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May 6, 2014

Jennifer Li, Utility Program Manager  
Office for Community Technology  
Revenue Bureau, City of Portland  
111 SW Columbia Street, Suite 600  
Portland, OR 97201

*Sent via email: Jennifer.Li@portlandoregon.gov*

Subject: AT&T Small Cell Pilot Program  
Proposed Amendments to Right-of-Way Agreement  
New Ordinance Amending Ordinance No. 185789

Dear Jennifer:

On behalf of New Cingular Wireless PCS, LLC ("AT&T"), this letter confirms that AT&T is interested in partnering with the City of Portland to establish a small cell pilot program, which will allow the City and AT&T to develop standards for the latest technology in wireless service. AT&T's development team is currently researching whether there is a suitable small cell network candidate that meets feasibility requirements and fits within AT&T's national small cell team plan. AT&T asks that the City Council amend its right-of-way agreement to approve the guidelines for a pilot project that, if pursued by AT&T, will help introduce small cell technology to Portland.

Demand for wireless service has skyrocketed in the past several years. From 2007 to 2013, AT&T saw the demand for data on its network grow by 30,000 percent.<sup>1</sup>

Furthermore, small businesses depend upon wireless service to compete. A recent AT&T survey of small businesses indicated that nearly all (98%) of small businesses utilize wireless technologies in their operations. Sixty-six percent of small businesses

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<sup>1</sup> AT&T. "AT&T Small Cells." *AT&T Press Room*, June 29, 2013.

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May 6, 2014  
Page 2

responded that they could not survive, or that it would be a major challenge to survive, without wireless service.<sup>2</sup>

Similarly, demand for wireless service in residential areas has grown significantly. For example:

- Nearly two out of five (38.2%) American homes no longer use traditional landline telephone service and instead choose to be wireless only.<sup>3</sup>
- In Oregon, 36.8% of homes choose to be wireless only and another 16.1% are “wireless-mostly.”<sup>4</sup>
- Nearly two-thirds of American adults aged 25–29 (65.6%) live in households with only wireless telephones.<sup>5</sup>

Consistent with these trends, the City has identified broadband service and infrastructure as vital for a prosperous and vibrant community. The City’s new policy direction is seen in its Broadband Strategic Plan, the Portland Plan, and the City’s draft new Comprehensive Plan. AT&T is committed to its continuing investment in Portland to support the City’s broadband and wireless goals.

As you know, the latest technology for meeting the rapidly growing demand for wireless services is small cells, which can complement the existing macro cell network by, among other things, adding capacity in targeted areas and reaching customers in areas not well situated for macro cell facilities.

The benefits of small cells are many. Small cell facilities are typically smaller in size with a minimal visual impact, and they work flexibly in a network, with multiple smaller facilities jointly providing the capacity or coverage that might otherwise be provided by one traditional cell facility. Small cells are very appropriately located on existing utility structures in the right-of-way, and AT&T proposes to attach its small cell facilities to poles in its introduction of the new technology to Portland.

AT&T’s current right-of-way agreement and the City’s regulations do not contemplate small cell technology, and their terms do not necessarily fit this different kind of facility. Through the small cell pilot program, the appropriate location, design, processes, and any other terms and conditions for installing small cell facilities can be determined

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<sup>2</sup> AT&T. “2013 AT&T Small Business Technology Poll.” *AT&T Website*. From URL: <http://www.att.com/gen/press-room?pid=23878>

<sup>3</sup> CDC Wireless Substitution: State-Level Estimates from the National Health Interview Survey, 2012 (December 2013).

<sup>4</sup> *Id.* at 9.

<sup>5</sup> CDC Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, January-June 2013 (June 2013).

May 6, 2014  
Page 3

jointly by the City's Office for Community Technology, AT&T, and when applicable, the utility pole owner.

Thank you for your continuing assistance with supporting the development of new technology in Portland. AT&T looks forward to working with the City to update its wireless standards to keep pace with rising demand and evolving technology.

Sincerely,

A handwritten signature in black ink, appearing to read 'Meridee E. Pabst', with a stylized flourish at the end.

Meridee E. Pabst

cc: Jan Bans  
Danielle Edson  
George Granger  
Ken Lyons  
Cindy Manheim  
Kyla Powell

EXHIBIT B. Agreement showing amendments stated in Ordinance for reference.

Grant a right-of-way use agreement to New Cingular Wireless PCS, LLC for three years for mobile telecommunications services, and establish terms and conditions (Ordinance).

The City of Portland ordains:

Section 1. NATURE AND TERM OF GRANT

- A. Grant of Authority. The City does hereby grant New Cingular Wireless PCS, LLC, ("AT&T Mobility" or "Grantee"), a Delaware limited liability company, successor-interest to AT&T Wireless Services of Oregon, Inc., and qualified to do business in the State of Oregon, and Grantee's successors and assigns, as approved by the City of Portland under Section 12 of this Agreement, the privilege and authority to access Structures located in the City Streets to construct, repair, replace, maintain and operate Facilities for a Telecommunications System in, under and over the surface of City Streets. Grantee intends to use its Telecommunications System to provide Mobile Telecommunications Services. Grantee represents that it has applied for and received all necessary regulatory authority to provide Mobile Telecommunication Services.
1. This Agreement does not authorize Grantee to operate a cable system or provide video programming, as defined by 47 U.S.C.A §522, or to provide a telecommunications service as defined in ORS 759.005(8) (2011).
  2. Nothing in this Agreement shall preclude Grantee from entering into a contract for the use of any portion of its Telecommunications System with any Person or other entity for any services, whether specified herein or not, provided that said Person or entity is another franchisee, licensee, or said Person has assumed responsibility for obtaining any required authority from the City.
- B. Duration. The term of this Agreement, and all rights and obligations pertaining thereto, shall be three (3) years, expiring on June 30, 2015, unless terminated sooner as provided herein or renewed in accordance with Section 15.
- C. Effective Date. The effective date of this Agreement shall be upon passage by the City Council, unless Grantee fails to file an unconditional written acceptance of this Agreement in accordance with Section 17 of this Agreement, in which event this Agreement shall thereupon be null and void. The passage date of this Agreement is set forth on the last page of the original hereof, as stamped by the Council Clerk.
- D. Agreement Not Exclusive. This Agreement is not exclusive. The City expressly reserves the right to grant 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 hereunder, by lease, franchise, permit or otherwise.

- E. Charter and General Ordinances To Apply. To the extent authorized by law, this Agreement is subject to the Charter of the City of Portland and general ordinance provisions passed pursuant thereto, affecting matters of general City concern and not merely existing contractual rights of Grantee now in effect or hereafter made effective. Section 10-201 through 10-218, inclusive, of the Charter of the City of Portland, (1942 compilation, as revised in part by subsequent amendments), are hereby incorporated by reference and made a part of this Agreement, to the extent authorized by law. Nothing in this Agreement 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.
- F. Mutual Reservation of Rights. Nothing in this Agreement shall be deemed a waiver by Grantee or the City of the rights of Grantee or City under applicable law. By entering into this Agreement, Grantee is not waiving its rights to seek judicial or administrative review of the provisions in this Agreement under applicable federal, state or local law. The City reserves and in no way waives any right to enforce the requirements in this Agreement during the term of this Agreement and Grantee agrees to such reservation and non-waiver by the City. Grantee also reserves and in no way waives any right to challenge the enforcement of the requirements in this Agreement and the City agrees to such reservation and non-waiver by Grantee.

