

**Ordinance No. 189420 As Amended**

Grant a temporary, revocable permit to New Cingular Wireless PCS, LLC for wireless communications services in the City (Ordinance)

The City of Portland ordains:

Section 1. The Council finds:

1. The City of Portland, Oregon (City) and New Cingular Wireless, PCS, LLC (AT&T) have reached final agreement on the terms and conditions of a ten -year franchise for AT&T to use the City streets to provide wireless communications services. In December 2018, City Council adopted Resolution 37405, which outlined the City's partnership with AT&T for community benefits. Resolution 37405 also directed the Office for Community Technology to negotiate a franchise agreement with AT&T as part of the partnership.
2. The City will shortly begin considering approval of the proposed franchise, following the formal Portland City Charter procedure of public notice and hearing. This process will begin with the publication of a notice of proposed franchise, together with the publication of the entire proposed agreement in the City's official newspaper. The process mandated by the Portland City Charter for adopting a proposed franchise may take up to four months, or more, from the date of initial publication.
3. AT&T has asked the City, in writing, if the City would issue a temporary, revocable permit allowing the City to immediately grant authorization to AT&T to use the City Streets under the terms substantially similar to the new franchise agreement. AT&T's letter acknowledges that the parties have otherwise reached final agreement on franchise terms and conditions, and identifies an immediate need to operate under the terms of the proposed franchise. AT&T has accepted that its rights under a revocable permit would end upon the permit's expiration, if not otherwise superseded by the proposed franchise. A copy of AT&T letter is attached to this Ordinance as Exhibit 3 and is hereby incorporated by reference.
4. The temporary, revocable permit to be issued under this Ordinance is substantially similar to the terms and conditions set forth in the proposed franchise agreement to be entered into between the City and AT&T.

NOW, THEREFORE, the Council directs:

**Section a. NATURE OF GRANT.** The City of Portland, Oregon (City) grants to New Cingular Wireless PCS, LLC, a Delaware limited liability company qualified to do business in the state of Oregon (Grantee), a franchise to access City's Streets to Install Wireless Communications Facilities to provide Wireless Communications Services. This Permit shall not exempt Grantee from acquiring permission from the owner(s) of any poles or other infrastructure before Installing Wireless Communications Facilities on such poles or other infrastructure.

- A. Grantee represents that it has received all necessary regulatory authority to provide Wireless Communications Services.
- B. This Permit does not authorize Grantee to operate a cable system as defined by 47 U.S.C. § 522 (7), provide video programming as defined by 47 U.S.C. § 522 (20) or to provide a telecommunications service as defined in ORS 759.005(8).
- C. This Permit is not exclusive. The City expressly reserves the right to grant franchises, licenses, permits or other similar rights to other Persons, as well as the right in its own name as a municipality, to use the Streets for similar or different purposes allowed Grantee.
- D. This Permit is subject to the City Charter and Code provisions, now in effect or hereafter made effective, that affect matters of general City concern and that are not materially in conflict with existing contractual rights of Grantee. Nothing in this Permit shall be deemed to waive the requirements of the various codes and ordinances of the City regarding permits, fees to be paid or the manner of construction.

**Section b. TERM OF PERMIT.**

- A. Duration. The term of this Permit shall be either (1) a period of only one year, as measured from its effective date; or (2) until the City grants a franchise to Grantee and the franchise becomes effective, whichever event occurs sooner.
- B. Effective Date. The effective date of this Permit shall be upon passage of the Permit by the City Council unless Grantee fails to file an unconditional written acceptance of this Permit in accordance with Section o.I, in which event this Permit shall be null and void. The passage date is set forth on the last page of this Permit, as stamped by the Council Clerk.

**Section c. DEFINITIONS.** The following terms have the meanings given below unless the context indicates otherwise. When not inconsistent with the context, words used in the present tense include the future tense, words in the plural include the singular and words in the singular include the plural. The word “shall” is always mandatory.

- A. Activate(d) means the date the Portland Bureau of Transportation issues a Wireless Cell Site Permit for a Wireless Communications Facility plus sixty (60) calendar days.
- B. Design Guidelines means the design and aesthetic requirements for Wireless Communications Facilities adopted by the Portland Bureau of Transportation.
- C. Install(ed)/(ing)/(ation) means to place, construct, operate, maintain, repair, replace, upgrade and remove Wireless Communications Facilities.

- D. Person means any natural person, and any individual, sole proprietorship, partnership, association, corporation, cooperative, limited liability company, municipal corporation or other form of organization authorized to do business in the State of Oregon.
- E. Streets means the surface of and the space above and below any public street as defined in Portland City Code Section 17.04.010.Y, road, alley or highway within the City, used or intended to be used by the general public, to the extent the City has the right to allow Grantee to use them.
- F. Wireless Communications Facility(ies) means the equipment, and associated structures, needed to transmit and/or receive electromagnetic signals. A Wireless Communications Facility typically includes antennas, supporting structures, enclosures and/or cabinets housing associated equipment or cable and may be attached to utility or City-owned structures or poles in the public right-of-way. Wireless Communications Facilities also include strand-mounted devices and associated equipment. Wireless Communications Facilities does not include equipment Installed for City purposes, including but not limited to air quality sensors or earthquake sensors.
- G. Wireless Communications Services means any wireless service using FCC-licensed or unlicensed spectrum including, without limitation, any personal wireless services, as defined in 47 U.S.C. § 332(c)(7)(C).
- H. Year/Annually means the period consisting of a full calendar year, beginning January 1 and ending December 31, unless otherwise provided in this Permit.

