

## FOR BOARD ACTION

Agenda Item # 8.b.

Meeting Date:

9/30/08

**SUBJECT:** Agreements for Antennas on Water Storage Tank (New Cingular Wireless)  
Willow High Water Tower SW Site

**PREPARED BY:** Doug Rovang, Senior Civil Engineer

ITEM DESCRIPTION:

A request has been received from New Cingular Wireless PCS LLC (Cingular, hereafter) for approval to install a wireless communications facility at the Willow High Level Water Tower SW site.

The installation consists of approximately three-hundred (300) square feet of exterior land space, water storage tank exterior space for up to twelve (12) antenna equivalents (six di-mode antennas), space required for twelve (12) 1-5/8" cable runs to connect equipment and antennas, and non-exclusive easements for cable runs and site access.

Staff has prepared the attached proposed Site Agreement for the requested Cingular installation. The proposed 2008 annual rent (prorated to reflect installation date) would be \$14,218.77. Annual rent thereafter will be based on the Consumer Price Index (CPI-U) to reflect future inflation.

The initial term of the contract would extend through 12/31/2013. Three additional five-year option periods are included, subject to termination notice by either the City or Cingular.

The proposed Site Agreement has been reviewed by the City Attorney.

UTILITY BOARD ACTION REQUESTED:

Staff recommends the Utility Board approve the proposed Site Agreement with New Cingular Wireless PCS LLC for a wireless communications facility at the Willow High Level Water Tower SW site, and request the Mayor and City Clerk to execute the Site Agreement.

  
General Manager

9/25/08  
Date

## SITE AGREEMENT

This Site Agreement ("Agreement") is made as of this \_\_\_\_ day of \_\_\_\_\_, 2008, by and between City of Rochester, a Minnesota municipal corporation, ("CITY"), whose address is 4000 East River Road NE, Rochester, Minnesota 55905 and New Cingular Wireless PCS, LLC a Delaware limited liability company ("LESSEE"), whose address is 12555 Cingular Way, Alpharetta, GA 30004, for the leasing of certain property interests:

1. PROPERTY. The property interests hereby leased (collectively, the "Leased Premises") and granted by CITY include the following:

Willow High Water Tower Site: Located at 1020 38<sup>th</sup> Street SW. Real property comprised of a 15' by 20' land area on which to locate a 10' by 15' grated outdoor equipment platform, water tower ("Structure") exterior space at the top of the water storage spheroid for attachment of twelve (12) antenna equivalents (each antenna assembly approximately 11" wide x 80" high, and total number of antenna assemblies not to exceed six), space required for twelve (12) cable runs (each not to exceed 1-5/8" diameter) with transition to 1/2" jumpers installed from within the top of the dry riser to antenna assemblies) to connect equipment and antennas, non-exclusive easements required to run utility lines/cables, and a non-exclusive easement across CITY's property (hereinafter defined) for access in or upon the CITY's real property ("CITY's Property"). CITY's property is legally described and Leased Premises are shown in relationship to CITY's property in Exhibit "A" attached hereto, and the locations of the antennas on the Structure are depicted in Exhibit "B" attached hereto. (An "antenna equivalent" is defined as follows: a single transmit/receive antenna, a single transmit antenna, or a single receive antenna is considered an antenna equivalent. For example, a di-mode antenna is two antenna equivalents, a tri-mode antenna is three antenna equivalents, and a quad-mode antenna is four antenna equivalents.)

2. TERM. The initial term of this Agreement shall commence at the time construction begins but no later than November 1, 2008, and shall terminate on December 31, 2013.
3. OPTION TERMS. LESSEE may extend the term of the Agreement for three (3) additional five (5) year option periods. Unless (a) CITY delivers to LESSEE written notice of non-renewal to LESSEE no later than Three Hundred Sixty (360) days prior to the expiration of the Initial Term or applicable Option Period, or (b) LESSEE gives CITY written notice of its intention not to extend at least Three Hundred and Sixty (360) days prior to the expiration of the then-current term, the applicable Option Period shall be deemed effective.
4. RENT. LESSEE shall pay CITY 2008 prorated rent for the Willow High Water Tower Site equivalent to an annual rent of fourteen-thousand-two-hundred-eighteen and 77/100 dollars (\$14,218.77). Rent prorations shall be based on the number of days in the calculation period. The rental year shall run from January 1 to December 31

