

CITY OF LAKEWOOD, WASHINGTON

ORDINANCE NO. 735

**AN ORDINANCE OF THE CITY OF LAKEWOOD, WASHINGTON, GRANTING UNTO NEW CINGULAR WIRELESS PCS, LLC (“AT&T”), A DELAWARE LIMITED LIABILITY COMPANY AUTHORIZED TO DO BUSINESS WITHIN THE STATE OF WASHINGTON, ITS AFFILIATES, SUCCESSORS AND ASSIGNS, THE RIGHT, PRIVILEGE, AND AUTHORITY TO INSTALL, CONSTRUCT, MAINTAIN, REPAIR AND OPERATE WIRELESS CELLULAR FACILITIES KNOWN AS SMALL WIRELESS FACILITIES WITHIN THE PUBLIC RIGHTS OF WAY, PROVIDING FOR SEVERABILITY AND RATIFICATION, AND ESTABLISHING AN EFFECTIVE DATE.**

**WHEREAS**, New Cingular Wireless PCS, LLC (“AT&T”), a Delaware Limited Liability Company (hereafter “Franchisee”) has made application to the City to construct, install, maintain, repair and operate Small Wireless Facilities within the public rights-of-way of the City; and

**WHEREAS**, Franchisee is a telecommunications company that, among other things, provides wireless communications services to customers in the Puget Sound region; and

**WHEREAS**, based on the representations and information provided by Franchisee, and in response to its request for the grant of a franchise, the City Council has determined that the grant of a non-exclusive franchise, on the terms and conditions herein and subject to applicable law, are consistent with the public interest; and

**WHEREAS**, Franchisee intends to install its Small Wireless Facilities within the rights-of-way; and

**WHEREAS**, the City Council has determined that the use of portions of the City's rights-of-way for installation of Small Wireless Facilities is appropriate from the standpoint of the benefits to be derived by local business and the region as a result of such services; and

**WHEREAS**, the City Council also recognizes that the use of public rights-of-way must be restricted to allow for the construction of amenities necessary to serve the future needs of the citizens of Lakewood and that the coordination, planning, and management of the City's rights-of-way is necessary to ensure that the burden of costs for the operations of non-municipal interests are not borne by the citizenry; and

**WHEREAS**, Franchisee agrees to secure all appropriate agreements and permits required by the City for the placement of Franchisee Facilities within the City’s boundaries; and

**WHEREAS**, the City is authorized by state law to grant such nonexclusive franchises within the boundaries of the City; and

**WHEREAS**, City staff and Franchisee have been working together to negotiate a franchise agreement allowing Franchisee to install Small Wireless Facilities in the public rights-of-way; and

**WHEREAS**, pursuant to RCW 35.21.860, the City is prohibited from imposing franchise fees upon a telephone business or “service provider” as defined in RCW 35.99.010, but can seek reimbursement for costs associated with the preparation, processing, and approval of the franchise agreement, including wages, benefits, overhead expenses, meetings, negotiations, publication fees, and other functions related to the approval of the franchise agreement.

THE CITY COUNCIL OF THE CITY OF LAKEWOOD, WASHINGTON, DO ORDAIN AS FOLLOWS:

### **1. Definitions**

For the purposes of this Franchise, the following defined terms, phrases, words and their derivations shall have the meaning provided below. When not inconsistent with the context in which the word is used, words used in the present tense include the future, words in the plural include the singular, words in lower case shall have their defined meaning even if the words are not capitalized, and words in the singular include the plural. Undefined words shall be given their common and ordinary meaning.

1.1 “Agency” means any governmental agency or quasi-governmental agency other than the City, including the FCC.

1.2 “Approved Wireless Facility(ies)” means Small Wireless Facilities which have been approved for installation by the City.

1.3 “City” or “Lakewood” means the City of Lakewood, a Washington State municipal corporation.

1.4 “Construct” or “Construction” means to install, operate, maintain, upgrade, remove, replace, repair, and/or restore any new or existing Facility, and may include, but is not limited to, digging and/or excavating to install, operate, maintain, upgrade, remove, replace, repair, and restore existing pipeline(s) and/or Facilities.

1.5 “Cost” means any actual, reasonable, and documented costs, fees, or expenses, including but not limited to attorneys’ fees.

1.6 “Day” means calendar day(s) unless otherwise specified.

1.7 “Director” means the head of the Public Works Engineering Department (or its successor department) of the City, or his or her designee.

1.8 “Effective Date” This Franchise is effective on the date it is fully executed by both parties following approval of the Franchise by an ordinance of the Lakewood City Council.

1.9 “Emergency” means a set of circumstances which demands immediate action to preserve public health, protect life, and protect public property.

1.10 “FCC” means the Federal Communications Commission or successor entity.

1.11 “Facility” or “Facilities” means, collectively or individually, any and all Franchisee’s Small Wireless Facilities.

1.12 “Franchise” means this ordinance and any related amendments, attachments, exhibits, or appendices.

1.13 “Franchise Area” means all present and future Lakewood Rights-of-Way for public roads, alleys, avenues, highways, streets, and throughways (including the area across, above, along, below, in, over, through or under such area), laid out, platted, dedicated, acquired or improved, and all city-owned utility easements dedicated for the placement and location of various utilities provided such easement would permit Franchisee to fully exercise the privilege granted under this Franchise within the area covered by the easement, without interfering with any governmental functions or other franchises or easements.

1.14 “Franchisee” means New Cingular Wireless PCS, LLC (“AT&T”), a Delaware Limited Liability Company authorized to do business within the State of Washington, and its respective successors and assigns and, when appropriate, agents, contractors (of any tier), employees, officers and representatives.

1.15 “Inventory of Facilities” means an accurate and current inventory of all Franchisee’s Small Wireless Facilities approved by City pursuant to this Franchise and installed by Franchisee, including sites that become inactive for any reason.

1.16 “Hazardous Substance” means any and all hazardous, toxic, or dangerous substance, material, waste, pollutant, or contaminant, including all substances designated under the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq.; the Comprehensive Environmental Response, Compensation and Usability Act, 42 U.S.C. § 9601 et seq.; the Hazardous Materials Transportation Act, 49 U.S.C. § 1801 et seq.; the Federal Water Pollution Control Act, 33 U.S.C. § 1257 et seq.; the Clean Air Act, 42 U.S.C. § 7401 et seq.; the Toxic Substances Control Act, 15 U.S.C. § 2601 et seq.; the Federal Insecticide, Fungicide, Rodenticide Act, 7 U.S.C. § 136 et seq.; the Washington Hazardous Waste Management Act, RCW Chapter 70.105, and the Washington Model Toxics Control Act, RCW Chapter 70.1050, as they exist or may be amended; or any other Laws. The term “Hazardous Substance” shall also be interpreted to include any substance which, after release into the environment, will or may reasonably be anticipated to cause death, disease, injury, illness, abnormalities, behavioral abnormalities, stunted or abnormal growth or development, or genetic abnormalities.

1.17 “Law” or “Laws” means any federal, state, or municipal code, statute, ordinance, decree, executive order, governmental approval, permit, regulation, regulatory program, order, rule, published specification, public standard, Environmental Law, or governmental authority, that

relate to telecommunications services, including but not limited to 47 U.S.C. § 101, et. seq. (Telecommunications Act of 1996), RCW 19.122 (Underground Utilities), WAC 480-80 (Utilities General – Tariffs and Contracts), RCW 35.99 (Telecommunications, Cable Television Service – Use of Rights-of-way), WAC Chapter 296-32 (Safety Standards for Telecommunications), RCW Chapter 80.36 (Telecommunications), WAC Chapter 480-120, et. seq., (Telephone Companies), RCW Chapter 35.96 (Electric and Communication Facilities – Conversion to Underground), and any related Laws. All references to Laws shall mean as they exist, may be amended or created. Notwithstanding the foregoing, Laws shall not include any amended law or newly created law that violates Franchisee’s rights to continue or modify existing non-conforming uses, or any other changes to laws which do not apply to previously-constructed real estate improvements and/or wireless communications facilities.

1.18 “Master License Agreement” means the City of Lakewood’s Master License for Small Wireless Facilities on City Facilities.

1.19 “Parties” means the City of Lakewood and Franchisee.

1.20 “Public Properties” means present and/or future property owned or leased by Lakewood within Lakewood’s present and/or future control and/or jurisdictional boundaries.

