

## RIGHT-OF-WAY USE AGREEMENT

This Right-of-Way Use Agreement (hereinafter “Agreement”) is entered into by and between the City of Salem, an Oregon municipal corporation (hereinafter “City”) and New Cingular Wireless PCS, LLC, a Delaware limited liability company qualified to do business in the State of Oregon (hereinafter “Grantee”), collectively referred to herein as the “Parties.”

### SECTION 1. NATURE AND TERM OF GRANT

A. Grant of Authority. The City does hereby grant to Grantee, and Grantee’s successors and assigns, as approved by the City of Salem under Section 13 of this Agreement, the privilege and authority to access City Rights-of-Way and Structures located in City Rights-of-Way to install, construct, repair, replace, upgrade, maintain, and operate Facilities for Grantee’s Mobile Telecommunications System in, upon, under, and over the surface of City Rights-of-Way. Access to any Structure is subject to receipt of written authorization from the owner of the subject Structure. Grantee shall use its Mobile Telecommunications System solely to provide services as defined in this Agreement. Grantee represents that it has applied for and received any and all regulatory authority that is required to provide Mobile Telecommunications Services.

1. This Agreement does **not** authorize Grantee to:

- a. Operate a cable system as defined by 47 U.S.C. §522(7);
- b. Provide video programming, as defined by 47 U.S.C. §522 (20); or
- c. Provide telecommunications service as defined in Oregon Revised Statutes (“ORS”) 759.005(8).

2. Nothing in this Agreement shall preclude Grantee from entering into a contract for the use of any portion of its Mobile 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, grantee or said Person has assumed responsibility for obtaining any required authority from the City.

B. Effective Date. The Effective Date of this Agreement shall be the first day of the full calendar month following the date on which both Parties sign this Agreement. If both Parties sign on the first day of any calendar month, that date shall be the Effective Date. (e.g., if both Parties sign on June 1, June 1 shall be the Effective Date, however if one Party signs on June 1 and the other Party signs on June 15, July 1 shall be the Effective Date.)

C. Duration. This Agreement, and all rights and obligations pertaining thereto, shall be effective for a period of five (5) years, as measured from its Effective Date, unless terminated sooner as provided herein. This Agreement shall renew automatically for two (2) additional five (5) year renewal terms unless terminated as set forth in Section 14 or Section 16 below, or unless either Party communicates in writing their decision not to renew the Agreement not less than one hundred eighty (180) days before the expiration of the five (5) year term.

- 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 Rights-of-Way 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 Salem 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, provided that Grantee's existing Facilities will be subject to any new ordinance provisions when Grantee is making a "substantial change," as defined in SRC 703, to such Facilities, unless deferral of such new ordinance provisions create a risk to public health, safety, property, or general welfare, or such change is mandated by law. Nothing in this Agreement shall be deemed to waive the requirements of the various codes, ordinances, resolutions, and administrative rules of the City regarding permits, fees to be paid, or the manner of construction.

## **SECTION 2. 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. "Attached Facilities" or "Macro Wireless Facilities" means any Facilities owned by Grantee affixed to a Structure in accordance with the terms of this Agreement except Small Cell Facilities, optical fiber, wires, coaxial cable and the mounting hardware used to attach Small Cell Facilities, optical fiber, wires, and 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, and any wireless system with a cumulative total volume of all facilities on the structure that is larger than a Small Cell Facility.
2. "City" means the City of Salem, 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 Salem.
4. "Facility" or "Facilities" means capital, equipment, and property, including but not limited to optical fiber, wires (including, without limitation, electrical and telephone utility wires, lines and cables), pipes, mains, conduits, ducts, pedestals, antennas, power boxes, power meters, mounting hardware, cabinets, equipment boxes, and electronic equipment owned or operated by Grantee and used for transmitting, receiving, distributing, providing, or offering Mobile Telecommunications Services over the spectrum of radio frequencies licensed by the Federal Communications Commission.
5. "Fees" means all fees payable by Grantee to the City pursuant to this Agreement.

6. "Ground Facilities" means any Facilities owned by Grantee that are not affixed to a Structure but are located in the Rights-of-Way. Ground Facilities include but are not limited to cabinets, power boxes, and other equipment boxes that cannot be located on a Structure for any reason.
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. "Hazardous Substance" has the meaning given in ORS 465.200(16).
9. "Mobile Telecommunications Service(s)" means commercial mobile radio service, as defined in Section 20.3 of title 47 of the Code of Federal Regulations as in effect on October 1, 2009.
10. "Mobile Telecommunications System" means all Facilities owned or used by Grantee for the purpose of providing Mobile Telecommunications Services and located in, upon, under, and/or above Rights-of-Way, excluding ducts, conduits, and vaults leased from another City franchisee, licensee, lessee or grantee.
11. "Original Structure" means a Structure located in the Rights-of-Way as of the Effective Date of this Agreement and has no Facilities attached to it or a Structure located in the Rights-of-Way that is replaced after the Effective Date of this Agreement, provided that such Structure is in the same location as the prior Original Structure and the City has determined that the Structure has not been replaced for the purpose of allowing Grantee to attach Facilities to it.
12. "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.
13. "Replacement Structure" means 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, guy, or support poles in the Rights-of-Way.
14. "Rights-of-Way" means the surface of, and the space above and below, any existing utility easement, public street, road, alley, highway, sidewalk, or landscape strip 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.
15. "Small Cell Facilities" means Facilities owned by Grantee that are shorter range, wireless systems affixed to a structure with generally smaller components than traditional Macro Wireless Facilities and are deployed where suitable in flexible configurations to provide capacity and coverage. Small Cell Facilities must meet the following criteria:
  - a. Each antenna is located inside an enclosure of no more than three cubic feet in volume or, if in the case of an antenna that has exposed elements, the antenna and

all of its exposed elements, if enclosed, could fit within an enclosure of no more than three cubic feet.

