

**ORDINANCE NO. 2019-59**

**AN ORDINANCE AUTHORIZING THE CITY MANAGER, OR HIS DESIGNEE, TO ENTER INTO AN AMENDED AGREEMENT WITH NEW CINGULAR WIRELESS PCS, LLC (FORMERLY KNOWN AS AT&T WIRELESS, PCS), FOR THE CONTINUED LOCATION OF ITS CELLULAR ANTENNA AND EQUIPMENT ON THE KENT CITY WATER TOWER LOCATED AT KENT STATE UNIVERSITY PROPERTY, AND DECLARING AN EMERGENCY.**

**WHEREAS**, New Cingular Wireless PCS, LLC needs to expand its use of the base premises at the water tower site at Kent State University to facilitate the use of cellular phones; and

**WHEREAS**, the City of Kent is agreeable to the continued use at an increased cost.

**WHEREAS**, the parties entered into the original agreement through City Ordinance No. 1998-30 on April 15, 1998.

**NOW, THEREFORE, BE IT ORDAINED** by the Council of the City of Kent, Portage County, Ohio, at least one-half (1/2) of all members elected thereto concurring:

**SECTION 1.** That Council does hereby authorize the City Manager, or his designee, to enter into an amended Agreement with New Cingular Wireless PCS, LLC in substantial compliance with the Agreement marked as Exhibit "A", attached hereto and incorporated herein.

**SECTION 2.** That it is found and determined that all formal actions of this Council concerning and relating to the adoption of this Ordinance were adopted in an open meeting of this Council and that all deliberations of this Council, and of any of its committees that resulted in such formal action, were in meetings open to the public in compliance with all legal requirements of Section 121.22 of the Ohio Revised Code.

**SECTION 3.** That this Ordinance is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health, safety and welfare of the residents of this City, for which reason and other reasons manifest to this Council, this Ordinance is hereby declared to be an emergency measure and shall take effect and be in force immediately after passage.

PASSED: May 15, 2019  
Date



\_\_\_\_\_  
Jerry T. Fiala  
Mayor and President of Council

EFFECTIVE: May 15, 2019  
Date

ATTEST: Dawn Bishop  
Dawn Bishop  
Interim Clerk of Council

I, DAWN BISHOP, INTERIM CLERK OF COUNCIL FOR THE CITY OF KENT, COUNTY OF PORTAGE, AND STATE OF OHIO, AND IN WHOSE CUSTODY THE ORIGINAL FILES AND RECORDS OF SAID COUNCIL ARE REQUIRED TO BE KEPT BY THE LAWS OF THE STATE OF OHIO, HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND EXACT COPY OF *ORDINANCE No.* \_\_\_\_\_, ADOPTED BY THE COUNCIL OF THE CITY OF KENT ON \_\_\_\_\_, 20\_\_\_\_.

(SEAL)

\_\_\_\_\_  
DAWN BISHOP  
INTERIM CLERK OF COUNCIL

Cell Site No.: CL220  
Cell Site Name: KSU Water Tower  
Fixed Asset No.: 10077427  
Market: OH / PA  
Address: 540A East Summit Street

## REINSTATEMENT AND RATIFICATION OF AND FOURTH AMENDMENT TO OPTION AND TOWER LEASE AGREEMENT

THIS REINSTATEMENT AND RATIFICATION OF AND FOURTH AMENDMENT TO OPTION AND TOWER LEASE AGREEMENT ("**Fourth Amendment**"), dated as of the latter of the signature dates below (the "**Effective Date**"), is by and between the City of Kent, having a mailing address of 319 South Water Street, Kent, OH 44240, and Kent State University (hereinafter, collectively referred to as "**Landlord**"), and New Cingular Wireless PCS, LLC, a Delaware limited liability company, having a mailing address of 575 Morosgo Drive NE, Atlanta, GA 30324 (hereinafter referred to as "**Tenant**").

