

RES 20-055

Wilmington, Delaware
September 17, 2020
October 15, 2020

#4859

Sponsor:

Council
Member
Freel

Co-Sponsor:

Council
President
Shabazz

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF WILMINGTON, that the License Agreement between the **CITY OF WILMINGTON,** a municipal corporation of the State of Delaware, and **NEW CINGULAR WIRELESS PCS, LLC,** (“New Cingular”) authorizing New Cingular to, among other things, construct, install, maintain, and operate wireless telecommunication facilities in the public rights of way of the City of Wilmington, a copy of which is attached hereto as Exhibit “A” and made a part hereof, is hereby approved, and the Mayor or his designee and City Clerk are hereby authorized to execute as many copies of said Agreement as may be necessary.

Passed by City Council,

Attest: _____
City Clerk

SYNOPSIS: This Resolution approves the License Agreement (“the License”) between the City and New Cingular Wireless PCS, LLC (“New Cingular”) to, among other things, construct, install, maintain, and operate wireless telecommunication facilities in the public rights of way of the City of Wilmington. This equipment is part of New Cingular’s network for the operation of wireless communications services. The initial term of the License is ten (10) years commencing on September 17, 2020 and shall continue thereafter until terminated by either party.

FISCAL IMPACT STATEMENT: New Cingular will pay the City an annual license fee in the amount of \$270 per node (as that term is defined by the License) per node user. Consistent with the License, the fee may be adjusted based upon a study of the City’s actual costs for maintaining the rights of way or a change in applicable law.

EXHIBIT A

A LICENSE AGREEMENT AUTHORIZING NEW CINGULAR WIRELESS PCS, LLC TO CONSTRUCT, INSTALL, MAINTAIN, REPAIR, OPERATE, RELOCATE, REPLACE AND REMOVE CERTAIN FACILITIES RELATING TO WIRELESS TELECOMMUNICATIONS FACILITIES INSTALLED IN PUBLIC RIGHTS-OF-WAY IN THE CITY OF WILMINGTON

This License Agreement, (“Agreement” or “License”) dated this ____ day of _____, 2020 (“Effective Date”), is made by and between the CITY OF WILMINGTON (“City”) and NEW CINGULAR WIRELESS PCS, LLC, (“Licensee”).

RECITALS

WHEREAS, Licensee, has requested consent of the City to use certain Public Rights-of-Way of the municipality to construct, maintain, and operate its facilities for use in providing wireless telecommunications services within the municipality for its own business purposes and profit; and

WHEREAS, it is the policy of the City to permit such entry into the corporate limits and such use of the Public Rights-of-Way for the provision of telecommunication services, subject to the exercise of the City’s police powers, and subject to the right of the City to charge for that use; and

WHEREAS, the City has agreed to grant a non-exclusive license to Licensee, for that purpose, as more fully set forth below; and

WHEREAS, Licensee desires to use certain City Public Rights-of-Way and is willing to do so consistent with this Agreement.

NOW, THEREFORE, and in consideration of the mutual covenants and conditions set forth herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged and intending to be legally bound, the parties hereby agree as follows:

1. Definitions.

Capitalized terms have the meaning specified in this section; terms not defined herein shall have the meaning set forth in the *Wilmington City Code* (“Code”) and City’s *Regulations for Placement and Maintenance of Wireless Telecommunications Facilities* (“Manual”), and if not defined there, their ordinary meaning. Singular terms include the plural; shall and will are mandatory, and “may” is permissive. References to statutes and regulations refer to the same as amended or renumbered.

1.1. “Agreement” or “License” means this Agreement, together with Appendices and Exhibits attached this Agreement, if any, and any amendments or modifications thereto.

1.2. “Applicable Law” or “Law” means all federal, state, and local laws, statutes, codes, ordinances, resolutions, orders, rules, and regulations.

1.3. “Authorizations” means the permissions Licensee must have in addition to this License to deploy Facilities and/or provide Services, which may include licenses, permits, zoning approvals; variances, exemptions; grants of authority to use private rights of way and/or

easements or facilities; agreements to make attachments to poles, ducts, conduits, towers, buildings, rooftops, manholes, and the like; and any other approval of a governmental authority or third persons with respect to (i) the construction, installation, repair, maintenance, operation or use of tangible or intangible property, as the case may be, or (ii) any requirement by a governmental authority for the engagement in a business or enterprise.

1.4. “Authorized Facilities” means Facilities that comply with the requirements of this License, and the City Code and Manual, and have all necessary Authorizations in full force and effect.

1.5. “Central Communications Hub” refers to a site that receives signals from Nodes, and includes equipment that propagates and/or converts, processes or controls the communications signals transmitted and received from the Nodes.

1.6. “Construction and Maintenance” and variations of those terms refer to any activity performed in the Public Rights-of-Way with respect to the Facilities, including construction, modification, replacement, repair, operation, maintenance, removal or relocation.

1.7. “Facility” or “Facilities” means any and all equipment and installations of any kind owned by Licensee and under the control of Licensee that are reasonably necessary and appropriate for the provision of Services including, but not limited to any optical repeaters, converters, power amplifiers, radios, multiplexers, remote radioheads, antenna, aboveground and underground fiber optic and coaxial cable, conduit, wires, meters, pedestals, power switches, cabinets, enclosures, and control boxes, and supporting structures, whether new, existing or replacement structures, and whether referred to singly or collectively.

1.8. “License” means the non-exclusive right granted, by ordinance and subject to this Agreement, to Licensee to Construct and Maintain the Facilities on, over, under, upon, across, and along the Public Rights-of-Ways within the License Area.

1.9. “License Area” shall mean all the area within the boundaries of the City.