## Section 2. DEFINITIONS

- A. Captions. Throughout this Agreement, captions to sections are intended solely to facilitate reading and to reference the sections and provisions of this Agreement. The captions shall not affect the meaning and interpretation of this Agreement.
- B. Definitions. For the purpose of this Agreement, the following terms, phrases, and their derivations shall 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 number include the singular number, and words in the singular include the plural number. The word "shall" is always mandatory and not merely directory.
1. "Agreement" means this Agreement, as approved by the City Council and accepted by Grantee, according to the terms of Section 17 of this Agreement.
  2. "City" means the City of Portland, Oregon, a municipal corporation, and all of the territory within its corporate boundaries, as such may change from time to time.
  3. "City Council" means the Council of the City of Portland.
  4. "Grantee" or "AT&T Mobility" means New Cingular Wireless PCS, LLC, a Delaware limited liability company, successor-interest to AT&T Wireless Services of Oregon, Inc.
  5. "Facility" means capital, equipment and property, including but not limited to the optical fiber, wires, pipes, mains, conduits, ducts, pedestals, antennas, cabinets and electronic equipment located in the Streets used for transmitting, receiving, distributing, providing

or offering Mobile Telecommunication Services over the spectrum of radio frequencies licensed by the Federal Communications Commission.

6. "Attached Facilities" are any Facilities affixed to a Structure except optical fiber, wires, coaxial cable and the mounting hardware used to attach optical fiber, wires, coaxial cable. Examples of "Attached Facilities" include but are not limited to antennas, telephone boxes, power boxes, and other equipment boxes and cabinets on Structures;
7. "Guy Pole" or "Support pole" means a pole that is used primarily to structurally support an electrical or telephone distribution or transmission pole, but has no energized conductors or telephone wires or Facilities attached.
8. "Licensee" is any Person franchised, licensed or otherwise permitted by the City to use the Streets including, if appropriate, the City itself. For the purposes of Section 6.C, Grantee shall not be construed to be a "Licensee" as defined herein.
9. "Mobile Telecommunications Service" means commercial mobile radio service, as defined in Section 20.3 of title 47 of the Code of Federal Regulations as in effect on June 1, 1999.
10. "Penalties" means any and all monetary penalties provided for in this Agreement.
11. "Person" means any individual, sole proprietorship, partnership, association, corporation or other form of organization authorized to do business in the State of Oregon, and includes any natural person.
12. "Streets" or "Right(s)-of-Way" means the surface of, and the space above and below, any public street, road, alley or highway, within the City, used or intended to be used by the general public for travel, to the extent the City has the right to allow Grantee to use them.
13. "Structure" means any utility pole, Guy or Support pole, utility pole extension, light standard or other similar pole in the Streets that is suitable for the installation of Facilities. An "Original Structure" is a pole or other similar facility that has not been constructed, replaced or improved to accommodate Facilities.
14. "Telecommunications System" means all necessary Facilities owned or used by Grantee for the purpose of providing Mobile Telecommunications Services and located in, under and above City Streets, excluding ducts, conduits and vaults leased from another City franchisee, licensee, lessee or permittee.
15. "Year", "Annual", or "Annually" means the period consisting of a full calendar year, beginning January 1 and ending December 31, unless otherwise provided in this Agreement.

### Section 3. COMPENSATION AND AUDITING

A. Amount. As compensation for the benefits and privileges under this Agreement, and in consideration of permission to use the Streets of the City, Grantee shall pay the following fees to the City through the duration of the Agreement for the right to install Facilities on Structures in the Streets:

1. The Minimum Annual Fee. The Minimum Annual Fee for this Agreement shall be \$15,000. The Minimum Annual Fee may be applied to the Right-of-Way Use Fee, below, but the combined Minimum Annual and Right-of-Way Use fees shall never be less than \$15,000.
2. (a) Right-of-Way Use Fee. Grantee shall pay as a Right-of-Way Use Fee \$7,500 per year per Structure that has any Attached Facilities. If Attached Facilities occupy a Structure for less than one year, the amount of this Fee for that year shall be prorated at \$625 per month. The Right-of-Way Use Fee is calculated from the first day of the month following the date Attached Facilities are installed on a Structure;
- (b) The Right-of-Way Use Fee shall increase by the Consumer Price Index for Urban Age Earners and Clerical Workers for the Portland, Oregon metropolitan region for the prior year, unadjusted for seasonal variations, as determined by the Bureau of Labor Statistics of the Department of Labor. This increase is applicable beginning one year after the Effective Date of this Agreement and every year thereafter for the term of this Agreement.
3. Installation and Application Fee.
  - (a) There shall be a one-time Installation and Application Fee of \$2,000 payable to the Portland Bureau of Transportation for each new Site that Grantee uses for Attached Facilities. A 'Site' is a Base Station (a fixed location with radio frequency equipment) that serves Attached Facilities. An additional Installation and Application Fee will be due for every additional 10 Attached Facilities or portion thereof.
    - (i) Example: Grantee constructs a Site and places five Attached Facilities in the streets. One Installation and Application Fee is due. The following year Grantee places an additional four Attached Facilities in the streets which connect to the same base station. No new Installation and Application Fee is due because Grantee has not yet placed more than 10 Attached Facilities for this base station. The following year Grantee places an additional three Attached Facilities in the streets which connect to the same base station. One new Installation and Application Fee is due because the base station serves more than 10 Attached Facilities.

(b) If the Attached Facilities are planned to be placed on a Structure in a Priority 4 Street, then a separate one-time fee of \$2,000 shall be assessed and payable to the Office for Community Technology (OCT) upon application.

B. Remittance Dates.

1. Grantee shall pay the greater of the Minimum Annual Fee or the aggregate of the Right-of-Way Use Fees for all Grantee's sites in the Right-of-Way on or before each May 15. The remittance shall be for the previous year.
2. For any Attached Facilities occupying the Right-of-Way for less than a full year, Grantee shall pay the prorated Right-of-Way Use Fee on or before May 15 of the following year after the date of installation or removal.
3. The applicable Installation and Application Fees shall be due and owing when plans are submitted to the City for approval.

C. Late Payments: Any payment not paid when due shall be subject to a delinquency penalty charge of five percent (5%) of the unpaid amount. Failure to make full payment and penalty charges within sixty (60) days of the applicable payment date shall constitute a violation of this Agreement. In addition, all overdue amounts, including penalty charges, shall bear interest, until paid, at the rate of one percent (1%) per month.

