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2001-01-16 10:13:19  
Cook County Recorder 39.50



After Recording  
MAIL TO:

Kim Pape  
OnePoint Communications  
Two Conway Park  
150 Field Drive, # 300  
Lake Forest, IL 60045



0010036201

*10-ju*

Property of Cook County Clerk's Office

# AGREEMENT

**Legal Description:**

Lot 17 and the South 40 feet of Lot 18 in Block 18 in Bushnell's Addition to Chicago, in Section 4, Township 39 North, Range 14 East of the Third Principal Meridian, in Cook County, Illinois.

**Property Address:** 1100 North Dearborn, Chicago, IL

**P.I.N.** 17-04-413-010

*39.50*

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## ONEPOINT COMMUNICATIONS TELECOMMUNICATIONS SERVICES AGREEMENT

**THIS AGREEMENT** is made this 23<sup>rd</sup> day of March, 1998 OnePoint Communications, LLC, a Delaware limited liability company, with its principal office at 2201 Waukegan Road, Suite West-100, Bannockburn, IL 60015 (including its operating subsidiaries, hereinafter referred to as "OnePoint") and Realty & Mortgage Company, as agent for Berger Realty Group LLC, with its principal office at 928 W. Diversey, Chicago, IL 60614 (hereinafter referred to as "Property Owner").

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A. Property Owner owns a parcel of real estate which consists of approximately 650 residential units ("Units") located in Chicago known as 1100 N. Dearborn, 40 E. Oak, & 2000 N. Lincoln Park West (the "Property");

B. Property Owner desires that OnePoint provide Telecommunications Services for the benefit of the residents of the Property and OnePoint is willing to provide the Telecommunication Services pursuant to this Agreement.

**NOW, THEREFORE**, in consideration of the mutual promises set forth in this Agreement, OnePoint and Property Owner agree as follows:

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**Section 1. Grant of Rights to OnePoint.** Property Owner hereby grants the following rights to OnePoint:

**1.1 Telecommunications Services.** Except as provided by existing state, local or federal law, OnePoint shall have (i) the sole and exclusive right to market Telecommunications Services to residents of the Property, (ii) the right to provide Telecommunications Services to residents of the Property, and (iii) the right to install, own, operate, control, replace, modify and maintain on-site equipment, specifically inside the residential unit and/or at the designated network interface unit (the "Equipment") on and through the Property deemed necessary by OnePoint to provide the Telecommunications Services pursuant to this Agreement. OnePoint does not contemplate the installation of any Equipment on the Property for the initial provision of the Telecommunications Services. Future enhancements may require Equipment. Any required equipment will be installed at a mutually agreed upon location. "Telecommunications Services" shall mean the transmission and/or receipt of telecommunications services (including but not limited to local and long distance services) and any and all services and features ancillary thereto that relate to

When Recorded, Please Return to:

Kim Pape  
OnePoint Communications  
Two Conway Park  
150 Field Drive, Suite 300  
Lake Forest, Illinois 60045

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voice and data transmission, as specified in Exhibit A attached hereto, as the same may be amended from time to time.

**1.2 Exclusivity.** Property Owner grants to OnePoint a right to install, maintain and operate Equipment on the Property as defined in Section 1.1 and an exclusive right to solicit residents and prospective residents of the Property to subscribe to the Telecommunications Services. Property Owner will not grant access to the Property for the purpose of, or permit or grant the right to permit, the soliciting for or marketing of Telecommunications Services other than by OnePoint and its affiliates. The foregoing shall not be deemed to restrict the provision of the Telecommunications Services by local exchange companies, only so long as it is a requirement of state, local or federal law that such entities may not be denied the ability to provide such service to the Property and such Telecommunications Services are provided to a resident specifically at the request of such resident.

**1.3 Right to Use of Property.** Property Owner hereby grants and conveys to OnePoint an exclusive and irrevocable right of entry and license (the "License") to use all necessary portions of the Property to market and provide Telecommunications Services to residents of the Property, including any activities incidental to marketing and providing Telecommunications Services, and to install, maintain, operate, repair and remove any Equipment as defined in Section 1.1. The duration of the License, which shall be deemed a covenant running with the Property and binding on all successors and assigns, shall be throughout the Term of this Agreement (including all renewal Terms) and for such additional period as may be necessary pursuant to Section 4.3. OnePoint's use and occupancy of the Property shall not unreasonably interfere with or hinder the operation of the Property in accordance with Property Owner's normal operating policies and procedures.