- b. All equipment associated with the Small Cell Facilities has a cumulative volume of no more than seventeen (17) cubic feet. The following associated equipment may be located outside the primary equipment enclosure and if so located, are not included in the calculation of equipment volume: Electric meter, telecommunication demarcation box, ground-based enclosures, battery back-up power systems, grounding equipment, power transfer switch, and cut-off switch.
  - c. The cumulative total of all Facilities on the structure associated with the Small Cell Facilities, including associated equipment outside the primary equipment enclosure, does not exceed twenty-one (21) cubic feet.
16. "Structure" means any utility pole, Guy Pole or Support Pole, utility pole extension, light standard, or other similar pole in the Rights-of-Way that is suitable for the installation of Facilities.
17. "Year," "Fiscal Year," "Annual," or "Annually" means the period consisting of twelve, full calendar months, beginning on July 1 and ending on June 30, unless otherwise provided in this Agreement.

### **SECTION 3. COMPENSATION AND AUDITING**

- A. Amount. As compensation for the benefits and privileges granted under this Agreement, and in consideration of permission to use the Rights-of-Way of the City, Grantee shall pay to the City an annual fee through the duration of this Agreement for the right to install, construct, repair, replace, maintain, and/or operate any Facilities in the Rights-of-Way. The annual fee to the City will be paid in advance for the current Fiscal Year and is the greater of either: a) the Minimum Annual Fee of ten thousand dollars (\$10,000) (the "Minimum Annual Fee"); or b) the Right-of-Way Use Fee set forth below:

- 1. Right-of-Way Use Fees.
  - a. Grantee shall pay, as a Right-of-Way Use Fee, six thousand five hundred eighty dollars (\$6,580) per year per Structure that has any Attached Facilities as of July 1.
  - b. Grantee shall pay, as a Right-of-Way Use Fee, one thousand two hundred fifty dollars (\$1,250) per year per Structure that has any Small Cell Facilities as of July 1.
  - c. Grantee shall also pay, as a Right-of-Way Use Fee, one thousand five hundred seventy-nine dollars (\$1,579) per year for each Ground Facility located above ground as of July 1.
  - d. Pursuant to SRC 35.220, Grantee shall also pay a per linear foot Right-of-Way Use Fee for Facilities installed in the Rights-of-Way that are not Attached Facilities, Small Cell Facilities, or Ground Facilities (e.g., optical fiber, wires, pipes, conduits

- and ducts). Such per linear foot fee shall increase in an amount equal to any percentage increase in the Consumer Price Index for All Urban Consumers, all items in the West region, Size Class B/C, for the prior calendar year, unadjusted for seasonal variations, as determined by the Bureau of Labor Statistics of the Department of Labor. This Right-of-Way Use Fee shall apply only where the Grantee owes no Right-of-Way Use Fees pursuant to Subsection 3.A.1.c. If such Facilities are installed for less than one year, Grantee shall pay the entire amount of this portion of the Right-of-Way Use Fee for the year without prorating or otherwise discounting such payment.
- e. Except as otherwise provided in Subsection 3.A.1.d, the Right-of-Way Use Fees in this Agreement shall increase by four percent (4%) per year. This increase is applicable beginning July 1, 2019 and every July 1 thereafter for the term of this Agreement.
  - f. Grantee shall not be liable for Right-of-Way Use Fees for any Facility, including any Attached Facility, Small Cell Facility, or Ground Facility, after such Facility is removed from the Rights-of-Way, except for those Fees already paid or prorated for the Fiscal Year. Annual fees shall not be refundable in the event Facilities are removed after the Payment Date (as defined hereinafter).
2. Installation and Application Fee.
- a. There shall be a one-time Installation and Application Fee of two thousand dollars (\$2,000) payable to the City for each Structure that Grantee uses for Attached Facilities or Small Cell Facilities, and for each Ground Facility.
  - b. If Attached Facilities, Small Cell Facilities, or Ground Facilities will be located on or adjacent to a Local or Collector Street, then there shall be a separate one-time fee of two thousand dollars (\$2,000) for each such Facility payable to the City.
3. Pre-Agreement Negotiation and Administration Fee. Grantee shall pay the City five thousand dollars (\$5,000) for its pre-Agreement costs, including the negotiation and initial administration of this Agreement.
4. This Agreement shall not be considered as written authorization to attach Facilities to City-owned structures. Grantee must receive separate written authorization from the City to attach to City-owned structures. Any such fees, lease amount, or rent negotiated or otherwise required to be paid by Grantee for attaching Facilities to City-owned structures is not included in, nor shall offset, the annual fee or one-time fees as described in this Agreement.

**B. Remittance Dates.** Grantee shall pay the above Fees as follows:

- 1. The annual fee (the greater of the Minimum Annual Fee or the Right-of-Way Use Fee) shall be due and payable to the City on August 1 and on August 1 annually thereafter (the "Payment Date").

For the first year that this Agreement is in effect, the prorated Minimum Annual Fee shall be due and payable to the City within thirty (30) days of the Effective Date.

2. If Grantee installs any Facilities on or after July 1, the amount of this portion of the Right-of-Way Use Fee for that year shall be prorated for each month that the Facilities were present. Grantee shall owe the Right-of-Way Use Fee for the full month regardless of the day of the month that the Facilities were installed, unless otherwise provided in this Agreement. Such prorated Right-of-Way Use Fees shall be due and payable thirty (30) days after completion of installation.

For the first year that this Agreement is in effect, if the prorated Right-of-Way Use Fee is greater than the prorated Minimum Annual Fee, the difference between the two figures shall be payable to the City thirty (30) days after completion of the most recent installation. The prorated Right-of-Way Use Fee for subsequent installations during the first year shall be due and payable to the City thirty (30) days after completion.

3. The Installation and Application Fee shall be due and payable when plans for Facilities are submitted to the City for approval. The City shall not approve any plans for Facilities before this Installation and Application Fee is received.
  4. The Pre-Agreement Negotiation and Administration Fee shall be due and payable within thirty (30) days of the Effective Date of this Agreement.
- C. Late Payments. Any payment not paid in full 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 material breach of this Agreement. In addition, all overdue amounts including penalty charges shall bear interest at the rate of one percent (1%) per month, calculated and compounded monthly without proration, until received by the City.