**WHEREAS**, Landlord (or its respective predecessor-in-interest) and Tenant (or its respective predecessor-in-interest) entered into a Option and Tower Lease Agreement dated October 1, 1998, as amended by First Amendment to Option and Tower Lease Agreement dated April 16, 2002, as amended by Second Amendment to Option and Tower Lease Agreement dated August 20, 2006, as amended by Third Amendment to Option and Tower Lease Agreement dated October 28, 2014 (hereinafter, collectively, the "**Agreement**"), whereby Landlord leased to Tenant certain Premises, therein described, that are a portion of the Property located at 540A East Summit Street, Kent, OH 44240; and

**WHEREAS**, the term of the Agreement expired on October 31, 2018, and Landlord acknowledges that Tenant has been occupying the Premises on a month-to-month basis and Landlord has accepted Rent during such month-to-month basis from Tenant and the parties mutually desire to renew the Agreement, memorialize such renewal period and modify the Agreement in certain other respects, all on the terms and conditions contained herein; and

**WHEREAS**, Landlord and Tenant desire to amend the Agreement to extend the term of the Agreement; and

**WHEREAS**, Landlord and Tenant desire to amend the Agreement to adjust the Rent (as defined below) in conjunction with the modifications to the Agreement contained herein; and

**WHEREAS**, Landlord and Tenant desire to amend the Agreement to modify the notice section thereof; and

**WHEREAS**, Lessor and Lessee desire to amend the Lease to clarify scope of Lessee's permitted use of the Premises; and

~~**WHEREAS**, Landlord and Tenant desire to amend the Agreement to permit Tenant to add, modify and/or replace equipment in order to be in compliance with any current or future federal, state or local mandated application, including but not limited to emergency 911 communication services; and~~

Cell Site No.: CL220  
Cell Site Name: KSU Water Tower  
Fixed Asset No.: 10077427  
Market: OH / PA  
Address: 540A East Summit Street

**NOW THEREFORE**, in consideration of the foregoing and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Landlord and Tenant agree that the recitals set forth above are incorporated herein as if set forth in their entirety and further agree as follows:

1. **Reinstatement and Ratification.** The Agreement, including all amendments thereto, if any, entered into prior to the date hereof, is attached hereto as **Exhibit A**. Landlord and Tenant hereby reinstate, ratify, confirm and adopt the Agreement, as amended herein, as of the latter signature date below.

2. **Extension of Term.** The term of the Agreement shall be extended to provide that the Agreement has a new initial term of five (5) years ("**New Initial Term**") commencing on November 1, 2018. The Agreement will automatically renew, commencing on the expiration of the New Initial Term, for up to three (3) separate consecutive additional periods of five (5) years each (each such five (5) year additional period is hereinafter referred to as an "**Additional Extension Term**" and each such Additional Extension Term shall be considered an Extension Term under the Agreement), upon the same terms and conditions of the Agreement, as amended herein, without further action by Tenant unless Tenant notifies Landlord in writing of Tenant's intention not to renew the Agreement at least sixty (60) days prior to the expiration of the New Initial Term or the then current Additional Extension Term. The New Initial Term and the Additional Extension Term are collectively referred to as the Term ("**Term**").

1. **Rent.** Commencing on November 1, 2018, the current Rent payable under the Agreement shall be ~~Threewø Thousand One Seven Hundred ThreeFifty and No20/100 Dollars (\$23,103750.2000)~~ per monthly, and shall continue during the Term, subject to adjustment as provided herein. Tenant shall pay eighty percent of the Rent (80%) to the City of Kent and the remaining twenty percent (20%) of the Rent to Kent State University. Section 5 of the Agreement shall be amended to provide that Rent shall be adjusted as follows: commencing on November 1, 2023, and each Additional Extension Term exercised thereafter, the monthly Basic-Rent will increase by ten percent (10%) over the Basic-Rent paid during the previous Term. in year two (2) of the New-Initial Term and each year thereafter, including throughout any Additional Extension Term exercised, the monthly Rent will increase by three percent (3%) over the Rent paid during the previous year.

~~3-2.~~ **Expansion of Permitted Use.** Tenant, its personnel, invitees, contractors, agents, or assigns may use the Premises, at no additional cost or expense, for the transmission and reception of any and all communications signals and, with prior written notice to Landlord, to modify, supplement, replace, upgrade, expand, including but not limited to the number and type(s) of antennas, or 'refurbish the equipment and/or improvements' thereon (collectively, "Communications Facility"), or relocate the same within the Premises at any time during the term of the Lease for any reason, so long as these changes do not exceed the structural capacity of the tower/structure at this height, or at Tenant's sole expense upgrade the structural capacity, or in order to be in compliance with any current or future federal, state or local mandated application, including but not limited to emergency 911 communication services or for any other reason.