**1.4 Acceptance of Property.** OnePoint shall have the right to assess the feasibility of marketing and providing the Telecommunications Services to the Property within the sixty (60)-day period immediately following the execution of this Agreement. During such sixty (60)-day period, Property Owner shall provide OnePoint with access to such Property as is reasonable and necessary to assess the feasibility of marketing and providing the Telecommunications Services at the Property. If OnePoint determines that the marketing and providing of the Telecommunications Services to the Property is feasible, OnePoint shall deliver to Property Owner, not later than the sixtieth (60th) day following the date of the execution of this Agreement, written notice of its acceptance of the Property and the date such notice is received by Property Owner shall be the "Acceptance Date" of the Property. If OnePoint has not delivered to Property Owner written notice of its acceptance of the Property within such sixty (60)-day period, then the Property shall be deemed rejected by OnePoint and this Agreement shall terminate on the expiration of such sixty (60)-day period.

**Section 2. Obligations of OnePoint.** OnePoint shall have the following obligations hereunder:

**2.1 Telecommunications Services and Rates.**

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(a) Services and Rates. OnePoint agrees to provide to each resident ("Customer") of the Property requesting the Telecommunications Services, on a nondiscriminatory basis, access to the Telecommunications Services, conditioned on the Customer paying Service charges and meeting other reasonable requirements as are established by OnePoint from time to time. Customers will be charged and billed individually by OnePoint for Telecommunications Services they receive at rates established by OnePoint. OnePoint shall be entitled to all amounts collected or arising from the provision of the Telecommunications Services.

(b) Fees to Property Owner. From and after the Acceptance Date during the Term hereof, OnePoint shall remit to Property Owner the fees set forth on Exhibit B attached hereto, pursuant to the terms provided therein.

**2.2 Operation, Maintenance and Repair.** OnePoint shall provide the Telecommunications Services in accordance with, in all material respects, federal, state and local laws, if any, which may be applicable thereto. OnePoint shall respond to any service and repair requests by Customers in a timely manner, and such responses shall be in material compliance with governmental laws and/or regulations and within general industry standards. OnePoint shall promptly repair all damage to the Property and all improvements thereon caused by OnePoint and its agents, employees and contractors.

**2.3 Insurance.** During the Term of this Agreement, OnePoint agrees to procure and maintain policies of general liability coverage in the amount of One Million Dollars (\$1,000,000) for (a) general liability property damage and bodily injury or death resulting from any one (1) accident; and (b) an umbrella excess liability policy providing coverage of at Two Million Dollars (\$2,000,000) for bodily injury and property damage combined. OnePoint shall provide to Property Owner certificates of insurance for such coverage within thirty (30) days after the date of this Agreement. Property Owner shall be listed as an additional insured party under such policies.

**2.4 Control, Ownership and Character of the Telecommunications System Equipment.** Subject to the terms hereof, the Equipment, if any, shall at all times remain the sole property of, and be controlled exclusively by, OnePoint, its successors and assigns. It is the intention of the parties that the Equipment and each and every component thereof, shall retain its character as personal property following the installation and shall not be deemed to be a fixture of the Property. Without limiting the foregoing, Property Owner shall not subject any such Equipment to any mortgage, deed of trust or lien of or upon the Property.

### **Section 3. Obligations of Property Owner.**

Property Owner shall have the following obligations:

**3.1 Promotion of Telecommunications Services.** Property Owner shall cooperate with OnePoint in promoting the Telecommunications Services to residents and prospective residents of the Property and shall use reasonable efforts to promote the use of the Telecommunications Services provided by OnePoint to residents and prospective residents of the Property as part of the amenities provided at the Property. As part of such promotional activities, Property

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Owner shall, among other things, distribute OnePoint's marketing materials to existing and prospective residents of the Property and encourage such residents to subscribe to the Telecommunications Services. Property Owner shall also permit OnePoint to utilize and provide mutually agreed upon incentive programs for Property Owner's designated property management personnel, leasing staff and other Property personnel to market and provide the Telecommunications Services at the Property, provided that all such property personnel shall remain employees of Property Owner, subject to direction and supervision from Property Owner.

**3.2 Information.** Property Owner shall provide to OnePoint, on a monthly basis, a current list of residents and information regarding Unit sales and current move-ins and move-outs and the entering into and termination of leases at the Property.

**3.3 Permits.** Property Owner shall cooperate with OnePoint and use reasonable efforts to assist in obtaining permits, consents, licenses and any other requirements which may be necessary for OnePoint to install and operate any Equipment as defined in Section 1.1 and furnish the Telecommunications Services in accordance with this Agreement, provided that OnePoint is primarily responsible for obtaining and maintaining such permits, consents, licenses and other requirements at its cost.

**Section 4. Term.** The term ("Term") of this Agreement shall include the Initial Term.

**4.1 Initial Term.** This Agreement shall remain in full force and effect for five (5) years (the "Initial Term") from April 1, 1998 (the "Commencement Date").

**4.2 Termination.** This Agreement shall terminate upon the expiration of the Term or earlier upon the first to occur of the following:

(a) the mutual written consent of the parties hereto;

(b) at the option of either party, if the other party materially breaches any of its representations, warranties or obligations under this Agreement, and fails to cure such breach within thirty (30) days after written notice thereof to the breaching party (which notice specifies the material breach(es)) of the other party's intention to terminate if not cured;

(c) at the option of either party, it becomes infeasible for legal or regulatory reasons or for technological reasons to provide Telecommunications Services to the Property.

(d) as expressly provided in Section 1.4.

**4.3 Removal of Equipment upon Termination.** Upon expiration or earlier termination of this Agreement, OnePoint shall have the right, at its expense, to remove the Equipment, if any, from the Property within one hundred twenty (120) days from the date of such expiration or termination, as the case may be; provided, however, that such period shall be extended by any period of time during which Property Owner does not provide access to the Property as

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provided herein, or due to delays caused by coordination with Property Owner's new service provider(s).

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## Section 5. Indemnification; Limitation of Remedies.

**5.1 Indemnification.** Subject to the provisions set forth in Section 5.2 below, OnePoint and Property Owner hereby agree to indemnify, defend and hold each other (and each other's members, partners, officers, directors, owners, employees and agents) harmless from and against all claims, losses and liabilities in any way relating to, arising out of, or resulting from a material breach of their respective representations, warranties or obligations under this Agreement.

**5.2 Limitation of Remedies.** NOTWITHSTANDING ANY OTHER PROVISION OF THIS AGREEMENT. NEITHER ONEPOINT NOR PROPERTY OWNER SHALL BE LIABLE FOR ANY REASON FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES, INCLUDING BUT NOT LIMITED TO LOST PROFITS OF ANY NATURE WHATSOEVER OR FOR THE CONDITION OR REPAIR OF ANY PROPERTY TO WHICH THE EQUIPMENT IS ATTACHED.

## Section 6. Miscellaneous.

**6.1 Entire Agreement.** This Agreement, including all Exhibits hereto (whether now or hereafter appended) which by this reference are incorporated herein, contains all of the terms and conditions agreed upon by the parties hereto with reference to the subject matter hereof and supersedes all prior agreements and negotiations with respect to the subject matter hereof. This Agreement cannot be modified or changed except by written instrument signed by all parties hereto.

**6.2 Representations and Warranties of Owner.** Property Owner hereby represents and warrants to OnePoint that: (a) this Agreement has been duly authorized, executed and delivered by Property Owner (b) no consent or approval of any other person or entity is required for the execution, delivery, performance or enforceability of this Agreement; and (c) there are no other telephone or wireline telecommunications service contracts affecting the Property.

**6.3 No Waiver.** No provision of this Agreement shall be deemed to have been waived, except if such waiver is contained in a written instrument and executed by the party against which such waiver is to be enforced. No waiver by a party of any term or condition of this Agreement shall constitute a waiver by such party of any prior, concurrent or subsequent breach or default of the same or any other term or condition of this Agreement.

**6.4 Notices.** All notices, demands, requests and other communications required or permitted hereunder shall be in writing, and shall be deemed given when actually delivered to the addressee at its address or facsimile number set forth following its name below:

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**To OnePoint:** OnePoint Communications, LLC  
2201 Waukegan Road, Suite West-100  
Bannockburn, IL 60015  
Facsimile No.: (847) 374-3701  
Attention: William F. Wallace, President

**To Agent of Property Owner:** Realty & Mortgage Co., as Agent for Owner  
928 W. Diversey Parkway  
Chicago, IL 60614

**6.5 Warranty.** EXCEPT AS EXPRESSLY STATED IN THIS AGREEMENT OR AS PROVIDED BY STATUTE, ONEPOINT MAKES NO WARRANTIES REGARDING ITS EQUIPMENT OR ITS PROVISION OF THE TELECOMMUNICATIONS SERVICES, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

**6.6 Force Majeure.** If OnePoint's performance of any of its obligations under this Agreement is interfered with by any reason or any circumstances beyond its control, including, without limitation, fire, explosion, power failure or power surge, acts of God, war, revolution, civil commotion, or requirement of any government or legal body or any representative of any such government or legal body, non-performance of any obligation of a third party contractor, labor unrest, including without limitation, strikes, slowdowns picketing or boycotts, then OnePoint shall be excused from performance on a day-by-day basis to the extent of such interference. Notwithstanding any of the provisions herein contained, the Telecommunications Services are not guaranteed to the extent of any breakdown in transmissions beyond the control of OnePoint.

**6.7 Severability.** In the event that any part of this Agreement shall be held to be indefinite, invalid or otherwise unenforceable, the entire Agreement shall not fail on account thereof, and the balance of the Agreement shall continue in full force and effect.

**6.8 Arbitration.** Any controversy, dispute, or claim of whatever nature arising out of, in connection with, or in relation to the interpretation, performance or breach of this Agreement, including any claim based on contract, tort or statute, shall be resolved at the written request of any party to this Agreement by final and binding arbitration before a single arbitrator agreed upon by the parties. In the event that a single arbitrator cannot be agreed upon by the parties within thirty (30) days of written request for arbitration, each party shall within five (5) days thereafter choose an arbitrator and the two (2) arbitrators so chosen shall choose a third arbitrator and the determination shall be made by a majority vote of at least two (2) of the three (3) arbitrators. If either party shall fail to choose an arbitrator, the arbitrator chosen by the other party shall act as the single arbitrator. The arbitration shall be conducted at a location determined by the arbitrator in the county in which the Property is located, administered by and in accordance with the then existing rules of practice and procedure of the American Arbitration Association. Both parties agree to act promptly to complete the arbitration within sixty (60) days from the date of written request for



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arbitration, where reasonably practicable. Each party shall bear its own expenses of the Arbitration and shall share the expense of the third arbitrator equally.

**6.9 Binding Effect and Assignment.** This Agreement shall be binding upon and inure to the benefit of the parties hereto, their successors in interest and permitted assigns.

(a) Assignment by Property Owner (Sale of Property). If Property Owner sells or otherwise conveys its ownership in the Property to any third party, or if Property Owner converts the Property to condominium regime, then the purchaser, transferee or condominium owners' association acquiring the Property shall accept an assignment of Property Owner's interest hereunder and assume Property Owner's obligations and responsibilities hereunder. Upon such assignment and assumption, for which Property Owner shall give OnePoint a minimum of thirty (30) days notice, Property Owner shall be relieved of all of its obligations hereunder with respect to the conveyed Property, and OnePoint shall look solely to the assignee for the same.

(b) Assignment by OnePoint. OnePoint shall have the right to make collateral assignments of this Agreement as security for the financing of its equipment, or in connection with other general financing that OnePoint may obtain. OnePoint shall have the right to assign its rights and obligations under this Agreement, to an entity that purchases all or substantially all of OnePoint's assets or that is OnePoint's successor by merger or restructure or recapitalization or to any affiliate (including, without limitation, all equity holders of OnePoint); provided, however, that any such assignment shall be to a financially and operationally capable assignee who will assume OnePoint's obligations pursuant to this Agreement. For any other assignment by OnePoint, OnePoint shall provide Property Owner with thirty (30) days prior notice of such assignment and such assignment shall be subject to Property Owner's consent, which consent shall not be unreasonably withheld. If Property Owner's consent to an assignment by OnePoint is required and Property Owner does not give notice of its refusal to consent to the assignment within the thirty (30) day period, Property Owner is deemed to consent to the assignment. Property Owner's consent shall not be conditioned upon receiving any monetary consideration from OnePoint or the assignee or obtaining any additional terms for Property Owner's betterment in this Agreement.

**6.10 Governing Law.** This Agreement shall be governed by, and interpreted in accordance with, the laws of Illinois.

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IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the date first set forth above.

**ONEPOINT:**

ONEPOINT COMMUNICATIONS, LLC

By: W F Wallace  
Its: William F. Wallace  
President

**AGENT FOR PROPERTY OWNER:**

Realty & Mortgage Company, as agent for  
Berger Realty Group LLC

By: [Signature]  
Its: Harold Rider, Jr.  
Vice President

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