#### **Section d. COMPENSATION.**

- A. Permit Fee. As compensation for the privileges under this Permit, Grantee shall pay the following franchise fee:
  - i. *Macro Site Franchise Fee*. \$8,000 per year per Wireless Communications Facility that qualifies as a Macro Site under the Design Guidelines. The City will automatically adjust the Macro Site Franchise Fee if another provider of Wireless Communications Service receives a lower Macro Site franchise fee.
  - ii. *Small Cell Site Franchise Fee*. \$1,250 per year per Wireless Communications Facility that qualifies as a Small Cell under the Design Guidelines. The City will automatically adjust the Small Cell Site Franchise Fee if another provider of Wireless Communications Service receives a lower Small Cell Site franchise fee.

The franchise fee for each Wireless Communications Facility shall increase by three percent (3%), rounded to the nearest dollar, on each January 1 following the Effective Date of this Permit. For example, if Grantee installs one Small Cell Site in year one and one Small Cell Site in year two, Grantee's total annual franchise fee in year three would be \$2,654 (\$1,327 franchise fee x two Small Cell Sites). The annual franchise fee covers a full calendar year, beginning January 1 and ending December 31. The annual franchise

fee will be prorated for partial years based on a twelve (12)-month year. For Wireless Communications Facilities Activated during the first half of the month, day one (1) through day fifteen (15), Grantee's proration will include that month. For Wireless Communications Facilities Activated during the second half of the month, day sixteen (16) through the last day of the month, Grantee's proration will not include that month.

Franchise Year	Annual Franchise Fee per Small Cell
One	\$1,250
Two	$\$1,250 + 3\% = \$1,288$
Three	$\$1,288 + 3\% = \$1,327$

**B. In-Kind Elements.** Upon agreement of the City and Grantee in writing, certain in-kind elements offered by Grantee or its affiliates may be used to offset all or a portion of the franchise fee for one or more Wireless Communications Facilities. The City will, on a case-by-case basis, review such in-kind elements depending on the totality of the circumstances, including but not limited to City's needs, locations, conditions, and any and all associated costs of such in-kind elements.

- i. *Up-Front Payment.* City and Grantee agree that Grantee shall pay a One-Million and Two-Hundred and Fifty-Thousand Dollar (\$1,250,000) up-front payment to offset franchise fees and Wireless Communications Facility permits due for up to one-hundred and fifty-two (152) Small Cell Sites.
  - a. *Up-Front Payment Timing.* Fifty percent (50%) of the payment is due within sixty (60) calendar days following the effective date of the relevant Master Lease Agreement and relevant Temporary Revocable Permit, whichever is later. The remaining fifty percent (50%) is due within sixty (60) calendar days following the effective date of the franchise. In the unlikely event the franchise is not in effect by August 1, 2019, the City shall refund to Grantee unexpended payments advanced.
  - b. *Effect on Annual Escalator.* The annual three percent (3%) escalator does not apply to Wireless Communications Facilities where franchise fees have been prepaid as part of the up-front payment until the up-front payment is exhausted. For each affected Facility, the annual franchise fee will be calculated as if the annual escalator had been applied to each of the preceding years. For all Wireless Communications Facilities not prepaid by the up-front payment, the standard franchise fee applies.
  - c. *Application of Up-Front Payment.* The up-front payment will be divided into two amounts: OCT Funds and PBOT Funds. The OCT Funds will be Nine Hundred Fifty Thousand Dollars (\$950,000), and the OCT Funds will be applied to Small Cell Site franchise fees until



the OCT Funds are depleted. The PBOT Funds will be Three Hundred Thousand Dollars (\$300,000), and the PBOT Funds will be applied to PBOT permit fees at PBOT's then-current permit fee structure for Wireless Cell Site applications until the PBOT Funds are depleted.

- ii. *Non-Profit Donation.* City and Grantee agree that Grantee shall donate, no later than December 31, 2019, Two-Hundred Thousand Dollars (\$200,000) to a non-profit of Grantee's choice for work in the City on digital inclusion.
- C. Timing of Payment. Grantee shall pay the total franchise fee to City in advance on or before January 2 of every Year. As of November 1 of every Year, Grantee shall calculate the total franchise fee payable for the following Year by identifying the cumulative number of Wireless Communications Facilities for which the City's Bureau of Transportation (PBOT) has issued a street opening permit and multiply that number times the applicable site-specific franchise fee (Macro Site Franchise Fee or Small Cell Site Franchise Fee). In addition, for new Wireless Communications Facilities, Grantee shall pay a franchise fee for each Wireless Communications Facility that Grantee installs within forty-five (45) calendar days after the new Wireless Communications Facility is Activated and, for new Wireless Communications Facilities Activated between November 1 and December 31, the annual franchise fee for the following Year.
- D. Reports. Payments shall be accompanied by a written report, containing an accurate statement in summarized form, as well as in detail, of Grantee's Wireless Communications Facilities in the Streets and the computation of the total franchise fee amount. Such reports shall be in a form satisfactory to the City and similar to the form found at [www.portlandoregon.gov/oct/article/401039](http://www.portlandoregon.gov/oct/article/401039). If applicable, Grantee's report shall also list each Wireless Communications Facilities that should be deducted from Grantee's up-front payment described in Section d.B.
- E. Catch-Up Payment. Grantee acknowledges that previous agreements between Grantee and City required Grantee to pay annually in arrears for its occupation of City's Streets. Grantee agrees to make a one-time catch-up payment as shown in **Exhibit 1**, incorporated by reference herein, to true-up the previous and current payment schedule. This one-time catch-up payment shall be due within thirty (30) calendar days of the Effective Date.
- F. Electronic Fund Transfer. Grantee shall set up electronic fund transfer within sixty (60) calendar days of the Effective Date to submit payments to the City by Automated Clearing House (ACH) payment receipts. The City may approve any written requests from Grantee for waivers from the ACH requirement.
- G. Liability for Licenses and Taxes. Payment of the Franchise Fee and other financial obligations under this Permit shall not exempt Grantee from the payment of any license, fee, tax or charge on the business, occupation, property or income of Grantee that may lawfully be imposed by the City, except as may otherwise be provided in the ordinance or ordinances imposing such other license, fee, tax or charge.