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 this Section 3 shall be subject to confirmation and recomputation by the City, provided that such audit and computation is initiated within three (3) years of the date any audited and recomputed payment is due. If no such audit or financial review is initiated within the three (3) year period, then any claim that the City might have had for additional compensation shall be forever waived. Grantee agrees to reimburse the City for:
  - a. The reasonable costs of such confirmation and recomputation if the City's recomputation discloses that Grantee had paid ninety-five percent (95%) or less of the Fees owing for the period of time 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 and recomputation if the City's recomputation discloses that Grantee had paid more than ninety-five percent (95%) but ninety-eight percent (98%) or less of the Fees owing for the period of time at issue.
  - c. Grantee shall have no obligation to pay the costs of confirmation and recomputation if the City's recomputation discloses that Grantee had paid more than ninety-eight percent (98%) of the Fees owing for the period of time at issue.
  - d. The City's costs that may be reimbursed under this Subsection 3.D. shall not exceed fifteen thousand dollars (\$15,000) per confirmation and recomputation.
  - e. If the City determines that Grantee made any underpayment, Grantee shall pay interest on the underpaid amounts as set forth in Subsection 3.C. above. If the City determines that Grantee made an underpayment exceeding five percent (5%) of the amount due, Grantee shall pay interest and the delinquency penalty pursuant to Subsection 3.C. above.
  - f. If Grantee disputes the City's determination of underpayment, Grantee shall immediately place the disputed amount into an interest-bearing escrow account at a financial institution acceptable to the City with instructions agreed to by the City until final resolution.
2. No acceptance of payment of Fees under this Agreement shall exempt Grantee from the payment of any other license, tax, or surcharge on the business, occupation, property, or income of Grantee that may be lawfully imposed by the City or any other taxing authority now in effect or hereafter made effective, except as may otherwise be provided in the ordinance or laws imposing such other license fee, tax, or charge.
  3. The City and its officers, agents, employees, and representatives shall have authority to arrange for and conduct reviews of Grantee's relevant financial obligations payable hereunder. 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 requested within three (3) years from the date payment was due. City requests for reviews shall be in writing. At no cost to the City, Grantee shall provide or cause to be provided to the City, within the Salem metropolitan region and during normal business hours, copies of all information reasonably within the scope of the review within thirty (30) days from the date of the written request. 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 thirty (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 thirty (30) days that Grantee fails to provide, or fails to cause to be provided, such requested information.
- E. Holdover. Should Grantee continue to maintain and operate Facilities in the Rights-of-Way beyond the expiration date of this Agreement as set forth in Subsection 1.C., this Agreement shall revert to a month-to-month agreement subject to all of the terms and conditions

contained herein, except that the Right-of-Way Use Fees for the holdover period shall increase to one hundred fifty percent (150%) of the amount of the Fees due as of the last Payment Date prorated for each month of the holdover period. These Fees shall be due and payable within thirty (30) days of the end of each month of the holdover period.

#### **SECTION 4. REPORTS.**

- A. On or before August 1 of each calendar year that this Agreement is in effect, Grantee shall submit a written report to the City, verified by an officer or other authorized representative of the Grantee, which includes an accurate statement in both detailed and summarized form of the Grantee's Facilities in the Rights-of-Way, including any new Facilities constructed and any existing Facilities relocated. Grantee shall submit such report in a form reasonably satisfactory to the City.
- B. Within thirty (30) days of receipt of same, Grantee shall submit to the City copies of all decisions, orders, and judgments by any federal, state, and local court, regulatory agency, or other government body, in which Grantee is a party, which substantially and materially affects Grantee's obligations under this Agreement.
- C. Grantee shall make available to the City, upon not less than fourteen (14) days' prior written notice, such information or reports pertinent to enforcing the terms of this Agreement, in such form and at such time as the City may reasonably request.

#### **SECTION 5. GENERAL INSURANCE AND BONDING PROVISIONS**

##### **A. Insurance.**

- 1. Grantee shall obtain and maintain at all times during the term of this Agreement the following insurance policies that protect the Grantee and the City, as well as the City's officers, boards, commissions, and employees:
  - a. Commercial General Liability insurance with a limit of \$2,000,000 per occurrence for bodily injury and property damage and \$3,000,000 general aggregate including premises-operations, contractual liability, personal injury and products completed operations;
  - b. Commercial Automobile Liability insurance covering all owned, non-owned, and hired vehicles with a limit of \$2,000,000 each accident for bodily injury, and property damage; and
  - c. Workers' Compensation Insurance at all times during the term of this Agreement as may be required by the workers' compensation insurance and safety laws of the State of Oregon and amendments thereto.
  - d. Excess / Umbrella Insurance may be in excess of, or in substitution for, coverages required under Sections 5.A.1.a. and b. provided they meet the minimum requirements in this agreement.



- e. Grantee will provide at least thirty (30) days' prior written notice to the City, of cancellation or non-renewal of any required coverage that is not replaced. Grantee shall maintain continuous, uninterrupted coverage in the terms and amounts required upon and after the Effective Date of this Agreement.
- 2. Upon the Effective Date of this Agreement and prior to commencement of any work pursuant to this Agreement, Grantee shall file with the City the required certificate(s) of insurance with additional insured endorsements, which shall state the following:
  - a. The policy number, name of insurance company, name and address of the agent or authorized representative, name and address of insured, project name, policy expiration date, and required specific coverage amounts;
  - b. That Grantee's required Commercial General Liability insurance policy is primary in respect to any other valid or collectible insurance that the City may possess, including any self-insured retentions the City may have, and any other insurance the City does possess shall be considered excess insurance only and shall not be required to contribute with this insurance; and
  - c. That Grantee's Commercial General Liability insurance policy waives any right of recovery the insurance company may have against the City.
  - d. City's additional insured status shall (i) be limited to bodily injury, property damage or personal and advertising injury caused, in whole or in part, by Grantee, its employees, agents or independent contractors; (ii) not extend to claims for punitive or exemplary damages arising out of the acts or omissions of City, its employees, agents or independent contractors or where such coverage is prohibited by law or to claims arising out of the gross negligence of City, its employees, agents or independent contractors; and, (iii) not exceed Grantee's indemnification obligation under this Agreement, if any.
- 3. The certificate(s) of insurance with endorsements and notices shall name the City of Salem as Certificate Holder, and be mailed to the City at the address specified in Section 17.F below.
- 4. Each of the required insurance policies shall be with insurers authorized or permitted to do business in the State of Oregon, with an A-:VII or better rating for financial condition and financial performance by Best's Key Rating Guide, Property/Casualty Edition or an equivalent rating entity.
- 5. In lieu of the insurance policies required by Section 5.A.1., Grantee may provide proof of applicable self-insurance for any or all of the foregoing coverage requirements in an amount at least equal to the coverage requirements of Section 5.A.1. in a form acceptable to the City and subject to review and approval by the City. Grantee shall provide proof of self-insurance to the City upon the Effective Date of this Agreement and prior to commencement of any work pursuant to this Agreement and thereafter upon request by the City.