1.21 “Public Ways” means any highway, street, shoulder, landscape area between sidewalk and curb or shoulder, alley, sidewalk, utility easement (unless their use is otherwise restricted for other users), or other areas designated for the public Rights-of-Way in the City of Lakewood that have been accepted by Lakewood for use as the public Rights-of-Way, including without limitation public Rights-of-Way for motor vehicles or any other uses under Lakewood’s control and/or in its jurisdictional boundaries, consistent with RCW 47.24.020 (Jurisdiction, control) and 47.52.090 (Cooperative agreements — Urban public transportation systems — Title to highway — Traffic regulations — Underground utilities and overcrossings — Passenger transportation — Storm sewers — City street crossings).

1.22 “Rights-of-way” means land acquired by reservation, dedication, prescription or condemnation, and intended to be used as a road, sidewalk, utility line or other similar public use. This term shall not include county, state, or federal rights-of-way or any property owned by any person or agency other than the City of Lakewood, except as provided by applicable Laws or pursuant to an agreement between the City and any such Person or Agency.

1.23 “Services” means wireless services offered by Franchisee in the City of Lakewood pursuant to its authority from the WUTC to provide competitive local exchange services.

1.24 “Small Wireless Facilities” or “Facilities” or “SWF” or “SWFs” has the same meaning as set forth in LMC 18A.95, as adopted or hereinafter amended.

1.25 “Telecommunications System” means all necessary Facilities owned or used by Franchisee for the purpose of providing Mobile Telecommunications Services and located in, under, and above City Streets, excluding ducts, conduits and vaults leased from another City franchisee, licensee, lessee or permittee.



1.26 “Poles” means any Pole located in the public rights-of-way and owned by a private utility company or City Light Poles that are suitable for the installation of Small Wireless Facilities. In addition to this Franchise, a Master License Agreement is required for use of approved City Light Poles.

1.27 “Work” means to construct, excavate, install, maintain, upgrade, remove, repair, replace and/or restore by, for, or at Franchisee’s request.

## **2. Grant of Authority**

2.1 Pursuant to RCW 35A.47.040, the City hereby grants Franchisee a non-exclusive license to use the City’s Rights-of-way, generally described as those areas within the present and future boundaries of the City and hereinafter referred to as the “Franchise Area,” to attach, install, construct, operate, lease, maintain, repair, replace, reattach, reinstall, relocate, and remove its Facilities, subject to the conditions outlined in this Franchise. Approved Facilities shall not unreasonably impair any improvement or interfere with the intended use of the City’s Rights-of-way. Franchisee shall obtain all permissions necessary to attach to Poles, conduits or related facilities.

2.2 This Franchise Agreement merely authorizes Franchisee to occupy and use the Franchise Area. This franchise does not confer any other rights described herein nor does it permit Franchisee to use the City’s Rights-of-way for purposes not specified in this Franchise. Nothing in this Franchise shall be deemed to grant, convey, create, or vest in Franchisee a real property interest in land, including any fee, leasehold interest, or easement.

2.3 Any work performed pursuant to the rights granted under this Franchise shall be subject to prior review and approval by the City in accordance with all applicable existing Laws.

2.4 Conditions: The purpose of this Franchise is to delineate the conditions relating to Franchisee’s use of the Franchise Area and to create a foundation for the Parties to work cooperatively in the public’s best interests after this ordinance becomes effective. This Franchise is granted subject to Lakewood’s land use authority, public highway authority, police powers, franchise authority, and any other case law, statutory or inherent authority, and is conditioned upon the terms and conditions provided in this Franchise, and Franchisee’s compliance with all Laws.

2.5 Risk and Liability: By accepting this Franchise, Franchisee assumes all risks or liabilities related to the Franchise, with no risk or liability conferred upon Lakewood except as expressly set forth in this Franchise. This Franchise is granted upon the express condition that Lakewood retains the absolute authority to grant other or further franchises in any Rights-of-Way and any Franchise Area, provided the parties to such other franchises do not unreasonably interfere with the use and placement of Franchisee’s existing Facilities. This and other franchises shall in no way prevent or prohibit Lakewood from using any of its Franchise Area, or affect its jurisdiction over them or any part of them, and Lakewood retains absolute authority to make all changes, relocations, repairs, maintenance, establishments, improvements, dedications or vacations of same

as Lakewood may see fit, including the dedication, establishment, maintenance and improvement of all new or existing Rights-of-Way, Public Property or Public Ways.

### **3. Terms**

3.1 Term. This Franchise shall commence on the Effective Date and extend for an initial term of five (5) years (the “Initial Term”), unless it is earlier terminated by either Party in accordance with the terms of the Franchise.

3.2 Renewal. Following the Initial Term, this Franchise shall be automatically renewed for one (1) successive five (5) year term (“Renewal Term”), unless either party gives the other party written notice of its intent not to renew this Franchise at least sixty (60) days prior to the expiration of the Initial Term. All terms and conditions of this Franchise shall remain in full force and effect for any subsequent Renewal Term.

3.3 Effect of Expiration of Franchise. Upon expiration of the Franchise, Franchisee shall have up to 90 days following expiration in which to remove all of its Facilities and related equipment from City Rights-of-Way, except as otherwise provided in Subsection 9.1. Within 30 days following expiration, Franchisee shall provide the City with a schedule and timeline for removing the Facilities. Thereafter, Franchisee shall have no access to City Rights-of-Way for the purpose of installing any Facilities.

### **4. Privileges Conveyed**

4.1 Franchise Granted. Pursuant to the Telecommunication Act of 1996 § 253(c), Lakewood Municipal Code, and the laws of the State of Washington including, but not limited to, RCW 47.24.020 (Jurisdiction, control), RCW 47.52.090 (Cooperative agreements — Urban public transportation systems — Title to highway — Traffic regulations — Underground utilities and overcrossings — Passenger transportation — Storm sewers — City street crossings), RCW 35A.47.040 (Franchises and permits — Streets and public ways), RCW 35.22.280 (Specific powers enumerated), RCW 35.99.020 (Permits for use of right-of way), and 80.36.040 (Use of road, street, and railroad right-of way – When consent of city necessary), and any related laws, Lakewood grants to Franchisee, authorized to do business in the State of Washington, and its successors and assigns (subject to and as provided for in Section 11), under this Franchise’s terms and conditions, the privilege to install, construct, operate, maintain, repair, upgrade, remove, replace, and improve its Facilities, together with all necessary equipment and appurtenances, for the provision of wireless telecommunications services from the areas within the Franchise Area. Without a separate franchise agreement, Franchisee shall not have the privilege to provide cable services in the City of Lakewood.

4.2 Limited Franchise: This Franchise conveys a limited privilege as to the Franchise Area in which Lakewood has an actual interest. It is not a warranty of title or interest in the Franchise Area. This privilege shall not limit Lakewood’s police powers, any statutory or inherent authority, jurisdiction over its property, Franchise Area, Rights-of-Way, or its zoning or land use authority. The terms and conditions of this Franchise shall not be construed to apply to Facilities

located outside of the Franchise Area. This Franchise does not confer upon Franchisee any privilege to install or use any Poles outside the Franchise Area.

4.3 Principal Use Limitation. This Franchise shall not authorize a principal use of the Franchise Area for purposes other than for wireless telecommunications services.

4.4 Franchise is Non-Exclusive. This Franchise is non-exclusive, and as a result, Lakewood expressly reserves the right to grant other or further franchises or to use the Franchise Area itself; provided that such uses do not unreasonably interfere with Franchisee's use and placement of its Facilities in any Rights-of-Way and/or any Franchise Area.

4.5 Acknowledgement. Franchisee acknowledges and warrants by its acceptance of the granted privileges, that it has carefully read and fully comprehends the terms and conditions of this Franchise. Franchisee accepts all reasonable risks of the meaning of the provisions, terms and conditions of the Franchise. Franchisee further acknowledges and states that it has fully studied and considered the requirements and provisions of this Franchise, and believes that the same are consistent with all Laws. If in the future Franchisee becomes aware that a provision of this Franchise may be unlawful or invalid, it will not use such potential invalidity to unilaterally ignore or avoid such provision. Instead, Franchisee will promptly advise Lakewood of the potential invalidity or illegality, and the Parties will meet within thirty (30) days and endeavor jointly to amend this Franchise to cure the invalidity or illegality.