#### H. Interest and Late Fees.

- i. *Interest.* All amounts not paid by Grantee when due or demanded shall bear interest at the rate pursuant to City Code 7.14.100 (Interest), including the amount of any underpayments discovered from any review of payments under this Permit.
- ii. *Late Fees.* In addition to all of the remedies provided by this Permit, if any franchise fee or other charge required by this Permit is not received by City within ten (10) business days after it is due, City may impose a late fee equal to the greater of Two Hundred and Fifty Dollars (\$250) or five percent (5%) of the amount of the delinquent franchise fee or other charge for the month in which the franchise fee or other charge is delinquent. Grantee shall pay any late fees immediately upon billing by City. The imposition by City and/or the payment by Grantee of any late fees shall not waive or cure Grantee's default. Failure to impose a late fee on one occasion does not affect a waiver of City's right to impose a late fee on subsequent delinquent payments.
- iii. *Penalties.* There shall be a penalty of five percent (5%) of any underpayment due within forty-five (45) calendar days of written notice from the City, if the City's review of payments under this Permit discloses that Grantee has paid ninety percent (90%) or less of the principal amount owing for the period under review.
- iv. *No Accord.* City's acceptance of payment shall not be construed as an accord that the amount paid is, in fact, the correct amount, nor as a release of any claim the City may have for further or additional sums payable.

#### Section e. **AUDITS.**

- A. City Authority. The City and its agents shall have authority to arrange for and conduct reviews of any payments under this Permit upon no less than thirty (30) calendar days' prior written notice to Grantee, and during normal business hours at reasonable locations in the City or the Portland metropolitan area designated by Grantee. The City's notice shall provide Grantee with a preliminary list of financial documentation requested by the City for review. The City may determine the scope of review in each instance. All amounts paid by Grantee shall be subject to review by the City, provided that such review is initiated within thirty-six (36) months from the date payment was due. If Grantee has not provided copies of all information reasonably within the scope of the review to City within thirty (30) calendar days from the notice date: (1) Grantee shall provide access within the Portland metropolitan region, during normal business hours, upon five (5) business days' prior written notice; and (2) the thirty-six (36) month period shall be extended by one day for each day or part thereof that Grantee fails to provide such information.
- B. Grantee's Reimbursement Responsibility. Grantee agrees to reimburse the City for the reasonable costs of such review if the review discloses that Grantee has paid ninety percent (90%) or less of the fees owing under this Permit for the period at issue. Grantee

shall reimburse the City within forty-five (45) calendar days of receipt of an invoice from the City showing such costs were actually incurred and were directly related to the review.

- C. Grantee Dispute of Review. Grantee shall have the ability to dispute any determination of underpayment by the City within thirty (30) calendar days of receipt of written notice from the City related to the review. If Grantee disputes the City's determination of any underpayment, Grantee shall place the disputed amount in an escrow account at a financial institution acceptable to the City with instructions agreed to by the City until final resolution. Grantee agrees that such disputes shall be heard by the Revenue Division's Business License Appeals Board using the process under Portland City Code Section 7.02.290. In such an appeal, Grantee shall bear the burden of proof establishing that the City's determination is incorrect, either in whole or in part.

**Section f. INSURANCE.** Work shall not commence until all insurance requirements listed below have been met and certificates have been approved by the City Attorney and filed with the City Auditor. All required insurance must be issued by companies or financial institutions with an AM Best rating of A- or better and duly authorized to do business in the State of Oregon.

- A. Insurance Certificate. As evidence of the required insurance coverage, Grantee shall furnish compliant insurance certificates, including required endorsements, to City prior to the Effective Date of the Permit. The certificates shall list City as a Certificate Holder. There shall be no cancellation of the insurance without thirty (30) calendar days' prior written notice to City. If the insurance is canceled or terminated prior to completion of this Permit, Grantee shall provide a new policy with the required coverage. Failure to maintain insurance as required by this Permit may be considered a breach of this Permit by City.
- B. Additional Insureds. The coverage shall apply as to claims between insureds on the policy. The insurance shall be without prejudice to other coverage. For liability coverage, the insurance certificate shall list City as a Certificate Holder and include as additional insureds "the City of Portland, Oregon, and its officers, agents and employees" and an endorsement to the liability policy shall confirm the listing of City as an additional insured. Notwithstanding the listing of additional insureds, the insurance shall protect each additional insured in the same manner as though a separate policy had been issued to each, but nothing herein shall operate to increase the insurer's liability as set forth elsewhere in the policy beyond the amount or amounts for which the insurer would have been liable if only one person or interest had been named as insured.
- C. Insurance Costs. Grantee shall be financially responsible for all pertinent deductibles, self-insured retentions or self-insurance.
- D. Required Coverage. The limits provided below shall be subject to any changes as to the maximum limits imposed on municipalities of the State of Oregon by Oregon state law during the term of this Permit.

