Piping Plover habitat; and (5) many of the sites may have the potential to impact migratory birds; and

*Whereas*, on October 5, 2001, the Service wrote to the Bureau expressing concerns over six communications facilities included within Phase IV of the MPSCS, indicating that the unconstructed site 9003 and five other unspecified but constructed sites located in the Keweenaw Peninsula, Upper Peninsula, Michigan, may affect migratory birds and federally listed threatened bald eagles; and

*Whereas*, on October 18, 2001, the WTB ordered MSP to cease and desist construction and operation of sites 8109, 8707, and 9003 pending resolution of the Service's concerns; and

*Whereas*, on October 31, 2001, MSP sent to the Service an "endangered species list request" requesting a list of species protected under the ESA that might be impacted by the facilities at sites 8109, 8707 and 9003; and

*Whereas*, the Service responded on November 5, 2001, with a letter stating that the endangered gray wolf may occur at or near sites 8109, 8707 and 9003, and that an active eagle nest may be present 1.5-2 miles away from site 9003; and

*Whereas*, on December 18, 2001, the Service concurred, based on biological evaluations prepared for MSP and the FCC for these sites, that sites 8109 and 8707 would have no effect on gray wolves, and would not likely adversely affect bald eagles; and

*Whereas*, based on the Service's December 18 concurrence, on December 20, 2001, the WTB rescinded its cease and desist order for sites 8707 and 8109; and

*Whereas*, the Service on November 7, 2002, concurred in a finding of not likely to adversely affect protected species for site 9003; and

*Whereas*, MSP currently operates site No. 9003 under the terms of a Special Temporary Authority ("STA") issued by the WTB in November 2002 and subsequently extended, and WTB will rescind

its cease-and-desist order and issue a permanent license for Site 9003 once all underlying issues involving the Keweenaw Bay Indian Community ("KBIC") are resolved;<sup>1</sup> and

*Whereas*, it appears that the section 7 process initiated in 1998 for the MPSCS has not been fully completed, due in part to the technical complexity, comprehensive scope, and evolving nature of the System, together with the amended construction period; and

*Whereas*, the Parties desire to ensure full compliance with their obligations and responsibilities under the Federal wildlife laws to avoid or minimize adverse impacts to protected species;

NOW THEREFORE, the Parties agree:

## **AGREEMENT**

### **1. Compliance with Section 7.**

- a) The Bureau, by and through MSP, its non-Federal representative, will submit an updated species list request to the Service. This request will seek to update, for sites that have not completed section 7 consultation, the accuracy of prior species lists provided by the Service in 1998 and 2001, and request a species list for those towers which have not been included in previous requests.
- b) Dependent on the outcome of these requests, the Parties will work cooperatively with the Service to prepare documentation, if necessary, that complies with the FCC Environmental Rules and the Service's section 7 implementing regulations. Specifically, any biological effect assessment will cover those species and sites in the MPSCS specifically identified by the Service. For this assessment, the Service has indicated that it will allow generic-effects or common-effects analysis where impacts from various towers are likely to be common or similar.
- c) Dependent on the results of any necessary biological assessment, the Parties will work cooperatively to expeditiously obtain a letter of concurrence or engage in formal consultation with the Service, as appropriate.
- d) If formal consultation is necessary, the Parties agree that MSP's licenses will be modified as the Bureau determines is necessary to reflect any reasonable and prudent alternatives (16 U.S.C. § 1536(b)(3)(A)), reasonable and prudent measures (16 U.S.C. § 1536(b)(4)(ii)), and terms and conditions (16 U.S.C. § 1536(b)(4)(iv)) contained within the Service's biological opinion, if any. The FCC retains discretionary authority over the individual licenses granted to MSP for the System, including the regulatory authority necessary to ensure that licensees comply with the

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<sup>1</sup> See Notes 2 and 3.

Act and with FCC regulations, including the Commission's environmental regulations.

e) In conformance with section 7(d) of the Endangered Species Act, MSP has not made and will not make any irreversible or irretrievable commitment of resources that has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternatives during on-going Section 7 consultations. In addition to other terms herein, with regard to any new towers that might be constructed as part of MSPCS, both during the period of this consultation and thereafter, MSP will notify the Service prior to construction of any such towers. MSP will further assure that the construction and operation of any new towers or antennas will comply with the ESA and the FCC's environmental rules.

