



MEMORANDUM

To: Members of the Finance Committee

From: Rich Olson, City Manager

Date: June 6, 2016

Re: Consideration – Execution of Water Tower Attachment Agreement
with New Cingular Wireless PCS, LLC

BACKGROUND:

In March 2000, the City entered into a Lease Agreement with Triton PCS Property Company, LLC to place cellular equipment on the Weeksville Road Water Tower. In 2005, the City was notified that New Cingular Wireless PCS, LLC had been named successor in interest to Triton under the agreement. The City's Lease Agreement with Triton provided that negotiations would be permitted at its five year expiration date to allow the lessor to continue leasing space on the tower, a provision that passed to Cingular in 2005.

Cingular approached City staff according to the timetable required in the lease agreement and requested that negotiations begin to formulate a new agreement. At that time, however, execution of a new agreement was deferred pending resolution of an easement issue that had come to staff's attention. Therefore, the City and Cingular signed an agreement whereby the Cingular equipment would remain on the tank past the lease expiration date with the relationship continuing to be governed by the existing Agreement until such time as the easement issue was resolved.

ANALYSIS:

The proposed water tower lease agreement will be between the City and New Cingular Wireless PCS, LLC, which is a Delaware limited liability company. City staff has used our standard water tower lease agreement as a template. Modifications have been made, but there are no substantial changes. The agreement would commence on July 1, 2016 and expire on June 30, 2021. The tenant (New Cingular Wireless) would have the right to extend the agreement for an additional four, five-year terms. During the initial term, New Cingular Wireless would pay the City \$30,000 per year, which is an increase of \$1,115.27 over the present lease payment.

If New Cingular Wireless decides to renew the agreement, there would be a cumulative Consumer Price Index (CPI) adjustment, which would reflect the changes in the CPI over the initial term. It has been very common over the past 10 years for cellular service providers to modify their antennae that are located on our water towers. If additional antennae are added, the City has the right to change the lease rate to reflect the additional apparatus on the tower. The lease contains standard liability insurance coverage, environmental restrictions and hold harmless clauses.

STAFF RECOMMENDATION:

By motion, recommend that the City Council authorize execution of the Water Tower Attachment Communications Site Agreement by Mayor Joseph W. Peel as presented herein for New Cingular Wireless PCS, LLC.

RCO/vdw

**WATER TOWER ATTACHMENT
COMMUNICATION SITE AGREEMENT
(With 90 day Due Diligence Period)**

THIS WATER TOWER ATTACHMENT COMMUNICATION SITE AGREEMENT ("Agreement") is entered into this ___ day of _____, 2016, by and between the City of Elizabeth City, ("Owner") and New Cingular Wireless PCS, LLC, a Delaware limited liability company ("Tenant").

1. Grant. Subject to the following terms and conditions, Owner hereby grants to Tenant the non-exclusive right to install, maintain, operate and remove radio communications equipment and appurtenances on Owner's tower (the "Water Tower") located on the property described in Exhibit "A" (the "Premises"), and leases to Tenant a portion of the Premises for construction and occupancy of an equipment shelter or building to house Tenant's equipment on the Premises as more particularly described in Exhibit "A". Owner shall continue to have the right to occupy the Premises and operate the Water Tower and to grant others rights to occupy or utilize the Premises and the Water Tower at Owner's sole discretion. Owner also grants to Tenant a non-exclusive easement during the term of this Agreement for ingress, egress and regress and for the installation and transmission of utilities on property described on attached Exhibit "B" ("Easement"). Tenant may install equipment, personal property, improvements, alterations or fixtures as listed on and in locations as shown on Exhibit "C" (the "Site Plans and Equipment"), or as Owner may otherwise approve, such approval not to be unreasonably withheld, conditioned or denied. Any personal property owned by Tenant, whether or not fixed or attached to the Premises or Water Tower, shall remain the property of Tenant prior to termination of this Agreement without regard to whether it appears on Exhibit "C".
2. This agreement supersedes the lease agreement between the City of Elizabeth City and Triton PCS Property Company, LLC, same being executed on March 30, 2000. It is further agreed that New Cingular Wireless PCS, LLC is a successor in interest to Triton PCS Property Company, LLC.
3. Use. Tenant shall use the Equipment and the Premises for the purpose of constructing, installing, maintaining, improving and operating, at Tenant's expense, a communications facility, including antennae, equipment shelter or building, platforms, cable runs and incidental uses of the Water Tower. Tenant shall be solely responsible for securing any and all building permits and approvals, zoning changes or approvals, variances, use permits, and other governmental permits from applicable governmental authorities, including any Federal Aviation Administration approval (collectively, "Permits") prior to any construction on the Premises. Owner agrees to reasonably cooperate with Tenant in obtaining the Permits, and copies of the Permits shall be provided to Owner upon request. Tenant shall promptly pay all costs and expenses and shall not cause or permit any lien to be created against the Premises.
4. Term. The term of this Agreement shall be **five (5) years**, commencing July 1, 2016 (the "Commencement Date") and terminating at midnight on June 30, 2021 ("Initial Term").
5. Renewal Term(s). Tenant shall have the right to extend this Agreement for **four (4) additional terms of five (5) years each** ("Renewal Term(s)") on the same terms and conditions as set forth in this Agreement except that the Rent shall be increased as specified in Paragraph 6 below. This Agreement shall automatically be renewed for each successive Renewal Term unless Tenant