1.10. “Node” means a Facility or set of Facilities at a fixed location that includes one or more radiofrequency transmitters or antennas, which wirelessly connects to mobile stations and which is connected along with other Nodes via a high capacity transport medium to a core network. A Node must be a Small Wireless Facility.

1.11. “Person” shall have the same meaning as the definition contained in City Code Section 42-704(v).

1.12. “Public Rights-of-Way” shall have the same meaning as the definition contained in City Code Section 42-704(x).

1.13. “Services” means any telecommunications service provided by means of the Facilities by Licensee pursuant to a certificate issued by the State of Delaware, or a license issued by the Federal Communications Commission; or the leasing, operation or maintenance of Facilities by Licensee, except that the term does not include cable service as defined in 47 USC 522(6), open video services or other multichannel video programming services other than video programming provided on a common carrier basis.

1.14. “Small Wireless Facility” has the same meaning as the term “small wireless facility” in 47 C.F.R.1.6002(l), as the same may be amended from time to time.

2. Grant of License

2.1. Grant. The City hereby grants to Licensee the nonexclusive right to Construct and Maintain Nodes comprised of Authorized Facilities within the Public Rights-of-Way, which License shall be exercised at Licensee's sole cost and expense, and which shall be subject to all deeds, easements, dedications, conditions, covenants, restrictions, encumbrances, and claims of title of record which may affect the Public Rights-of-Way. The License is not divisible, and Licensee may not grant any person the right to use or occupy the Public Rights-of-Way. The grant does not extend to any other service or Facility, and Licensee may be required to obtain an additional License or an amendment to this License before using and occupying the Public Rights-of-Way to provide additional services or Facilities. It is the intent of the parties that this License be liberally amended or additional Licenses issued to allow for the provision of additional services, subject to appropriate and lawful conditions.

2.2. Special Conditions on Grant.

2.2.1. Licensee may place Nodes in the Public Rights-of-Way, but may not place Central Communications Hubs in the Public Rights-of-Way.

2.2.2. Unless exempted by virtue of the City Code and Manual, each Node shall be placed subject to a wireless permit, as that term is used in Section 1.3 of the Manual. The permit will approve the location and the design of any particular Node.

2.2.3. Designs attached to this Agreement have been pre-approved pursuant to Section 2.6 of the Manual, for use at the locations indicated in that approval. The City may direct Licensee which pre-approved design to use in particular locations if it is determined that one design is more consistent with the surrounding areas than others. The City will not unreasonably refuse to approve other designs or locations for Facilities if the City determines that the design (a) otherwise complies with Applicable Law; (b) is subject to concealment elements and aesthetic requirements that minimize visual impacts and ensure the Facilities will be consistent in size and shape with existing structures in the same area; and (c) does not contain lighting elements (other than on City approved Light Poles) or produce noise that would violate the noise ordinances of the City. Ground-mounted cabinets associated with the Nodes are not permitted other than with the express review and approval of the City. In approving locations, the City may ensure that the Node Facilities are placed to minimize impacts on adjoining property owners, and other Public Right-of-Way users. A Node will not be approved in an area where the lines of the incumbent local exchange carrier are underground, except where the Facilities can be concealed within or on an existing structure to the reasonable satisfaction of the City, or an existing structure may be replaced with a structure of a design satisfactory to the City; unless Licensee demonstrates that denial of the application would prohibit or have the effect of prohibiting the provision of personal wireless services, within the meaning of 47 U.S.C. §332(c)(7), and otherwise violate Applicable Law, such that the City is required to approve the Facilities.

- 2.2.4. Subject to the City's permitting requirements, Licensee may repair and replace Facilities, so long as the appearance of the Facilities or property affected by the repair or replacement does not change.
- 2.2.5. Subject to obtaining the written permission of the owner(s) of the affected property, and subject to conditions of this License and the City Code, Licensee may enter upon the Public Right-of-Way to perform Construction and Maintenance on Nodes in or on utility poles, street light poles or other structures within the Public Right-of-Way lawfully owned and operated by City or by other entities. *Provided that*, use of any street light pole or traffic signal poles or other structure owned, leased or otherwise subject to the control of the City in the Rights of Way ("City Facility") requires a separate agreement with the City consenting to, and establishing the conditions for such use. If Licensee proposes to use a street light pole for which the City paid or pays a fee for installation or service, the City may require Licensee to provide City title to that street light pole as a condition of use as provided in such separate agreement.
- 2.3. No Real Property Interest. Nothing herein shall be deemed to grant, convey, create or vest in Licensee a real property interest in land, including any fee, leasehold interest, or easement, or the right to place the Facilities at any particular location within the Public Rights-of-Way.
- 2.4. Compliance with Law.
- 2.4.1. The exercise of License rights by Licensee is subject to, and strictly conditioned upon compliance with the terms of this Agreement and Applicable Law now existing or hereinafter enacted.
- 2.4.2. All work upon the streets and public places of the City performed by Licensee shall be in accordance with all applicable standards, codes, and ordinances, and will be done under the general supervision of the Department of Public Works and/or Department of Licenses & Inspections. Nothing in this Agreement shall be construed as a waiver of any laws, regulations or rules of the City or of the City's right to require the Licensee to secure the appropriate permits or Authorizations, or to pay the applicable fees associated with the same. Nothing in this Agreement shall act as a waiver of the City's police powers. Nothing herein prevents Licensee from challenging the applicability of a particular fee or regulation to it on the ground that it is unduly discriminatory or preempted by state or federal law.
- 2.4.3. Continued occupancy of the Public Rights-of-Way is contingent upon strict compliance with the terms and conditions of any permit. Subject to Section 13.8, if material terms and conditions of any permit are no longer enforceable, then the City may terminate the permit and make continued occupancy subject to such conditions as it may impose with respect to the Facilities pursuant to Applicable Law. This Agreement does not authorize occupancy for any purpose where the occupancy is not permitted under the City Code or Manual.
- 2.5. Conditions Precedent. The License shall commence upon the Effective Date, provided that the Licensee shall have met each of the conditions precedent set forth below and otherwise in this Agreement (unless the City agrees to waive any of the conditions precedent), at which time it shall become effective: The Licensee shall have secured its insurance policies as set

forth in Section 10 of this Agreement and delivered the certificate of insurance to the City's Risk Manager, with proof that the policies will be in effect on or before the Effective Date, and that the policies are in accordance with this Agreement.