4.6 Enforceable Contract. Franchisee specifically agrees to comply with the provisions of any applicable Laws, as they exist or may be amended. The express terms and conditions of the Franchise constitute a valid and enforceable contract between the Parties, subject to any applicable Laws.

## **5. Administrative Tax and Utility Fees**

5.1 Franchise Fees Prohibited by State Law. Pursuant to RCW 35.21.860, the City is prohibited from imposing franchise fees upon a telephone business, as defined in RCW 82.16.010, or a Service Provider for use of the Rights-of-way, as defined in RCW 35.99.010, except a utility tax or actual administrative expenses related to the franchise incurred by the City. Franchisee does hereby warrant that its operations, as authorized under this Franchise, are those of a Service Provider as defined in RCW 35.99.010.

5.2 Reimbursement of Costs. Franchisee shall be subject to an administrative fee in the amount of five thousand dollars (\$5,000) for reimbursement of costs associated with the preparation, processing and approval of this Franchise, including wages, benefits, overhead expenses, meetings, negotiations and other functions related to the approval. This administrative fee may also include one-time fees for costs associated with the preparation, processing and approval of a Master License Agreement, if a Master License Agreement is necessary, including wages, benefits, overhead expenses, meetings, negotiations and other functions related to the approval. The administrative fee excludes permit fees required for the work in the City Rights-of-way, including but not limited to, Right of Way Permit, and Small Wireless Facility Permit, Building Permit, and other permits required by the Lakewood Municipal Code. Licensee shall



bear the sole cost and expense related to the procurement of these aforementioned permits. Payment of the one-time administrative fee is due at the time of submitting a Small Wireless Facility Franchise Application. This will serve as an initial deposit, additional fees may apply if additional staff, attorney and consultant-related time is necessary. Payment of all additional fees will be due within 30 days after the Lakewood City Council's approval of the Franchise ordinance.

5.3 Electricity Charges. Franchisee shall be solely responsible for the payment of all electrical utility charges to the applicable utility company based upon the Franchisee's Facilities' usage of electricity and applicable tariffs.

5.4 Permit Fee. Franchisee shall be subject to all permit fees associated with activities undertaken through the authority granted in this Franchise or under applicable Laws. No construction, maintenance, or repairs (except for emergency repairs) shall be undertaken in the Franchise Area without first obtaining appropriate permits from the City of Lakewood, except in the case of an Emergency. In case of an Emergency, Franchisee may proceed with Construction, maintenance, or repairs necessary to address the Emergency without first obtaining appropriate permits, but shall, within 24 hours of the Emergency, obtain the appropriate permits from the City of Lakewood. Such 24-hour period shall be extended to accommodate the duration of any closure of the City of Lakewood (for example, for a holiday or weekend).

5.5 Emergency Fee. Franchisee shall promptly reimburse Lakewood for any and all Costs incurred by Lakewood while responding to any emergency arising from work done under the authority of this franchise involving public safety.

5.6 Reimbursement period. Franchisee shall reimburse Lakewood within forty-five (45) days of Lakewood's submittal of an itemized billing for reasonably incurred Costs, itemized by project, for Franchisee's proportionate share of all actual, identified expenses incurred by Lakewood in planning, constructing, installing, repairing, altering, or maintaining any of Franchisee's Facilities.

5.7 Changes in State Law. If RCW 35.21.860 is amended to allow collection of a franchise fee, this Franchise shall be amended to require franchise fee payments as allowed by Law or, if the amount of the franchise fee is not expressly set by such Law, by the amount agreed upon by the Parties.

## **6. Approval of Small Wireless Facilities**

6.1 Permits. Franchisee shall be required to obtain all permits from Lakewood necessary for work in the City and/or the City's rights-of-ways.

6.2 Master License Agreement. Franchisee shall be required to obtain a Master License Agreement from the City for use of City-owned Poles for Approved Facilities.



6.3 Inventory. Franchisee shall maintain a current Inventory of Facilities throughout the Term of this Franchise. Franchisee shall provide to City a copy of the Inventory no later than 180 days after the effective date of this Franchise, and shall be updated within 30 business days of a reasonable request by the City. The Inventory shall include GIS coordinates, date of installation, type of Pole used for installation, description/type of installation for each Small Wireless Facility installation and photographs taken before and after the installation of the Small Wireless Facility and taken from the public street. Concerning Facilities that become inactive, the Inventory shall include the same information as active installations in addition to the date the Facilities were deactivated and the date the Facilities were removed from the Rights-of-way. The City shall compare the Inventory to its records to identify any discrepancies, and the Parties will work together in good faith to resolve any discrepancies. Franchisee will only be required to report one time on an Inventory any Facilities which were removed from the Rights-of-way.

6.3.1 Disclosure to Third Parties: Any drawings and/or information concerning the location of Franchisee's Facilities provided by Franchisee shall be used by Lakewood solely for management of the Franchise Area. Lakewood shall take all prudent steps reasonably necessary to prevent unnecessary disclosure or dissemination of such drawings, maps, records and/or information to any third party without the prior notice to Franchisee, unless the third party is an authorized governmental entity of any tier or a public records requestor. Lakewood will provide Franchisee with notice of any public records request for Franchisee's paperwork as soon as reasonably practicable.

6.4 Unauthorized Installations. Any Franchisee Facilities installations in the City Rights-of-way that were not authorized under this Franchise or other approval by the City ("Unauthorized Facilities") that are identified by the City as a result of comparing the Inventory to internal records or through any other means will be subject to the payment of an Unauthorized Facilities Charge by Franchisee. City shall provide written notice to Franchisee of any Unauthorized Facilities identified by City staff and Franchisee shall have 30 days thereafter in which to establish that this site was authorized. Failure to establish that the site is authorized will result in the imposition of an Unauthorized Facilities Installation Charge in the amount of \$500.00 per Unauthorized Facility per day starting on the 31st day. Franchisee may submit an application to the City under this Franchise for approval of the Unauthorized Facilities. If the application for the Unauthorized Facilities is not approved based on applicable considerations under this Franchise or applicable Laws, Franchisee shall remove the Unauthorized Facilities and any related facilities from the City's Rights-of-way within 30 days after the expiration of all appeal periods for such denial. The City shall not refund any assessed fines, unless Franchisee is successful in an appeal.

6.5 Revocation. The Director may revoke Franchisee's permission to use a licensed location for Franchisee's non-compliance with a term or terms of this Franchise subject to the same notice and right to cure procedures for a default in Section 16.

## 7. Construction of Facility Requirements

7.1 Compliance with Law Required. The work done by Franchisee in connection with the installation, construction, maintenance, repair, and operation of Facilities on Poles within the City Rights-of-way shall be subject to and governed by all applicable Laws related to the construction, installation, operation, maintenance, and control of Franchisee's Facilities installed in the City's Rights-of-way. Franchisee shall not attach, install, maintain, or operate any Facilities or other equipment in or on the City's Rights-of-way without the prior approval of the City for each location, which approval shall not be unreasonably withheld, conditioned, or delayed. Franchisee shall not attach, install, maintain, or operate any Facilities or other equipment in or on the City's Rights-of-way without the prior approval from Pole owners.

### 7.2 No Interference.

7.2.1 Franchisee, in the performance and exercise of its rights and obligations under this Franchise, shall not physically interfere in any manner with the existence and operation of any and all existing public and private rights-of-way, sanitary sewers, water mains, storm drains, gas mains, poles, aerial and underground electrical and telephone wires, electrifiers, cable television, and other telecommunications, utility, or municipal property, without the express written approval of the owner or owners of the affected property or properties, except as permitted by applicable Law or this Franchise.

7.2.2 If Franchisee's Facilities physically interfere with any of the activities enumerated within Section 7.2 above, then Franchisee shall promptly cease operation of or relocate the Facilities causing the interference upon receiving notice from the City. If interference is not cured within 30 days after receipt of written notice from the City of such interference such Facilities may be deemed unauthorized and subject to the provisions of Section 6.4 of this Franchise.

7.2.3 Following installation or modification of Facilities, the Director may require Franchisee to test Franchisee's Facilities' radio frequency and other functions to confirm it does not interfere with the City's Operations or other equipment or property that are located within ten (10) meters of the Facilities.

7.2.4 Wireless service providers or communications services providers with permission from the City to use the Rights-of-way to provide wireless services must comply with the provisions of Section 7.2 of this Franchise to avoid, correct, and/or eliminate physical or harmful interference with Franchisee's Facilities.