## **2. Measures to Understand and Address Potential Effects to Migratory and Listed Birds.**

a) MSP will participate in and facilitate the implementation of an Avian Collision Study (attached hereto as Exhibit "1") (the "Avian Collision Study"), which will attempt to research the role (if any) of height, lighting, and guy wires in avian collisions at selected towers of the MPSCS. In order to implement the Avian Collision Study, Michigan will apply to the Service for any necessary permits.

b) The Avian Collision Study is intended to systematically study the occurrence of avian collision with communications towers and to measure the extent to which several variables (e.g., height, lighting, guy wires) may have an effect on the incidence of such collisions. The study is also designed to help identify reasonable and cost-effective measures that might be available to further minimize such impacts on migratory birds.

c) The parties expect that the data collected in the Avian Collision Study may point to cost-effective mitigation or reasonably prudent solutions, which in turn would allow the parties to discuss with the Service the possibility of further modifying the underlying FCC authorizations to effectuate such solutions as may be reasonable. The Parties therefore agree to review the data and results of the Avian Collision Study within a reasonable period of time after its completion, and meet with the Service to work in good faith to discuss the results and implications of the study and the need for mitigation measures deemed reasonable, feasible, within MSP budgetary limitations, and, if lighting is involved, acceptable to the Federal Aviation Administration.

## **3. Certification of Environmental Compliance for the MPSCS.**

a) Upon completion of the section 7 consultation regarding the MPSCS between the Service and WTB, the Bureau will conclude its environmental review of the MPSCS.

b) The WTB recognizes MSP's good faith efforts to contribute to the understanding of the effect of its communication towers on migratory birds and avian endangered or threatened species through its substantial commitment to the design, implementation and completion of the Avian Collision Study as described in Exhibit 1. In consideration of that effort and the other terms of this agreement, neither the WTB nor EB will, on their own motion or in response to an outside complaint, initiate or entertain any new proceeding, formal or informal, or impose on MSP or any related entity, or recommend to the full Commission or another Bureau, any forfeiture or other sanction for any action or failure of action, or other failure or alleged failure of compliance, prior to the date of signing of this agreement, in connection with the Commission's environmental rules, 47 C.F.R. §§ 1.1301-1.1319, with respect to the MPSCS.<sup>2</sup> Notwithstanding the foregoing, the FCC will enforce any reasonable and prudent mitigation measures or other terms that may be agreed to in connection with the section 7 consultation described herein.

#### **4. General Provisions.**

a) Resources. Nothing in this Agreement shall require the Parties, in fulfilling their obligations and responsibilities as provided herein, to expend funds that have not been lawfully appropriated and administratively allocated for such use.

b) Term. This Agreement is binding upon the WTB, EB with respect to Paragraph 3(b) and the general provisions in this section 4, and MSP, and after mutual execution by the Parties shall remain in effect until completion of section 7 consultation for all of the towers currently constructed and part of the MPSCS, or April 30, 2006, whichever is later.

c) Jurisdiction. MSP admits the jurisdiction of the FCC over it and the subject matter of this action. MSP also acknowledges the authority of the WTB and EB to enter into and adopt this MOA.

d) Waiver of Judicial Review. The WTB, EB, and MSP waive any further procedural steps and rights they may have to seek judicial review or otherwise challenge or contest the validity of this MOA.

e) Purpose. This MOA represents the final and complete settlement agreement between WTB, EB and MSP regarding MSP's compliance with the FCC's environmental rules in connection with the planning, siting, and construction of the MPSCS.<sup>3</sup> The WTB, EB and MSP agree that this MOA is for settlement purposes

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<sup>2</sup> Site 9003 is excluded from this provision with regard to 47 C.F.R. § 1.1307(a)(4) and (5).