D. Acceptance of Payment and Recomputation.

1. No acceptance of any payment made by Grantee shall be construed as an accord that the amount paid is, in fact, the correct amount, nor shall any acceptance of payments be construed as a release of any claim the City may have for further or additional sums payable. All amounts paid under Section 3 shall be subject to confirmation and recomputation by the City, provided that such audit and computation is completed within three (3) years of the date any audited and recomputed payment is due. If no such audit or financial review is conducted within the three (3) year period, then any claim that the City might have had for additional compensation shall be forever waived and relinquished. Grantee agrees to reimburse the City for:
  - a. The reasonable costs of such confirmation if the City's recomputation discloses that Grantee had paid 95% or less of the Agreement fees owing for the period at issue upon receipt of an invoice from the City showing such costs were actually incurred and directly related to the audit.
  - b. One-half of the reasonable costs of such confirmation if the City's recomputation discloses that Grantee had paid more than 95% but less than 98% of the Agreement fees owing for the period at issue.
  - c. The City's costs which may be reimbursed under this Section shall not exceed \$5,000.00 per audit or financial review.



- d. If the City determines that Grantee made any underpayment, and that the underpayment exceeded 5% of the amount due, Grantee shall pay late fees pursuant to Section 3.C, above.
  - e. If Grantee disputes the City's determination of underpayment, Grantee shall immediately place the disputed amount in an escrow account until final resolution.
2. The City and its agents and representatives shall have authority to arrange for and conduct reviews of Grantee's records pertaining to this Agreement including those for Facilities Grantee installed on structures in City Rights-of-Way and Grantee's performance bond and insurance policy as required in this Agreement. 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 be completed within three (3) years from the date payment was due. City requests for reviews shall be in writing. If Grantee has not provided copies of all information reasonably within the scope of the review to the City within 30 days from the date of the written request, Grantee shall provide access within the Portland metropolitan region, during normal business hours, upon 48 hours prior written notice. If the City requests in writing that Grantee provide, or cause to be provided, copies of any information reasonably within the scope of the review, and Grantee fails within 30 days of receipt of the request to provide, or cause to be provided, such information, then the three (3) year period shall be extended by one day for each day or part thereof beyond 30 days that Grantee fails to provide, or fails to cause to be provided, such requested information.

E. Cost of Pre-Franchising and Publication. Grantee shall pay the reasonable pre-franchising publication costs associated with this Agreement, as such publication is required by the City Charter.

#### Section 4. GENERAL INSURANCE AND BONDING PROVISIONS

##### A. Insurance.

- 1. At all times during which Grantee's Facilities are in the Streets as described in Section 1.A under this Agreement, Grantee shall comply with requirements for insurance and other applicable forms of financial guaranty for right-of-way permits, as established by applicable Portland City Code and implementing regulations in effect as of the date of this Agreement, along with any revisions implemented by the City during the term of this Agreement.
- 2. Grantee shall maintain on file with the City Auditor a certificate of insurance certifying the coverage required above. The certificate of insurance shall be subject to the approval as to form by the City Attorney.
- 3. In the alternative to providing a certificate of insurance to the City, certifying liability insurance coverage as required in this Section, Grantee may provide the City with a

statement regarding its self-insurance. Grantee's self-insurance shall provide at least the same amount and scope of coverage for Grantee and the City, its officers, agents and employees, as otherwise required under this Section. The adequacy of such self-insurance shall be subject to the approval as to form by the City Attorney. Upon Grantee's election to provide self-insurance coverage under this Section 4.A.3, any failure by Grantee to maintain adequate self-insurance shall be a material violation of this Agreement.

B. Faithful Performance Bond.

1. Upon the effective date of this Agreement, Grantee shall furnish proof of the posting of a faithful performance bond running to the City, with good and sufficient surety approved by the City, in the penal sum of ten thousand dollars (\$10,000), conditioned that Grantee shall well and truly observe, fulfill, and perform each term and condition of this Agreement. Grantee shall pay all premiums charged for the bond, and shall keep the bond in full force and effect at all times throughout the term of this Agreement, including, if necessary, the time required for removal of all of Grantee's Facilities installed in the City's Streets. The bond shall contain a provision that it shall not be terminated or otherwise allowed to expire without thirty (30) days prior written notice first being given to the City Auditor. The bond shall be subject to the approval as to form by the City Attorney.
2. During the term of this Agreement, Grantee shall file with the City Auditor a duplicate copy of the bond along with written evidence of payment of the required premiums. However, in no event shall the City exercise its rights against the performance bond under Section 4.B if a bona fide, good faith dispute exists between the City and Grantee.

- C. Construction Bond. At all times during which Grantee is constructing, repairing, replacing or maintaining its Facilities in the Streets, Grantee shall comply with the requirements for right-of-way permits established by applicable Portland City Code and implementing regulations in effect as of the date of this Agreement, along with any revisions implemented by the City during the term of this Agreement, for providing construction bonds or other forms of financial guarantee satisfactory to the City. ..

Section 5. COVENANT TO INDEMNIFY AND HOLD THE CITY HARMLESS

- A. General Indemnification. Grantee hereby agrees and covenants to indemnify, defend and hold the City, its officers, agents and employees, harmless from any claim for injury, damage, loss, liability, cost or expense, including court and appeal costs and reasonable attorney fees or expenses, arising from any casualty or accident to person or property by reason of any construction, excavation or any other act done under this Agreement, by or for Grantee, its agents or employees, or by reason of any neglect or omission of Grantee to keep its Facilities in a safe condition, but not if arising out of or by reason of any negligence or willful misconduct by the City, its officers, agents or employees. The City shall provide Grantee with prompt notice of any such claim, which Grantee shall defend with counsel of its own choosing and no settlement or compromise of any such claim will be done by the City

without the prior written approval of Grantee. Grantee and its agents, contractors and others shall consult and cooperate with the City while conducting its defense of the City.

- B. Relocation Indemnification. Grantee also hereby agrees to indemnify the City for any damages, claims, additional costs or expenses assessed against or payable by the City arising out of or resulting, directly or indirectly, from Grantee's failure to remove, adjust or relocate any of its Facilities in the City Streets in a timely manner in accordance with Section 6.E, unless Grantee's failure arises directly from the City's negligence or willful misconduct.
- C. Hazardous Substances Indemnification. Grantee agrees to forever indemnify the City against any claims, costs, and expenses, of any kind, whether direct or indirect, incurred by the City arising out of the release or threat of release of Hazardous Substances caused by Grantee's ownership or operation of Facilities in the Streets.