- i. *Commercial General Liability.* Grantee shall provide and maintain commercial general liability and property damage insurance in the amount of \$2,000,000 (two million U.S. dollars) per occurrence, and aggregate limit of \$4,000,000 (four million U.S. dollars) that protects Grantee and City and its officers, agents and employees from any and all claims, demands, actions and suits for damage to property or personal injury arising from Grantee's work under this Permit.
- ii. *Automobile Liability.* Grantee shall carry automobile liability insurance with a combined single limit of \$1,000,000 (one million U.S. dollars) each occurrence, and an umbrella or excess liability coverage of \$2,000,000 (two million U.S. dollars), for bodily injury and property damage. The insurance shall include coverage for any damages or injuries arising out of the use of automobiles or other motor vehicles by Grantee.
- iii. *Workers' Compensation.* Grantee shall comply with the workers' compensation law, ORS Chapter 656, as it may be amended. If required, Grantee shall maintain coverage for all subject workers as defined by ORS Chapter 656 and shall maintain a current, valid certificate of workers' compensation insurance on file with the City Auditor for the entire period during which work is performed under this Permit. Contractors who are non-subject workers meeting one of the exceptions in ORS 656.027 may not be required to carry workers' compensation insurance. Any Contractor requesting an exemption from the workers' compensation coverage listed above must make that request in writing to the City Attorney, stating its Contractor's qualification for exemption under ORS 656.027.

#### **Section g. FAITHFUL PERFORMANCE BOND.**

- A. General. Within thirty (30) calendar days of the Effective Date, Grantee shall maintain in full force and effect, at its own cost and expense, a faithful performance bond running to the City, with good and sufficient surety approved by the City in an amount of \$100,000. Grantee shall immediately replace or replenish to the full amount any draw down of the security by City. The bond shall be in effect until the later of: (i) termination of this Permit; or (ii) removal of all or part of Grantee's Wireless Communications Facilities installed in the City's Streets.
- B. Copy of Bond. The performance bond shall contain a provision that it shall not be terminated or otherwise allowed to expire without thirty (30) calendar days' prior written notice first being given to the City. The performance bond is subject to review and approval by the City Attorney. Grantee shall file with the City a duplicate copy of the performance bond, along with written evidence of payment of the required premium. However, in no event shall the City exercise its rights against the performance bond if a bona fide, good faith dispute exists between City and Grantee.

#### **Section h. COVENANT TO INDEMNIFY AND HOLD CITY HARMLESS.**

- A. General. Grantee shall indemnify, defend and hold harmless the City, its officers, agents and employees, from any claims, damages, costs or expenses, including but not limited to reasonable attorney fees and appeal costs, arising from any claims made by third parties against the City for personal injury or property damage by reason of: (i) any excavation, Installation or any other act done under this Permit, by or for Grantee, its agents or employees; or (ii) any neglect or omission of Grantee to keep its Wireless Communications Facilities in a reasonably safe condition. Grantee's indemnification obligation shall not extend to liability to the extent caused by the negligence or willful misconduct of the City or its officers, agents, boards or employees or any other third party. The City shall notify Grantee in writing as soon as reasonably practical after receiving written notice of any third-party action or other claim against it. Grantee shall have the sole and absolute right, upon written notice to the City, to defend the claim with counsel of its own choosing. No settlement or compromise of any such claim will be made by Grantee without the prior written approval of the City, which approval shall not be unreasonably withheld, delayed or conditioned. Grantee and its agents, contractors, officers and employees shall consult and cooperate with the City while conducting its defense of the City, and the City shall fully cooperate with Grantee.
  
- B. Relocation. Grantee shall indemnify the City for any damages, claims, additional costs or expenses assessed against or payable by the City arising out of or resulting from Grantee's failure to remove, adjust or relocate any of its Wireless Communications Facilities in the Streets in a timely manner in accordance with a relocation schedule consistent with the City Code, furnished to Grantee by the City's duly authorized agent in writing, unless Grantee's failure arises from the City's or the City's contractor's negligence or willful misconduct.
  
- C. Hazardous Substances. Grantee agrees to forever indemnify the City, its officers, agents and employees, from and against any claims, costs and expenses of any kind, whether direct or indirect, or pursuant to any state or federal law, statute, regulation or order, for the removal or remediation of any leaks, spills, contamination or residues of Hazardous Substances, directly attributable to Grantee's Wireless Communications Facilities in the Streets. "Hazardous Substances" shall have the meaning given by ORS 465.200(16) (2017).

#### **Section i. STREET USE AND CONSTRUCTION.**

- A. General. Grantee shall use the City's Streets and Install Grantee's Wireless Communications Facilities in accordance with the laws of the State of Oregon and applicable City regulations, ordinances and standards.
  
- B. Restoration of Streets. Grantee's responsibility for maintaining repairs to any Street surface areas disturbed by Grantee's work shall end upon the occurrence of either a reconstruction of the Street in an approved manner by the City (curb to curb) or upon subsequent work at the same location by any other Person franchised, permitted, licensed or otherwise granted authority by the City, whichever occurs first.