7.2.5 The Parties acknowledge that the rules and regulations of the FCC regarding radio frequency interference apply to the terms of this Franchise.

7.2.6 If the City receives an application from another franchisee or permittee for the installation of Facilities within 100 feet of Franchisee's Facilities approved herein, and the City reasonably believes such Facilities might create physical or electronic interference with Franchisee's Facilities, then the City may instruct the other franchisee or permittee to

provide written notice to Franchisee of the proposed installation. The notice shall include a description of the radio frequencies, power levels, direction of broadcast, location of the proposed installation and any other information that is reasonably necessary for Franchisee and its customers to confirm whether there will be any physical or electronic interference with Franchisee's Facilities. Within 30 days after receipt of the notice required herein, Franchisee shall notify the other franchisee or permittee and the City if there is reasonable cause to believe there will be physical or electronic interference from the proposed installation. If Franchisee notifies the franchisee or permittee and the City that there will not be any interference, or if Franchisee fails to respond within the 30-day period, the City shall have satisfied its duty to avoid interference under this Section 7.2.

7.3 Installation. Franchisee shall, at its own cost and expense, install the Franchisee's Facilities in a good and workmanlike manner and in accordance with the requirements promulgated by the Director, as such may be amended from time to time. Franchisee's work shall be subject to the regulation, control and direction of the Director as allowed by Law. All work done in connection with the installation, operation, maintenance, repair, modification, upgrade, removal, and/or replacement of the Facilities shall be in compliance with all applicable Law.

7.3.1 Inspections. The Director may perform visual inspections of any Facilities located in the City Rights-of-way as the Director deems appropriate without notice. If the inspection requires physical contact with Facilities, the Director shall provide written notice to Franchisee within 5 - 10 business days of the planned inspection. Franchisee may have a representative present during such inspection.

7.3.2 Expiration of Permits. All Facilities shall be installed by the Franchisee within one year of receiving approval of all necessary Permits from the City. Permits issued for facilities not installed within one year of issuance of the permit will expire and require (re)application and updated approval for all necessary City permits prior to installation.

7.3.3 All Facilities shall be put to use within one year of receiving approval of all necessary Permits from the City. Any Facilities not put to use within one year of approval shall be deemed an Unauthorized Installation and subject to section 6.4 of this agreement. Notwithstanding the foregoing, the City may grant an extension to such one-year period upon a written request by Franchisee demonstrating that there are delays in obtaining necessary permits, licenses, franchises, rights-of-way, easements and other rights required to commence operation of the Facilities due to circumstances beyond the Franchisee's control.

7.4 Placement. Facilities shall not impede pedestrian or vehicular traffic in the Rights-of-way. If Facilities are installed in a location that is not in accordance with the plans approved by the Director or impedes pedestrian or vehicular traffic or does not comply or otherwise renders the City Rights-of-way non-compliant with applicable Laws, including the Americans with Disabilities Act, then Franchisee shall remove the Facilities. After ten (10) business days from receiving written notification by the City of non-compliant conditions, Franchisee shall be subject



to a \$500.00 per day penalty for every day Franchisee remains non-compliant, regardless of whether or not Franchisee's contractor, subcontractor, or vendor installed the Pole or Facilities.

7.5 Electrical Supply. Franchisee shall be responsible for obtaining any required electrical power service to Facilities. The City shall not be liable to Franchisee for any stoppages or shortages of electrical power furnished to the Facilities, including without limitation, stoppages or shortages caused by any act, omission, or requirement of the public utility serving the structure or the act or omission of any other tenant of the structure, or for any other cause beyond the control of the City.

7.6 Fiber Connection. Franchisee shall be responsible for obtaining access and connection to fiber optic lines or other backhaul solutions that may be required for its Facilities. Backhaul providers must have a current franchise with the City prior to performing any work.

7.7 Generators. Franchisee shall not install any generators without the City's prior approval in accordance with applicable law. Generators shall be underground wherever technologically feasible.

7.8 Orphan Pole Provision. If Franchisee leases a structure in the Right-of-Way from a landlord and such landlord later replaces, removes or relocates the structure, for example (and not by limitation) by building a replacement structure, Franchisee shall remove or relocate its Facilities within the Right-of-Way prior to the landlord removing the initial structure at no cost to the City.

7.9 Repairs. Whenever the installation, placement, attachment, repair, modification, removal, operation, use, or relocation of Facilities, or any portion thereof, is required or permitted under this Franchise, and such installation, placement, attachment, repair, modification, removal, operation, use, or relocation causes any property of the City to be damaged or to have been altered in such a manner as to make it unusable, unsafe, or in violation of any Laws, Franchisee, at its sole cost and expense, shall promptly repair and return such property to its original condition, reasonable wear and tear excepted. If Franchisee does not repair such property or perform such work as described in this paragraph, then the City shall have the option, upon 30 days' prior written notice to Franchisee or immediately if there is an imminent danger to the public, to perform or cause to be performed such reasonable and necessary work on behalf of Franchisee and to charge Franchisee for the reasonable and actual costs incurred by the City. Franchisee shall reimburse the City for its actual repair costs within 30 days after receiving the invoice from the City.

7.10 Hazardous Substances. Franchisee shall comply with all applicable State and federal laws, statutes, regulations and orders concerning hazardous substances relating to Franchisee's Facilities in Rights-of-Way.

7.11 Lateral Support. Whenever Work on Facilities have caused or contribute to a condition that in the City of Lakewood's reasonable determination would substantially impair or substantially impairs the lateral support of the Franchise Area, Lakewood may direct Franchisee, at Franchisee's sole expense, to take such actions as are reasonably necessary within the Franchise Area to repair and/or not impair the lateral support. If Franchisee fails or refuses to take prompt action, or if an emergency situation requires immediate action, Lakewood may enter the Franchise



Area and take any action necessary to protect the public, any Public Way, Public Property, and Rights-of-Way, and Franchisee shall be liable to Lakewood for all costs, fees, and expenses resulting from that necessary action. This provision shall survive the expiration, revocation or termination of this Franchise for a period of five years.

7.11 Workmanship: All Work done by Franchisee or at Franchisee's direction or on its behalf, including all Work performed by contractors or subcontractors, shall be considered Franchisee's Work and shall be undertaken and completed in a workmanlike manner and in accordance with the descriptions, plans and specifications Franchisee provided to Lakewood, and be warranted for at least one year. Franchisee's activities (including work done at Franchisee's direction or on its behalf) shall not damage or interfere with other franchises, licenses, utilities, drains or other structures, or the Franchise Area, and shall not unreasonably interfere with public travel, park uses, other municipal uses, adjoining property, and shall not endanger the safety of or injure persons and/or property. Franchisee's Work shall comply with all applicable Laws.

7.12 Damage During Work: In case of any damage caused by Franchisee, or by Franchisee's Facilities, to Franchise Area, Franchisee agrees to repair the damage to conditions that meet or exceed requirements established by the Department of Transportation, at its own cost and expense. Franchisee shall, upon discovery of any such damage, immediately notify Lakewood. Lakewood will inspect the damage and set a time limit for completion of the repair. If Lakewood discovers damage caused by Franchisee to the Franchise Area, Lakewood will give Franchisee notice of the damage and set a reasonable time limit in which Franchisee must repair the damage. In the event Franchisee does not make the repair as required in this section, Lakewood may repair the damage to its satisfaction at Franchisee's sole expense.

7.13 Restoration Requirements: Franchisee shall, after Work on any of Franchisee's Facilities within the Franchise Area, restore the surface and subsurface of the Franchise Area and any other property within the Franchise Area which may have been disturbed or damaged by such Work, reasonable wear and tear excepted. All restoration of Rights-of-Way, sidewalks and other improvements or amenities shall conform to the City of Lakewood Standard Specifications for Road, Bridge and Municipal Construction and the City of Lakewood's Engineering Standards Manual in effect at that time. Restoration shall include all landscaping, irrigation systems and trees. Lakewood shall have final approval of the condition of the Franchise Area after restoration pursuant to Applicable Laws as they exist or may be amended or superseded, provided that such provisions are not in conflict or inconsistent with the express terms and conditions of this Franchise.

7.14 Tree Trimming. Upon obtaining a written permit from the City, if such a permit is required, Franchisee may prune or cause to be pruned, using proper pruning practices in accordance with such permit, any tree in the Rights-of-Way which interferes with the System.