#### Section 6. CONSTRUCTION, REPLACEMENT, REPAIRS AND MAINTENANCE

- A. Permits. Grantee shall apply for and obtain all permits necessary for the construction, installation and maintenance of its Facilities and Structures in the Streets. Grantee shall pay all applicable fees due for City construction permits. All construction and maintenance of any and all Grantee's Facilities and Structures within the Streets incident to Grantee's provision of Mobile Telecommunications Services shall, regardless of who performs installation and/or construction, be and remain the responsibility of Grantee.
- B. Installation of Equipment. Grantee's Facilities and Structures shall be installed and maintained in accordance with the laws of the State of Oregon and the ordinances and standards of the City regulating such construction.
- C. Common Users.
  - 1. Use of Structures by Third-parties. Grantee acknowledges that the Streets have a finite capacity for containing Structures and other Facilities. Therefore, Grantee agrees that whenever the Grantee and any Licensee determine that collocation of Licensee's Facilities is safe, practical and will not result in signal or other interference, the Grantee shall allow such collocation on its Structures, subject to the approval of the City and the negotiation of a mutually acceptable collocation agreement between Grantee and Licensee. This right of use shall be subject to Section 6.C.2, to the terms and conditions of an agreement for use of Structures entered into by the Grantee and the Licensee, and to the safety and reliability of Grantee's Telecommunications System and maintenance requirements.
  - 2. Coordination of Licensee Usage.
    - a. All Attachments and Structures shall meet local, state and federal clearance and other safety requirements, be properly grounded and anchored, and meet the provisions of contracts executed between the Grantee and the Licensee. The Grantee may, at its option, correct any Attachment deficiencies and charge the Licensee for its costs.

Each Licensee shall pay the Grantee for any fines, fees, damages, or other reasonable costs the Licensee's Attachments cause the Grantee to incur.

D. Facility and Structure standards. This section establishes standards for attaching Facilities to Structures in the Streets. Unless otherwise specified, all references in this subsection 6.D to the existing or allowed height of a Structure or utility pole are measured from ground level.

1. Structure selection

- a. Grantee shall co-locate wireless Facilities on existing buildings, water towers or tanks, or on Original or Replacement Structures in the Streets.
- b. The Streets are prioritized for siting wireless Facilities. The categories for Streets may be identified by referring to the City's official map of Wireless Street Priorities. Grantee must attach Facilities onto Structures in the Streets in the following order of priority:
  - i. Priority 1 Streets (generally freeways, highways, and streets in industrial areas), before using poles on
  - ii. Priority 2 Streets (generally high traffic volume streets), before using poles on
  - iii. Priority 3 Streets (generally medium traffic volume streets), before using poles on
  - iv. Priority 4 Streets (generally low traffic volume residential streets).

If Grantee selects a Structure to support its Facilities on a Priority 4 street, Grantee shall provide RF contour maps (in color) illustrating the calculated coverage using the proposed antennas at the target signal level, plus and minus 5 dB, and the calculated coverage areas for all existing adjacent cell sites, to support the rejection of other Structures. If other Structures were ruled out for non-RF coverage reasons, Grantee shall identify and explain those reasons.

- c. For all Structures except those in Priority 1 Streets, Grantee must place antennas and Facilities first on Structures that carry high voltage transmission power lines before placing them on any other Structure. For the purposes of this subsection 6.D, "high voltage transmission" means lines with capacity for transmitting electricity of 57,000 volts or greater.
2. Original Structures. Facilities may be attached to Original Structures in the Streets, provided:
- a. The requirements in 6.D.1 are met;
  - b. Facilities do not jeopardize the physical integrity of the Structure;
  - c. Antennas and antenna mounting devices below the top of the Structure shall be mounted flush with the Structure or on extension arms that are no greater than one (1) foot in length.

- d. Antennas and antenna mounting devices above the top of the Structure:
  - i. Mounting devices and antennas other than omni-directional or “whip” antennas shall be concealed within a canister or unicell-style cylinder, the diameter of which shall be no greater than twelve inches (12”) more than the diameter of the Structure as measured six (6) feet from the butt of the Structure.
  - ii. The combined height of the antennas and mounting device on a Structure that carries high voltage transmission lines shall not project more than:
    - (A) Twenty (20) feet above the Structure if the Structure is in a Priority 2 or 3 Street.
    - (B) Fifteen (15) feet above the Structure if the Structure is 1) in a Priority 4 Street, and 2) less than or equal to fifty (50) feet in height; or
    - (C) Twenty (20) feet above the Structure if the Structure is 1) in a Priority 4 Street, and 2) more than fifty (50) feet in height.
    - (D) The combined height of the antenna and mounting device on Structures in Priority 1 Streets is not regulated.
  - iii. The combined height of the antennas and mounting device on a Structure that does not carry high voltage transmission lines shall not project more than:
    - (A) Fifteen (15) feet above a Structure in a Priority 2 or 3 Street; or
    - (B) Ten (10) feet above a Structure in a Priority 4 Street.
    - (C) The combined height of the antennae and mounting device on Structures in Priority 1 Streets is not regulated.
- e. All Facilities mounted on an Original Structure shall be painted, coated, or given a surface application to conform to the color and surface of the Structure. If cabinets require a special heat-reducing paint finish, they must be a neutral color such as beige, off-white, or light gray; and
- f. The dimensions of equipment cabinets mounted on poles in Priority 1, 2, and 3 Streets are not regulated. The height plus width plus depth of equipment cabinets mounted on poles in Priority 4 Streets shall be no more than 120 lineal inches combined.
- g. The Original Structure is not replaced with a taller Structure, except as authorized in Section 6.D.3.
- h. In the case of wireless Facilities proposed for stand-alone non-utility poles, Grantee shall first meet with the Office for Community Technology and the City Engineer to review feasibility and applicable requirements. After the Office for Community Technology notifies Grantee that the review has been completed, Grantee may commence the notice and meeting requirements under Section 6.D.4.

3. Replacement Structures. For purposes of this Section “Replacement Structure” shall mean a Structure that a) replaces an existing Structure or Original Structure to accommodate Facilities; and b) does not result in an increase in the total number of utility or guy poles in the Streets except as otherwise approved by the City Engineer. Facilities may be attached to Replacement Structures in the Streets, provided:
- a. The Replacement Structure is of sufficient integrity to support the Facilities;
  - b. The Replacement Structure must comply with the requirements of 6.D.1.a and b, and 6.D.2.e and f;
  - c. For all Structures except those in Priority 1 Streets, Grantee shall place antennas and Facilities first on Structures that carry high voltage transmission power lines before placing them on any other Structure. For the purposes of this subsection, “high voltage transmission” means either power lines with capacity for transmitting electricity of 57,000 volts or greater, or a skipped pole between high voltage transmission power lines. Skipped poles are defined in subsection 6.D.3.e.ii, below.
  - d. Color. Prior to installation, if the Replacement Structure is not made entirely of wood, it shall be painted, coated, or given a surface application to conform to the color of the Original Structure.
  - e. Replacement Height Limits. A Structure or Original Structure may be replaced with a Replacement Structure that is taller than the Original Structure. The total combined height of a Replacement Structure and any mounting devices shall be no greater than that allowed in Table 1, below.
    - i. Guy poles. Guy poles are shorter than the utility poles they support. On Priority 1, 2, and 3 streets a guy pole may be replaced as if it is the same height as the pole it supports using Table 1, below. On Priority 4 streets a Guy pole can be replaced up to the height of the pole it supports.
 