notifies Owner of Tenant's intention not to renew the Agreement at least 30 days prior to expiration of the then current term.

6. Rent.

- (a) Initial Term. Beginning on the Commencement Date, Tenant shall pay to Owner as rental the sum of Thirty Thousand dollars (**\$30,000.00**) annually ("Rent") which shall include Tenant's irrevocable right to use and occupy a lease area approximately 400 square feet at the base of Owner's Water Tower. Rent payments shall be made annually in advance at the notice address as specified below and shall be prorated for any partial year at the commencement or termination of this Agreement, based on the number of days in the year.
- (b) Renewal Terms. In the event that Tenant elects to renew this Agreement as provided in paragraph 5, Rent shall be adjusted at the beginning of each five-year renewal period by adding the previous five-year Consumer Price Index (CPI) as determined by the Bureau of Labor Statistics as of June 30 of each consecutive year. For example, the cumulative CPI increase for July 1, 2017, July 1, 2018, July 1, 2019, July 1, 2020 and July 1, 2021 shall be added to the base rent for the renewal period beginning July 1, 2022. Notwithstanding anything contained herein to the contrary, Tenant shall have forty-five (45) days to pay the amount of any increase in the Rent applicable to the first year of any Renewal Term.

7. Water Tower Maintenance.

- (a) Owner represents and warrants that its operation of the Water Tower, exclusive of Tenant's Equipment, including the lighting system, meets and will be maintained in accordance with all applicable laws, rules and regulations, including, without limitation, rules and regulations of the Federal Communications Commission, Federal Aviation Administration and all applicable local codes and regulations. The costs of maintaining the Water Tower, including painting of the exterior and finishing or painting the interior of the Water Tower, shall be borne by Owner, with the exception of Tenant's antennae and Equipment. In the event damage is caused to Tenant's equipment or personal property by Owner's agents, employees, contractors or subcontractors, the cost of repairing such damage shall be borne by Owner who shall, upon due notice and proof of loss provided by Tenant, timely reimburse Tenant the cost of repairing such damage. In the event damage is caused to Owner's equipment or personal property by tenant's agents, employees, contractors or subcontractors, the cost of repairing such damage shall be borne by Tenant who shall, upon due notice and proof of loss provided by Owner, timely reimburse Owner the cost of repairing such damage.
- (b) Tenant shall maintain its antennae, transmission lines, equipment and equipment shelter in good operating condition. In the event damage is caused to the Water Tower by Tenant or Tenant's agents, employees, contractors or subcontractors, the cost of repairing such damage shall be borne by Tenant who shall timely repair any such damage. Should Owner fail to timely make repairs required by this Agreement, Tenant may, at Tenant's option, make such repairs and Owner shall promptly reimburse Tenant for its costs and expenses incurred in such repair. Upon termination or expiration of this License, Tenant shall remove its Equipment from the Water Tower and repair damage, if any, to the Water Tower caused by the removal of Tenant's Equipment, normal wear and tear excepted.

If Owner fails to make said repairs or to provide maintenance after Tenant has given Owner five (5) days notice of the need to provide maintenance and repairs to the Water

Tower lighting systems, Water Tower, utility lines, water pumps, related equipment and building as provided herein, Tenant shall have the right to withhold Rent payments to Owner, or, shall at Tenant's option and upon notice to Owner, terminate this Agreement. Tenant shall have the right to apply such Rent withheld hereunder to make the necessary repairs and provide the necessary maintenance and Tenant shall not thereafter be responsible to Owner for the Rent withheld for such maintenance and repairs. Tenant's activities and operations and the Equipment shall not interfere with Owner's maintenance, repair and operation of the Water Tower and its lighting system.