2.6. Conditions Subsequent: RF Emissions. Without limiting the other provisions of this Agreement, Licensee must cease its operations if it is not in compliance with Federal Communications Commission ("FCC") regulations governing RF emissions (including any standards that may be adopted in the future), as the same may be amended from time to time, except to the extent that the FCC or other Order, Ruling or Regulation permits it to continue to operate. The issuance of this License is not intended to insulate Licensee from any claim or any remedy based on RF emissions. On request, or to the extent that Licensee is aware of any non-conformance, Licensee shall submit a report identifying applicable standards, measured emissions, and any area where it has Facilities that do not comply with applicable standards. The report will not be treated as confidential.

2.7. Other Authorizations. As a condition of this grant, Licensee is required to obtain and is responsible for any Authorization that may be required for the installation, operation or maintenance of the Facilities.

2.8. Licensee's Expense. Except as specifically provided otherwise, all costs incurred by Licensee in connection with its compliance with, or enjoyment of, this License shall be borne by Licensee and not by City, and all work that must be performed in order to permit the placement of Facilities at particular locations (including work required to comply with Applicable Law relating to persons with disabilities) shall be paid for by Licensee.

2.9. Application to Subcontractors. Licensee is responsible for ensuring that all contractors and subcontractors comply with the requirements of this License and Applicable Law when performing work on behalf of Licensee, and Licensee is jointly and severally responsible for their acts and omissions.

2.10. No Third Party Beneficiaries. Nothing in this Agreement, express or implied, is intended to or shall confer upon any person (other than the City and Licensee), any right, benefit or remedy under this Agreement of any nature whatsoever.

3. Term.

This Agreement shall be in force and effect for an initial term of ten (10) years, and shall continue in force and effect thereafter until properly terminated by either party. Either party may terminate the Agreement at the end of its initial ten-year term, or at any time thereafter, by giving written notice of its intention to do so no less than two (2) years before the proposed date of termination. Upon termination, all of City's consents to use and occupancy of the Public Rights-of-Way, and Licensee's rights to use and occupy the Public Rights-of-Way are also terminated. Notwithstanding the foregoing, all of Licensee's duties related to use of the Public Rights-of-Way, and its duties to indemnify the City, shall survive termination until the Facilities are removed, or Licensee's obligations terminate by agreement of the parties. It is understood and agreed that the decision of whether to renew or to terminate this Agreement pursuant to this Section shall be made by those elected officials then in office under such circumstances as may then obtain. Provided, however, nothing in this paragraph is intended to expand or contract any rights that Licensee may have as a matter of state or federal law to obtain a license from City.

Public Rights-of-Way License Fee

3.1. Scope. The compensation set forth herein is for use of the Public Rights-of-Way to install wireless Nodes for the provision of Services. Licensee may use the Public Rights-of-Way to provide additional services only with the agreement and consent of the City. Licensee may not permit any other person to place equipment that person owns or controls as part of that Node without agreement of, and payment of an additional fee to the City as described below.

3.2. When Additional Fees May Be Required. If a Node is to be modified so that it no longer is a small wireless facility, an additional fee must be paid, which fee shall be established by negotiation prior to modification. If a facility is proposed which does not meet the definition of a Node, the fee shall be established by negotiation prior to installation. The fees that may be charged are only subject to such limits as may be established by state and federal law.

3.3. Amount. Subject to Sections 3.9-3.10, Licensee will pay a fee of \$270.00 per Node per annum-per Node user. Licensee is a user, and any person who owns or controls any portion of the Node is also a user, provided that, for a Licensee that does not provide Services, Licensee and one entity providing Services count as a single user. This amount shall be adjusted annually based on the percentage increase in the annual average CPI-U for the Philadelphia-Camden-Wilmington Region, with the 2019 annual average serving as the reference period and with the first adjustment being made for the calendar year 2021.

3.4. Holdover. Subsequent to the termination of this Agreement, if Licensee, without the City's express approval, continues to occupy the Public Rights-of-Way and continues to operate; or if it ceases operation but fails to remove the Facilities within 120 days of the termination of this Agreement; the City may, at its option, increase any of the fees charged by 2.5 times.

3.5. Payment. The annual rent due for Node shall be paid in accordance with this paragraph. On the first day of the month following approval of any Node, Licensee shall pay Licensor the amount owed per annum (as adjusted by CPI) for the approved Node multiplied by a percentage equal to the number of remaining months in the fiscal year divided by 12. Thereafter, on July 1 of every year, Licensee shall pay Licensor the annual rent owed for the Node. If Licensee subsequently adds an additional user, from the date of installation of the additional user Licensee shall pay Licensor the \$270 per annum (as adjusted by CPI) rent at a percentage equal to the number of remaining months in the fiscal year divided by 12. Thereafter, on July 1 of every year, it shall pay the Licensor the rent owed for such additional users. If Licensee ceases to use a Node, Licensor will rebate an allocable portion of the rent paid in advance, based upon the date all of Licensee's Equipment are removed, and the affected property restored as required under City Code Section 42-713(g).