of each year. The CITY will issue an invoice for each subsequent year's rent on or about March 1 of that year. The rental amount for the Willow High Water Tower Site will be adjusted annually based on the CPI-U. Rent for the current year shall be determined by multiplying the rent for the prior year by a fraction, the numerator of which is the CPI-U (Annual) of the immediately previous year and the denominator of which is the CPI-U (Annual) for the year immediately prior to the immediately previous year. Should LESSEE terminate the lease for any of the other four sites leased from the CITY for a reason other than default by LESSOR or for a reason beyond LESSEE's reasonable control, then the rental amount for the Willow High Water Tower Site will also reflect the total number of CITY sites then utilized by LESSEE as follows (after adjustment for the annual CPI change): three (3) or four (4) sites - 100% of annually adjusted amount; two (2) sites - 115% of three site adjusted amount; and one (1) site - 130% of three-site adjusted amount. The rental adjustment set forth in the prior sentence shall not apply if any site lease is not renewed by CITY or is terminated by CITY. If this Agreement is terminated for any reason other than LESSEE's default, any prepaid rents for the period after termination will be refunded to LESSEE (or credited against any termination fee payable by LESSEE pursuant to Section 12 below).

5. **USE.** LESSEE may use the Leased Premises for the purpose of installing, removing, replacing, maintaining, modifying, altering, upgrading and operating a communications facility (the "Communications Facility"). The manner in which the Communications Facility may be attached to the Leased Premises shall be documented in Exhibits A and B, and any subsequent documents as needed, and is subject to the prior approval by CITY which approval shall not be unreasonably conditioned, withheld or delayed. Any proposed modifications or alterations to the CITY's structure that may affect its structural integrity shall be included in the documentation provided by the LESSEE and shall include plans and drawings signed by a professional structural engineer licensed in the State of Minnesota. CITY shall provide LESSEE with twenty-four (24) hour, seven (7) day a week year round access to the Leased Premises. LESSEE will pay all personal property taxes (if any) assessed against its Communications Facility. LESSEE will not allow any mechanics' or materialmens' liens to be placed on the Leased Premises as a result of its work on the Leased Premises.
6. **DUE DILIGENCE.** LESSEE, its agents and contractors, are hereby granted the right, at its sole cost and expense, to enter upon the CITY's Property and conduct such studies as LESSEE deems necessary to determine the Leased Premises' suitability for the Communications Facility. These studies may include surveys, soil tests, environmental evaluations, radio wave propagation measurements, field strength tests and such other analyses and studies as LESSEE deems necessary or desirable.
7. **UTILITIES.** The LESSEE shall operate its equipment on a separately metered electrical circuit. LESSEE shall establish accounts for electrical, telephone, or other utility services as needed and shall pay all costs associated with installation and service.
8. **GROUND LOCATED COMMUNICATIONS EQUIPMENT BUILDING.** The ground level equipment building shall be located where shown in Exhibit A. The building shall be a pre-fabricated type with exposed aggregate exterior finish, and shall comply with all related CITY and Minnesota Building Code requirements. LESSEE shall maintain the building entirely at LESSEE's cost. LESSEE shall be responsible for all permits related to the building. When the building is no longer of use to LESSEE, the building shall be removed, and the property returned to its condition prior to construction of the building, reasonable wear and tear, loss by casualty and other causes beyond LESSEE's control excepted.
9. **REMOVAL OF COMMUNICATIONS FACILITY.** All personal property, trade fixtures, and improvements installed by LESSEE shall remain LESSEE's property and shall be removed, at no cost to CITY, by LESSEE within 60 days of the termination of this Agreement.
10. **INSURANCE.** LESSEE shall maintain commercial general liability insurance acceptable to the CITY, insuring LESSEE against liability for personal injury, death or damage to personal property arising out of use of the Leased Premises by LESSEE, with combined single limits of One Million and No/100 Dollars (\$1,000,000). LESSEE shall also maintain fire and extended coverage insurance insuring LESSEE's building and personal property for its full insurable value (subject to reasonable deductibles). LESSEE will list CITY as an additional insured on the commercial general liability policy to the extent allowed under paragraph 13, Indemnity, of this

Agreement. Lessee will be allowed to self-insure for the amounts and types of insurance required herein. Lessee shall provide a certificate of self-insurance prior to commencement of operations.

11. **CONDITION OF PROPERTY.** CITY represents that CITY's Property is in as-is condition. If, in the CITY's judgment, the CITY's Property or Structure become unusable for the intended purpose of potable water storage due to condition or other factors, the CITY retains the right to cancel the Agreement with three-hundred-sixty (360) days written notice to the LESSEE, notwithstanding any provisions herein to the contrary.
12. **TERMINATION.** This Agreement may be terminated by LESSEE for any reason without penalty upon six (6) months notice to CITY.
13. **INDEMNITY.** CITY and LESSEE each indemnify the other against, defend and hold the other harmless from any and all costs (including reasonable attorneys' fees and expenses) and claims, actions, damages, obligations, liabilities and liens which arise out of (a) the breach of this Agreement by the indemnifying party; and (b) the use and/or occupancy of the Leased Premises or CITY's Property or Structure by such indemnifying party. This indemnity shall not apply to any claims, actions, damages, obligations, liabilities and liens arising from any negligence or intentional misconduct of the indemnified party and shall survive the termination of this Agreement.
14. **HAZARDOUS SUBSTANCES.** CITY represents that CITY has no knowledge of any substance, chemical, or waste on CITY's Property that is identified as hazardous, toxic or dangerous in any applicable federal, state or local law or regulation. CITY shall hold LESSEE harmless from and indemnify LESSEE against any damage, loss, expense, response costs, or liability, including consultant fees and attorneys' fees resulting from the presence of hazardous substances on, under or around CITY's Property or resulting from hazardous substances being generated, stored, disposed of, or transported to, on, under, or around CITY's Property as long as the hazardous substances were not generated, stored, disposed of, or transported by LESSEE or its employees, agents or contractors.
15. LESSEE shall hold CITY harmless from and indemnify CITY against any damage, loss, expense, response costs, or liability, including consultant fees and attorneys' fees resulting from the presence of hazardous substances on, under or around CITY's Property or resulting from hazardous substances being generated, stored, disposed of, or transported to, on, under, or around CITY's Property provided that the hazardous substances were generated, stored, disposed of, or transported by LESSEE or its employees, agents or contractors.
16. **CASUALTY.** CITY shall immediately give LESSEE notice of any damage to the Communications Facility. If any portion of CITY's Property or Structure or the Communications Facility is damaged by any casualty and such damage adversely affects LESSEE's use of the Leased Premises, this Agreement shall terminate as of the date of the casualty if LESSEE gives written notice of the same within thirty (30) days after LESSEE receives notice of such casualty, and any prepaid rent shall be refunded to LESSEE. If notice of termination is given, or if CITY or LESSEE undertake to rebuild the Communications Facility, CITY agrees to use its reasonable efforts to permit LESSEE to place temporary transmission and reception facilities on the CITY's Property at no additional rent until such time as LESSEE is able to secure a replacement transmission location or the reconstruction of the Communications Facility is completed.
17. **QUIET ENJOYMENT.** LESSEE, upon performance of its obligations hereunder, shall peaceably and quietly have, hold and enjoy the Leased Premises. CITY shall not cause or permit any use of CITY's properties that interferes with or impairs (a) the integrity of the Communications Facility and/or the Structure to which it is attached, or (b) the quality of the communication services being rendered by LESSEE from the Leased Premises. LESSEE shall not cause or permit any use of Leased Premises that interferes with or impairs (a) the integrity of the CITY's Property and/or the Structure to which it is attached, or (b) the use of the Structure for its intended purpose of potable water storage.
18. **DEFAULT.** Except as expressly limited hereby, CITY and LESSEE shall each have such remedies for the default of the other party hereto as may be provided at law or equity following written notice of such default and failure to cure the same within thirty (30) days; provided however that a default shall be deemed cured if (i) such default

reasonably cannot be cured within said thirty (30) day period, and (ii) cure is commenced within such thirty (30) day period and diligently pursued to completion.

19. INTERFERENCE. LESSEE's equipment shall be installed and operated in a manner, which does not cause interference to existing equipment. Should any such interference occur, LESSEE shall diligently pursue a cure to remove or satisfactorily attenuate such interference. If such interference to the existing equipment cannot be cured or satisfactorily attenuated, LESSEE agrees to immediately stop using its equipment if so demanded in writing by CITY. CITY hereby covenants to use reasonable effort to afford LESSEE similar protection from interference which may be caused by the operations of subsequent additional users of CITY's Property.

20. MISCELLANEOUS.

- A. LESSEE agrees to provide a signed and notarized Acknowledgment of Authorized Signature as a part of this Agreement, indicating that the person signing the Agreement is an officer of LESSEE or is duly authorized by LESSEE's Board of Governors to bind LESSEE to this Agreement.
- B. This Agreement supersedes all prior discussions, negotiations, agreements and understandings between CITY and LESSEE concerning the Southeast Water Tower Site. All agreements and understandings between CITY and LESSEE relating to this Site are included herein. This Agreement may only be amended in writing signed by all parties. Exhibits referenced herein are incorporated into this Agreement by reference.
- C. This Agreement may be signed in counterparts by the parties hereto.
- D. The LESSEE shall comply with all federal, state, and local laws, ordinances, rules, and regulations otherwise governing the placement, operation, or maintenance of its equipment. LESSEE will specifically comply with OSHA vertical ladder clearance requirements, and will install RF safety signage in compliance with 47 CFR 1.1307(b) as appropriate for the Site (if not already present).
- E. The terms and conditions of this Agreement shall run with the land and shall extend to and bind the heirs, personal representatives, successors and assigns of LESSEE; provided, however, that LESSEE may assign this Agreement at any time with prior written approval by CITY which approval shall not be unreasonably denied. Any assignee of this Agreement shall be fully responsible for any and all responsibilities and obligations provided herein to the LESSEE. LESSEE may assign this Agreement to its affiliates without the prior written approval of CITY. As used herein, the term "affiliates" shall mean an entity that controls, is controlled by or is under common control with LESSEE. Upon assignment, LESSEE shall have no further liability under this Agreement.
- F. Notices shall be in writing and sent by United States Mail, postage prepaid, certified or registered with return receipt requested or by courier service to the address set forth beneath the signature of each party below.

If to LESSEE, notice should be sent to the following:

If to Tenant (via certified mail):

New Cingular Wireless PCS, LLC  
Attn: Network Real Estate Administration  
Re: Cell Site #:MPLSMN3616; Cell Site Name: Bamber  
Fixed Asset NO: 10128800  
PO Box 1630  
Alpharetta, GA 30009

It to Tenant (via overnight mail):

New Cingular Wireless PCS, LLC  
Attn: Network Real Estate Administration  
Re: Cell Site #:MPLSMN3616; Cell Site Name: Bamber  
Fixed Asset NO: 10128800  
12555 Cingular Way  
Alpharetta, GA 30004

With copy to:

New Cingular Wireless PCS, LLC  
Attn: Legal Department  
Re: Cell Site #:MPLSMN3616; Cell Site Name: Bamber  
Fixed Asset NO: 10128800  
15 East Midland Ave  
Paramus, NJ 07652

- G. This Agreement shall be construed in accordance with the laws of the State of Minnesota.
- H. If any term of this Agreement is found to be void or invalid, such invalidity shall not affect the remaining terms of this Agreement, which shall continue in full force and effect.
- I. LESSEE represents that with the exception of LESSEE's Leasing Agents (whose compensation is LESSEE's sole responsibility), LESSEE has not been represented by a real estate broker or other listing agent in connection with this Agreement for purposes of commission, fee or other payment to such broker or any other leasing agent claiming to have represented LESSEE. If CITY is represented by any broker or listing agent, CITY is responsible for all commissions, fee or other payment to such agent.
- J. CITY acknowledges that a Memorandum of Agreement in the form annexed hereto as Exhibit C will be recorded by LESSEE in the official records of Olmsted County. CITY agrees to sign all necessary and appropriate documents to facilitate the filing of the Memorandum of Agreement.
21. MAINTENANCE, IMPROVEMENT EXPENSES. After initial installation, LESSEE shall obtain written approval prior to undertaking any modification of its Communications Facility, which approval shall not be unreasonably denied. All modifications to the Leased Premises and all improvements made for LESSEE's benefit shall be at LESSEE's expense and such improvements, including the Communications Facility and equipment, shall be maintained in a good state of repair at least equal to the standard of maintenance of the surrounding CITY's Property on or adjacent to the Leased Premises and shall be secured by LESSEE. LESSEE's antennas shall at all times be painted, at LESSEE's expense, the same color as the Structure. In the event CITY's reasonable maintenance of CITY's Property affects areas involving the Leased Premises, LESSEE agrees to protect its equipment from such repairs at LESSEE's sole cost and expense.
22. ARBITRATION. Any claim, controversy or dispute arising out of this Agreement shall be settled by arbitration in accordance with the applicable rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. The arbitration shall be conducted in Olmsted County, Minnesota. There shall be no discovery other than the exchange of information provided to the arbitrator by the parties. The arbitrator shall have the authority only to award compensatory damages and shall not have authority to award punitive damages or other non-compensatory damages; the parties hereby waive all rights to and claims for monetary awards other than compensatory damages.
23. W-9. CITY agrees to provide LESSEE with a completed IRS Form W-9, or its equivalent, upon execution of this Agreement and at such other times as may be reasonably requested by LESSEE.









## RESOLUTION

BE IT RESOLVED by the Public Utility Board of the City of Rochester, Minnesota, to approve the attached Site Agreement with New Cingular Wireless PCS LLC with 2008 rent of Fourteen-Thousand-Two-Hundred-Eighteen and 77/100 Dollars (\$14,218.77) prorated based on equipment installation date, and to request that the Mayor and the City Clerk execute the Site Agreement for

Maintaining Antennas and Appurtenant Equipment for a Wireless Communications Facility  
at the Willow High Level Water Tower SW site.

Passed by the Public Utility Board of the City of Rochester, Minnesota, this 30th day of September, 2008.

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President

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Secretary