Example 1: A 20 foot guy pole that supports a 30 foot utility pole in a Priority 3 Street may be replaced as if it is 30’ tall. Therefore, it can be replaced with a pole 45 feet tall (30’ + 50% of 30’);

Example 2: A 20 foot guy pole that supports a 30 foot utility pole in a Priority 4 Street may be replaced up to a maximum of 30 feet.
    - ii. Skipped poles. There are Streets where runs of taller poles (typically high voltage transmission) and shorter poles (typically low voltage distribution or communication) are located on the same side of the Street. Where the shorter pole is situated adjacent and between two taller poles in the same run, the shorter pole is known as a “skipped pole.” A skipped pole may be replaced with a pole of the same height as the adjacent taller poles.

Example: A 45 foot (45') pole is situated adjacent and between two 65 foot (65') poles on the same side of a Priority 4 Street. The 45' pole can be replaced as if it were 65' using Table 1, below. Therefore, it can be replaced with a pole 80 feet tall (65' + 15'). If the 45' pole is on the opposite side of the Priority 4 Street from the taller poles, it cannot be replaced as if it were 65'; it can only be replaced up to a height of 60 feet (45' + 15').

Table 1

Maximum Combined Additional Height Allowed for Replacement Structures and Antenna Mounting Devices (All figures are in feet over the height of the existing Structure measured from ground level)	
Street Type	Additional Height
Priority 1 (freeways, highways, and streets in industrial areas)	80'
Priority 2 (high traffic volumes)	Lesser of 40' or 50% of the height of the pole
Priority 3 (medium traffic volumes)	Lesser of 35' or 50% of the height of the pole
Priority 4 (low traffic volumes; residential streets)	Lesser of 15' or 45% of the height of the pole

- f. Antennas above the top of the Replacement Structure and Mounting Device.  
Antennas shall not project more than three (3) feet above the maximum allowable height of the Replacement Structure and mounting device. Example: A 35 foot pole on a Priority 4 Street may be replaced with a pole and mounting device, the top of which is no more than 50 feet tall, and the measurement to the top of the antennas may be no more than 53 feet.
- g. Replacement Structure Engineering. In the event that a Structure needs to be replaced to provide structural capacity to support the Facility, Grantee must provide to the City a written statement from the pole owner that the Replacement Structure is no greater in width than the engineering minimum required by the Oregon Public Utility Commission.
- h. Street Trees. If a Structure in a Priority 4 street is proposed for replacement, Grantee shall submit the sum of One Thousand Dollars (\$1,000) to the Bureau of Parks to fund street tree planting. Grantee shall consult with the owner of the Structure and the Bureau of Parks to determine if a tree could be planted in the parking strip such that a mature tree canopy could develop around the Replacement Structure to reduce the visual impact of the Replacement Structure to the abutting property. If a tree cannot be planted with this result, then the Park Bureau shall deposit the funds into the Tree Damage Fund for its use.

4. Notice and Meeting. In the case of Grantee Facilities not otherwise co-located with existing Facilities, and proposed in or within 400 feet of a Priority 4 Street, Grantee shall provide written notice and participate in or conduct an informational neighborhood meeting consistent with this Agreement, except where superseded by applicable rules promulgated by the City.
  - a. Grantee will provide written notice to residents and property owners within a 400 foot radius of the Structure to be replaced. The notice shall: clearly state the name of the wireless carrier directing the work and what work will occur; identify the Structure to be replaced and Facilities that will be added; identify when the change is scheduled to begin and end; provide a contact name and telephone number of a representative of the wireless carrier, the pole owner, and the City of Portland; provide the date, time and location of a meeting to present and discuss the changes; and be sent no less than 14 days and no more than 30 days from the meeting date. A copy of this notice shall be provided to one or more officers of the city-recognized neighborhood association, business association, Neighborhood Coalition office or its equivalent, a representative of the pole owner, and the City.
  - b. Grantee shall participate in or conduct a meeting in coordination with the city-recognized neighborhood association and business association where the Structure is located. The meeting shall occur at least 30 days before Grantee submits its application to the City to place Facilities on a Structure. If no neighborhood association or business association meeting can be arranged, the carrier shall arrange a separate meeting at reasonably convenient date, time and location for the recipients of the notice.
5. Carrier shall not locate any Facilities, such as cabinets, at grade within the Streets, but may connect its Facilities in the Streets to Facilities located on property adjacent to the Streets in accordance with applicable City Code sections and with the permission of the adjacent property owner.
6. Carrier may make excavations in the City Streets for any Facility needed for the maintenance or extension of its Mobile Telecommunications System. Subject to obtaining permits from the City. Prior to doing such work, carrier must apply for, and obtain, appropriate permits from the City, and give appropriate notices to any franchisees, licensees, or permittees of the City, or bureaus of the City, or other units of government owning or maintaining facilities that may be affected by the proposed excavation.
7. In the event that emergency repairs are necessary for carrier's underground Facilities in the Streets, carrier shall immediately notify the City of the need for such repairs. Carrier may immediately initiate such emergency repairs, and shall apply for appropriate permits the next business day following discovery of the emergency. Carrier must comply with all Charter and ordinance provisions relating to such excavations or construction, including the payment of permit or license fees.



8. Locates. Carrier shall comply with the requirements of the Oregon Utility Notification Law, codified at ORS 757.542 to 757.562 and 757.993 (2011), and the rules and regulations promulgated thereunder.
9. Small cells and distributed antenna systems. Grantee may install and maintain small cells or distributed antenna systems (DAS) on existing Structures in the Streets. Small cell and DAS facilities are specifically excepted from Sections 3.A, 3.B, and 6.D.1 – 8 of this Agreement, but are otherwise subject to all other remaining terms and conditions of this Agreement. The location, design, processes, fees and any other terms and conditions for installing small cell and DAS facilities within the Streets will be determined jointly by the Office for Community Technology, Grantee, and when applicable, the utility pole owner. Grantee shall apply for and obtain all permits and permissions necessary from the City, the utility pole owners, and any other required entities for the construction, installation and operation of these small cells and DAS. All construction and maintenance of these small cells and DAS shall be the responsibility of Grantee, regardless of who performs the installations and/or construction.

E. Relocation.

1. The City shall have the right to require Grantee to change the location of its Facilities in the Streets when the public convenience requires such change, and the expense thereof shall be paid solely by Grantee. The City shall provide Grantee with the standard notice given under the circumstances to other Lessees, franchisees, licensees, or permittees. Should Grantee fail to remove or relocate any such Facilities by the date established by the City, the City may cause and/or effect such removal or relocation, and the expense thereof shall be paid by Grantee, including all expenses incurred by the City due to Grantee's delay. If the City requires Grantee to relocate its Facilities located within the City's Streets, the City will make a reasonable effort to provide Grantee with an alternate location for its Facilities within the City's Streets.
2. The provisions of this Section 6.E shall in no manner require or preclude Grantee from making any arrangements it may deem appropriate when responding to a request for relocation of its Facilities by any person or entity, other than the City where the Facilities to be constructed by said person or entity are not or will not become City owned, operated or maintained Facilities.