3.6. No Accord or Satisfaction. The acceptance of any payments shall not be treated as an accord or satisfaction. Upon reasonable notice by the City to audit Licensee's books and records, Licensee shall produce its books and records for review at the City's offices, or in such other manner acceptable to the City. The City may inspect Facilities as necessary to ensure that the fees owed under this Agreement are being paid. If an audit shows that Licensee

has underpaid the amount due hereunder by 5% or more for any year reviewed, the cost of the audit shall be paid by Licensee.

3.7. Interest on Late Payment. Interest will be charged on any late payment at the statutory interest rate on judgments under State law, or if there is no such rate the prime rate charged by the bank the City uses as its main depository, plus 3%.

3.8. Payment Not In Lieu. The fee specified in this Section 3 is not in lieu of any other license, tax, fee or assessment, which may be imposed under this Agreement, the City Code or Applicable Law, or in lieu of rents for use or in return for a license to use public property other than the Public Rights-of-Way as herein specified.

3.9. Adjustment Based on Cost Study. The City may adjust these fees at any time if based on a study of its actual costs, an adjusted fee is a reasonable approximation of costs, the costs are reasonable, and are non-discriminatory. In the event the City conducts a study prior to any fee adjustment, the City must provide any study and a breakdown of actual costs considered resulting in a fee adjustment and Licensee shall reimburse the City for a proportional share of the costs of conducting such study, based on the number of similarly situated Licensees whose compensation for use of the rights-of-way is based on cost.

3.10. Adjustment To Non-Cost-Based Rates. Should Applicable Law permit City to charge a fee that is not cost-based, City may adopt any lawful fee, and apply it to Licensee at any time two (2) years after the effective date of this Agreement.

4. Work in the Public Rights-of-Way.

4.1. No Limitation on Obligation to Comply With Applicable Laws. Without limiting its obligations under Section 2, Licensee shall comply with the requirements of this Section.

4.2. No Interference.

4.2.1. No Public Right-of-Way or other public place shall be obstructed longer than necessary during Construction and Maintenance, and once completed, any disturbance associated with the Construction and Maintenance to the Public Rights-of-Way or public place, shall be restored as required under City Code Section 42-713(g) and any other Applicable Law. No part of any Public Right-of-Way, or other public place of the City, including any public drain, sewer, catch basin, water pipe, pavement or other public improvement, shall be damaged. However, should any such damage occur, the Licensee shall repair the same as promptly as possible, and, in default thereof, the City may make such repairs and charge the reasonable cost thereof to and collect the same from the Licensee. In no event may Facilities be constructed or maintained in a manner that creates a hazardous condition, or a condition that is inconsistent with Applicable Law protecting persons with disabilities.

4.2.2. Without limiting the City's authority under this Agreement or the City Code, the City may manage Construction and Maintenance within the Public Rights-of-Way to prevent undue burdens on those Public Rights-of-Way and users of them; and to maximize efficient use of the Public Rights-of-Way. The City may require Licensee to coordinate construction activities with other entities occupying the Public Rights-

of-Way. And where there are conflicting requests for construction of Facilities similar to those authorized hereunder at a particular location, the City, after providing Licensee and other affected entities an opportunity for comment, may require consolidation of Facilities or develop a non-discriminatory means of allocating sites that may be appropriate for placement of facilities in the Public Rights-of-Way.

4.3. Closing of Public Rights-of-Ways. Nothing in this Agreement shall be construed as a waiver or release of the rights of the City in and to the Public Rights-of-Ways. In the event that all or part of the Public Rights-of-Ways within the License Area are (1) closed to pedestrian and/or vehicular traffic and/or utilities and services comparable to Services; or (2) vacated in accord with the City Code, or if ownership of the land in, under or over the affected Public Rights-of-Ways is otherwise transferred to another Person, all rights and privileges granted pursuant to this Agreement with respect to such Public Rights-of-Ways, or any part of such Public Rights-of-Ways so closed, vacated, or transferred, shall cease upon the effective date of such closing, vacation, or transfer, and Licensee shall remove its Facilities from such public Rights-of-Ways, unless an agreement is otherwise reached with the new party owning or controlling the subject property. Nothing herein is meant to preclude Licensee from pursuing any rights it may have under state law against a private Person if the Public Right-of-Way is vacated for the benefit of that Person. The City shall provide reasonable prior written notice to Licensee of any such closing, vacation, or transfer to allow Licensee to remove its Facilities where the right to continue to occupy and use such Public Rights-of-Way is not reserved for Licensee.

4.4. Relocation of Facilities.

4.4.1. Licensee may be required to remove and relocate its Facilities, subject to such notice as may ordinarily be provided to users of similar structures but in no event less than 60 days' notice (except in an emergency), if: the structures to which they are attached or located within are removed, ordered to be removed or relocated; or to accommodate the use of the Public Rights-of-Way by other entities; or to ensure that the facilities or structures to which they are attached or located within do not interfere with the use of the Public Rights-of-Way by the public, or present a risk to public health or safety. To the extent that Licensee is required to remove or relocate its Facilities to accommodate the use of the Public Rights-of-Way by a third party, nothing herein prevents Licensee from seeking compensation from that third party (other than parties identified in Section 4.4.3).

4.4.2. If Licensee's Facilities are located aboveground in the Public Right-of-Way and the distribution lines of the incumbent local exchange carrier or electric utility subsequently are placed underground, Licensee's aboveground Facilities (other than those comparable to any Facilities of the incumbent local exchange carrier which are permitted to remain aboveground) shall be placed underground at the same time, except for such Facilities which, because of their concealment elements and location, are specifically approved by permit to remain aboveground. Nothing herein prevents Licensee from submitting an application for placement of Facilities aboveground, subject to showing that as proposed, the City is required to grant the application under Applicable Law.