8. Maximum Permissible Emissions; Cooperative Efforts. Tenant shall regulate its antenna power output ("RF Emissions") according to applicable guidelines or restrictions imposed by the FCC for RF Emissions standards on Maximum Permissible Exposure ("MPE") levels. Similarly, any subsequent communications service providers ("Subsequent Users") installing Equipment on the Property or the Premises after the Commencement Date of this Agreement shall also be held to compliance with such limits, rules and regulations and such Subsequent User shall adjust its RF Emissions subordinate to any requirements of Tenant. If Owner requires an engineering evaluation or other power density study be performed to evaluate RF Emissions compliance with MPE limits then all reasonable costs of such an evaluation or study shall be shared equally among Tenant and any Subsequent Users of the Premises. If said study indicates that RF Emissions at the facility do not comply with MPE limits, then Tenant and any Subsequent User shall immediately take any steps necessary to ensure that they are individually in compliance with such limits or shall, upon demand of Owner, cease operations until a maintenance program or other mitigating measures can be implemented to comply with MPE. Tenant shall have the right to terminate this Agreement in the event any mitigation measures cannot be implemented without materially adversely affecting the Tenant's operations of its Equipment.
9. Due Diligence Period. Tenant's obligation to perform under this Agreement shall be subject to and conditioned upon:
- (a) Tenant's securing appropriate approvals for Tenant's intended use of its Equipment on the Premises from the Federal Communications Commission, the Federal Aviation Administrator, and any other federal, state or local regulatory agency having jurisdiction over Tenant's proposed use of the Equipment;
 - (b) Tenant's obtaining, at its option, a title report or commitment for a leasehold title policy from a title insurance company of Tenant's choice which must show no defects or restrictions of title or any liens or encumbrances which may adversely affect Tenant's use of the Premises or Tenant's ability to obtain financing;
 - (c) Tenant's obtaining, at its option, a survey and analysis tests, which must show no defects, which, in the opinion of the Tenant may adversely affect Tenant's use of the Premises;
 - (d) Tenant's approval of the condition of the Premises, which may be subject to, at Tenant's option, an environmental audit of the Premises performed by an environmental consulting firm of Tenant's choice; and
 - (e) Tenant's determination that the Water Tower is structurally appropriate for Tenant's needs.
10. Interference. Tenant agrees to install Equipment of types and generating frequencies which will not cause interference to transmissions or signals from other users of the Water Tower as may be already in place on the Water Tower. At Owner's request, Tenant shall provide a detailed interference analysis showing potential conflicts between Tenant's frequencies and those of the other users already in place on the Water Tower. In the event the Equipment causes such

interference, Tenant will take all steps necessary to correct and eliminate the interference. If the interference cannot be eliminated within 48 hours after receipt of written notice from Owner to Tenant (Notice Date), Tenant shall temporarily disconnect the electric power and shut down the Equipment (except for intermittent operation for the purpose of testing, after performing maintenance, repair, modification, replacement, or other action taken for the purpose of correcting such interference) and if such interference is not corrected within 30 days after receipt of the written notice, Tenant agrees to remove the Equipment from the Water Tower and the Premises and this Agreement shall terminate as if by expiration. After the Equipment has been installed, Owner shall place similar restrictions upon interference with Tenant's frequencies on others using Owner's Water Tower with Owner's permission, or under privity of contract with Owner (Third Parties), installed on the Water Tower after Tenant's installation of the Equipment. In the event Third Parties' interference cannot be eliminated or rectified to Tenant's satisfaction within 48 hours after receipt of written notice from Tenant to Owner (Notice Date), Owner shall cause such Third Parties to temporarily disconnect the electric power and shut down the Third Parties' Equipment (except for intermittent operation for the purpose of testing, after performing maintenance, repair, modification, replacement, or other action taken for the purpose of correcting such interference) and if such interference is not corrected within 30 days after receipt of the written notice, Owner shall, at the request of Tenant require the party causing the interference to remove its equipment from the Water Tower and the Premises, or Tenant may, at Tenant's sole discretion and option, terminate this Agreement upon notice to Owner.