F. Record of Installations.

1. On the date Grantee files its acceptance in accordance with Section 17, and annually thereafter, in the event any new Facilities are constructed or any existing Facilities are relocated, Grantee shall provide to the City's Office for Community Technology, or its successor, a list that identifies the location of Grantee's Facilities in the Streets. In addition, Grantee shall file a Radio Frequency Transmission Facility Registration Form, made available by the City, for each existing and new Facility that is installed on Structures in the Streets. For existing Facilities, the form shall be filed on the date

Grantee files its acceptance in accordance with Section 17, and every two years thereafter. For new Facilities, the form shall be filed within ten (10) days of the date the Facility is attached to the Structure in the City Streets, and every two years thereafter.

2. Within thirty (30) days following Grantee's acquisition of any Facilities in the Streets, or upon any addition or annexation to the City of any area in which Grantee retains any such Facilities in the Streets, Grantee shall submit to the City a written statement describing all Facilities involved, whether authorized by agreement, license, permit or any other form of prior right, and specifying the location of all such Facilities. Facilities acquired by Grantee shall immediately be subject to the terms of this Agreement, within a reasonable period of time to bring such acquired Facilities into compliance with this Agreement.
3. Radio frequency emission levels. All existing and proposed Radio Frequency Transmission Facilities are prohibited from exceeding or causing other 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. Restoration After Construction. Grantee shall, after construction, maintenance or repair of Facilities, leave the Streets in as good or better condition in all respects as it was before the commencement of such construction, maintenance or repairs, excepting normal wear and tear in strict compliance with the requirements for right-of-way permits established by applicable Portland City Code and implementing regulations, and the expense thereof shall be paid by Grantee

H. Tree Pruning.

1. After obtaining a written permit from the City Forester, Grantee may prune or cause to be pruned, using proper arboricultural practices in accordance with such permit, any tree in or overhanging the Streets which interferes with Grantee's Facilities. Permit requirements for pruning are located in Portland City Code Chapter 20.40.080(E), or by contacting the City Forester's Office. Except in emergencies, Grantee may not prune trees at a point below 30 feet above sidewalk grade until one week after written notice has been given to the owner or occupant of the premises abutting the Street in or over which the tree is growing. For the purposes of this Section 6.H, an emergency exists when it is necessary to prune to protect the public from imminent danger. The owner or occupant of the premises abutting the Street shall have seven days from receipt of Grantee's notice to prune such tree at his or her own expense. If the owner or occupant fails to do so, Grantee may prune such tree at its own expense.
2. The City Forester may, at his or her own discretion, waive the notification and permit process in the case of single trees, if Grantee adequately demonstrates to the City Forester's satisfaction the ability to consistently apply proper arboricultural practices to the pruning of trees. Before any tree trimming permit may be issued, any contractor to be used by Grantee shall be subject to the approval of the City Forester. The City Forester

shall have the discretion to cancel the permit if, at any time, Grantee or its agents, fails to use proper arboricultural practices.

#### Section 7. RESERVATION OF CITY STREET RIGHTS

Nothing in this Agreement shall be construed to prevent the City from constructing sewers, grading, paving, repairing and/or altering any Street or laying down, repairing or removing water mains or constructing or establishing any other public work or improvement. All such work shall be done, insofar as practicable, so as to not obstruct, injure or prevent the unrestricted use and operation of Grantee's Facilities in the Streets. However, if any of Grantee's Facilities interfere with the construction or repair of any Street or public improvement, including construction, repair or removal of a sewer or water main, Grantee's Facilities shall be removed or replaced in the manner the City shall direct in accordance with Section 6.E; provided, however, the City will cooperate with Grantee to identify alternate locations within the Streets. Any and all such removal or replacement shall be at the expense of Grantee. Should Grantee fail to remove, adjust or relocate its Facilities by the date established by the City Engineer's written notice to Grantee, the City may cause and/or effect such removal, adjustment or relocation, and the expense thereof shall be paid by Grantee, including all costs and expenses incurred by the City due to Grantee's delay.

#### Section 8. STREET VACATION

If any Street or portion thereof used by Grantee is vacated by the City during the term of this Agreement, unless the City Council specifically reserves to Grantee the right to continue its installation in the vacated Street, Grantee shall, without expense to the City, forthwith remove its Facilities from such Street, and restore, repair or reconstruct the Street where such removal has occurred, and place the Street in such condition as may be required by the City Council which shall be no better than the condition of such Street immediately prior to removal. In the event of any failure, neglect or refusal of Grantee, after thirty (30) days' notice by the City, to repair, improve or maintain such Street, the City may do such work or cause it to be done, and the direct cost thereof, as found and declared by the City Council, shall be entered in the Docket of City Liens against any property of Grantee which City may choose, and such lien shall be enforced in like manner and with like effect as other liens entered in such docket. The City shall cooperate with Grantee to identify alternative locations within the Streets.

#### Section 9. MAINTENANCE OF FACILITIES

Grantee shall provide and put in use all Facilities necessary to control and carry Grantee's Mobile Telecommunications Services so as to prevent injury to the City's property or property belonging to any Person within the City. Grantee, solely at its own expense, shall repair, renew, change and improve said Facilities from time to time as may be necessary to accomplish this purpose. Grantee shall not construct its Telecommunications System in a manner that requires any customer, except the City, or any entity permitted by the City to install cables, ducts, conduits, or other facilities, in, under or over the City's Streets.

## Section 10. DISCONTINUED USE OF FACILITIES

If Grantee intends to discontinue using any Facilities in the Streets, Grantee shall comply with the requirements of applicable Portland City Code and implementing regulations regarding the discontinuation of the use of Facilities.

## Section 11. HAZARDOUS SUBSTANCES:

- A. Compliance. Grantee shall comply with all applicable state and federal laws, statutes, regulations and orders concerning Hazardous Substances relating to Grantee's Mobile Telecommunications System in the Streets. For purposes of this Section, "Hazardous Substances" shall have the meaning given by ORS 465.200(15) (2011). Grantee shall place utility corridor fill and use containment barriers in compliance with the requirements for right-of-way permits established by applicable Portland City Code and implementing regulations.
- B. Maintenance and Inspection. Grantee shall maintain and inspect its Facilities located in the Streets. Upon reasonable notice to Grantee and in the presence of an authorized representative of Grantee, the City may inspect Grantee's Facilities in the Streets to determine if any release of Hazardous Substances has occurred, or may occur, from or related to Grantee's Telecommunications System.
- C. Remediation. In removing or modifying Grantee's Facilities as provided in this Agreement, Grantee shall also remove all Hazardous Substances in compliance with applicable environmental clean-up standards related thereto. Upon request, the City shall provide Grantee with information within the City's possession regarding potentially responsible parties for the purposes of recovering such removal costs.