6. Severability of Interest. "Severability of interest" or "separation of insureds" clauses shall be made a part of the Commercial General Liability and Commercial Automobile Liability policies.
7. In order to account for increases in State Tort Claims Act limits, no more than once during any five (5) year period, the City shall have the right to require Grantee to increase the amounts of the insurance provided in the franchise. The City shall give Grantee not less than ninety (90) days' written notice of such requirement.

**B. Faithful Performance Bond.**

1. Upon the Effective Date of this Agreement and prior to commencement of any work pursuant to 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 one hundred thousand dollars (\$100,000), conditioned that Grantee shall well and truly observe, fulfill, and perform each and every term and condition of this Agreement. Should the Grantee place Facilities in the Rights-of-Way at more than ten (10) sites pursuant to this Agreement, the penal sum of the required faithful performance bond shall be increased by two thousand dollars (\$2,000) for each additional site. 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 Rights-of-Way. 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 Manager. 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 Manager 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 5.B. until it has made a good faith effort to seek compliance with the terms of this Agreement or applicable permit.

- C. Construction Bond. During all times when Grantee is performing any construction work in, upon, under, or over the Rights-of-Way requiring a permit, Grantee shall post a faithful performance bond or irrevocable letter of credit in the manner and form required by SRC 77.120. The bond or letter of credit shall be conditioned that Grantee shall well and truly observe, fulfill and perform each term and condition under Section 7 of this Agreement and of any permit required by SRC Chapter 77. Grantee shall pay all premiums or other costs associated with maintaining the bond or letter of credit, and shall keep the same in full force and effect at all times during the construction work. The bond or letter of credit shall provide that it may be terminated one year after completion of the project and written acceptance by the Director of Public Works. For the duration of any construction work, Grantee shall file with the City a copy of the bond or letter of credit, along with written evidence of payment of the required premiums. The bond or letter of credit shall be subject to approval as to form by the City Attorney.

## **SECTION 6. COVENANT TO INDEMNIFY AND HOLD THE CITY HARMLESS**

- A. General Indemnification. Grantee hereby agrees and covenants to indemnify, defend, save and hold the City, its officers, agents, and employees, harmless from any and all claims 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 pursuant to this Agreement, whether or not such act is permitted by 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 to the extent such claim arises 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 hereby agrees to indemnify, defend, save and hold harmless the City, its officers, agents, and employees for any and all 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 Rights-of-Way in a timely manner in accordance with a relocation schedule furnished to Grantee by the City Engineer under this Agreement, unless Grantee's failure arises directly from the City's negligence or willful misconduct.
- C. Indemnification – Hazardous Substances. Notwithstanding any other provision of this Agreement, Grantee agrees to forever indemnify the City, its officers, agents, and employees, from and against any claims, damages, losses, liabilities, costs, and expenses of any kind whatsoever, 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, associated with, arising from or due to Grantee's structures or Facilities in the Rights-of-Way unless such leaks, spills, contamination or residue arise directly from the City's negligence or willful misconduct.
- D. General Limitation. Neither Party will be liable under this Agreement for consequential, indirect, or punitive damages (including lost revenues, loss of equipment, interruption, loss of service, or loss of data) for any cause of action, whether in contract, tort, or otherwise, even if the Party was or should have been aware of the possibility of these damages, whether under theory of contract, tort (including negligence), strict liability, or otherwise.

## **SECTION 7. CONSTRUCTION, REPLACEMENT, REPAIRS AND MAINTENANCE**

- A. Permits. Grantee shall apply for and obtain all permits necessary for the construction, installation and operation of its Facilities in the Rights-of-Way. Grantee shall pay all applicable fees due for City construction permits. All construction and maintenance of any and all Grantee's Facilities within the Rights-of-Way 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 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, installation and maintenance.
- C. Common Users. Grantee shall allow and encourage co-location by other users of the Rights-of-Way, provided such co-location does not interfere with Grantee's Facilities or jeopardize the physical integrity of the Structure and provided the owner of the Structure consents to such co-locations.
- D. Facility and Structure Standards. This subsection establishes standards for attaching Facilities to Structures and placing Facilities in the Rights-of-Way. Grantee shall comply with the requirements of the City's Wireless Communications Facilities Code, SRC Chapter 703.
  - 1. Street Trees. If a Structure on a Local or Collector Street is proposed by Grantee for replacement, Grantee shall submit the sum of two thousand dollars (\$2,000) to the City to fund street tree planting. The City's Public Works Department shall 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 Public Works Department shall deposit the funds into the Tree Canopy Preservation Fund for its use.
  - 2. Unless otherwise agreed to in writing by the City, Grantee shall locate all Facilities in accordance with applicable City codes and ordinances. The City shall, upon reasonable request of the Grantee and prior to Grantee's submission of any permits or applications for installing or placing new Facilities, participate in preliminary meetings and site visits and provide Grantee with a written determination of the required location of the Facilities. The City may not reject any subsequent permit or other application based solely on the location of Facilities included in the written determination provided pursuant to this Subsection if Grantee's permit or application places the Facilities in accordance with the City's written determination. Where an alternative location for Facilities placement, other than an underground location, is permitted, Grantee shall install such Facilities as directed by the City, including but not limited to any direction involving location, screening, and color of the Facilities, provided that the City and Grantee shall mutually agree on the alternate location of Facilities. Where an alternative location for Facilities placement, other than an underground location, is identified on a Minor Arterial, Local, or Collector Street, the height plus width plus depth of any cabinets or equipment boxes in the Rights-of-Way shall be no more than one hundred twenty (120) linear inches combined.
  - 3. Grantee may make excavations in the Rights-of-Way for any Facility needed for the maintenance or extension of its Mobile Telecommunications System, subject to obtaining the appropriate permits from the City. Prior to commencing such excavation work, Grantee shall apply for, and obtain, all appropriate permits from the City and give

appropriate notices to any franchisees, licensees, or grantees of the City, or departments of the City, or other units of government owning or maintaining facilities that may be affected by the proposed excavation.