11. Utilities and Access.

- (a) Owner represents that utilities adequate for Tenant's intended use of the Premises are presently available. Further, from time to time, Tenant shall have the right to install utilities, to be separately metered at Tenant's expense, and to improve present utilities on the Premises, including but not limited to the installation of emergency power generators. Tenant shall have the right to permanently place utilities on, or to bring utilities across or under, the Premises and the Easement in order to service the Equipment throughout the Initial Term or any Renewal Term of this Agreement. Owner shall, upon Tenant's request, execute a separate written easement in a form which may be filed of record evidencing this right. Tenant shall be responsible for all utility connection charges, and all utility use charges, for electricity or any other utility used by Tenant.
- (b) Tenant shall have access to the Premises and the Equipment at all times, 24 hours each day, through the access drive presently existing on the Easement. Owner shall maintain the access drive in good condition throughout the Initial Term of this Agreement or any Renewal Term. To the degree additional access is required across other property owned by Owner, Owner shall execute an easement evidencing this right and agrees to maintain said access so that no interference is caused to Tenant by other tenants, Tenants, invitees or agents of the Owner.

12. Termination. Except as otherwise provided, this Agreement may be terminated, without any penalty or further liability, immediately upon written notice or as otherwise provided below, as follows:

- (a) By either party upon a default of any covenant or term of this Agreement by the other party which default is not cured within 30 days of receipt of written notice of default (without, however, limiting any other rights available to the parties pursuant to any other provisions of this Agreement); or

- (b) By Tenant if it is unable to obtain or maintain any license, permit or other Permits necessary to the construction and operation of the Equipment or Tenant's business or intended use of the Premises; or
- (c) By Tenant if the Premises or Equipment is damaged by casualty so as to hinder the effective use of the Equipment; or in the event that interference, whether or not from Owner's activities or any other source, to transmissions or signals from the Communications Facility, in Tenant's judgment, may not be adequately corrected or eliminated by Tenant;
- (d) By Tenant, if, in Tenant's reasonable judgment, network design or technology changes render the Communications Facility obsolete or unnecessary; or
- (e) By Tenant upon six months written notice to Owner.

13. Structural Analysis.

- (a) Tenant shall be solely responsible to ensure that Tenant's installation of the Equipment shall not significantly affect the structural integrity of the Water Tower, and that no such damage results to the Water Tower due to installation of the Equipment. Owner agrees to furnish Tenant promptly upon Tenant's request, with true and accurate copies of all analyses performed on the Water Tower within the two years preceding the request and Tenant's attachment of antennas or Equipment on the Water Tower. In the absence of such an analysis or if the most recent analyses are insufficient for Tenant's needs, Tenant may request a new analysis. If Owner reasonably believes that the structural integrity of the Water Tower will be affected, Owner may request Tenant obtain a new analysis. Owner agrees to cooperate with Tenant in acquiring the new analysis of the Water Tower. If a new analysis of the Water Tower is requested by Tenant or Owner, Tenant shall be responsible for coordinating that new analysis by a licensed structural engineer or other party acceptable to Owner, and Tenant shall furnish a copy of the analysis to Owner. The costs of the new analysis shall be paid solely by Tenant. If Tenant requests, Owner shall submit, within 10 days of Tenant's request, bids for any needed reinforcement or other work to make the Water Tower structurally sound. Should Tenant not terminate this Agreement under Section 6 Water Tower Maintenance above, Owner shall reinforce or otherwise make the Water Tower structurally sound for Tenant's use in accordance with such a submitted bid, at Owner's sole cost.
- (b) Owner shall notify Tenant in writing five (5) days prior to attaching, or permitting any other person or entity to attach, any additional antennas, microwave dishes, or other similar equipment (Additional Antennas) to the Water Tower. Should Additional Antennas be attached to the Water Tower, and Tenant reasonably believes that such attachment endangers the structural integrity of the Water Tower, upon Tenant's written request, Owner shall furnish, at Owner's expense, a tower analysis performed on the Water Tower by a licensed structural engineer, or other party acceptable to Tenant indicating that attachment of the Additional Antennas to the Water Tower does not impair the structural integrity of the Water Tower and will not materially diminish the Water Tower's function or useful life. All such tower analyses shall be in compliance with current industry standards.

14. Taxes. Tenant shall pay any personal property taxes assessed on, or any portion of such taxes attributable to, Tenant's Equipment. Tenant shall not pay real property taxes or other fees and assessments attributable to the Water Tower or the Premises.