## Section 12. CITY'S WRITTEN CONSENT REQUIRED FOR ASSIGNMENT, TRANSFER, MERGER, LEASE OR MORTGAGE

- A. Consent. Except as otherwise permitted by Section 12.B and except to entities that control, are controlled by, or are under common control with Grantee, neither this Agreement nor any of Grantee's Facilities located in the Streets by authority of this Agreement shall be sold, leased, mortgaged, assigned, merged or otherwise transferred without the prior written consent of the City as expressed by ordinance, which consent shall not be unreasonably withheld, Grantee shall give written notice to the City of any transfers to entities under common control within ten (10) days of such transfers. The City's granting of consent in one instance shall not render unnecessary any subsequent consent in any other instance. Nothing contained in this Section 12.A shall be deemed to prohibit the mortgage, pledge, or assignment of tangible assets of Grantee's Telecommunications System for the purpose of financing the acquisition of equipment for or the construction and operation of Grantee's Telecommunications System, within or outside the City, without the City's consent, but any such mortgage, pledge or assignment shall be subject to the City's other rights contained in this Agreement.

1. In determining whether the City will consent to any sale, lease, mortgage, assignment, merger or transfer, the City may inquire into the technical, legal, and financial qualifications of the prospective party. Grantee shall assist the City in any such inquiry. The City may condition any sale, lease, mortgage, assignment, merger or transfer upon such conditions related to the technical, legal, and financial qualifications of the prospective party to perform according to the terms of this Agreement, as it deems appropriate. The City shall not unreasonably delay or withhold its consent to any such sale, lease, mortgage, assignment, transfer or merger.
  2. No sale, lease, mortgage, 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 Section 4, including, but not limited to, providing certificates of insurance, unless the City Council waives such compliance by ordinance. Within ten (10) days after execution and delivery of any instrument so consented to by the City, Grantee shall file with the Auditor an executed counterpart or certified copy thereof.
- B. Transfers Without Consent in Ordinary Course of Business. Grantee shall not lease any of its Facilities without the City's prior consent as expressed by ordinance. However, and notwithstanding Section 12.A, hereof, Grantee may lease any portion of its 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 Facilities. A lessee of Grantee's Facilities shall not obtain any rights under this Agreement. For the purposes of this Subsection, a capital lease shall be treated as a lease under this Subsection until the conclusion of the lease, when transfer of ownership occurs. At that point in time, the capital lease shall be treated as a sale under Section 12.B.1.
1. Notwithstanding Section 12.A.1, Grantee may sell portions of its 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:
    - a. The sale is to the holder of a current existing, valid telecommunications or mobile telecommunications agreement, franchise, permit or lease with the City.
    - b. Within fourteen days of the sale being executed and becoming final, Grantee shall provide written notice to the City, describing the Facilities sold by Grantee, identifying the purchaser of the Facilities, the location of the Facilities (in accordance with the requirements of Section 6.F.1), and providing an executed counterpart or certified copy of the sales documents.
    - c. Grantee remains solely responsible for locating, servicing, repairing, relocating or removing its remaining Facilities.
    - d. Within fourteen days of the sale being executed and becoming final, the purchaser of such Facilities shall file written notice to the City that it has assumed sole responsibility for locating, servicing, repairing, relocating or removing the purchased

Facilities under the purchaser's current, existing valid Agreement. The purchaser shall not obtain any of Grantee's rights under this Agreement.

### Section 13. FORFEITURE AND REMEDIES

- A. Forfeiture. In addition to any other rights set out elsewhere in this Agreement, the City reserves the right to declare a forfeiture of the Agreement, and all of Grantee's rights arising thereunder, in the event that:
1. Grantee violates any material provision of the Agreement.
    - a. For purposes of this Section, the following are material provisions of this Agreement, allowing the City, without limitation, to exercise its rights under this Section or as set forth elsewhere in this Agreement:
      - (1) The invalidation, failure to pay or any suspension of Grantee's payments of Fees to the City for use of the Streets under this Agreement;
      - (2) Any failure by Grantee to submit timely reports regarding the calculation of its Agreement Fees to the City;
      - (3) Any failure by Grantee to maintain the liability insurance required under this Agreement;
      - (4) Any failure by Grantee to maintain the performance bond required under this Agreement;
      - (5) Any failure by Grantee to otherwise fully comply with the requirements of Sections 3 through and including Section 17 of this Agreement.
  2. Grantee is found by a court of competent jurisdiction to have practiced any fraud or deceit upon the City.
  3. There is a final determination that Grantee has failed, refused, neglected or is otherwise unable to obtain and/or maintain any permit required by any federal or state regulatory body regarding Grantee's operation of its Mobile Telecommunications System or Services within the City.
- B. Additional Remedies. In addition to any rights set out elsewhere in this Agreement, as well as its rights under the City Code, the City reserves the right at its sole option to apply any of the following, alone or in combination:
1. Impose a financial penalty of up to \$1,000.00 per violation;
  2. Suspend Grantee's rights under this Agreement, until Grantee corrects or otherwise remedies the violation;

3. Revocation. The City Council or Grantee may revoke this Agreement in the event that any provision becomes invalid or unenforceable and the City Council or Grantee expressly finds that such provision constituted a consideration material to the Agreement. The City or Grantee shall exercise its revocation rights under this subsection by providing 30 days written notice prior to the effective date of the revocation, and an opportunity to renegotiate acceptable provisions in accordance with Section 14.
- C. Determination of Remedy. In determining which remedy or remedies are appropriate, the City shall consider the nature of the violation, the person or persons burdened by the violation, the nature of the remedy required in order to prevent further such violations, and any other matters the City deems appropriate.
- D. Notice and Opportunity to Cure. The City shall give Grantee thirty (30) day's prior written notice of its intent to exercise its rights under this Section, stating the reasons for such action. If Grantee cures the stated reason within the thirty (30) day notice period, or if Grantee initiates efforts satisfactory to the City to remedy the stated reason and the efforts continue in good faith, the City shall not exercise its remedy rights. If Grantee fails to cure the stated reason within the thirty (30) day notice period, or if Grantee does not undertake and/or maintain efforts satisfactory to the City to remedy the stated reason, then the City Council may impose any or all of the remedies available under this Section. However, in no event shall the City exercise its rights under this Section if a bona fide, good faith dispute exists between the City and Grantee.

#### Section 14. RENEGOTIATION

In the event that any provision of this Agreement becomes invalid or unenforceable and the City Council or Grantee expressly finds that such provision constituted a consideration material to entering into this Agreement, the City and Grantee may mutually agree to renegotiate the terms of this Agreement. The party seeking renegotiation shall serve on the other party written notice of an offer to renegotiate. In the event the other party accepts the offer to renegotiate, the parties shall have 90 days to conduct and complete the renegotiation. If both parties agree to renegotiations under this Section, the parties shall proceed in good faith and in a manner that is reasonable under the circumstances.