<sup>3</sup> Site 9003 is excluded from this provision with regard to 47 C.F.R. § 1.1307(a)(4) and (5).

only and that by agreeing to this MOA, MSP does not admit any liability for violating Commission rules in connection with the matters that are subject to this MOA.

f) Notices. Notices hereunder may be sent to, and all contacts regarding this Agreement shall be made through the following persons, or their successor representatives as such may be appointed with notice given to the other party. Changes in representatives do not require approval from the other party and are effective upon receipt of written notice.

	<p>Jeffrey S. Steinberg, Deputy Chief Commercial Wireless Division Wireless Telecommunications Bureau Federal Communications Commission 445 12<sup>th</sup> Street, SW Washington, D.C. 20554</p> <p>e-mail – jeffrey.steinberg@fcc.gov Phone - 202.418.0896 Fax - 202.418.7224</p>
<p>Iris M. Lopez, Assistant Attorney General Office of the Michigan Attorney General State Operations Division P.O. Box 30212 Lansing, MI 48909</p> <p>Phone 517.373.1162 Fax - 517.373.2060 e-mail – lopezi@michigan.gov</p>	
<p>and:</p> <p>Ms. Mary P. Levine Administrative Assistant, Agency Services Department of Information Technology</p> <p>4000 Collins Rd., P.O. Box 30631 Lansing, MI 48909-8131</p> <p>e-mail – levinemp@michigan.gov Phone 517.336.6616 Fax 517.336.6551</p>	

- g) Amendments. The Parties may propose modifications to this Agreement by providing written notice to each other Party. Such notice shall include a statement of the proposed modification and the reason for the modification. The amendment will become effective upon written approval by all of the Parties.
- h) Dispute Resolution. Each Party shall have all remedies otherwise available to protect its interests, except that no Party shall be liable for any money damages arising from this Agreement. The Parties to this Agreement agree to work together in good faith to resolve any disputes, using dispute resolution procedures agreed upon within a reasonable time, not to exceed 60 days from receipt of notice requesting utilization of this provision.
- i) No Third Party Beneficiaries. This Agreement does not create any new right or interest in any member of the public as a third-party beneficiary, nor shall it authorize anyone not a party to this Agreement to maintain a suit for personal injury, damages, injunction, declaratory judgement or otherwise based on the provisions of this Agreement. The duties, obligations, and responsibilities of the Parties to this Agreement, with respect to third parties, shall remain as imposed under existing law.
- j) Severability. If any provision of this Agreement is held to be invalid or otherwise unenforceable, all other provisions may remain in effect, to the extent that they can be reasonably applied in the absence of the invalid or unenforceable provision, and continue to generally accomplish the purposes of the Agreement.
- k) No Agency Relationship. This Agreement shall not itself make or be deemed to make any Party to this Agreement the agent for or the partner of the other.
- l) References to Regulations and Governing Law. Any reference in this Agreement to any regulation or rule shall be deemed to refer to the regulation or rule as currently written. The terms of this Agreement shall be governed by and construed in accordance with applicable Federal law, or, if none, with the law of the State of Michigan. Nothing in this Agreement is intended to limit the authority of the FCC to fulfill its responsibilities under applicable Federal laws, nor MSP to fulfill all duties under applicable State laws. All activities undertaken pursuant to this Agreement must be otherwise lawful and in compliance with all applicable State and Federal laws and regulations.
- m) Counterparts. This MOA may be executed in any number of counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same agreement.



IN WITNESS WHEREOF, duly authorized representatives of the Parties hereto have executed this Agreement on the date set forth below:

<p>Federal Communications Commission Wireless Telecommunications Bureau</p> <p>By: _____</p> <p>Name: _____</p> <p>Title: _____</p> <p>Date: _____</p>	<p>The State of Michigan Department of State Police</p> <p>By: _____</p> <p>Name: _____</p> <p>Title: _____</p> <p>Date: _____</p>
<p>Federal Communications Commission Enforcement Bureau</p> <p>By: _____</p> <p>Name: _____</p> <p>Title: _____</p> <p>Date: _____</p>	<p>The State of Michigan Department of Information Technology</p> <p>By: _____</p> <p>Name: _____</p> <p>Title: _____</p> <p>Date: _____</p>