15. Liability Insurance. During the Initial term and all Renewal Terms of this Agreement, Owner and Tenant shall each maintain, at its own expense, commercial general liability insurance covering claims for personal injury, death and property damage with limits \$1,000,000.00 per occurrence, and \$2,000,000 aggregate. Such insurance shall insure against liabilities arising out of or in connection with Owner and Tenant's use or occupancy of the Premises and the Water Tower subject to the standard exceptions found in commercial general liability insurance policies. Tenant may self insure this coverage.
16. Condemnation. If a condemning authority takes, or acquires by deed in lieu of condemnation, all of the Premises, or a portion sufficient to render the Premises or the Water Tower, in the opinion of Tenant, unsuitable for the use which Tenant was then making of the Premises or the Water Tower, Tenant may terminate this Agreement effective as of the date the title vests in the condemning authority. Owner and Tenant shall share in the condemnation proceeds in proportion to the values of their respective interests in the Premises (which for Tenant shall include, where applicable, the value of its Equipment, moving expenses, prepaid Fees and business dislocation expenses).
17. Environmental Matters.
- a. Owner represents that, to Owner's best knowledge, no Hazardous Materials are presently located on the Premises or Easement, and Owner agrees that it will provide, at no cost or expense to Tenant, for the removal of any Hazardous Materials if Hazardous Materials are present on the Premises or the Easement prior to the date of this Agreement or if Hazardous Materials are brought onto the Premises or Easement by Owner, its agents, servants, employees, licensees, invitees or contractors. If after Tenant takes possession of the Premises Hazardous Materials are discovered to exist on, under or beneath the Premises, Tenant may terminate this Agreement and Tenant shall owe no further duties, obligations or liability to Owner.
 - b. Tenant shall comply with all laws, ordinances, rules, orders or regulations applicable to Hazardous Materials. Tenant shall not use the Premises or the Easement for treatment, storage, transportation to or from, use or disposal of Hazardous Materials (other than petroleum products necessary for the operation of an emergency electrical generator to serve the Equipment). Tenant shall be responsible for any expense incident to the abatement or compliance with the requirements of any federal, state or local statutory or regulatory requirements caused, directly or indirectly, by the activities of the Tenant or Tenant's agents, employees or contractors.

As used in this Agreement, "Hazardous Materials" shall mean any and all polychlorinated by phenyls, petroleum products, asbestos, urea formaldehyde and other hazardous or toxic materials, wastes or substances, any pollutants, and/or contaminants, or any other similar substances or materials which are defined or identified as such in or regulated by any federal, state or local laws, rules or regulations (whether now existing or hereinafter enacted) pertaining to environmental regulations, contamination, cleanup or any judicial or administrative interpretation of such laws, rules or regulations or any substance that after release into the environment and upon exposure, ingestion, inhalation or assimilation, either directly from the environment or directly through food chains will or may reasonably be anticipated to cause death, disease, behavior abnormalities, cancer or genetic abnormalities.

18. Hold Harmless. Owner agrees to defend, indemnify and hold Tenant and its affiliates or subsidiary companies, their officers, agents and employees harmless from and against any and all, costs, charges, expenses, losses, claims, actions, suits, causes of action, judgments and charges of every kind and nature whatsoever, including reasonable attorneys fees, which in any

manner arise out of or relate to Owner's use or occupancy of the Premises, or from Owner's performance or failure to perform under this Agreement or from any negligence or intentional misconduct by Owner, its subcontractors, agents, servants, employees or any or all of them, or from any defect in the title to the Premises, or from the presence of any Hazardous Materials on the Premises prior to the Commencement Date, or thereafter if brought onto the Premises by Owner or Owner's agents, employees, invitees or contractors.

Tenant agrees to defend, indemnify and hold Owner and its Affiliates or subsidiary companies, their officers, agents and employees harmless from and against any and all costs, damages, expenses, losses, claims, actions, suits, causes of action, judgments, and charges of every kind and nature whatsoever, including reasonable attorney's fees, which may in any manner arise out of or relate to Tenant's use of the Equipment or Premises or the performance or non-performance of this Agreement by Tenant's subcontractors, employees, agents, or assigns, including without limitation, those that may arise out of the use or furnishing of materials, and as to such claims, actions or causes of action arising from or resulting from any negligence or intentional misconduct by Tenant its subcontractors, agents, servants, employees, or any or all of them. Affiliates shall mean any person or entity that directly or indirectly, through one or more intermediaries, controls, is controlled by or is under common control with, another person or entity. Control for this definition shall be defined as holding at least a majority of voting power or operating control.

19. Notices. All notices, requests, demands and other communications hereunder shall be in writing and shall be deemed given if personally delivered or mailed, by certified mail, return receipt requested, or by overnight service having a record of receipt to the addresses indicated below:

If to Owner, to:

City of Elizabeth City
306 E. Colonial Ave.
P. O. Box 347
Elizabeth City, NC 27907-0347
(252) 337-6864
56-6000226 (Tax Identification Number)

If to Tenant, to:

New Cingular Wireless PCS, LLC
ATTN: AT&T Legal Department
Fixed Asset #: 10068471, Cell Site: NF183, (VA-WV)
208 S. Akard Street
Dallas, TX 75202-4206

20. Title and Quiet Enjoyment. Owner represents and warrants that it has the full right, power and authority to execute and enter into this Agreement. Owner further warrants that Tenant shall have the quiet enjoyment of the Premises during the term of this Agreement and Owner shall defend, protect, indemnify and hold harmless Tenant against any interference with Tenant's use and quiet enjoyment of the Premises or breach of this paragraph 18.