4. In the event that emergency repairs are necessary for Grantee's Facilities in the Rights-of-Way, Grantee shall immediately notify the City of the need for such repairs. Grantee may immediately initiate such emergency repairs and shall apply for all appropriate permits the next business day following discovery of the emergency. Grantee shall comply with all Charter and ordinance provisions relating to such excavations or construction, including the payment of permit or license fees.
5. Locates. Grantee shall comply with the requirements of the Oregon Utility Notification Law, codified at ORS 757.542 to 757.562 and 757.993 (2013), and the rules and regulations promulgated thereunder.

E. Relocation.

1. The City shall have the right to require Grantee to change the location of its Facilities in the Rights-of-Way when the public convenience requires such change, and the expense thereof shall be paid solely by Grantee. The City shall provide Grantee not less than ninety (90) days' written notice prior to any such change of location. Should Grantee fail to remove or relocate any such Facilities by the date established by the City, the City may remove or relocate such Facilities, and the expense thereof shall be paid by Grantee, including all expenses incurred by the City due to Grantee's delay or failure. If the City requires Grantee to relocate its Facilities located within the City's Rights-of-Way, the City will make a reasonable effort to provide Grantee with an alternate location within the City's Rights-of-Way for the relocated Facilities.
2. The provisions of this Section 7.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. Within thirty (30) calendar days of the Effective Date of this Agreement, and on August 1 annually thereafter, 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 Rights-of-Way. For existing Facilities, the form shall be filed within thirty (30) calendar days of the Effective Date of this Agreement. For new Facilities, the form shall be filed within thirty (30) calendar days of the date the Facility is installed or placed in the Rights-of-Way.
2. Within thirty (30) days following Grantee's acquisition of any Facilities in the Rights-of-Way, or upon any addition or annexation to the City of any area in which Grantee retains any such Facilities in the Rights-of-Way, 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, provided that Grantee shall have a reasonable period of time to bring such acquired Facilities into compliance with this Agreement. For purposes of calculating any compensation owed pursuant to Section 3 of this Agreement, any such acquired Facilities shall be treated as new installations and are subject to the Right-of-Way Use Fee and Installation and Application Fee from the date the acquisition or annexation becomes effective.

3. Radio frequency emission levels. Grantee's Facilities shall be operated and maintained so that the Facilities are in compliance with all radio frequency emission standards specified by the Federal Communications Commission.

G. Maps. Grantee shall maintain maps and data pertaining to its Facilities located in the City Rights-of-Way on file or made available at an office in the State of Oregon. The City shall be allowed to inspect all such maps and data pertaining to its Facilities located in the City Rights-of-Way at any time during regular business hours upon not less than five (5) business days' prior notice. Upon written request of the City and without charge, Grantee shall provide a map or maps consistent with this Section 7 to the City showing the locations as-built of its installed Mobile Telecommunications System in the City Rights-of-Way. Such as-built maps shall be provided to the City within ten (10) calendar days of receipt of City's written request. Such as-built maps shall be in a form acceptable to the City Engineer with adequate vertical and horizontal control defining the specific location of Grantee's Facilities. Except as required by law, the City shall not disclose or transmit any such as-built maps or related data to third parties unless permitted by Grantee, subject to Section 17.H.

H. Restoration After Construction. Grantee shall, after construction, installation, maintenance or repair of Facilities, leave the Rights-of-Way in as good or better condition in all respects as they were before the commencement of such construction, installation, maintenance, or repairs, excepting normal wear and tear. Grantee agrees to promptly complete restoration work and to promptly repair any damage caused by such work at its sole cost and expense. When any opening is made by Grantee in a hard surface pavement in any Rights-of-Way, Grantee shall promptly refill the opening and restore the surface to a condition satisfactory to the City Engineer in accordance with standards developed and adopted by the City Engineer. All excavations made by Grantee in the Rights-of-Way shall be properly safeguarded for the prevention of accidents. All of Grantee's work under this Section 7 shall be done in strict compliance with all applicable rules, regulations and ordinances of the City.

I. Tree Pruning. After obtaining a written permit from the City, Grantee may prune or cause to be pruned, using proper arboricultural practices in accordance with such permit, any tree in or overhanging the Rights-of-Way which substantially interferes with Grantee's Facilities. Except in emergencies, Grantee may not prune trees at a point below thirty (30) feet above sidewalk grade until ten (10) days after written notice has been given to the owner or occupant of the premises abutting the Rights-of-Way in or over which the tree is growing. For the purposes of this Subsection 7.I., an emergency exists when it is necessary to prune a

tree in order to protect the public from imminent danger. The owner or occupant of the premises abutting the Right-of-Way shall have seven (7) days from receipt of Grantee's written 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.

- J. Compliance with City Codes. Grantee agrees that it is subject to and must obtain all approvals required by all applicable City codes, ordinances, resolutions, and administrative rules, including the Unified Development Code, now in effect or hereafter made effective, provided that Grantee's existing Facilities will be subject to any new ordinance provisions when Grantee is making a "substantial change," as defined in SRC 703, to such Facilities, unless deferral of such new ordinance provisions create a risk to public health, safety, property, or general welfare, or such change is mandated by law. This Agreement in no way creates or vests property rights in Grantee; and Grantee hereby waives any claims for damages based on Grantee's use of the City's Right-of-Way related to limitations imposed on, or affirmative actions required of, Grantee through application of the City's codes, ordinances, resolutions, and administrative rules affecting.