7.15 Survey Monuments: All survey monuments which are disturbed or displaced by Franchisee in its performance of any work under this Franchise shall be referenced and restored by Franchisee, in accordance with WAC 332-120 (Survey Monuments – Removal or Destruction) and other applicable Laws.

7.16 Failure to Restore: If it is determined that Franchisee has failed to restore the Franchise Area in accord with this section, Lakewood shall provide Franchisee with written notice including a description of actions Lakewood believes necessary to restore the Franchise Area. If Franchisee fails to restore the Franchise Area in accord with Lakewood's notice within thirty (30) days of that notice, Lakewood, or its authorized agent, may restore the Franchise Area at Franchisee's sole and complete expense. The privilege granted under this section shall be in addition to others provided by this Franchise.

## **8. Emergencies**

8.1 The City retains the right and privilege to cure or move any Facilities located within the Rights-of-way of the City, as the City may determine to pose an immediate danger to the property, life, health or safety of any individual. If the Director reasonably determines that there is an imminent danger to the public, then the City may immediately secure, adjust, disconnect, remove, or relocate the applicable Facilities at Franchisee's sole cost and expense. The City shall notify Franchisee by telephone promptly upon learning of the emergency and shall exercise reasonable efforts to avoid an interruption of Franchisee's operations.

8.2 Prompt Response Required by Franchisee. In the event of any emergency involving damaged Franchisee Facilities located in or under the Franchise Area, or Franchisee's Facilities within the Franchise Area, Franchisee shall, upon receipt of notification by telephone from Lakewood of the existence of such condition, immediately take those actions as are necessary to correct the dangerous condition without first applying for and obtaining a permit as required by this franchise. However, this does not relieve Franchisee from the requirement of obtaining any permits necessary for this purpose, and the Franchisee shall apply for all such permits no later than the next succeeding day during which Lakewood City Hall is open for business. The Franchisee shall also notify West Pierce Fire and Rescue District and the Lakewood Police Department through the South Sound 911 dispatch system of the emergency.

## **9. Removal**

9.1 Removal Required After Expiration, Termination, or Revocation of Franchise. Upon the expiration, termination, or revocation of the rights granted under this Franchise, the Franchisee shall commence removal of all of Franchisee's Facilities at the Franchisee's sole expense from the Rights-of-Way within thirty (30) days of receiving notice from the City. Within 30 days of receiving notice from the City, Franchisee shall provide the City with a schedule and timeline for removing the Facilities. Any plans for removal of the Franchisee's Facilities must first be approved by the City, and all necessary permits must be obtained prior to such work. Removal of all Franchisee Facilities shall be completed within 90 days. Facilities not removed within 90 days shall be deemed an "Unauthorized Installation" and shall be subject to the imposition of Unauthorized Installation Charges as set forth in Section 6.4.

9.1.1 Restoration. Franchisee shall repair any damage to the City Rights-of-way, and the property of any third party resulting from Franchisee's removal activities (or any other of Franchisee's activities hereunder) within 10 days following the date of such removal, at Franchisee's sole cost and expense, including restoration of the City Rights-of-way and such property to the same or better condition as it was immediately before the date Franchisee was granted a Permit for the applicable licensed location, including restoration or replacement of any damaged trees, shrubs or other vegetation, reasonable wear and tear excepted. Such repair, restoration and replacement shall be subject to the sole, reasonable approval of the Director.

9.3 Removal or Relocation Required for City Project. Franchisee understands and acknowledges that the City may require Franchisee to remove or relocate its Facilities, or any portion thereof, from the City Rights-of-way, and Franchisee shall, at the Director's direction, remove or relocate the same at Franchisee's sole cost and expense, whenever the Director reasonably determines that the relocation or removal is needed for any of the following purposes:

9.3.1 Required for the construction, completion, repair, widening, relocation, or maintenance of, or use in connection with, any City construction or maintenance project.

9.3.2 Required to locate the utilities underground as set forth in this Franchise.

9.3.3 In any such case, the City shall use reasonable efforts to afford Franchisee a reasonably equivalent alternate location, if available.

9.3.4 If Franchisee fails to remove the Facilities, or any portion thereof, as requested by the Director within 90 days of Franchisee's receipt of the request, then the City shall be entitled to remove the Facilities, or any portion thereof, at Franchisee's sole expense without further notice to Franchisee, and Franchisee shall, within 30 days following the issuance of invoice for the same, reimburse the City for its reasonable expenses incurred in the removal and disposal of the Facilities, or any portion thereof.

9.4 Ownership. The City agrees that no part of any Facilities constructed, modified, or erected or placed within the City Rights-of-way by Franchisee will become, or be considered by the City as being affixed to or a part of the City Rights-of-way. Unless a Master License Agreement with the City specifies otherwise, all portions of the Facilities constructed, modified, erected, or placed by Franchisee on the City Rights-of-way will be and remain the property of Franchisee and may be removed by Franchisee at any time during or after the Term consistent with this Franchise.

9.5 Franchisee Responsible. Franchisee shall be responsible and liable for the acts and omissions of Franchisee's employees, temporary employees, officers, directors, consultants, agents, affiliates, subsidiaries, sublicensees, sublessees, and subcontractors in connection with the performance of this Franchise, as if such acts or omissions were Franchisee's acts or omissions.



## **10. Undergrounding of Facilities**

10.1 Franchisee acknowledges and agrees that if the City allows the placement of Small Wireless Facilities above ground the City may, at any time in the future, require the conversion of Franchisee's aerial facilities to an underground installation or relocated at Franchisee's expense if the existing poles on which Franchisee's Facilities are located are designated for removal due to a City Project as described in Section 9. This Franchise does not place an affirmative obligation on the City to allow the relocation of such Facilities on public property or in the Public Ways, nor does it relieve Franchisee from any Code provision related to the siting of wireless facilities.

10.2 The City may require undergrounding of wirelines (either telecommunications or electrical), but the City shall allow to remain above ground those Facilities which must be above ground in order to be functional. Franchisee shall cooperate with the City and modify the affected Facilities to incorporate the placement of wireline services underground and internal to the pole if the replacement pole is hollow (for example electrical and fiber) or otherwise consistent with a design plan agreed to between the City and Franchisee, at no cost to the City.

10.3 Franchisee shall not remove any underground Facilities that require trenching or other opening of the Public Ways, except as provided in this Section 10.3. Franchisee may remove any underground Facilities from the Public Ways that have been installed in such a manner that it can be removed without trenching or other opening of the Public Ways, or if otherwise permitted by the City. When the City determines, in the City's reasonable judgment, that Franchisee's underground Facilities must be removed in order to eliminate or prevent a hazardous condition, Franchisee shall remove such Facilities at Franchisee's sole cost and expense. Franchisee must apply and receive a permit prior to any such removal of underground Facilities from the Public Ways and must provide as-built plans and maps.

10.4 The provisions of this Section shall survive the expiration, revocation, or termination of this Franchise. Nothing in this Section shall be construed as requiring the City to pay any costs of undergrounding any of the Franchisee's Facilities.

## **11. Records and Reports**

11.1 Franchisee shall maintain Records of its operations under this Franchise that are open and accessible to the City. The City shall have the ability to inspect such Records of Franchisee as are reasonably necessary to monitor compliance with the Franchise at a local office during Normal Business Hours and upon at least ten (10) days' prior written notice. Such notice shall specifically reference the Section of the Franchise that is under review so that Franchisee may organize the necessary books and records for easy access by the City. Such notice shall not apply to the Public Records File required by the FCC. If any such Records are under the control of an affiliated entity or a third party or are stored in a computer, Franchisee shall promptly take steps to secure access to such records as are reasonably necessary for the City's inspection. Alternatively, if the books and records are not easily accessible at the local office of Franchisee,



Franchisee shall pay the reasonable travel costs of the City's representative to view the books and records at the appropriate location.

11.2 Franchisee acknowledges that information submitted to the City is subject to the Washington Public Records Act, chapter 42.56 RCW, and is open to public inspection, subject to any exceptions permitted by law (unless an exemption applies).