21. Owner's Representations and Warranties. Owner represents and warrants that Tenant's intended use of the Premises as a site for the transmission and receipt of wireless communication signals; for the construction and maintenance of towers, antennae or buildings; and related facilities ("Intended Use") is not prohibited by any covenants, restrictions, reciprocal easements, servitudes, subdivision rules or regulations which would prohibit Tenant's Intended Use of the Premises. Nor are there any easements, licenses, rights of use or other encumbrances on the Premises, which will interfere with or constructively prohibit Tenant's Intended Use of the Property.
22. Assignment. Tenant may assign this Lease provided Tenant promptly notifies Owner of such assignment and the assignment is subject to the provisions of this Lease. Further, Tenant may, upon notice to Owner, mortgage or grant a security interest in this Lease and the Communications Facility, and may assign this Lease and the Communications Facility to any such mortgagees or holders of security interests including their successors and assigns (hereinafter collectively referred to as "Mortgagees").
23. Successors and Assigns. This Agreement shall be binding upon and inure to the benefit of the parties, their respective heirs, successors, personal representatives and assigns.
24. Compliance with Laws. All installations and operations in connection with this Agreement by either party shall be conducted in accordance with all applicable rules and regulations of the Federal Communications Commission, Federal Aviation Agency, and any other applicable federal, state and local laws, codes and regulations. Tenant is solely responsible for the licensing, operation and maintenance of Tenant's Equipment, including, without limitation, compliance with any terms of its Federal Communications Commission license with respect to tower light observation and any notification to the Federal Aviation Administration in that regard. Tenant's Equipment, transmission lines, and any related devices, and the installation, maintenance and operation thereof, shall not damage the Water Tower or any property or properties adjoining, or interfere with the use of the Water Tower and the remainder of the Premises, by Owner or others, and Tenant shall defend, indemnify and hold harmless Owner from any such damage.
25. Holding Over. In the event Tenant remains on the Water Tower and in possession of the shelter or building on the Premises after the expiration of the Initial Term or a Renewal Term without executing a new Agreement, Tenant shall occupy the Premises month-to-month, subject to all of the terms and conditions of this Agreement insofar as so consistent. Owner has the right to terminate the "Holding Over" period with ten days written notification to tenant and grants tenant 60 days to remove all radio communications equipment and appurtenances.
26. Estoppel. Each party agrees to furnish to the other, within 10 days after request, such truthful estoppel information as the other may reasonably request.
27. WAIVER OF LIABILITY. Neither Owner nor Tenant shall be responsible or liable to the other party for any loss or damage arising from any claim to the extent attributable to any acts or omissions of other licensees or tower users occupying the communications facility or vandalism or for any structural or power failures or destruction or damage to the communications facility except to the extent caused by the negligence or willful misconduct of such party. Notwithstanding anything to the contrary in this agreement, in no event shall Owner or Tenant be liable to the other for, and Owner and Tenant each hereby waive the right to recover, incidental,

consequential (including lost profits, loss of use or loss of business opportunity), punitive, exemplary and similar damages.

28. Miscellaneous.

- a. The substantially prevailing party in any litigation arising under this Agreement shall be entitled to its reasonable attorney's fees and court costs, including appeals, if any.
- b. This Agreement constitutes the entire agreement and understanding of Owner and Tenant and supersedes all offers, negotiations and other agreements. Any amendments to this Agreement must be in writing and executed by Owner and Tenant.
- c. If either Owner or Tenant is represented by a real estate broker or agent in this transaction, that party shall be fully responsible for any fees or commission due such broker or agent and shall hold the other party harmless from any such claims arising from execution of this Agreement.
- d. Owner agrees to cooperate with Tenant in executing any documents necessary to protect Tenant's rights under this Agreement or Tenant's use of the Premises. Tenant may record this Agreement or a Memorandum of Agreement executed by all parties.
- e. This Agreement shall be construed in accordance with the laws of the state in which the Premises are located.
- f. If any term of this Agreement is found to be void or invalid, such invalidity shall not affect the remaining terms of this Agreement, which shall continue in full force and effect.
- g. Each of the undersigned warrants that he or she has the full right, power, and authority to execute this Agreement on behalf of the party indicated for the purposes herein contained.

THIS WATER TOWER ATTACHMENT AGREEMENT CONSTITUTES A PROPOSAL BY TENANT TO LEASE SPACE ON OWNER'S PREMISES AND SHALL NOT BE BINDING UPON TENANT UNTIL SUCH TIME AS IT IS EXECUTED ON BEHALF OF TENANT BY TENANT'S AUTHORIZED REPRESENTATIVE AND DELIVERED TO OWNER.

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IN WITNESS WHEREOF, Owner and Tenant have executed Agreement as of the date year first above written.

ATTEST:

OWNER: City of Elizabeth City

By: _____

By: _____

Title: City Clerk

Title: _____

(SEAL)

TENANT: New Cingular Wireless PCS, LLC,
by AT&T Mobility Corporation, its Manager

Witness (es)

By: _____

Title: _____

(SEAL)

ACKNOWLEDGMENTS

STATE OF NORTH CAROLINA

COUNTY OF _____

I, _____, a Notary Public of the County and State aforesaid, certify that Vivian D. White personally appeared before me this day and acknowledged that she is City Clerk of the City of Elizabeth City, a North Carolina municipal corporation, and that by authority duly given and as the act of the said corporation, the foregoing instrument was signed by Mayor Joseph W. Peel in its name.

WITNESS my hand and notarial seal this ___ day of _____, 2016.

Notary Public

My Commission Expires: _____

(SEAL)

(Acknowledgements Continued on Next Page)

COMMONWEALTH OF VIRGINIA

COUNTY OF HENRICO

I, _____, a Notary Public of the County and State aforesaid, certify that CAROL A. MURPHY personally appeared before me this day and acknowledged that he/she is SR. MANAGER OF REAL ESTATE AND CONSTRUCTION of AT&T MOBILITY CORPORATION, manager of NEW CINGULAR WIRELESS PCS, LLC a Delaware limited liability company, and that by authority duly given and as the act of the said corporation, the foregoing instrument was signed in its name.

WITNESS my hand and notarial seal this ____ day of _____, 20__.

Notary Public

My Commission Expires: _____

(SEAL)

EXHIBIT "A"

LEGAL DESCRIPTION OF
PROPERTY

The property referred to herein as Premises is located within the parent parcel described as follows:

Located in Nixonton Township, Pasquotank County, North Carolina, and being a portion of the North Carolina State Board of Education Property recorded in Deed Book 90, page 401 with rights to the same property granted by the State of North Carolina to the City of Elizabeth City as of April 11, 1995 and recorded in Deed Book 576 page, 100, and more particularly described as follows:

BEGINNING at a new iron pin (NIP) set a distance of 87.50 feet south of the southern line of the Isa Klanke property, said NIP is further located the following courses and distances from the southwest corner of the said Isa Klanke property: S 83° 46' 54" E 122.50 feet along the southern line of the Isa Klanke property to a point; thence S 6° 13' 06" W 87.50 feet to the said point of beginning; thence from said point of beginning S 83° 46' 54" E 175.00 feet to a NIP; thence S 6° 13' 06" W 175.00 feet to a NIP; thence N 83° 46' 54" W 175.00 feet to a NIP; thence N 6° 13' 06" E 175.00 feet to the said point of BEGINNING. Said easement contains 30,625 square feet as per survey and plat prepared by McDowell & Associates, P.A., entitled in part "Survey of Easement for the City of Elizabeth City Elevated Water Tank, surveyed May 12, 1994" and reference to said plat is hereby made.

TOGETHER with an utility and access easement containing 36,703 square feet and connecting the aforesaid water tank easement with N.C. Highway 34, and more particularly described as follows:

BEGINNING at a NIP set in the eastern margin of N.C. Highway 34 (100' right of way), said NIP is further located N 34° 03' 52" W 647.42 feet from a right of way marker which is located N 36° 12' 14" W 195.29 feet from the southwest corner of the North Carolina State Board of Education property; thence from said point of beginning N 34° 03' 52" W 105.00 feet along North Carolina Highway 34 to a NIP; thence N 55° 56' 09" E 270.23 feet to a NIP; thence S 61° 25' 18" E 204.54 feet to the aforesaid water tank easement point of beginning; thence with said water tank easement S 6° 13' 06" W 54.07 feet to a point; thence N 61° 25' 18" W 132.76 feet to a NIP; thence S 55° 56' 09" W 268.27 feet to the point of BEGINNING, as per survey and plat called for above.

EXHIBIT "B"

LEGAL DESCRIPTION OF EASEMENT

The Easement for ingress, egress and utilities across the parent parcel described on Exhibit "A" will be located as shown on the sketch below.

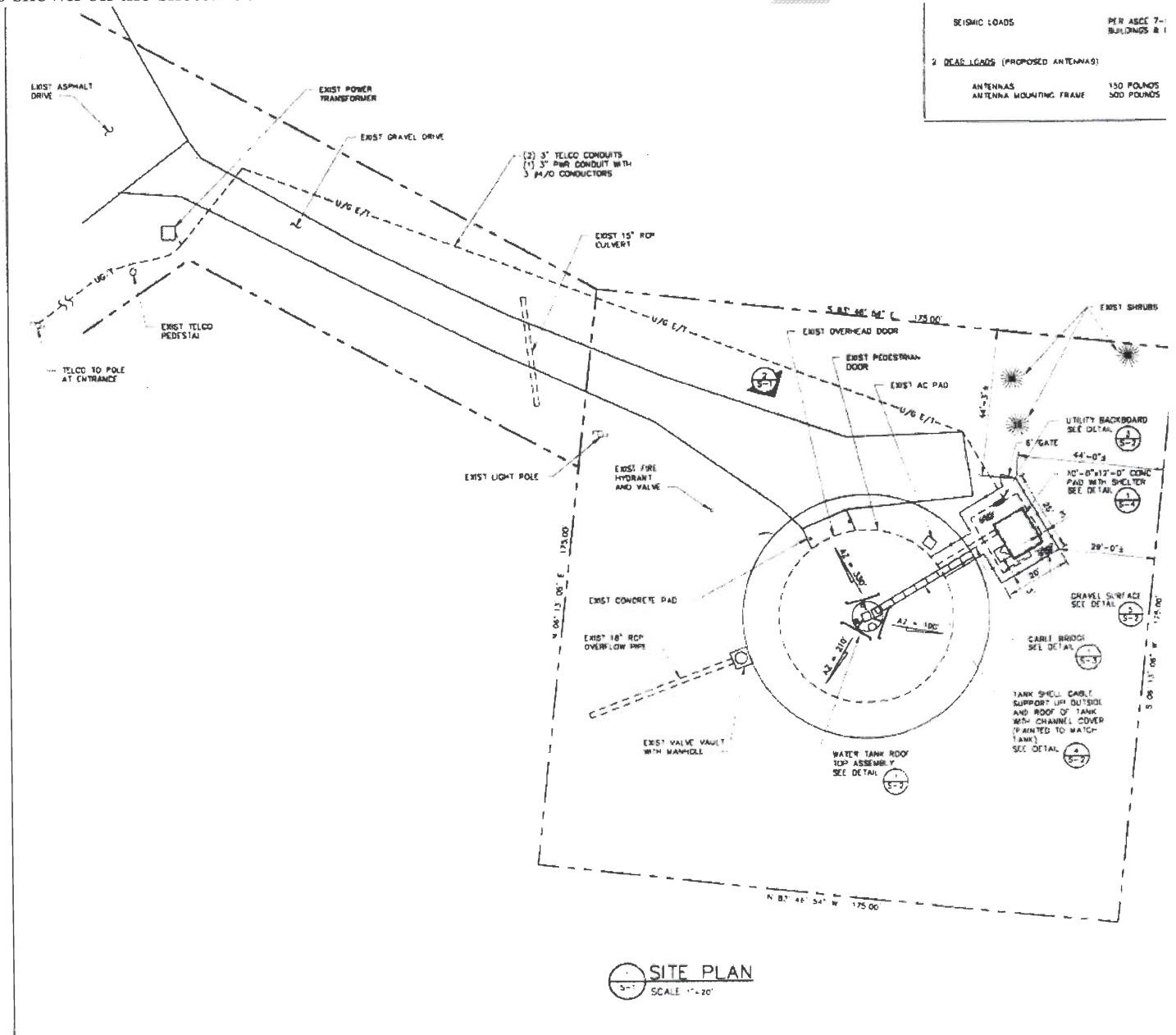


EXHIBIT "C"

SITE PLAN
And
EQUIPMENT LIST

Equipment Shelter to house transmission cables & equipment to be located upon concrete pad located as shown on the site drawing included in Exhibit B.

Equipment outside the shelter will be as shown on two signed and sealed pages prepared by Maser Consulting P.A. with revision date 3/10/16, which follow this page.

DRAFT