## **SECTION 8. RESERVATION OF CITY STREET RIGHTS**

Nothing in this Agreement shall be construed to prevent the City from constructing sewers, widening streets, constructing sidewalks, grading, paving, repairing, and/or altering any Rights-of-Way 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 Rights-of-Way. However, if any of Grantee's Facilities interfere with the construction or repair of any Rights-of-Way 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 Subsection 7.E. In the event of such relocation, the City will cooperate with Grantee to identify alternate locations within the Rights-of-Way. Any and all such removal or replacement shall be at the expense of Grantee; provided, however, that if the City pays for or reimburses the relocation costs of another telecommunications provider, under substantially similar circumstances, it may pay for or reimburse a proportionate share of Grantee's relocations costs to the extent permitted or allowed by the funding source and applicable laws. 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 9. STREET VACATION**

If any Rights-of-Way 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 of Facilities in the vacated Rights-of-Way, Grantee shall, without expense to the City, forthwith remove its Facilities from such Rights-of-Way and restore, repair or reconstruct the Rights-of-Way where such removal has occurred, and place the Rights-of-Way in such condition as may be required by the City Council which shall be as good or better than the condition of such Rights-of-Way immediately prior to removal. In the event of any failure,

neglect or refusal of Grantee, after thirty (30) days' written notice by the City, to restore, repair, improve or maintain such Rights-of-Way, 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.

## **SECTION 10. MAINTENANCE OF FACILITIES**

Grantee shall construct, install, operate and maintain all Facilities necessary to control and carry on 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 maintain, repair, renew, change, and improve said Facilities from time to time as may be necessary to accomplish this purpose. Grantee shall not construct its Mobile Telecommunications System in a manner that requires any customer, except the City, or any entity permitted by the City, to install in, upon, under, or over the City's Rights-of-Way any cables, ducts, conduits, or other facilities.

## **SECTION 11. DISCONTINUED USE OF FACILITIES**

- A. Grantee may at any time for any reason discontinue use of or remove any or all of its Facilities from the City's Rights-of-Way. Whenever Grantee intends to discontinue use of its Facilities within all or part of a particular portion of the Rights-of-Way and does not intend to use said Facilities again for six (6) months or more, Grantee shall submit to the City for approval a completed application describing the Facility and the date on which Grantee intends to discontinue using the Facility. Grantee may remove the Facility within one hundred twenty (120) days of the date on which it discontinues use or request that the City permit it to remain in place. If Grantee is permitted to abandon its Facilities in place, upon consent of the City, the ownership of the Facilities to be abandoned shall transfer to the City, and Grantee shall have no further obligation or liability therefor. Notwithstanding Grantee's request that any such Facility remain in place, the City may require Grantee to remove the Facility from the Rights-of-Way or modify the Facility in order to protect the public health and safety or otherwise serve the public interest. The City may require Grantee to perform a combination of modification and removal of the Facility; provided, however, that Grantee may elect to remove its Facility entirely in the event the City requests any modification to it. Grantee shall complete such removal or modification in accordance with a reasonable schedule set by the City's Public Works Director and at Grantee's sole expense. Any such removal or modification shall be directed by, and to the satisfaction of, the Public Works Director. Until such time as Grantee removes or modifies the Facility as directed by the Public Works Director, or until the rights to and responsibility for the Facility are accepted by another person having authority to construct and maintain such Facility, Grantee shall be responsible for all necessary repairs and relocations of the Facility, as well as maintenance and restoration of the Rights-of-Way, in the same manner and degree as if the Facility were in active use, and Grantee shall retain all liability for such Facility.
- B. If Grantee discontinues use of Facilities on a Replacement Structure, and that Replacement Structure is taller than the Original Structure, Grantee shall return the Replacement Structure to the height of the Original Structure at Grantee's sole expense. Grantee shall have not less



than ninety (90) days nor more than one hundred eighty (180) days to return the Replacement Structure to the height of the Original Structure. In the alternative, after proper notice pursuant to this Agreement, Grantee may request, and the City may grant in its sole discretion, a waiver from this requirement.

## **SECTION 12. HAZARDOUS SUBSTANCES.**

- A. Compliance with Applicable Law. Grantee shall comply with all applicable local, state, and federal laws, statutes, regulations, and orders concerning Hazardous Substances relating to its Mobile Telecommunications System or Facilities in the Rights-of-Way.
- B. Maintenance, Inspection, and Remediation. Grantee shall maintain and inspect its Mobile Telecommunications System and Facilities located in the Rights-of-Way. If Grantee discovers any Hazardous Substances in the course of Grantee's work on its Mobile Telecommunications System or Facilities in the Rights-of-Way, Grantee shall provide a written report of the discovery to the City within two (2) business days of the discovery. Grantee shall immediately proceed to remove and remediate, in accordance with all applicable local, state, and federal laws, any Hazardous Substances in the Rights-of-Way directly attributable to or caused by Grantee's Mobile Telecommunications System or Facilities or the acts or omissions of Grantee. Nothing in this Agreement transfers or is intended to transfer any liability to the City for removal or remediation of any such Hazardous Substances found in the Rights-of-Way.
- C. Construction, Modification, or Removal of Facilities. In the course of construction, installation, modification or removal of any of its Facilities in the Rights-of-Way, to the extent necessary to safely proceed with such work, Grantee shall remove and remediate Hazardous Substances encountered in the course of its activities in accordance with, and only to the extent required by, all applicable local, state, and federal laws, statutes, regulations, and orders. Grantee may use reasonable business efforts to recover its costs for such removal and disposal from all legally responsible third parties.

## **SECTION 13. CITY'S WRITTEN CONSENT REQUIRED FOR ASSIGNMENT, TRANSFER, MERGER, LEASE OR MORTGAGE**

- A. Consent. Except as otherwise permitted by Section 13.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 Rights-of-Way by authority of this Agreement shall be sold, leased, mortgaged, assigned, merged, or otherwise transferred without the prior written consent of the City, which consent shall not be unreasonably withheld, conditioned, or delayed. Grantee shall give written notice to the City of any transfers to entities under common control within ten (10) calendar 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 13.A. shall be deemed to prohibit the mortgage, pledge, or assignment of tangible assets of Grantee's Mobile Telecommunications System for the purpose of financing the acquisition of equipment for or the construction and operation of Grantee's Mobile 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 withhold, condition, or delay, 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 is required may occur until the successor, assignee, or lessee has complied with the requirements of Section 5, including but not limited to, providing certificates of insurance, unless the City Council waives such compliance by ordinance. Within ten (10) calendar days after execution and delivery of any instrument so consented to by the City, Grantee shall file with the City Manager 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 written consent, which consent shall not be unreasonably withheld, conditioned, or delayed. However, and notwithstanding Section 13.A., hereof, Grantee may lease any portion of its Facilities in the ordinary course of its business without otherwise obtaining the City's consent, 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 Section, a capital lease shall be treated as a lease under this Section 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 13.B.1.

1. Notwithstanding Section 13.A.1, Grantee may sell portions of its Facilities in the ordinary course of its business, without otherwise obtaining the City's consent, so long as Grantee complies with the following conditions:
  - a. The sale is to the holder of a current, existing, valid agreement, franchise, permit, or lease with the City authorizing the purchaser to operate Facilities for offering Mobile Telecommunications Services in the City and in its Rights-of-Way.
  - b. Within fourteen (14) calendar 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 Subsection 7.F.1.), and providing an executed counterpart or certified copy of the sales documents.
  - c. Grantee remains solely responsible for locating, servicing, maintaining, repairing, relocating, or removing its remaining Facilities.

- d. Within fourteen (14) calendar 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, maintaining, repairing, relocating, or removing the purchased Facilities under the purchaser's current, existing, valid agreement, franchise, permit, or lease with the City and has agreed to timely pay the amounts due pursuant to Section 3 of this Agreement. The purchaser shall not obtain any of Grantee's rights under this Agreement.

#### **SECTION 14. 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 this Agreement and all of Grantee's rights arising hereunder, in the event that:

1. Grantee violates any material provision of this 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) Grantee's failure to pay to the City any of the Fees required under this Agreement;
    - (2) The invalidation or any suspension of Grantee's payments of Fees to the City for use of the Rights-of-Way under this Agreement;
    - (3) Any failure by Grantee to submit timely reports regarding the calculation of its Fees to be paid to the City under Section 3 of this Agreement;
    - (4) Any failure by Grantee to maintain the liability insurance required under this Agreement;
    - (5) Any failure by Grantee to maintain the performance bond required under this Agreement; or
    - (6) 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 perpetrated or 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 within the City.

- B. Additional Remedies. In addition to any rights set out elsewhere in this Agreement, as well as its rights under the Salem Revised Code, the City reserves the right at its sole option to apply any of the following, alone or in combination:
1. Penalty. Impose a financial penalty of one thousand dollars (\$1,000) per violation (a separate and distinct offense shall be deemed committed each day on which a violation occurs or continues);
  2. Suspension. Suspend Grantee's rights under this Agreement, until Grantee corrects or otherwise remedies the violation;
  3. Revocation. The City or Grantee may revoke this Agreement in the event that any provision of the Agreement becomes invalid or unenforceable, and the City 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 Section 14.B.2. by providing not less than thirty (30) days' written notice prior to the effective date of the revocation and an opportunity to renegotiate acceptable provisions in accordance with Section 15.
- 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 similar violations, and any other matters the City deems appropriate in its sole discretion.
- D. Notice and Opportunity to Cure. The City shall give Grantee not less than thirty (30) days' prior written notice of its intent to exercise its rights under Section 14, 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 those 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 may impose any or all of the remedies available under this Section 14.

## **SECTION 15. RENEGOTIATION**

In the event that any provision of this Agreement becomes invalid or unenforceable and the City 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 ninety (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 16. TERMINATION AND REMOVAL OF FACILITIES**

- A. If this Agreement is terminated or expires on its own terms and is not replaced by a new Agreement or similar authorization, Grantee shall remove its Mobile Telecommunications System and all Facilities from the City Rights-of-Way within one hundred twenty (120) days of such expiration or termination unless the City has, in writing, authorized abandonment in place. In determining whether to permit abandonment in place, the City shall consider Grantee's comments. Following consideration of any such comments, the City Manager may issue a written order permitting abandonment in place. If Grantee is permitted to abandon its Mobile Telecommunications System or any Facilities in place, the ownership of such Facilities permitted to be abandoned in place in the Rights-of-Way shall transfer to the City, and Grantee shall have no further obligation or liability therefor. The City may require Grantee to perform a combination of modification (for Facilities permitted to be abandoned in place) and removal of the Facilities; provided, however, that Grantee may elect to remove its Mobile Telecommunications System or Facilities entirely in the event the City requests any modification. Grantee shall complete such removal or modification in accordance with a reasonable schedule set by the City and at Grantee's sole expense. Any such removal or modification shall be directed by and to the satisfaction of the City's Public Works Director. Until such time as Grantee removes or modifies its Mobile Telecommunications System or Facilities as directed by the Public Works Director, or until the rights to and responsibility for the Mobile Telecommunications System or Facilities are accepted by another person having authority to construct and maintain the Mobile Telecommunications System or Facilities, Grantee shall be responsible for all necessary repairs and relocations of all Facilities, as well as maintenance and restoration of the Rights-of-Way, in the same manner and degree as if the Mobile Telecommunications System or Facilities were in active use, and Grantee shall retain all liability for the Mobile Telecommunications System and all Facilities.
- B. If this Agreement is terminated or expires on its own terms and is not replaced by a new Agreement or similar authorization, and if the City does not permit abandonment in place, Grantee shall return all Replacement Structures that are taller than the Original Structures to the height of the Original Structure at Grantee's sole expense. Grantee shall have not less than ninety (90) days nor more than one hundred and eighty (180) days to return the Replacement Structure to the height of the Original Structure. In the alternative, after proper notice pursuant to this Agreement, Grantee may request, and the City may grant in its sole discretion, a waiver from this requirement.

## **SECTION 17. MISCELLANEOUS**

### **A. Compliance with Laws.**

1. Both Grantee and the City shall comply with all applicable federal and state laws.
2. Subject to Subsection 7.J, 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, subsection, 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.
- C. Regulation and Nonenforcement by the City. The City 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 17.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, 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. Venue and Choice of Law.
1. Exclusive venue for litigation of any action arising under this Agreement shall be in the Circuit Court of the State of Oregon for Marion County unless exclusive jurisdiction is in federal court, in which case exclusive venue shall be in the United States District Court for the District of Oregon. Each Party hereto expressly waives any and all rights to maintain an action under this Agreement in any other venue, and expressly consents that, upon motion of the other Party, any case may be dismissed or its venue transferred, as appropriate, so as to effectuate this choice of venue.
  2. This Agreement 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. Whenever notice is required or permitted to be given under this Agreement, such notice shall be given in writing to the other Party by: a) personal delivery; b) sending via a reputable commercial overnight courier; c) mailing using registered or certified United States mail, return receipt requested, postage prepaid; or d) electronically confirmed facsimile transmission to the addresses or facsimile numbers set forth below:

If to the City: City Manager's Office  
City of Salem, Oregon  
555 Liberty St. SE, Room 220  
Salem, Oregon 97301  
FAX (503) 588-6354

With a copy to: City Attorney's Office  
City of Salem, Oregon  
555 Liberty St. SE, Room 205  
Salem, Oregon 97301  
FAX (503) 361-2202

If to Grantee: New Cingular Wireless PCS, LLC  
Attn: Network Real Estate Administration  
575 Morosgo Drive NE  
Atlanta, Georgia 30324

With a copy to: New Cingular Wireless PCS, LLC  
208 S. Akard Street  
Dallas, TX 75202-4206

Any such notice or communication delivered by personal delivery shall be deemed to be given upon actual receipt. Any notice sent by overnight courier shall be deemed to be given five (5) calendar days after dispatch. Any notice sent by United States mail shall be deemed to be given five (5) calendar days after mailing. Any notice sent by facsimile transmission shall be deemed to be given when receipt of the transmission is generated by the transmitting machine. (or the first business day thereafter if faxed on a Saturday, Sunday or City holiday). To be effective against either Party, such facsimile transmission shall be confirmed by telephone notice to the other Party.

G. Public Records. Documents and records submitted by Grantee to the City may be subject to public inspection under the Oregon Public Records Law, ORS 192.410 through 192.505. Grantee acknowledges it is responsible for becoming familiar with the provisions of the Oregon Public Records Law.

H. Confidential Records. Grantee may identify information, submitted to the City as confidential, such as trade secrets, financial records, customer information, or technical information (as defined in ORS 192.501 or 192.502). Grantee shall prominently mark any information for which it claims confidentiality with the word "Confidential" on each page of such information prior to submitting such information to the City. Grantee shall also provide a written explanation as to why such information is confidential under state or federal law. The City shall treat any information so marked as confidential until the City receives any request for disclosure of such information. City shall make reasonable efforts to provide the Grantee notice of a request for information marked as confidential, including a copy of the

request, within ten (10) business days of receiving any such request. Grantee shall have five (5) business days within which to provide a written response to the City before the City will disclose any of the requested confidential information. The City shall retain the sole discretion to determine whether to release the requested confidential information, in accordance with applicable laws.

I. Amendments.

1. This Agreement may be amended only by written instrument executed with the same formalities as this Agreement.
2. 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 Mobile Telecommunications Services as defined in Section 2. In the event that Grantee actually receives authority to offer services outside the scope of this Agreement, or otherwise begins offering services outside the scope of those otherwise identified in this Agreement, Grantee shall immediately notify the City. Within ninety (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 Grantee's occupancy of the Rights-of-Way, it is determined by the City that Grantee's transmission facilities are negatively impacting the City's communication facilities, Grantee agrees to cooperate with the City 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 Grantee in installing a temporary replacement facility so as to avoid disruption of Grantee's service.

K. Unless otherwise specified in this Agreement, in the event of termination of this Agreement under Section 1.C. or forfeiture or revocation pursuant to Section 14, all indemnity rights, audit rights and confidentiality obligations shall survive for a period of three (3) additional years following the date of termination or forfeiture.

L. Grantee shall be responsible for obtaining all other necessary approvals, authorizations, and agreements to attach Facilities to Structures owned or controlled by any third party. Grantee acknowledges and agrees that the City is making no representation, warranty, or covenant whether any of the foregoing approvals, authorizations, or agreements are required or may be obtained by Grantee from any other Person.

M. Grantee acknowledges that it, and not the City, shall be responsible for compliance with all marking and lighting requirements of the Federal Aviation Administration (the FAA) or the Federal Communications Commission (the FCC). Grantee shall indemnify and hold the City



harmless from any fines or other liabilities caused by Grantee's failure to comply with such requirements. Should Grantee or the City be cited by either the FAA or the FCC because Grantee's Facilities or System are not in compliance and should Grantee fail to cure the conditions of noncompliance within the timeframe allowed by the citing agency, the City may either terminate this Agreement immediately on notice to Grantee or proceed to cure the conditions of noncompliance at Grantee's sole expense.

- N. Nondiscrimination. Grantee agrees that no person shall, on the grounds of race, religion, color, creed, national origin, sex, marital status, familial status, sexual orientation, gender identity, source of income, age or physical or mental disability suffer discrimination in the performance of this Agreement when employed by Grantee. Grantee agrees to comply with all applicable requirements of state and federal civil rights and rehabilitation statutes, rules and regulations. Further Grantee agrees not to discriminate against minority-owned, women-owned, or emerging small businesses in awarding subcontracts as required by ORS 279A.110.
- O. 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.
- P. Complete Agreement. This Agreement, including all attachments and laws, rules and regulations incorporated herein, constitutes the entire agreement and understanding between the Parties with respect to the subject matter hereof.

#### **SECTION 18. OTHER AUTHORITY SUPERSEDED:**

Upon the Effective Date of this Agreement, any and all authority to access the City Rights-of-Way and Structures located in the City Rights-of Way previously granted to Grantee by the City shall be superseded by this Agreement.

**IN WITNESS WHEREOF** the Parties have caused this Agreement to be signed in their respective names by their duly authorized representatives as of the dates set forth below.

CITY OF SALEM, OREGON

New Cingular Wireless PCS, LLC, a  
Delaware limited liability company

By: AT&T Mobility Corporation  
Its: Manager

By: \_\_\_\_\_  
Steven D. Powers, City Manager

By: \_\_\_\_\_  
(typed name and title)

Dated: \_\_\_\_\_

Dated: \_\_\_\_\_