#### Section 15. EXPIRATION AND RENEWAL

Renewal. Upon the expiration of the initial three year term of this Agreement, on application made by Grantee for Agreement renewal or additional authority to exercise the privileges, or any of them, hereby granted, Grantee shall have the first and preferential right to take and receive such authority upon terms and conditions approved by the City. If Grantee does not promptly apply for such renewal or additional authority, or if Grantee rejects the terms and conditions of such authority offered by the City, the City may, within one year from the expiration of the prior Agreement, grant a permit or Agreement to any other Person. In the event of such a grant, such other Person taking such new or additional authority, shall in addition to any compensation to be paid to the City for such new or additional authority, pay to Grantee, at or before the time such

new or additional authority takes effect, and before Grantee shall be deprived of the right to possess, maintain and operate its Telecommunications System located within the Streets, the fair and equitable valuation of Grantee's Telecommunications System located within the Streets. If the third party and Grantee cannot agree on the fair and equitable value of said Telecommunications System, the dispute shall be submitted for a declaratory determination by the courts of the State of Oregon. Until such time as the City exercises its rights as set forth in this Section, Grantee's rights and responsibilities within the City shall continue to be controlled by the terms and conditions of this Agreement.

#### Section 16. MISCELLANEOUS

##### A. Compliance with Laws.

1. Both Grantee and the City shall comply with all applicable federal and state laws.
2. Grantee shall comply with all applicable City ordinances, resolutions, rules and regulations adopted or established pursuant to the City's lawful authority.

B. Severability. If any Section, provision or clause of this Agreement is held by a court of competent jurisdiction to be invalid or unenforceable, or is preempted by federal or state laws or regulations, the remainder of this Agreement shall not be affected, unless the City Council determines such section, provision or clause was material to the City's agreement to issue an agreement to the Grantee.

C. 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 Agreement in the public interest. Grantee shall not be relieved of its obligations to comply with any of the provisions of this Agreement 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 Agreement by reason of such failure or neglect.

##### D. Force Majeure.

1. For purposes of this Section 16.D, the term 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 hereto.
2. If Grantee is wholly or partially unable to carry out its obligations under this Agreement 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 Agreement, 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, by reason of Force Majeure, to carry out its responsibility and duties under this Agreement.

- E. Choice of Forum. Any litigation between the City and Grantee arising under or regarding this Agreement 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.
- F. Choice of Law. This contract 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.
- G. Notice. Any notice provided for under this Agreement shall be sufficient if in writing and (1) delivered personally to the following addressee, (2) deposited in the United States mail, postage prepaid, certified mail, return receipt requested, or (3) sent by overnight or commercial air courier (such as Federal Express):

1. If to the City:                   Office for Community Technology  
   City of Portland, Oregon  
   111 SW Columbia Street, Suite 600  
   Portland, Oregon 97201  
   Email: cffranchiseinfo@portlandoregon.gov

With a copy to:           City Attorney's Office  
   City of Portland  
   Room 430, City Hall  
   1221 SW 4th Avenue  
   Portland, Oregon 97204  
   FAX (503) 823-3089

2. If to Grantee:                   New Cingular Wireless PCS, LLC  
   Attn: Network Real Estate Administration  
   Re: City of Portland, Oregon ROW Agreement  
   12555 Cingular Way, Suite 1300  
   Alpharetta, GA 30004

With a copy to:           New Cingular Wireless PCS, LLC  
   Attn: AT&T Legal Department  
   Re: City of Portland, Oregon ROW Agreement

By US Mail:           PO Box 97061  
   Redmond, WA 98073-9761

By Courier           16331 NE 72<sup>nd</sup> Way  
   Redmond, WA 98052-7827

3. Any such notice, communication or delivery shall be deemed effective and delivered upon the earliest to occur of actual delivery, three (3) business days after depositing in the United States mail as aforesaid, one (1) business day after shipment by commercial air courier as aforesaid or the same day as facsimile transmission (or the first business day thereafter if faxed on a Saturday, Sunday or legal holiday), or the same day as electronic mail transmission (or the first business day thereafter if sent by electronic mail on a Saturday, Sunday or legal holiday) but, in the case of electronic mail, only if followed by transmittal by national overnight courier or hand for delivery on the next Business Day.

#### H. Public Records.

1. Grantee acknowledges that information submitted by Grantee to the City may be open to public inspection under the Oregon Public Records Law. Grantee is responsible for becoming familiar with and understanding the provisions of the Oregon Public Records Law.
  2. Grantee may identify information submitted to the City as confidential, if Grantee reasonably believes such information is qualified for an exemption recognized under the Oregon Public Records Law. Grantee shall prominently mark each page, or portion thereof, for which it is claiming confidentiality as "Confidential" prior to submitting such information to the City. When submitting such information to the City, Grantee shall submit documentation that specifically identifies the applicable exemption under the Oregon Public Records Law, and stating the reason(s) Grantee believes the information is exempt from public inspection. After reviewing Grantee's request for confidentiality, and determining whether the identified exemptions are applicable, the City shall take reasonable steps to protect the confidential nature of any such information, consistent with the Oregon Public Records Law, including only disclosing such information to employees, representatives, and agents thereof that have a need to know or in order to enforce the provisions of this Franchise.
  3. Within five (5) working days of receiving a public records request, the City shall provide the Grantee with written notice of the request, including a copy of the request. Grantee shall have five (5) working days within which to provide a written response to the City, before the City may disclose any of the requested confidential information. If the City determines that it will be necessary to reveal the information, the City shall promptly notify Grantee, and do so at least five (5) working days prior to the information being released. The City shall retain final discretion to determine whether to release the requested information in response to any public records request as recognized under the Oregon Public Records Law.
- I. Amendment. The City has negotiated this Agreement in good faith, in reliance upon the information provided by Grantee regarding the scope of its authority to offer the Mobile Telecommunications Services described in Section 2.B.9 above. In the event that Grantee actually receives authority to offer telecommunications services outside the scope of this Agreement, or otherwise begins offering telecommunications services outside the scope of

those identified in Section 2.B.9, Grantee shall immediately notify the City. Within 90 days of receiving such notice, the City may either enter into negotiations with Grantee to revise or amend this Agreement to reflect such changed circumstances, or may proceed with early termination of this Agreement. The parties will negotiate in good faith to revise the Agreement to authorize the expanded scope of services.

- J. Interference. Grantee shall, at its expense, comply with all Federal Communications Commission Radio Frequency requirements in connection with the use, operation, maintenance, construction and/or installation of its Facilities. If at any time during the Grantee's occupancy of the transmission location, it is determined by the Portland Bureau of Technology Services ("BTS") that the Grantee's transmission facilities are negatively impacting the City's communication facilities, Grantee agrees to cooperate with BTS in addressing the negative impact. Grantee agrees to temporarily shut off power and transmission to and from the transmission facility that is causing a problem until the problem is resolved, provided that the City agrees to cooperate with and assist the Grantee in installing a temporary replacement facility so as to avoid disruption of Grantee's service.

#### Section 17. WRITTEN ACCEPTANCE

On or before the thirtieth (30th) day after this ordinance becomes effective, Grantee shall file in the Office of the Auditor of the City of Portland a written acceptance of this ordinance, executed by Grantee, subject to the approval as to form by 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 ordinance 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 ordinance.

#### Section 18. OTHER AUTHORITY SUPERSEDED:

Upon effectiveness of this Agreement, any and all authority to operate Facilities or Attached Facilities in the Streets previously granted to Grantee by the City shall be superseded by this Agreement.