Cell Site No.: CL220  
Cell Site Name: KSU Water Tower  
Fixed Asset No.: 10077427  
Market: OH / PA  
Address: 540A East Summit Street

Landlord shall reasonably cooperate in obtaining governmental and other use permits or approvals necessary or desirable for the foregoing permitted use. If Landlord does not comply with the terms of this section, in addition to any other rights it may have at law, Tenant may terminate the Lease and shall have no further liability to Landlord. If Landlord does not comply with the terms of this section, Tenant will have the right to exercise any and all rights available to it under law and equity, including the right to cure Landlord's default and to deduct the costs of such cure from any monies due to Landlord from Tenant.

**4.3. Emergency 911 Service.** In the future, without the payment of additional Rent, or any other consideration, and at a location mutually acceptable to Landlord and Tenant, Landlord agrees that Tenant may add, modify and/or replace equipment in order to be in compliance with any current or future federal, state or local mandated application, including but not limited to emergency 911 communication services.

**5.4. Right of First Refusal.** Notwithstanding any other provisions contained in the Agreement, if at any time after the date of this Fourth Amendment, Landlord receives a bona fide written offer from a third party seeking any sale, conveyance, assignment or transfer, whether in whole or in part, of any property interest in or related to the Premises, including without limitation any offer seeking an assignment or transfer of the Rent payments associated with the Agreement or an offer to purchase an easement with respect to the Premises ("**Offer**"), Landlord shall immediately furnish Tenant with a copy of the Offer. Tenant shall have the right within ninety (90) days after it receives such copy to match the financial terms of the Offer and agree in writing to match such terms of the Offer. Such writing shall be in the form of a contract substantially similar to the Offer, but Tenant may assign its rights to a third party. If Tenant chooses not to exercise this right or fails to provide written notice to Landlord within the ninety (90) day period, Landlord may sell, convey, assign or transfer such property interest in or related to the Premises pursuant to the Offer, subject to the terms of the Agreement. If Landlord attempts to sell, convey, assign or transfer such property interest in or related to the Premises without complying with this Section 5, the sale, conveyance, assignment or transfer shall be void. Tenant shall not be responsible for any failure to make payments under this Agreement and reserves the right to hold payments due under this the Agreement until Landlord complies with this Section 5. Tenant's failure to exercise the right of first refusal shall not be deemed a waiver of the rights contained in this Section 5 with respect to any future proposed conveyances as described herein.

**6.5. Charges.** All charges payable under the Agreement such as utilities and taxes shall be billed by Landlord within one (1) year from the end of the calendar year in which the charges were incurred; any charges beyond such period shall not be billed by Landlord, and shall not be payable by Tenant. The foregoing shall not apply to monthly Rent which is due and payable without a requirement that it be billed by Landlord. The provisions of this subparagraph shall survive the termination or expiration of the Agreement.

**7.6. Acknowledgement.** Landlord acknowledges that: 1) this Fourth Amendment is entered into of the Landlord's free will and volition; 2) Landlord has read and understands this Fourth Amendment and the underlying Agreement and, prior to execution of this Fourth Amendment, was free to consult with counsel of its choosing regarding Landlord's decision to enter into this Fourth



Cell Site No.: CL220  
Cell Site Name: KSU Water Tower  
Fixed Asset No.: 10077427  
Market: OH / PA  
Address: 540A East Summit Street

Amendment and to have counsel review the terms and conditions of this Fourth Amendment; 3) Landlord has been advised and is informed that should Landlord not enter into this Fourth Amendment, the underlying Agreement between Landlord and Tenant, including any termination or non-renewal provision therein, would remain in full force and effect.