4.4.3. The rights and privileges granted hereby shall not be in preference or hindrance to the right of the City, or any other governmental agency, improvement district or other authority having jurisdiction, to perform or carry on any public works, public improvements or public projects. In the event that the Facilities interfere in any way with the construction, maintenance or repair of such public works, public improvements, or public projects, the Licensee, at its expense, shall (a) immediately commence work to remove or relocate the object of such interference if emergency circumstances exist or (b) otherwise, within sixty (60) days of notice of such interference, protect or relocate its Facilities, as may be directed by the relevant authority.

4.4.4. The City shall cooperate with Licensee in finding a suitable alternative location for any relocated Facilities removed pursuant to this Section in a manner that, to the extent reasonably consistent with other provisions of this License, and which allows Licensee to continue to provide Service to its customers, including, but not limited to, expediting approval of any necessary permits required for the relocation of Facilities.

4.4.5. If Licensee defaults in its obligations hereunder, the City may remove or relocate the Facilities and charge the reasonable cost thereof to and collect the same from the Licensee.

4.5. All Work Performed Safely. Construction and Maintenance shall be done in a workmanlike manner. All work involved in the Construction and Maintenance of the Facilities shall be performed in a safe, thorough, and reliable manner using materials of good and durable quality. The Licensee shall comply with applicable codes and industry standards, as amended from time to time. The Licensee shall employ ordinary care at all times and employ commonly accepted methods and devices for the prevention of failures and accidents that are likely to cause damage, injury, or nuisance to the public. In addition, the Licensee shall, at its sole cost and expense, undertake all necessary and appropriate efforts to prevent accidents at its work sites, and to comply with safety requirements of all permits, licenses, and other forms of approval or authorization. Licensee will comply with City requirements for identification of the Facilities and for identification of employees, subcontractors, vehicles and equipment when performing work within the Public Right-of-Way.

4.6. Maintenance.

4.6.1. Licensee shall maintain the Facilities in good condition and neat and orderly appearance, and in compliance with all Applicable Laws, permits, Authorizations and site licenses.

4.6.2. Licensee shall keep the Facilities free of debris and anything of a dangerous, noxious or offensive nature or which would create a hazard or undue vibration, heat, noise or interference. If the City gives Licensee written notice of a failure by Licensee to maintain the Facilities, Licensee shall use its best efforts to remedy such failure within forty-eight (48) hours after receipt of such written notice. If Licensee defaults in its obligations hereunder, the City may perform the necessary work and charge the reasonable cost thereof to and collect the same from the Licensee.

4.6.3. Licensee shall at all times keep and maintain the Facilities free of all graffiti located thereon and shall comply with City Code Section 36-40.

4.7. Emergency Notification. The Licensee shall provide the City with a twenty-four (24) hour emergency telephone number at which a representative of the Licensee, not voice mail or a recording, can be contacted in the event of an emergency. At the City's request, a contact number will also be placed on Licensee's Facilities in such manner as the City may reasonably direct. The Licensee shall respond immediately to address a reported emergency.

4.8. Excavation Notices. Licensee must be a member of an approved notification center pursuant to the Underground Utility Damage Prevention and Safety Act (Miss Utility) and comply with the requirements of 26 *Del. C.* § 801.

4.9. Inspection by City. The City shall have commercially reasonable access to inspect any work conducted by Licensee during the Construction and Maintenance of Facilities.

5. Removal Due to Termination or Abandonment.

Following the termination of the License for any reason, or in the event Licensee ceases to operate and abandons any Facilities, Licensee shall, within one hundred twenty (120) days, remove such Facilities from the Public Rights-of-Way and restore the Public Rights-of-Way to the condition required under City Code Section 42-713(g). Alternatively, the City may allow Licensee, in the City's sole and absolute discretion, to abandon Facilities in place and convey the Facilities to the City free and clear. If Licensee defaults in its obligations hereunder as set forth in Section 7, the City may perform the necessary work and charge the reasonable cost thereof to and collect the same from the Licensee.

6. Required Reports.

6.1. Upon request, the Licensee shall provide City an "as-built" map clearly indicating the location of the Facilities in the Public Rights-of-Way, which maps shall identify the owner of any structure on or within which Licensee's Facilities are located.

6.2. Upon request, and to the extent not expressly required under a permit, Licensee will keep City apprised of the status of any work in the Public Rights-of-Way.

6.3. Upon request, Licensee shall provide any required certificate of public convenience and necessity, and shall provide other proofs that it has authority to construct, maintain and provide Services.

7. Default and Remedies

7.1. Defaults. The following are defaults under this Agreement:

7.1.1. If either party fails to perform or comply with any of the conditions or covenants of this License and such failure continues for a period of thirty (30) calendar days after written notice thereof, unless the performance cannot be reasonably completed within the thirty (30) day period, and the party has commenced good faith efforts to perform and is diligently proceeding to complete performance to the satisfaction of the other party; or

7.1.2. If Licensee fails to pay any sums herein specified when due and does not pay within thirty (30) calendar days after receipt of written notice of said default; or

7.1.3. Licensee's acts or omissions create an imminent hazard to persons or properties which Licensee cannot or does not immediately correct.

7.2. Default by Licensee. In the event of default by Licensee as specified in the preceding section, which default has not been cured in any applicable cure period, the City shall have the right to terminate this License, by giving thirty (30) calendar days written notice to Licensee, and in addition may pursue any other remedies available to it at law or equity. The thirty-day notice period shall not constitute an additional cure period.