11.3 Franchisee may identify documents submitted to the City that Franchisee believes are non-disclosable, such as trade secrets. Franchisee shall prominently mark any document for which it claims confidentiality with the mark "Confidential," in letters at least one-half (1/2) inch in height, prior to submitting such document to the City. The City shall treat any document so marked as confidential and will not disclose it to Persons outside of the City, except as required by law and as provided herein. If the City receives a public disclosure request for any documents or parts of documents that Franchisee has marked as "Confidential," the City shall provide Franchisee with written notice of the request, including a copy of the request. If Franchisee fails to obtain a Court order prohibiting disclosure of the documents marked "Confidential" and served such order on the City within the 10 business days, the City may release the documents. The City will not assert an exemption from disclosure or production on Franchisee's behalf.

## **Section 12. Transfer or Assignment**

12.1 Neither Franchisee nor any other Person may transfer the Facilities or the Franchise without the prior written consent of the City, which consent shall not be unreasonably withheld or delayed. No change in control of Franchisee, defined as an acquisition of 50% or greater ownership interest in Franchisee, shall take place without the prior written consent of the City, which consent shall not be unreasonably withheld or delayed. No consent shall be required, however, for (a) a transfer in trust, by mortgage, hypothecation, or by assignment of any rights, title, or interest of Franchisee in the Franchise or in the Facilities in order to secure indebtedness, or (b) a transfer to an affiliated entity directly or indirectly owned or controlled by Franchisee or its parent entities. Within 30 days of receiving a request for consent, the City shall, in accordance with FCC rules and regulations, notify Franchisee in writing of the additional information, if any, it requires to determine the legal, financial and technical qualifications of the transferee or new controlling party. If the City has not taken action on Franchisee's request for consent within 120 days after receiving such request, consent shall be deemed given.

12.2 Except as allowed in this Section 11, the Facilities and this Franchise shall not be sold, assigned, transferred, leased or disposed of, either in whole or in part, either by involuntary sale or by voluntary sale, merger or consolidation; nor shall title thereto, either legal or equitable, or any right, interest or property therein pass to or vest in any Person without the prior written consent of the City, which consent shall not be unreasonably withheld, conditioned, or delayed.

12.3 Franchisee shall promptly notify the City of any actual or proposed change in, or transfer of, or acquisition by any other party of control of Franchisee. The word "control" as used herein is not limited to majority stock ownership but includes actual working control in whatever

manner exercised. Every change, transfer or acquisition of control of Franchisee shall make this Franchise subject to cancellation unless and until the City shall have consented thereto.

12.4 The parties to the sale, transfer or change of control shall make a written request to the City for its approval of a sale, transfer or change of control and shall furnish all information required by applicable law.

12.5 The City may condition the transfer of this Franchise upon such terms and conditions as it deems reasonably appropriate, including, for example, any adequate guarantees or other security, as allowed by applicable law. Additionally, the prospective controlling party or transferee shall effect changes as promptly as practicable in the operation of the Facilities, if any changes are necessary, to cure any violations or defaults presently in effect or ongoing.

12.6 The City shall act by ordinance or resolution on the request within 120 days of the request, provided it has received all information required by applicable law. Subject to the foregoing, if the City fails to render a final decision on the request within 120 days, such request shall be deemed granted unless the requesting party and the City agree to an extension of time.

12.7 Within 30 days of any transfer, sale or change of control, if approved or deemed granted by the City, Franchisee shall file with the City a copy of the deed, agreement, lease or other written instrument evidencing such sale or transfer of ownership or control, certified and sworn to as correct by Franchisee and the transferee or new controlling entity. In the event of a sale or transfer of ownership, the transferee shall also file its written acceptance agreeing to be bound by all of the provisions of this Franchise. In the event of a change in control, in which Franchisee is not replaced by another entity, Franchisee will continue to be bound by all of the provisions of the Franchise and will not be required to file an additional written acceptance. The approval of any change in control shall not be deemed to waive any rights of the City to subsequently enforce noncompliance issues relating to this Franchise.

12.8 Notwithstanding the foregoing, the City's consent shall not be required for a hypothecation or an assignment of Franchisee's interest in the Franchise in order to secure indebtedness or for a transfer to an intra-company affiliate, provided that Franchisee must reasonably notify the City within 30 days and the affiliate must have the requisite legal, financial and technical capability.

### **13. Indemnification**

13.1 Franchisee releases, covenants not to bring suit against, and agrees to indemnify, defend, and hold harmless the City, its officers, employees, agents, and representatives from any and all claims, costs, judgments, awards, or liability to any person, for injury or death of any person or damage to property caused by or arising out of any acts or omissions of Franchisee, its agents, servants, officers, contractors, or employees in the performance of this Franchise and any rights granted within this Franchise and/or the negligence or willful misconduct of Franchisee, unless any such claims, costs, judgments, awards, or liability are caused by or arise from the sole negligence or willful misconduct, or criminal actions on the part of the City, its officers, agents, employees, volunteers, or elected or appointed officials, or contractors.

13.2 Inspection or acceptance by the City of any work performed by Franchisee at the time of completion of construction shall not be grounds for avoidance by Franchisee of any of its obligations under this Section. These indemnification obligations shall extend to claims that are not reduced to a suit and any claims that may be compromised, with Franchisee's prior written consent, prior to the culmination of any litigation or the institution of any litigation.

13.3 The City shall promptly notify Franchisee of any claim or suit and request in writing that Franchisee indemnify the City. City's failure to so notify and request indemnification shall not relieve Franchisee of any liability that Franchisee might have, except to the extent that such failure prejudices Franchisee's ability to defend such claim or suit. Franchisee may choose counsel to defend the City subject to this Section 13.3. In the event that Franchisee refuses the tender of defense in any suit or any claim, as required pursuant to the indemnification provisions within this Franchise, and said refusal is subsequently determined by a court having jurisdiction (or such other tribunal that the parties shall agree to decide the matter), to have been a wrongful refusal on the part of Franchisee, Franchisee shall pay all of the City's reasonable costs for defense of the action, including all expert witness fees, costs, and attorney's fees, and including costs and fees incurred in recovering under this indemnification provision. If separate representation to fully protect the interests of both parties is necessary, such as a conflict of interest between the City and the counsel selected by Franchisee to represent the City, then upon the prior written approval and consent of Franchisee, which shall not be unreasonably withheld, the City shall have the right to employ separate counsel in any action or proceeding and to participate in the investigation and defense thereof, and Franchisee shall pay the reasonable fees and expenses of such separate counsel, except that Franchisee shall not be required to pay the fees and expenses of separate counsel on behalf of the City for the City to bring or pursue any counterclaims or interpleader action, equitable relief, restraining order or injunction. The City's fees and expenses shall include all out-of-pocket expenses, such as consultants and expert witness fees, and shall also include the reasonable value of any services rendered by the counsel retained by the City but shall not include outside attorneys' fees for services that are unnecessarily duplicative of services provided the City by Franchisee. Each party agrees to cooperate and to cause its employees and agents to cooperate with the other party in the defense of any such claim and the relevant records of each party shall be available to the other party with respect to any such defense.

13.4 The parties acknowledge that this Franchise may be subject to RCW 4.24.115. Accordingly, in the event of liability for damages arising out of bodily injury to persons or damages to property caused by or resulting from the concurrent negligence of Franchisee and the City, its officers, officials, employees, and volunteers, Franchisee's liability shall be only to the extent of Franchisee's negligence, including Franchisee's negligence resulting from the concurrent negligence of Franchisee and the City. It is further specifically and expressly understood that the indemnification provided constitutes Franchisee's waiver of immunity under Title 51 RCW, solely for the purposes of this indemnification. This waiver has been mutually negotiated by the parties.

13.5 Notwithstanding any other provisions of this Section 13, Franchisee assumes the risk of damage to its Facilities located in the Rights-of-Way and upon City-owned property from



activities conducted by the City, its officers, agents, employees, volunteers, elected and appointed officials, and contractors, except to the extent any such damage or destruction is caused by or arises from any solely negligent, willful misconduct or criminal actions on the part of the City, its officers, agents, employees, volunteers, or elected or appointed officials, or contractors. In no event shall either party be liable for any indirect, incidental, special, consequential, exemplary, or punitive damages, including, by way of example and not limitation, lost profits, lost revenue, loss of goodwill, or loss of business opportunity in connection with its performance or failure to perform under this Franchise. Franchisee releases and waives any and all such claims against the City, its officers, agents, employees, elected or appointed officials, or contractors. Franchisee further agrees to indemnify, hold harmless and defend the City against any third-party claims for damages, including, but not limited to, business interruption damages, lost profits and consequential damages, brought by or under users of Franchisee's Facilities as the result of any interruption of service due to damage or destruction of Franchisee's Facilities caused by or arising out of activities conducted by the City, its officers, agents, employees, or contractors.

13.6 The provisions of this Section 13 shall survive the expiration, revocation, or termination of this Franchise.

#### **14. Insurance**

14.1 Franchisee shall carry and maintain for so long as Franchisee has Facilities in the Rights-of-Way, insurance against claims for injuries to persons or damages to property which may arise from or in connection with the acts or omissions of Franchisee under this Franchise. Franchisee shall require that every subcontractor maintain substantially the same insurance coverage with substantially the same policy limits as required of Franchisee, except for the Excess Umbrella coverage described in subsection (d) below. Franchisee shall carry insurance from insurers with a current A.M. Best rating of not less than A-, VII. Franchisee shall provide a copy of a certificate of insurance and additional insured endorsement to the City for its inspection at the time of acceptance of this Franchise, and such insurance certificate shall evidence a policy of insurance that includes:

- (a) Automobile Liability insurance with limits of \$5,000,000 combined single limit per accident for bodily injury and property damage;
- (b) Commercial General Liability insurance as per form ISO CG 00 01 or its equivalent, written on an occurrence basis with limits of \$5,000,000 per occurrence for bodily injury and property damage and \$5,000,000 general aggregate including personal and advertising injury, contractual liability; premises; operations; independent contractors; products and completed operations; and broad form property damage; explosion, collapse and underground (XCU);



- (c) Workers' Compensation coverage as required by the Industrial Insurance laws of the State of Washington and Employer's Liability with a limit of \$1,000,000 each accident/disease/policy limit; Evidence of qualified self-insurance is acceptable;
- (d) Excess Umbrella liability policy with limits of \$10,000,000 per occurrence and in the aggregate. Franchisee may use any combination of primary and excess to meet required total limits.

14.2 Payment of deductible or self-insured retention shall be the sole responsibility of Franchisee. Franchisee's umbrella liability insurance policy shall provide "follow form" coverage over its primary liability insurance policies or be at least as broad as such underlying policies.

14.3 The required Commercial General Liability and Umbrella/Excess Liability insurance policies carried by Franchisee shall include the City, its officers, officials, employees, agents, and volunteers ("Additional Insureds"), as an additional insured by blanket endorsement with regard to activities performed under this Franchise or by or on behalf of the Franchisee and the required Commercial Auto Liability policy obtained by Franchisee shall include the Additional Insureds, as an additional insured by blanket endorsement with regard to the use of vehicles by or on behalf of Franchisee while in performance of this Franchise. In addition, the required insurance policy shall contain a clause stating that coverage shall apply separately to each insured against whom a claim is made, or suit is brought, except with respect to the limits of the insurer's liability. Franchisee shall provide to the City a certificate of insurance and a copy of the blanket additional insured endorsements. Receipt by the City of any certificate showing less coverage than required is not a waiver of Franchisee's obligations to fulfill the requirements. Franchisee's required general and auto liability insurance shall be primary insurance with respect to the City. Any insurance, self-insurance, or insurance pool coverage maintained by the City shall be in excess of Franchisee's required insurance and shall not contribute with it.

14.4 Upon receipt of notice from its insurer(s), Franchisee shall provide the City with thirty (30) days prior written notice of any cancellation or non-renewal of any insurance policy, required pursuant to this Section 14, that is not replaced. Franchisee shall, prior to the effective date of such cancellation, obtain replacement insurance policies meeting the requirements of this Section 14. Failure to provide the insurance cancellation notice and to furnish to the City replacement certificates of insurance meeting the requirements of this Section 14 shall be considered a material breach of this Franchise and subject to the City's election of remedies described in Section 17 below. Notwithstanding the cure period described in Section 17.2, the City may pursue its remedies immediately upon a failure to furnish evidence of replacement insurance.

14.5 Franchisee's maintenance of insurance as required by this Section 14 shall not be construed to limit the liability of Franchisee to the coverage provided by such insurance, or otherwise limit the City's recourse to any remedy available at law or equity. Further, Franchisee's

maintenance of insurance policies required by this Franchise shall not be construed to excuse unfaithful performance by Franchisee.

14.6 The City may review all insurance limits once every three (3) calendar years during the Term and may make reasonable adjustments in the limits in accordance with prudent risk management practices and insurance industry standards upon thirty (30) days' prior written notice to Franchisee. Franchisee shall then provide an updated certificate of insurance to the City showing compliance with these adjustments and shall furnish the required blanket additional insured endorsement.

## **15. Security**

15.1 Bond Requirement. Before undertaking any of the Work authorized by this Franchise, as a condition precedent to Lakewood's issuance of any permits, Franchisee shall, upon Lakewood's request, furnish a Performance Bond in the amount of twenty-five thousand dollars (\$25,000) that shall remain in effect for the term of this Franchise. The bond shall be conditioned so that Franchisee shall observe all the covenants, terms and conditions and shall faithfully perform all of the obligations of this Franchise, and to repair or replace any defective work or materials discovered in the Franchise Area. The bond shall ensure the faithful performance of Franchisee's obligations under the Franchise, including, but not limited to, Franchisee's payment of any penalties, claims, liens, or fees due Lakewood that arise by reason of the operation, construction, or maintenance of the Facilities within the Franchise Area. Franchisee shall pay all premiums or other costs associated with maintaining the bond. Additionally, if Lakewood determines that the Performance Bond is inadequate to ensure Franchisee's performance of a project, Franchisee shall post any additional bonds required to guarantee performance by Franchisee in accordance with the conditions of any permits and/or the requirements of this Franchise. In lieu of a separate bond for routine individual projects involving work in the Franchise Area, Franchisee may satisfy Lakewood's bond requirements by posting a single ongoing performance bond in an amount approved by Lakewood.

## **16. General Provisions**

16.1 Compliance with Laws. Notwithstanding anything to the contrary in this Franchise, each Party shall ensure that any and all activities it performs pursuant to this Franchise shall comply with all applicable Laws, including but not limited to: (a) worker's compensation laws, (b) unemployment compensation laws, (c) the Federal Social Security Law, (d) the Fair Labor Standards Act, and (e) all Laws relating to environmental matters and occupational safety.

16.2 Eminent Domain: This Franchise shall not preclude a governmental body from acquiring the Franchise Area by lawful condemnation, or Lakewood from acquiring any portion of the Facilities by lawful condemnation. In determining the Facilities' value, no value shall be attributed to the right to occupy the Franchise Area.

16.3 Force Majeure. Except for payment of amounts due, neither Party shall have any liability for its delays or its failure of performance due to: fire, explosion, pest damage, power failures, strikes or labor disputes, acts of God, the elements, war, civil disturbances, acts of civil or military authorities or the public enemy, inability to secure raw materials, transportation facilities, fuel or energy shortages, or other causes beyond its control, whether or not similar to the foregoing.

16.4 As Is: Franchisee agrees and accepts the Franchise Area in an “as is” condition. Franchisee agrees that Lakewood has never made any representations, implied or express warranties, or guarantees as to the suitability, security or safety of the location of Franchisee’s Facilities or the Franchise Area, or possible hazards or dangers arising from other uses or users of the Franchise Area, Rights-of-Way, Public Property, and Public Ways including any use by Lakewood, the general public, or by other utilities. As to Lakewood and Franchisee, Franchisee shall remain solely and separately liable for the Work, function, testing, maintenance, replacement and/or repair of the Facilities or other activities permitted by this Franchise.

16.5 Notice. Whenever notice to or notification by any Party is required, that notice shall be in writing and directed to the recipient at the address set forth below, unless written notice of change of address is provided to the other Party. Any notice or information required or permitted to be given to the Parties under this Franchise may be sent to following Addresses unless otherwise specified:

City Address:  
City of Lakewood  
Director, Public Works Engineering Department  
6000 Main Street SW  
Lakewood, WA 98499  
Phone: (253)-589-2489

Franchisee Address:  
New Cingular Wireless PCS, LLC  
Site No. City of Lakewood Wireless Franchise Agreement (WA)  
1025 Lenox Park Blvd. NE, 3<sup>rd</sup> Floor  
Atlanta, Georgia 30319  
For emergencies call: AT&T NOC (800) 832-6662  
ReleaseAdmin@att.com  
With a copy to:

New Cingular Wireless PCS, LLC  
Attn: AT&T Legal Dept – Network Operations  
Site No. City of Lakewood Wireless Franchise Agreement (WA)  
208 S. Akard Street  
Dallas, TX 75202-4206



16.5.1 If the date for making any payment or performing any act is a legal holiday, payment may be made or the act performed on the next succeeding business day which is not a legal holiday.