**8.7. Notices.** Section 12 of the Agreement is hereby deleted in its entirety and replaced with the following:

**"NOTICES.** All notices, requests, demands and communications hereunder will be given by first class certified or registered mail, return receipt requested, or by a nationally recognized overnight courier, postage prepaid, to be effective when properly sent and received, refused or returned undelivered. Notices will be addressed to the parties as follows:

If to Tenant:

New Cingular Wireless PCS, LLC  
Attn: Network Real Estate Administration  
Re: Cell Site # CL220  
Cell Site Name KSU Water Tower (OH); Fixed Asset No.: 10077427  
575 Morosgo Drive NE  
Atlanta, GA 30324

With a required copy of the notice sent to the address above to AT&T Legal at:

New Cingular Wireless PCS, LLC  
Attn: AT&T Legal Department  
Re: Cell Site # CL220  
Cell Site Name KSU Water Tower (OH); Fixed Asset No: 10077427  
208 S. Akard Street  
Dallas, Texas, 75202-4206

A copy sent to the Legal Department is an administrative step which alone does not constitute legal notice.

And as to Landlord:

City of Kent  
319 South Water Street  
Kent, OH 44240

Either party hereto may change the place for the giving of notice to it by thirty (30) days prior written notice to the other as provided herein."

**9.8. Memorandum of Agreement.** Either party will, at any time upon fifteen (15) days prior written notice from the other, execute, acknowledge and deliver to the other a recordable

**Cell Site No.:** CL220  
**Cell Site Name:** KSU Water Tower  
**Fixed Asset No.:** 10077427  
**Market:** OH / PA  
**Address:** 540A East Summit Street

Memorandum of Agreement substantially in the form of the Attachment 1. Either party may record this memorandum at any time, in its absolute discretion.

~~10.9.~~ **Other Terms and Conditions Remain.** In the event of any inconsistencies between the Agreement and this Fourth Amendment, the terms of this Fourth Amendment shall control. Except as expressly set forth in this Fourth Amendment, the Agreement otherwise is unmodified and remains in full force and effect. Each reference in the Agreement to itself shall be deemed also to refer to this Fourth Amendment.

~~11.10.~~ **Capitalized Terms.** All capitalized terms used but not defined herein shall have the same meanings as defined in the Agreement.

[NO MORE TEXT ON THIS PAGE - SIGNATURES TO FOLLOW ON NEXT PAGE]

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Cell Site No.: CL220  
Cell Site Name: KSU Water Tower  
Fixed Asset No.: 10077427  
Market: OH / PA  
Address: 540A East Summit Street

IN WITNESS WHEREOF, the parties have caused their properly authorized representatives to execute this Reinstatement and Fourth Amendment on the dates set forth below.

LANDLORD:  
City of Kent

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

By: AT&T Mobility Corporation  
Its: Manager

By: NOT FOR EXECUTION

By: NOT FOR EXECUTION

Print Name: \_\_\_\_\_

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

LANDLORD:  
Kent State University

By: NOT FOR EXECUTION

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

[ACKNOWLEDGMENTS APPEAR ON THE NEXT PAGE]







Cell Site No.: CL220  
 Cell Site Name: KSU Water Tower  
 Fixed Asset No.: 10077427  
 Market: OH / PA  
 Address: 540A East Summit Street

TENANT ACKNOWLEDGEMENT

STATE OF \_\_\_\_\_ )  
 ) SS.  
 COUNTY OF \_\_\_\_\_ )

I certify that I know or have satisfactory evidence that \_\_\_\_\_ is the person who appeared before me, and said person acknowledged that he/she signed this instrument, on oath stated that he/she was authorized to execute the instrument and acknowledged it as the \_\_\_\_\_ of AT&T Mobility Corporation, the Manager of **New Cingular Wireless PCS, LLC, a Delaware limited liability company**, to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

DATED: \_\_\_\_\_

Notary Seal

\_\_\_\_\_  
 (Signature of Notary)  
 \_\_\_\_\_  
 (Legibly Print or Stamp Name of Notary)  
 Notary Public in and for the State of \_\_\_\_\_  
 My appointment expires: \_\_\_\_\_

**Cell Site No.:** CL220  
**Cell Site Name:** KSU Water Tower  
**Fixed Asset No.:** 10077427  
**Market:** OH / PA  
**Address:** 540A East Summit Street

**Attachment 1**

**Memorandum of Agreement**

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**Cell Site No.:** CL220  
**Cell Site Name:** KSU Water Tower  
**Fixed Asset No.:** 10077427  
**Market:** OH / PA  
**Address:** 540A East Summit Street

**Exhibit A**

**Copy of Agreement**

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