7.3. Default by City. In the event of default by the City, Licensee shall have the right to terminate this License while any default continues, beyond any applicable cure period, by giving thirty (30) calendar days written notice to the City, which thirty (30) day period shall not constitute an additional cure period, and in addition may pursue any other remedies available to it for injunctive relief. Licensee shall have no recourse for damages against the City except as required by state law, whether resulting from enforcement or non-enforcement of this License or any provision of Applicable Law.

8. City Termination Right.

City shall have the right to terminate this Agreement (i) if the City is mandated by law, a court order or decision, or the federal or state government to take certain actions that will cause or require the removal of the Facilities from the Public Rights-of-Way; or (ii) if Licensee's Authorizations with respect to the Facilities and/or provide Service are terminated, revoked, expired, or otherwise abandoned; or (iii) if any term related to the design or placement of the Facilities is unenforceable.

9. Indemnification

Before commencing any work, and as a condition of occupancy, Licensee ("Indemnitor") shall execute an indemnity in a form acceptable to the City Solicitor which shall provide that Indemnitor shall be liable for, and the Indemnitor shall indemnify, defend and hold the City, its officers, agents, servants, employees, attorneys, consultants and independent contractors (the "Indemnitees") harmless from, any and all liabilities, suits, obligations, fines, damages, penalties, claims, costs, charges and expenses (including, without limitation, reasonable attorneys' fees and disbursements), that may be imposed upon or incurred by or asserted against any of the Indemnitees arising out of any work associated with the Facilities (including but not limited to installation, operation, relocation, replacement or removal) or permits issued to Indemnitor for work in the Public Rights-of-Way performed by it, or on its behalf, or to cure an act or omission of the Indemnitor or persons acting on its behalf. This indemnity may be included as part of an authorization, and if included, shall be deemed a condition of any work performed in the Public Rights-of-Way. If any claim, action or proceeding is made or brought against any of the Indemnitees by reason of any event to which reference is made as set forth herein; then upon demand by the City, the Indemnitor shall either resist, defend or satisfy such claim, action or proceeding in such Indemnitee's name, by the attorneys for, or approved by, the Indemnitor's insurance carrier (if such claim, action or proceeding is covered by insurance) or by the Indemnitor's attorneys. The foregoing notwithstanding, upon a showing that the Indemnitee reasonably requires additional representation (because, for example, a conflict of interest exists which makes joint representation of the Indemnitee by Indemnitor's counsel inadvisable), such Indemnitee may engage its own attorneys to defend such Indemnitee, or to assist such Indemnitee

in such Indemnitee's defense of such claim, action or proceeding, as the case may be, and the Indemnitor shall pay the reasonable fees and disbursements of such attorneys of such Indemnitee.

10. Insurance and Performance Bond.

10.1. Insurance. Licensee shall procure and maintain insurance for the duration of this License against any and all claims for bodily injury, including death, and for property damage which may be caused, in whole or in part, by the Construction and Maintenance of Facilities or activities Licensee, its agents, representatives or employees may perform pursuant to this License (the "Work"). Such insurance shall be in the following amounts, which assume that no hazardous materials will be associated with any of the Facilities, and that the Facilities will be of a kind and type regularly installed in the Public Rights-of-Way. Once every three (3) years with 60 days' prior written notice to Licensee, the City may require additional insurance if, in the City's reasonable view, the Facilities present additional risks to it, the public or property.

10.2. Coverages and Limits:

- 10.2.1. General Liability per ISO form CG 0001 (or its equivalent) \$1,000,000 per occurrence/ annual aggregate
- 10.2.2. Automobile Liability \$1,000,000 per accident
- 10.2.3. Workers' Compensation Statutory Limits
- 10.2.4. Employer's Liability \$500,000/\$500,000/\$500,000

10.3. Certificates. Certificates showing proof of such insurance shall be submitted to City by e-mail to BSantiago@Wilmingtonde.gov prior to commencement of any work under this license. Further, it shall be an affirmative obligation upon Licensee to advise City, by e-mail to BSantiago@Wilmingtonde.gov and mail to the City's Risk Manager, thirty (30) days prior notice of cancellation, substantial modification below this Agreement's requirements or a non-renewal of any required coverage that is not replaced.

10.4. Endorsements. The General Liability policy is to include City, its officers, officials, and employees as additional insureds as their interest may appear under this Agreement excluding Worker's Compensation and Employer's Liability. City's additional insured status shall (i) be limited to bodily injury, including death, property damage or personal and advertising injury caused, in whole or in part, by Licensee, 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 Licensee's indemnification obligation under this Agreement, if any. Such coverage shall be primary and shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

10.5. Workers' Compensation. Licensee shall maintain Workers' Compensation Insurance for all of Licensee's employees who are in any way connected with the Work. Such insurance shall comply with all applicable state laws and to the extent allowed by law provide a waiver of subrogation against the City, its officers, officials, agents and employees.

1.1.1 Licensee and/or its insurers are responsible for payment of any liability arising out of Workers' Compensation, unemployment or employee benefits offered to its employees. Insurance is to be placed with insurers with a current A.M. Best's rating of not less than A:VII and eligible to do business in the State of Delaware, unless otherwise approved by City; and Licensee shall not self-insure in satisfaction of any of the insurance requirements set out herein without herein without the express written consent of City.