- C. Relocation. Grantee shall relocate its Wireless Communications Facilities within the Streets when public convenience requires such change, in compliance with the requirements of applicable Portland City Code and administrative regulations, and the expense thereof shall be paid by Grantee (however payment by Grantee shall in no way limit Grantee's right, if any, to seek reimbursement for such costs from any third-party).
- D. Acquisition of Wireless Communications Facilities. Within thirty (30) calendar days of Grantee's acquisition of Wireless Communications Facilities in the Streets, or upon any addition or annexation to the City of any area in which Grantee owns or operates any Wireless Communications Facility within the Streets, Grantee shall submit to City a written statement describing all Wireless Communications Facilities involved, whether authorized by franchise, license, permit or any other similar form of right granted by the City, and specifying the location of all such acquired Wireless Communications Facilities. Such Wireless Communications Facilities shall immediately be subject to the terms of this Permit, with a reasonable period of time to bring the acquired Wireless Communications Facilities into compliance with this Permit. The City expressly reserves the right to install, affix, maintain, remove or relocate City streetlights and other City-owned infrastructure, including traffic signals, beacons, signs and transportation control equipment, in the Streets without charge, for use by the City or other government entities and for emergency services.
- E. Collocation. Grantee's Wireless Communications Facilities shall be attached to poles and other infrastructure located within the Streets. Grantee shall also allow and encourage other wireless carriers to collocate Wireless Communications Facilities on poles and other infrastructure with Grantee's Wireless Communications Facilities; provided such collocation does not interfere with Grantee's Wireless Communications Facilities or jeopardize the physical integrity of the poles or other infrastructure, and provided the owner of the poles or other infrastructure consents to such collocations.
- F. Radio Frequency Emission Levels. All existing and proposed Wireless Communications Facilities are prohibited from exceeding, or causing other Wireless Communications Facilities to exceed, the radio frequency emission standards specified in Part 1, Practice and Procedure, Title 47 of the Code of Federal Regulations, Section 1.1310, Radio Frequency Radiation Exposure Limits.
- G. Discontinuing Use of Wireless Communications Facilities. If Grantee decides to discontinue use of Wireless Communications Facilities within all or a portion of the Streets and does not intend to use those Wireless Communications Facilities again in the future, the City may direct Grantee to remove the Wireless Communications Facilities or may permit the Wireless Communications Facilities to be left in place as abandoned, which permission shall not be unreasonably withheld or delayed. If Grantee is permitted to abandon its Wireless Communications Facilities in place, upon written consent of the City, the ownership of Wireless Communications Facilities in the City's Streets shall transfer to the City and Grantee shall have no further obligation therefor. Notwithstanding Grantee's request that any such Wireless Communications Facility remain in place, the City Engineer may require Grantee to remove the Wireless



Communications Facility from the street area or modify the Wireless Communications Facility in order to protect the public health and safety or otherwise serve the public interest. The City Engineer may require Grantee to perform a combination of modification and removal of the Wireless Communications Facility. Grantee shall complete such removal or modification in accordance with a reasonable schedule set by the City Engineer. Until such time as Grantee removes or modifies the Wireless Communications Facility as directed by the City Engineer, or until the rights to and responsibility for the Wireless Communications Facility are accepted by another Person having authority to construct and maintain such Wireless Communications Facility, Grantee shall be responsible for all necessary repairs and relocations of the Wireless Communications Facility, as well as restoration of the Streets, in the same manner and degree as if the Wireless Communications Facility were in active use, and Grantee shall retain all liability for such Wireless Communications Facility. In no event shall Grantee's removal of a Wireless Communications Facility entitle Grantee to a full or partial refund of any franchise fee remitted to City.

#### **Section j. INTERFERENCE.**

- A. Grantee agrees to Install Wireless Communications Facilities of the type and frequency which will not cause harmful interference which is measurable in accordance with then-existing industry standards to any equipment of City that is operating within its licensed frequencies, if any, and in accordance with applicable laws and regulations. In the event any after-installed Grantee's equipment causes such interference, and after City has notified Grantee of such interference by a written communication, Grantee will take all commercially reasonable steps necessary to correct and eliminate the interference including but not limited to, at Grantee's option, powering down such interfering equipment and later powering up such interfering equipment for intermittent testing. If the interference continues for a period in excess of forty-eight (48) hours following notification, City shall have the right to require Grantee to reduce power and/or cease operations until Grantee can repair the interfering equipment. If, after a period of six (6) months, Grantee is unable to fully eliminate the interference, City shall be entitled to require Grantee to relocate the equipment.
- B. Grantee agrees that no diminution of light, air or signal transmission by any structure (whether or not erected by City) will entitle Grantee to any reduction of the annual franchise fee, nor result in any liability of City to Grantee, or in any other way affect this Permit.

#### **Section k. CITY'S CONSENT REQUIRED FOR ASSIGNMENT, TRANSFER, MERGER, LEASE OR MORTGAGE.**

- A. Council Consent. Except as otherwise provided in Sections k.B and k.C below, neither this Permit, nor all or substantially all of Grantee's Wireless Communications Facilities, shall be sold, leased, assigned, merged or otherwise transferred without the prior written consent of the City as expressed by ordinance, which consent shall not be unreasonably withheld or delayed, except to entities that control, are controlled by, or are under

common control with Grantee. Grantee shall give written notice to the City of any transfers to entities under such common control within ten (10) business days of such transfers. The City's granting of consent in one instance shall not render unnecessary any subsequent consent in any other instance.

- i. In determining whether the City will consent, the City may inquire into the technical, legal and financial qualifications of the prospective party. Grantee shall assist the City in any such inquiry.
- ii. No sale, lease, assignment, transfer or merger for which the City's consent by ordinance is required may occur until the successor, assignee or lessee has complied with the requirements of this Permit, including but not limited to providing certificates of insurance. Within ten (10) business days after execution and delivery of any instrument so consented to by the City, Grantee shall file with the City Auditor an executed counterpart or certified copy thereof.

**B. Leases.** Grantee shall not lease any portion of its Permitted Wireless Communications Facilities without the City's prior consent as expressed by ordinance, which consent shall not be unreasonably withheld, conditioned or delayed. However, and notwithstanding Section k.A, Grantee may lease any portion of its Wireless Communications Facilities in the ordinary course of its business without otherwise obtaining the City's consent by ordinance, so long as Grantee remains solely responsible for locating, servicing, repairing, relocating or removing such portion of its Wireless Communications Facilities. A lessee of any portion of Grantee's Wireless Communications Facilities shall not obtain any rights under this franchise.

**C. Sales.** Notwithstanding Section k.A, Grantee may sell portions of its Wireless Communications Facilities in the ordinary course of its business, without otherwise obtaining the City's consent by ordinance, so long as Grantee complies with the following conditions:

- i. The sale is to the holder of a current and valid franchise, license, permit, or other similar right granted by the City;
- ii. Within fourteen (14) calendar days of the sale being executed and becoming final, Grantee shall provide written notice to the City, describing the portions of the Wireless Communications Facilities sold by Grantee, identifying the purchaser of the Wireless Communications Facilities, the location of the Wireless Communications Facilities and providing an executed counterpart or certified copy of the sales documents;
- iii. Grantee remains solely responsible for locating, servicing, repairing, relocating or removing its remaining Wireless Communications Facilities; and
- iv. Within fourteen (14) calendar days of the sale being executed and becoming final, the purchaser of such Wireless Communications Facilities shall file written notice

to the City that it has assumed sole responsibility for locating, servicing, repairing, relocating or removing the purchased Wireless Communications Facilities under the purchaser's current and valid franchise, license, permit or other similar right granted by the City. The purchaser shall not obtain any of Grantee's rights under this Permit.

## **Section I. PERMIT VIOLATIONS.**

**A. Remedies.** In addition to any rights set out elsewhere in this Permit, or such other rights as it may possess, and subject to the notice and cure terms set forth in Section I.F below, the City reserves the right at its discretion to apply any of the following remedies, alone or in combination, in the event Grantee violates any material provision of this Permit, including but not limited to payment of the franchise fee, submitting timely and accurate reports, providing timely access to records and maintaining all required insurance and performance bonds:

- i. Impose liquidated damages as provided in Section I.B;
- ii. Recover specific damages from all or any part of the security provided pursuant to this Permit; provided, however, the assessment shall be for such amount as the City reasonably determines is necessary to remedy the violation;
- iii. Commence litigation seeking recovery of monetary damages or specific performance of this Permit, as such remedy may be available;
- iv. Suspend Grantee's Permit rights related to the violation, until Grantee corrects or otherwise remedies the violation;
- v. Reduce the duration of the term of this Permit on such basis as is reasonable; or
- vi. Revoke this Permit.

## **B. Liquidated Damages.**

- i. The City and Grantee recognize that delays, expense and unique difficulties would be involved in establishing actual losses suffered by the City and the public as a result of Grantee's violation of certain material provisions of this Permit. In the circumstances identified in this Section, where proof of specific, actual damages would not be feasible, the City and Grantee agree that the City may require Grantee to pay liquidated damages to the City. The parties agree that such amounts are a reasonable estimate by the parties of the harm (including increased costs of administration and other damages difficult to measure) the City and the public would suffer in the event of Grantee's breach of the following provisions:

- a. Failure to send reports or other requested information or data as required by Sections d and e;

- b. Failure to respond to financial review requests as required by Section e;
    - c. Failure to provide or maintain insurance or bonds as required by Sections f and g; and
    - d. Failure to comply with Section k in connection with any transfer.
  - ii. Subject to Grantee's right to notice and the opportunity to cure as provided in Section l.F, if the City determines that Grantee has violated any of the provisions listed above, the City may assess liquidated damages of \$1,000 on a per violation basis. The liquidated damage amount is stated in 2018 dollars and shall be adjusted each year for any increase in the Consumer Price Index (CPI) for Urban Wage Earners and Clerical Workers for the West Region, Size A (over 2.5 million) for the prior year, unadjusted for seasonal variations, as determined by the Bureau of Labor and Statistics of the Department of Labor and as published in such Bureau of Labor Statistics' Detailed Report.
- C. Choice of Remedy. In determining which of the remedies available under this Permit is appropriate, the City may consider, among other things: (i) the nature and extent of the violation; (ii) whether Grantee has had a history of similar violations; (iii) the Person burdened by the violation and the cost of remedying the violation; (iv) the nature of the remedy required in order to prevent further such violations; and (v) such other factors as the City may deem appropriate.
- D. Revocation. In addition to its other rights and remedies as set forth in this Permit, and subject to applicable bankruptcy laws, the City shall have the right to revoke this Permit after the appointment of a receiver or trustee to take over and conduct Grantee's business, or the initiation of receivership, reorganization, insolvency or other similar action or proceeding, unless Grantee, its receiver or trustee timely and fully perform all obligations, until such time as this Permit is either rejected or assumed by Grantee, its receiver or trustee.
- E. Grantee Obligations. Grantee shall not be relieved of its obligations to comply promptly with this Permit by reason of any failure of the City to enforce prompt compliance. The City's failure to enforce shall not constitute a waiver of any term, condition or obligation imposed upon Grantee; nor a waiver of rights by the City or acquiescence in Grantee's conduct. The acts or omissions of affiliates are not beyond Grantee's control, and the knowledge of affiliates shall be imputed to Grantee.
- F. Notice and Opportunity to Cure.
- i. The City shall give Grantee thirty (30) calendar days' prior written notice of its intent to exercise any of its rights under Section l.A, identifying the reasons for such action.

- ii. If Grantee removes or otherwise cures to the satisfaction of the City the asserted violation constituting the stated reason within the thirty (30) calendar day notice period, or if cure is not reasonably possible within the thirty (30) calendar day period and Grantee initiates good faith efforts satisfactory to the City within the thirty (30) calendar day period to cure the asserted violation constituting the stated reason and the efforts continue in good faith, the City shall not exercise its rights under Section 1.A.
- iii. If Grantee fails to remove or otherwise cure the asserted violation constituting the stated reason within the thirty (30) calendar day notice period, or if Grantee does not undertake and continue efforts satisfactory to the City to remedy the stated reason, then the City may exercise any or all of the remedies available under Section 1.A or such other rights as the City may possess.

**G. Removal of Wireless Communications Facilities.** If the City has revoked this Permit as provided in Section 1.A, or if this Permit has expired without being renewed or extended, all of Grantee's rights under this Permit shall immediately cease and be divested. Thereafter, except as provided in this Section, or as otherwise provided by ordinance, Grantee shall at its own expense remove its Wireless Communications Facilities from the Streets and restore the Streets to the standards provided in applicable regulations of the City. In the event of a failure by Grantee to properly perform such work, then the City may perform the work and collect the cost thereof from Grantee. The cost thereof shall be a lien upon Grantee's Wireless Communications Facilities and a set-off against any sums owed Grantee by City.

**Section m. FCC'S SMALL CELL ORDER AND MUNICIPAL CHALLENGE TO ORDER.** This Permit was negotiated prior to the effective date of the Federal Communication Commission's 2018 Small Cell Order (Order). The City has filed a legal challenge to the Order. The parties acknowledge and agree to comply with the terms and conditions of this Permit and that, after reviewing the facts and circumstances, this Permit's timing, unique circumstances and exchange of values is appropriate and negotiated in good faith, notwithstanding the future effective date of the Order or the resolution of any relevant litigation.

**Section n. EXPIRATION.** Until the expiration of this Permit, the City shall have the right, at its election, to: (i) renew or extend Grantee's Permit; (2) allow the Permit to expire without further action; or (3) take such further action as the City deems appropriate. Until such time as the City exercises its rights under this Section, Grantee's rights and responsibilities within the City shall be controlled by the terms of this Permit.

**Section o. MISCELLANEOUS PROVISIONS.**

- A. **Severability.** The parties agree that if any term or provision of this Permit, with the sole exception of Section d, is declared by a court of competent jurisdiction to be illegal or in conflict with any law, the validity of the remaining terms and provisions shall not be affected, and the rights and obligations of the parties shall be construed and enforced as if the Permit did not contain the particular term or provision held to be invalid. If Section d

is declared by a court of competent jurisdiction to be illegal or in conflict with any law, this Permit shall be automatically terminated and City shall refund to Grantee within sixty (60) calendar days thereafter all unexpended payments under Section d.B.

Notwithstanding the foregoing, all provisions concerning indemnity shall survive the revocation of this Permit for any cause. Expiration or revocation of this Permit shall not extinguish, prejudice or limit either party's right to enforce this Permit with respect to any default or defect in performance that has not been corrected.

**B. Regulation and Nonenforcement by the City.** The City Council shall be vested with the power and authority to reasonably regulate the exercise of the privileges permitted by this Permit in the public interest. Grantee shall not be relieved of its obligations to comply with any of the provisions of this Permit by reason of any failure of the City to enforce prompt compliance, nor does the City waive or limit any of its rights under this Permit by reason of such failure or neglect.

**C. Force Majeure.**

- i. *Definition.*** "Force Majeure" shall mean Acts of God, landslides, earthquakes, lightning, fires, hurricanes, volcanic activity, storms, floods, washouts, droughts, civil disturbances, acts of terrorism or of the public enemy, partial or entire failure of utilities, strikes, explosions, lockouts or other industrial disturbances, insurrections, public riots or other similar events which are not reasonably within the control of the parties.
- ii. *Grantee Responsibility.*** If Grantee is wholly or partially unable to carry out its obligations under this Permit as a result of Force Majeure, Grantee shall give the City prompt notice of such Force Majeure, describing the same in reasonable detail, and Grantee's obligations under this Permit, other than for the payment of monies due, shall not be deemed in violation or default for the duration of the Force Majeure. Grantee agrees to use its best efforts to remedy as soon as possible, under the circumstances, Grantee's inability to carry out its responsibilities and duties.

**D. Choice of Forum.** Any litigation between the City and Grantee arising under or regarding this Permit shall occur, if in the state courts, in the Multnomah County Court having jurisdiction thereof, and if in the federal courts, in the United States District Court for the District of Oregon, Portland.

**E. Choice of Law.** This Permit shall be governed by and construed in accordance with the laws of the State of Oregon, even if Oregon's choice of law rules would otherwise require application of the law of a different state.

**F. Notice.** All notices to, and other written communication between, the parties shall be deemed to be received five (5) business days after being sent by pre-paid first class certified mail return receipt requested, or upon receipt when sent by reliable expedited courier services which provide written evidence of delivery. All notices and written



communication shall be sent to the parties as set forth below, or to such other places as they may designate by like notice from time to time.

If to City:

Office for Community Technology  
City of Portland  
111 SW Columbia Street, Suite 600  
Portland, OR 97201

If to Grantee:

New Cingular Wireless PCS, LLC  
Attn: Network Real Estate  
Administration  
Re: Cell Site: Portland Franchise (OR)  
Fixed Asset #:  
575 Morosgo Drive NE  
Atlanta, GA 30324

With a copy to:

City Attorney's Office  
City of Portland  
1221 SW 4th Avenue, Room 430  
Portland, OR 97204

With a copy to:

New Cingular Wireless PCS, LLC  
Attn: Legal Department  
Re: Cell Site: Portland Franchise (OR)  
Fixed Asset #:  
208 S. Akard Street  
Dallas, Texas, 75202-4206

#### **G. Public Records.**

- i. *General.* Grantee acknowledges that information submitted by Grantee to the City may be open to public inspection under the Oregon Public Records Law.
- ii. *Confidential Information.* Grantee may identify information submitted to the City as "Confidential," if Grantee reasonably believes such information is qualified for an exemption recognized under the Public Records Law. When submitting such information to the City, Grantee shall also submit documentation that specifically identifies the applicable exemption under the Public Records Law and state the reason(s) Grantee believes the information is exempt. The City shall take reasonable steps to keep the identified information confidential, acting consistently with the Public Records Law.
- iii. *Notice to Grantee.* Within five (5) business days of receiving a public records request for information identified by Grantee as confidential, the City shall provide Grantee with written notice of the request, including a copy of the request. Within the limits and discretion allowed by Oregon laws, the City will maintain the confidentiality of information.
- iv. *City Discretion.* The City shall retain discretion to determine whether to release the requested information, consistent with the Public Records Law. Nothing in this Section affects Grantee's right to seek legal relief to prevent the City's release of Grantee's confidential information.

- H. Amendment. The City has negotiated this Permit in good faith and in reliance upon the information provided by Grantee regarding the scope of its authority to offer services associated with its Wireless Communications Facilities. If Grantee offers or receives authority to offer services outside the scope of this Permit that utilize Grantee's Wireless Communications Facilities in the Streets, Grantee shall immediately notify the City. Within ninety (90) calendar days of receiving such notice, the City may elect to enter into negotiations with Grantee to amend this Permit, to extend separate authority to Grantee for such services, or to proceed with early revocation of this Permit. The parties will negotiate in good faith to reach mutual agreement on the lawful means to provide the necessary authority for Grantee to provide such services using Streets.
- I. Written Acceptance. On or before the thirtieth (30th) calendar day after this Permit becomes effective, Grantee shall file in the Office of the Auditor a written acceptance of this Permit substantially in the form attached hereto as **Exhibit 2**, executed by Grantee, meeting the approval of the City Attorney. Any failure on the part of Grantee to file such written acceptance within such time shall be deemed an abandonment and rejection of the rights and privileges conferred hereby and this Permit shall thereupon be null and void. Such acceptance shall be unqualified and shall be construed to be an acceptance of all the terms, conditions and restrictions contained in this Permit.
- J. Other Authority Superseded. Upon effectiveness of this Permit, any and all authority to operate previously granted to Grantee by the City is superseded by this Permit.
- K. Entire Agreement. This Permit contains the entire agreement between the City and Grantee and supersedes all prior written or oral discussions or agreements. There are no oral or written understandings that vary or supplement the conditions of this Permit that are not contained here.
- L. Captions. Captions shall not affect the meaning and interpretation of this Permit.

Passed by the Council: MAR 13 2019  
 Mayor Ted Wheeler  
 Prepared by JL/MKH  
 Date Prepared: 2/14/19

Mary Hull Caballero  
 Auditor of the City of Portland

By 

Deputy

122 - 228

1140

Agenda No.  
**ORDINANCE NO.**  
 Title

189420 As Amended

✓ \*Grant a temporary, revocable permit to New Cingular Wireless PCS, LLC for wireless communications services in the City. (Ordinance)

<b>INTRODUCED BY</b> Commissioner/Auditor: <b>Mayor Wheeler</b>	CLERK USE: DATE FILED <u>FEB 05 2019</u>
<b>COMMISSIONER APPROVAL</b> Mayor—Finance & Administration - Wheeler <i>YOD</i> Position 1/Utilities - Fritz Position 2/Works - Fish Position 3/Affairs - Hardesty Position 4/Safety - Eudaly	Mary Hull Caballero Auditor of the City of Portland  By: <i>[Signature]</i> Deputy
<b>BUREAU APPROVAL</b> Bureau: OCT Bureau Head: Elisabeth Perez <i>CP</i>	ACTION TAKEN:  FEB 13 2019 <b>PASSED TO SECOND READING As Amended</b>
Prepared by: Jennifer Li Date Prepared: January 28, 2019	MAR 13 2019 9:30 A.M.
Impact Statement Completed <input checked="" type="checkbox"/> Amends Budget <input type="checkbox"/>	
Portland Policy Document If "Yes" requires City Policy paragraph stated in document. Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>	
<b>City Auditor Office Approval:</b> required for Code Ordinances	
<b>City Attorney Approval:</b> required for contract, code, easement, franchise, comp plan, charter <i>MKH 2/1/19</i>	
Council Meeting Date <b>February 13, 2019</b>	

AGENDA	FOUR-FIFTHS AGENDA	COMMISSIONERS VOTED AS FOLLOWS:	
<b>TIME CERTAIN</b> <input type="checkbox"/> Start time: _____  Total amount of time needed: _____ (for presentation, testimony and discussion)		YEAS	NAYS
<b>CONSENT</b> <input checked="" type="checkbox"/> <i>PCU</i>	1. Fritz	1. Fritz <input checked="" type="checkbox"/>	
<b>REGULAR</b> <input type="checkbox"/> Total amount of time needed: _____ (for presentation, testimony and discussion)	2. Fish	2. Fish <input checked="" type="checkbox"/>	
	3. Hardesty	3. Hardesty	<input checked="" type="checkbox"/>
	4. Eudaly	4. Eudaly <input checked="" type="checkbox"/>	
	Wheeler	Wheeler <input checked="" type="checkbox"/>	