16.5.2 The Parties may change the address and representative by providing written notice of such change by accepted e-mail or certified mail. All notices shall be deemed complete upon actual receipt or refusal to accept delivery. Facsimile or a .pdf e-mailed transmission of any signed original document and retransmission of any signed facsimile transmission shall be the same as delivery of an original document.

16.3 Costs to be Borne by Franchisee. Franchisee shall pay for all costs of publication of this Franchise, and any and all notices prior to not more than two (2) public meetings provided for pursuant to this Franchise.

16.4 Binding Effect. This Franchise shall be binding upon the parties hereto, their permitted successors and assigns.

16.5 Authority to Amend. No provision of this Franchise Agreement shall be amended or otherwise modified, in whole or in part, except by an instrument, in writing, duly executed by the City and the Franchisee, which amendment shall be authorized on behalf of the City through the adoption of an appropriate resolution or order by the City, as required by applicable law.

16.6 No Joint Venture. Nothing herein shall be deemed to create a joint venture or principal-agent relationship between the parties and neither party is authorized to, nor shall either party act toward third persons or the public in any manner that would indicate any such relationship with the other.

16.7 Waiver. The failure of either party at any time to require performance by the other of any provision hereof shall in no way affect the right of the other party hereafter to enforce the same. Nor shall the waiver by either party of any breach of any provision hereof be taken or held to be a waiver of any succeeding breach of such provision, or as a waiver of the provision itself or any other provision.

16.8 Severability. If any Section, subsection, paragraph, term or provision of this Franchise is determined to be illegal, invalid or unconstitutional by any court or agency of competent jurisdiction, such determination shall have no effect on the validity of any other Section, subsection, paragraph, term or provision of this Franchise, all of which will remain in full force and effect for the term of the Franchise.

16.9 Entire Agreement. This Franchise and all Exhibits represent the entire understanding and agreement between the parties hereto with respect to the subject matter hereof and supersede all prior oral negotiations and written agreements between the parties.

16.10 Compliance with Federal, State, and Local Laws. The parties shall comply with applicable federal, state and local laws, rules and regulations.



16.11 Discrimination Prohibited. In connection with this Franchise, including and not limited to all Work, hiring and employment, neither Franchisee nor its employees, agents, subcontractors, volunteers or representatives shall discriminate on the basis of race, color, sex, religion, nationality, creed, marital status, sexual orientation or preference, age (except minimum age and retirement provisions), honorably discharged veteran or military status, or the presence of any sensory, mental or physical handicap, unless based upon a bona fide occupational qualification in relationship to hiring and employment, in employment or application for employment or in the administration of the delivery of services or any other benefits under this agreement. Franchisee shall comply fully with all applicable Laws that prohibit such discrimination. A copy of this language must be made a part of any contractor or subcontractor agreement.

## **17. Dispute Resolution**

17.1 Informal Dispute Resolution. Prior to proceeding with the formal Procedure for Remedying of Franchise Violations process as set forth below (in subsection 17.2), The City agrees to provide Franchisee informal verbal or electronic mail notice of any alleged material violation of this Franchise and allow Franchisee a reasonable opportunity to cure the violation. If the alleged violation is investigated by Franchisee and determined to be valid, Franchisee agrees to exert good faith efforts to immediately resolve the matter. However, if the alleged violation is determined by Franchisee to be invalid, or outside of Franchisee's legal responsibilities, the Franchisee promptly shall so advise the City. Franchisee agrees to exert good faith efforts to expedite its investigation, determination and communications to Grantor so that the informal resolution process proceeds on an expedited basis. If the City believes that Franchisee is unreasonably delaying the informal resolution process, it may commence the formal dispute resolution process.

### 17.2 Procedure for Remedying Franchise Violations.

17.2.1 Notice of Franchisee Default: If there is any alleged Franchisee default as to performance under this Franchise, Lakewood shall notify Franchisee in writing stating with reasonable specificity the nature of the alleged default. Within thirty (30) days of its receipt of such notice, Franchisee shall provide a written response to Lakewood acknowledging receipt of notice and stating Franchisee's response. Franchisee has sixty (60) days ("cure period") from the date of the notice's mailing to:

17.2.1.1 Respond to Lakewood contesting Lakewood's assertion(s) as to the dispute or any alleged default and requesting a meeting, or:

17.2.1.2 Cure the alleged default, or;

17.2.1.3 Notify Lakewood if Franchisee cannot cure the alleged default within sixty (60) days, due to the nature of the default. Notwithstanding such notice, Franchisee shall promptly take all reasonable steps to begin to cure the alleged default and notify Lakewood in writing and in detail as to the actions that Franchisee will take and the projected completion date.

17.3 Meeting. The parties agree to arbitration to resolve their disputes. However, the parties agree prior to commencing any arbitration action to first make good faith efforts to meet and confer to attempt to settle any dispute arising out of or relating to this Franchise through senior management escalation. Either party may seek to have the dispute escalated to senior management of each party upon notice initiated by either party and thereafter, the senior management shall each exchange relevant information in good faith and attempt to resolve the dispute for a period not to exceed forty-five (45) days from the date that either party first initiated the senior management escalation process. After the expiration of the forty-five (45) day escalation period, or such later date as mutually agreed to, either party may initiate arbitration. The foregoing obligation to escalate to senior management and arbitrate is an essential and material part of this Franchise; in case of a failure of either party to follow the foregoing dispute resolution process, the other may seek specific enforcement of such obligation in any courts having jurisdiction of this Franchise.

17.4 Continuation of Obligations: Unless otherwise agreed by Lakewood and Franchisee in writing, Lakewood and Franchisee shall continue to perform their respective obligations under this Franchise during the pendency of any dispute.

17.5 Arbitration. The Parties agree that any dispute, controversy, or claim arising out of or relating to Arbitration Claims, shall be referred for resolution to the American Arbitration Association in accordance with the rules and procedures in force at the time of the submission of a request for arbitration.

17.6 No provision of this Franchise shall be deemed to bar the right of either party to seek or obtain judicial relief from a violation of any provision of the Franchise or any rule, regulation, requirement or directive promulgated hereunder. Neither the existence of other remedies identified in this Franchise nor the exercise thereof shall be deemed to bar or otherwise limit the right of either party to recover monetary damages, as allowed under applicable law, or to seek and obtain judicial enforcement of obligations by means of specific performance, injunctive relief or mandate, or any other remedy at law or in equity.

17.7 The City specifically does not, by any provision of this Franchise, waive any right, immunity, limitation or protection (including complete damage immunity) otherwise available to the City, its officers, officials, Councils, boards, commissions, authorized agents, or employees under federal, state, or local law including by example Section 635A of the Cable Act. The Franchisee shall not have any monetary recourse against the City, or its officers, officials, Council, Boards, commissions, agents or employees for any loss, costs, expenses or damages arising out of any provision, requirement of this Franchise or the enforcement thereof

## **18. Effective Date**

18.1 This ordinance shall be in full force and effect from and after its passage, approval, and five (5) calendar days after its legal publication as provided by law, and provided it has been duly accepted by Franchisee.

SIGNATURE PAGE TO FOLLOW.

APPROVED BY THE CITY COUNCIL this 1st day of June, 2020.

CITY OF LAKEWOOD

Don Anderson  
Don Anderson, Mayor

Attest:

Briana Schumacher  
Briana Schumacher, City Clerk

Approved as to Form:

Heidi Ann Wachter  
Heidi A. Wachter, City Attorney

Date of Publication: June 4, 2020



UNCONDITIONAL ACCEPTANCE

The undersigned, Franchisee, accepts all the privileges of the above-granted franchise, subject to all the terms, conditions, and obligations of this Franchise.

DATED: June 16, 2020.

New Cingular Wireless PCS, LLC (“AT&T”)

By: AT&T Mobility Corporation  
Its: Manager

By:   
WAYNE WOOTEN (Jun 16, 2020 19:49 EDT)