10.6. Self-Insurance. Notwithstanding the foregoing, Licensee shall have the right, subject to prior written approval by City that Licensee's established self-insurance program is commercially reasonable, to self-insure the coverages required in Section 10. Licensee shall provide the City at least (60) days' written notice of its election to self-insure. In the event Licensee elects to self-insure its obligation to include the City as an additional insured, the following provisions shall apply (in addition to those set forth in in Section 10): (i) Licensee or its parent company shall have and continuously maintain a tangible net worth of at least two hundred million dollars (\$200,000,000.00); (ii) Licensee shall continuously maintain appropriate loss reserves for the amount of its self-insurance obligations under this Section 10, which reserves are annually approved by Ernst & Young, or any successor auditing company; (iii) Licensee shall undertake the defense of any self-insured claim for which a defense and/or coverage would have been available from the insurance company, including a defense of Licensor, at Licensee's sole cost and expense, with counsel selected by Licensee and reasonably acceptable to the City; (iv) Licensee shall use its own funds to pay any claim or replace property or otherwise provide the funding which would have been available from insurance proceeds but for Licensee's election to self-insure; (v) Licensee shall pay any and all amounts due in lieu of insurance proceeds which would have been payable if Licensee had carried the insurance policies, which amounts shall be treated as insurance proceeds for all purposes under this Agreement; (vi) All amounts which Licensee pays or is required to pay and all loss or damages resulting from risks for which Licensee has elected to self-insure shall not limit Licensee's indemnification obligations set forth in this Agreement; and (vii) Licensee shall establish and maintain a commercially reasonable self-insurance program to administer. City may require Licensee to provide proof of its compliance with the foregoing provisions of this subsection.

10.7. Performance Bond or Letter of Credit. Licensee shall, as a material condition of its License Agreement, and prior to the commencement of any Construction and Maintenance, deliver to the City a performance bond or irrevocable letter of credit in the amount of fifty thousand dollars (\$50,000.00), payable to the City to ensure the appropriate and timely performance of Construction and Maintenance and compliance with the obligations of its License. The required performance bond or irrevocable letter of credit must be with good and sufficient sureties, issued by a surety company authorized to transact business in the State of Delaware, and satisfactory to the City Solicitor in form and substance, and must be maintained until all obligations to City under this License (including obligations to remove) are satisfied.

11. Transfer

11.1. The License, or control of the License or of Facilities within the Public Right-of-Way may not be assigned or transferred directly or indirectly by any means without the prior written consent of City which consent shall not be unreasonably withheld, conditioned or delayed if:

(i) Licensee is in compliance with this Agreement and (ii) the transfer or assignment does not create any additional burden upon the Public Right-of-Way, or materially and adversely affect the City's interests under this Agreement and License. An assignee or transferee must accept all obligations of the Licensee, and responsibility for all acts and omissions of License known and unknown, if the transaction results in a change in Licensee.

11.2. Notwithstanding the foregoing, to allow for internal restructuring, Licensee shall have the right to assign this License and all rights and obligations accorded Licensee to a wholly-owned subsidiary or a parent entity of Licensee (each, a "Permitted Assignee") without the prior written consent of City, provided that the change is not part of a transaction that results in a change of control of the ultimate parent of Licensee as of the Effective Date, or an assignment of assets to an entity that is not under the control and ownership of the entity that is the ultimate parent of Licensee as of the Effective Date. In the event Licensee assigns his License to a Permitted Assignee, Licensee shall provide the City with written notice of such assignment within thirty (30) days of such assignment, and the assignee must, by that date, agree to be bound by this Agreement, to accept responsibility for all acts and omissions of the Licensee known and unknown.

11.3. Licensee may mortgage, pledge, or hypothecate its interest in Facilities without consent to any financing entity, or agent on behalf of any financing entity to whom Licensee (1) has obligations for borrowed money or in respect of guaranties thereof, (2) has obligations evidenced by bonds, debentures, notes or similar instruments, or (3) has obligations under or with respect to letters of credit, bankers acceptances and similar facilities or in respect of guaranties thereof. Any such assignment to a financing entity or its agent shall be subordinate to the terms of this License Agreement, will not permit any person to succeed to the rights of Licensee under the License without the City's consent, and will not result in any lien extending to property owned by the City or the License itself.

12. Notices

12.1. All notices, requests, demands, and other communications hereunder which are required to be in writing shall be deemed given if personally delivered or by sent to the following addresses by certified mail, return receipt requested; or by an overnight delivery service providing proof of delivery:

City:

City of Wilmington
Department of Public Works
Louis L. Redding City/Cty Bldg. 6th Floor
800 French Street
Wilmington, DE 19801
Attention: Commissioner

With a copy to:
City of Wilmington Law Department
Louis L. Redding City/Cty Bldg. 9th Floor
800 French Street
Wilmington, DE 19801
Attention: City Solicitor

Licensee:

New Cingular Wireless PCS, LLC,
Attention: Tower Asset Group - Lease Administration,
Re: Cell Site # _____; Cell Site Name: _____
Fixed Asset No: _____
1025 Lenox Park Blvd NE
3rd Floor
Atlanta, GA 30319

With a copy to:
New Cingular Wireless PCS, LLC
Attention: AT&T Legal Department – Network Operations
Re: Cell Site # _____; Cell Site Name: _____
Fixed Asset No: _____
208 S. Akard Street
Dallas, TX 75202-4206

All invoicing to Licensee may be made to the following address:

New Cingular Wireless PCS, LLC
Attention: Tower Asset Group – Lease Administration
Re: Cell Site # _____; Cell Site Name: _____
Fixed Asset No: _____
1025 Lenox Park Blvd NE
3rd Floor
Atlanta, GA 30319

12.2. Other Notices. Licensee shall identify an entity to which notice may be provided by email or telephone call, twenty-four (24) hours a day, seven (7) days a week, regarding problems or complaints resulting from the construction or maintenance of Facilities, or conditions affecting the safety or integrity of the Facilities (downed poles or lines, for example), including matters that may require immediate relocation or removal of Facilities. Initially, that notice may be provided to the Network Operations Center at (800)-852-2671.

12.3. Changing Notice. Either party may change the person, address, email or telephone to which notice may be provided by written notice to the other party. Each party must ensure that the other has accurate information as to where notices are to be provided.

13. Miscellaneous

13.1. Materials and Claims. All materials furnished for any work done in the License Area by Licensee shall be at Licensee's sole cost and expense. Licensee agrees to protect the Facilities installed in the Public Rights-of-Way and property of the City, and City, from all claims of contractors, laborers and material men pertaining to such work. Licensee shall promptly pay all contractors and materialmen furnishing labor, materials or services with any respect to any work performed by or on behalf of Licensee in the Public Rights-of-Way and property of the City, so as to minimize the possibility of a lien attaching to the any property of

the City or the Facilities in the Public Rights-of-Way. Should any such lien be made or filed by reason of such work performed by or on behalf of Licensee, Licensee shall cause the same to be discharged and released of record by bond or otherwise within thirty (30) days after written request by City.

13.2. No Advertisement. Licensee shall not place any advertisement or other notice on or about the Facilities which identifies the Licensee in any way (except for emergency notification postings).

13.3. Entire Agreement. This Agreement contains the entire agreement and understanding between the City and Licensee related to the License, and supersedes all prior or contemporaneous proposals, negotiations, agreements and understandings, if any, related to the subject matter hereof.

13.4. Modification. This Agreement shall not be modified or amended except by written instrument executed by the City and Licensee, or its successors, transfers, heirs or assigns.

13.5. Non-Waiver. Failure of City to insist on strict performance of any of the conditions, covenants, terms or provisions of this License or to exercise any of its rights hereunder shall not waive such rights, but City shall have the right to enforce such rights at any time and take such action as might be lawful or authorized hereunder, either in law or equity. The receipt of any sum paid by Licensee to City after a breach of this License shall not be deemed a waiver of such breach unless expressly set forth in writing.

13.6. Force Majeure. If either City or Licensee is prevented or delayed from fulfilling any term or provision of this Agreement by reason of fire, flood, earthquake, or like acts of nature, wars, revolution, civil commotion, explosion, acts of terrorism, embargo, acts of the government in its sovereign capacity, material changes of laws or regulations, labor difficulties, including without limitation, strikes, slowdowns, picketing or boycotts, unavailability of equipment of vendor, or any other such cause not attributable to the negligence or fault of the party delayed in performing the acts required by the Agreement, then performance of such acts shall be excused for the period of the unavoidable delay, and the affected party shall endeavor to remove or overcome such inability as soon as reasonably possible.

13.7. Choice of Law. This Agreement shall be interpreted and enforced under the laws of the State of Delaware. Any and all suits for any claims or for any breach or dispute arising out of this Agreement shall be brought and maintained in a court of competent jurisdiction in the State of Delaware.

13.8. Change in Law and Severability. If any provision or portion thereof of this Agreement is or becomes invalid under any applicable statute or rule of law, and such invalidity does not materially alter the essence of this Agreement to either party, such provision shall not render unenforceable this entire Agreement. Rather, the parties intend that the remaining provisions shall be administered as if the Agreement did not include the invalid provision. If, as a result of a change in law by statute, rule, ruling or otherwise, the total compensation to the City arising as a result of Licensee's occupation of the Public Rights-of-Way (including attachments on City-owned facilities therein) is materially reduced, the Parties agree to negotiate in good faith to amend this Agreement to ensure that total compensation to the City remains substantially comparable, to the extent permitted under applicable law.

13.9. Construction. This Agreement has been negotiated between the parties and their respective counsel, and the parties agree that no provision shall be construed against the drafter.

13.10. Immunity. This Agreement shall not be deemed to waive the City's statutory or common law immunity.

13.11. Representations.

13.11.1. Each Party to this Agreement represents and warrants that it has the full right, power, legal capacity, and authority to enter into and perform the its respective obligations hereunder and that such obligations shall be binding upon such Party.

13.11.2. Licensee represents that it is validly existing and in good standing under the laws of the State of Delaware, that it is qualified to do business under the laws of the State of Delaware, and that it has the power and authority to own its properties, to carry on its business as now being conducted, to enter into this License and carry out the transactions contemplated hereby, and to perform and carry out all covenants and obligations on its part to be performed under and pursuant to this License.

IN WITNESS THEREOF, the parties hereby bind themselves legally to the terms and conditions set forth in this Agreement, as evidenced by the signature of their duly authorized representatives.

[Remainder of this page left blank. Signature pages follow.]

NEW CINGULAR WIRELESS PCS, LLC

By: John Green (SEAL)

Title: Area Manager

STATE OF DELAWARE)
) ss:
COUNTY OF NEW CASTLE)

On this, the ___ day of _____, 20___, before me, the undersigned officer, personally appeared _____, who acknowledged ___self to be the _____ of _____, and that as such _____, being authorized to do so, executed the foregoing instrument for the purposes therein contained by signing on behalf of and in the name of _____.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Notary Public
Printed Name of Notary:
Commission Expires:

[signatures continue on following page]

[signatures continued from previous page]

CITY OF WILMINGTON

By: _____
Kelly A. Williams, Commissioner
Department of Public Works

STATE OF DELAWARE)
) ss:
COUNTY OF NEW CASTLE)

On this, the ___ day of _____, 20___, before me, the undersigned officer, personally appeared Kelly A. Williams, who acknowledged herself to be the Commissioner of the Department of Public Works of the City of Wilmington, and that as such Commissioner, being authorized to do so, executed the foregoing instrument for the purposes therein contained by signing in the name of the City of Wilmington.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Notary Public
Printed Name of Notary:
Commission Expires: