

NEW CINGULAR WIRELESS PCS, LLC TOWER SITE USE/LEASE AGREEMENT

This Tower Site Use/Lease Agreement (this "Lease") is entered into this 10 day of November 2005 ("Execution Date"), between the City of Broken Arrow, an Oklahoma municipal corporation, 220 South First Street, Broken Arrow, OK 74012 ("City") and New Cingular Wireless PCS, LLC, 6100 Atlantic Boulevard, Norcross, GA 30071 ("Cingular Wireless").

1. **Premises.** Subject to the following terms and conditions, City leases to Cingular Wireless a portion of the real property (the "Property") described in the attached **Exhibit A**. Cingular Wireless's use of the Property shall be limited to that portion of the Property, together with easements for access and utilities, described and depicted in attached **Exhibit B** (collectively referred to hereinafter as the "Premises").

The Premises, located at and being part of the NE/4 SW/4 of Section 35, Township 19 North, Range 15 East, in the City of Broken Arrow, County of Tulsa, State of Oklahoma, comprise approximately one thousand two hundred and twenty-five square feet (35' X 35').

2. **Term.** The initial term of this Lease shall be Five (5) years, commencing upon the earlier of (i) Cingular Wireless's commencement of construction of the Antenna Facilities (hereinafter defined), or (ii) the ninetieth (90th) day after execution of this Lease (the "Commencement Date"), and terminating upon expiration of the entire term at Midnight on the last day of the first full month following the Commencement Date.

3. **Permitted Use.** The Premises may be used by Cingular Wireless only for permitted uses, which are (i) the transmission and reception of communications signals, (ii) the construction, alteration, maintenance repair, replacement and relocation of related facilities, towers, antennas, equipment and buildings, and (iii) activities related to any of the foregoing. Cingular Wireless shall obtain (prior to or after the Commencement Date), at Cingular Wireless's expense, all licenses and permits or authorizations required for Cingular Wireless's use of the Premises from all applicable government and/or regulatory entities (the "Governmental Approvals") and may (prior to or after the Commencement Date) obtain a title report, perform surveys, soils tests, and other engineering procedures or environmental investigations on, under and over the Property, necessary to determine that Cingular Wireless's use of the Premises will be compatible with Cingular Wireless's engineering specifications, system, design, operations and Governmental Approvals. City agrees to reasonably cooperate with Cingular Wireless (at no cost to City), where required, to perform such procedures or obtain Governmental Approvals. City agrees that Cingular Wireless shall have the right to immediately terminate this Lease without any penalty or liability if Cingular Wireless shall not have obtained all Governmental Approvals on or before the Commencement Date specified in paragraph 2 above, provided that Cingular Wireless shall have the right, without obligation, to appeal any denial and the contingency date for obtaining Governmental Approvals shall be extended until such time as a final decision is rendered and is not the subject of any further appeal made or defended by Cingular Wireless. City agrees that Cingular Wireless shall have the right to terminate this Lease without any penalty or liability if Cingular Wireless notifies City of unacceptable results of any radio test, title report or of the survey or soils tests. City also agrees that if, based on the result of any environmental investigation or inquiry, Cingular Wireless determines that the condition of the Property is unsatisfactory or if Cingular Wireless believes that leasing or continued leasing of the Premises would expose Cingular Wireless to undue risks of government action or intervention or third-party liability, Cingular Wireless may, without any penalty or liability, immediately terminate this Lease.

4. Rent.

a. Starting on the Commencement Date, Cingular Wireless shall pay City, as rent, the sum of Two thousand dollars and no cents (\$2,000.00) monthly ("Rent"). Cingular Wireless shall have the option to pay the Rent in either monthly or annual installments. Once Cingular Wireless makes its option of either monthly or annual installment payments, then Cingular Wireless shall not change its payment schedule until the next anniversary of the Commencement Date. Should Cingular Wireless choose to make monthly installments, the Rent shall be due on the first day of each month after the Commencement Date. Should Cingular Wireless choose to make annual installments, the Rent shall be due on or before the first day of the Commencement Date,

and shall thereafter be due on or before each anniversary date of the Commencement Date, in advance, to City, at City's address specified in paragraph 13 below.

b. If the Commencement Date should be other than the first day of a calendar month, Rent shall be prorated to the end of that calendar month. If this Lease is terminated at a time other than on the last day of a month, the Rent shall be prorated as of the date of termination for any reason other than a default by Cingular Wireless, and all prepaid Rents shall be refunded to Cingular Wireless.

5. Renewal.

a. Cingular Wireless shall have the right to extend this Lease for three (3) additional, five-year terms ("**Renewal Term**"). Each Renewal Term shall be on the same terms and conditions as set forth herein except that Rent shall be increased after each term by fifteen percent (15%) of the Rent applicable in the immediately preceding five-year term.

b. This Lease shall automatically renew for each successive Renewal Term unless Cingular Wireless shall notify City, in writing, of Cingular Wireless's intention not to renew this Lease, at least 60 days prior to the expiration of the term or any Renewal Term.

c. If Cingular Wireless shall remain in possession of the Premises at the expiration of this Lease or any Renewal Term without a written agreement, such tenancy shall be deemed a month-to-month tenancy under the same terms and conditions of this Lease.

6. **Interference.** Cingular Wireless shall not use the Premises in any way that interferes with the use of the Property by City, or tenants or licensees of City with rights to the Property prior in time to Cingular Wireless's (subject to Cingular Wireless's rights under this Lease, including non-interference). Similarly, City shall not use, nor shall City permit its tenants, licensees, employees, invitees or agents, to use any portion of City's properties in any way that interferes with the operations of Cingular Wireless. The interfering party shall, upon notice from the other, be responsible for ceasing said interference, and such interference shall be deemed a material breach. In the event any such interference does not cease promptly, the parties acknowledge that continuing interference may cause irreparable injury and, therefore, the injured party shall have the right, in addition to any other rights that it may have at law or in equity, to bring action to enjoin such interference or to terminate this Lease immediately upon notice.

7. Improvements; Utilities; Access.

a. Cingular Wireless shall have the right, at its expense, to erect and maintain on the Premises, improvements, personal property and facilities and any number of radio transmitting and receiving antennas and electronic equipment shelters (collectively the "Antenna Facilities"). City approves the location of such buildings and other improvements as shown on attached **Exhibit C**. Cingular Wireless shall submit the construction plans and specifications for the Antenna Facilities to City for City's approval which approval shall not be unreasonably withheld or delayed; however, if City has not responded to Cingular Wireless within ten (10) days of receipt of such plans and specification, the plans and specifications shall be deemed approved by City. Cingular Wireless shall have the right to replace or upgrade the Antenna Facilities at any time during the term of this Lease. Cingular Wireless shall cause all construction to occur lien-free and in compliance with all applicable laws and ordinances. The Antenna Facilities shall remain the exclusive property of Cingular Wireless. Cingular Wireless shall have the right to remove the Antenna Facilities upon the termination of this Lease.

b. Cingular Wireless, at its expense, shall keep and maintain the Premises and all buildings and improvements now or hereafter located thereon in commercially reasonable condition and repair during the term of this Lease. Upon termination of this Lease, the Premises shall be returned to City in good, usable condition.

c. Cingular Wireless shall pay any additional utilities charges due to Cingular Wireless's use of the Premises. Cingular Wireless shall have the right to install utilities, at Cingular Wireless's expense, and to improve the present utilities on the Premises (including, but not limited to the installation of emergency power

generators). City hereby grants an easement to permanently place any utilities on, or to bring utilities across, the Property in order to service the Premises and the Antenna Facilities as shown on **Exhibit B**. Cingular Wireless shall obtain approval from City's Communications Systems Manager prior to the installation of any proposed emergency power generator(s).

d. As partial consideration for rent paid under this Lease, City hereby grants Cingular Wireless an easement as shown on **Exhibit B** ("Easement") for ingress, egress, and access (including access as described in paragraph 1) to the Premises adequate to service the Premises and the Antenna Facilities at all times during the term of this Lease or any Renewal Term. Upon notice, City shall have the right, at City's sole expense, to relocate Cingular Wireless's Easement, provided such new location shall not materially interfere with Cingular Wireless's operations. Any Easement provided hereunder shall have the same term as this Lease.

e. City represents and warrants that the Premises are now and shall continue in the future to be operated, managed and maintained in compliance with all applicable Federal, State and local laws and regulations.

f. Cingular Wireless shall have 24-hours-a-day, 7-days-a-week access to the Premises at all times during the term of this Lease and any Renewal Term.

g. Any facility, tower, antenna, equipment or building that is not being used for the transmission and/or reception of communications signals for a continuous period of twelve (12) months shall be considered abandoned. Cingular Wireless shall remove the same at its expense within ninety (90) days of receipt of notice from City. If Cingular Wireless fails to remove said abandoned facility, tower, antenna, equipment or building after the expiration of ninety (90) days' notice, then same shall be considered a public nuisance and shall be removable by the Broken Arrow City Council through the nuisance abatement procedures of the Broken Arrow Code.

h. Cingular Wireless shall provide written notice to City that Cingular Wireless intends to use the tower for microwave.

8. **Default.** Any of the following occurrences, conditions or acts shall be deemed a "Default" under this Lease:

a. if Cingular Wireless fails to pay amounts due under this Lease within ten (10) days of its receipt of written notice that such payments are overdue;

b. if either party fails to observe or perform its obligations under this Lease and does not cure such failure within thirty (30) days from its receipt of written notice of breach; or such longer period as may be required to diligently complete a cure commenced within the 30-day period.

9. **Termination.** Except as otherwise provided herein, this Lease may be terminated, without any penalty or further liability as follows:

a. upon ten (10) days written notice in the event of a Default (as defined above);

b. upon ninety (90) days written notice by Cingular Wireless if Cingular Wireless is unable to obtain, maintain, or otherwise forfeits or cancels any license, permit or Governmental Approval necessary to the construction and/or operation of the Antenna Facilities or Cingular Wireless's business;

c. upon ninety (90) days written notice by Cingular Wireless if the Premises are or become unacceptable under Cingular Wireless's design or engineering specifications for its Antenna Facilities or the communications system to which the Antenna Facilities belong;

d. immediately upon written notice if the Premises or the Antenna Facilities are destroyed or damaged so as in Cingular Wireless's reasonable judgment to substantially and adversely affect the effective use of the

Antenna Facilities. In such event, all rights and obligations of the parties shall cease as of the date of the damage or destruction, and Cingular Wireless shall be entitled to the reimbursements of any Rent prepaid by Cingular Wireless. If Cingular Wireless elects to continue this Lease, then all Rent shall abate until the Premises and/or Antenna Facilities are restored to the condition existing immediately prior to such damage or destruction;

e. at the time title to the Property transfers to a condemning authority, pursuant to a taking of all or a portion of the Property sufficient in Cingular Wireless's determination to render the Premises unsuitable for Cingular Wireless's use. City and Cingular Wireless shall each be entitled to pursue their own separate awards with respect to such taking. Sale of all or part of the Premises to a purchaser with power of eminent domain in the fact of the exercise of the power shall be treated as a taking by condemnation.

f. Cingular Wireless shall have the right to terminate this Lease without cause by giving written notice to City and paying City the amount of Five Thousand Dollars (\$5,000.00) at the time of termination as liquidated damages.

10. **Taxes.** Cingular Wireless shall pay any personal property taxes assessed on or any portion of such taxes attributable to, the Antenna Facilities. City shall pay, when due, all real property taxes and all other fees and assessments attributable to the Premises. However, Cingular Wireless shall pay, as additional Rent, any increase in real property taxes levied against the Premises (excluding any additional taxes that relate to the period prior to the Commencement Date) which is directly attributable to Cingular Wireless's use of the Premises, and City agrees to furnish proof of such increase to Cingular Wireless.

11. **Insurance and Subrogation.**

a. Cingular Wireless will provide Commercial General Liability Insurance in an aggregate amount of \$2,500,000.00 and name City as an additional insured on the policy or policies. Cingular Wireless may satisfy this requirement by obtaining an appropriate endorsement to any master policy of liability insurance Cingular Wireless may maintain.

b. Cingular Wireless hereby releases City from liability and waives all right of recovery against City for any loss or damage covered by Cingular Wireless's first party property insurance policies for all perils insured hereunder. In the event of such insured loss, Cingular Wireless's insurance company shall not have a subrogated claim against City.

c. Cingular Wireless shall not commence construction of Tower or Antenna Facilities until each of its contractors and subcontractors obtain insurance in no less than or in terms no more restrictive than the following: General Liability Insurance covering all premises and activities. The applicable limit of liability shall not be less than Two Million Five Hundred Thousand Dollars (\$2,500,000.00) per claimant, Two Million Five Hundred Thousand Dollars (\$2,500,000.00) annual aggregate; Worker's Compensation Insurance Coverage in compliance with the Worker's Compensation Laws of the State of Oklahoma; and Comprehensive Automobile Liability Insurance applicable to all owned, hired and non-owned vehicles in an amount not less than One Million Dollars (\$1,000,000.00) per occurrence.

12. **Hold Harmless.**

a. Cingular Wireless agrees to indemnify, defend and hold City harmless from and against injury, loss, damage or liability (or any claims in respect of the foregoing), costs or expenses (including reasonable attorney's fees and court costs) arising from the installation, use, maintenance, repair or removal of the Antenna Facilities or the breach of this Lease.

b. City shall be liable to Cingular Wireless against any and all injury, loss, damage or liability (or any claims in respect to the foregoing), costs or expenses (including reasonable attorney's fees and court costs) arising from any act, omission or negligence of City or its employees or agents, occurring in or about the Property or Premises, or the breach of this Lease, except to the extent attributable to the negligent or intentional acts or omission of Cingular Wireless, its employees, agents or independent contractors and only to the extent allowed by law under the Governmental Tort Claims Act, Title 51 O.S. 1991 § 151, *et seq.*

13. **Notices.** All notices, requests, demands and other communications hereunder shall be in writing and shall be deemed given if personally delivered or mailed, certified mail, return receipt requested, or sent by overnight carrier to the following addresses:

If to City, to:

City of Broken Arrow
City Manager
220 South First Street
Broken Arrow, Oklahoma 74012

If to Cingular Wireless, to:

c/o Cingular Wireless LLC
Attention: Network Real Estate Administration
Re: Cingular Wireless Cell Site #10070642; Cell Site Name: First Baptist-Broken Arrow WT
6100 Atlantic Boulevard
Norcross, GA 30071

With a Copy to:

Cingular Wireless LLC
Attn: Legal Department
Re: Cingular Wireless Cell Site #10070642; Cell Site Name: First Baptist-Broken Arrow WT
15 E Midland Ave.
Paramus, NJ 07652

14. **Quiet Enjoyment, Title and Authority.**

a. City covenants and warrants to Cingular Wireless that City has full right, power and authority to execute this Lease; it has good and unencumbered title to the Property free and clear of any liens or mortgages, except those disclosed to Cingular Wireless that will not interfere with Cingular Wireless's rights to or use of the Premises; and execution and performance of this Lease will not violate any laws, ordinances, covenants, or the provisions of any mortgage, lease, or other agreement binding on City.

b. City covenants that at all times during the term of this Lease, Cingular Wireless's quiet enjoyment of the Premises or any part thereof shall not be disturbed as long as Cingular Wireless is not in Default beyond any applicable grace or cure period.

c. If Premises are encumbered by a deed of trust, mortgage or other security interest, City will use its best efforts to provide promptly to Cingular Wireless a non-disturbance agreement, duly executed by the holder of such security interest. No foreclosure of any such deed of trust, mortgage or other security contract, or deed granted in lieu thereof, shall result in a termination of this Lease or Cingular Wireless's rights granted herein.

15. **Environmental Laws.**

a. Cingular Wireless represents, warrants and agrees that it will conduct its activities on the Property in compliance with all applicable Environmental Laws. City represents, warrants and agrees that it has in the past and will in the future conduct its activities on the Property in compliance with all applicable Environmental Laws and that the Property is free of hazardous substance as of the Execution Date of this Lease.

b. City shall be responsible for, and shall promptly conduct any investigation and remediation as required by any Environmental Laws or common law, of all spills or other releases of hazardous substances, not caused solely by Cingular Wireless, which have occurred or which may occur on the Property.

c. Cingular Wireless agrees to defend, indemnify and hold City harmless from and against any and all claims, causes of action, demands and liability including, but not limited to, damages, costs, expenses, assessments, penalties, fines, losses, judgments and attorney's fees that City may suffer due to the existence or

discovery of any hazardous substances on the Property or the migration of any hazardous substances to other properties or released into the environment arising solely from Cingular Wireless's activities on the Property.

d. City agrees that it will assume any and all liability regarding any and all claims, causes of action, demands and liability including, but not limited to, damages, costs, expenses, assessments, penalties, fines, losses, judgments and attorney's fees that Cingular Wireless may suffer due to the existence or discovery of any Hazardous Substance on the Property or the migration of any hazardous substance to other properties or discharges into the environment, which relate to or arise solely from City's activities during this Lease, except for any claims, causes of action, demands and liability including, but not limited to, damages, costs, expenses, assessments, penalties, fines, losses, judgments and attorney's fees attributable to Cingular Wireless, its employee's, agent's or independent contractor's activities on the Property. This assumption of liability is limited to the extent provided in the Oklahoma Governmental Tort Claims Act, Title 51 O.S. 1991 § 151, *et seq.* or any other federal or state laws.

e. The indemnification in section c. above specifically includes costs incurred in connection with any investigation of site conditions or any cleanup, remedial, removal or restoration work required by any governmental authority.

16. Assignment and Subleasing.

a. Cingular Wireless may assign this Lease to any person controlling, controlled by, or under common control with Cingular Wireless, or any person or entity that, after first receiving FCC or state regulatory agency approvals, acquires Cingular Wireless's radio communications business and assumes all obligations of Cingular Wireless under this Lease. Upon such assignment, Cingular Wireless shall be relieved of all liabilities and obligations hereunder and City shall look solely to the assignee for performance under this Lease and all obligations hereunder. Cingular Wireless may sublet any part of the Premises, including Tower and ground space, upon notice to City, only if such sublease is subject to the provisions of this Lease. However, all sublessees shall also be required to negotiate directly with City regarding the leasing of City's ground space within the Premises. The subleased ground space shall be located inside the Premises herein and all rental payments for such ground space leased from City shall be paid directly to City. City retains the right to approve all other assignments of this Lease, which approval will not be unreasonably withheld or delayed.

b. Additionally, Cingular Wireless may, upon notice to City, mortgage or grant a security interest in this Lease and the Antenna Facilities, and may assign this Lease and the Antenna Facilities to any such Mortgagees or holders of security interests including their successors or assigns (hereinafter collectively referred to as "**Mortgagees**"), provided such Mortgagees agree to be bound by the terms and provisions of this Lease. In such event, City shall execute such consent to leasehold financing as may reasonably be required by Mortgagees. City agrees to notify Cingular Wireless and Cingular Wireless's Mortgagees simultaneously of any default by Cingular Wireless and to give Mortgagees the same right to cure any default as Cingular Wireless except that the cure period for any Mortgagee shall not be less than ten (10) days after receipt of the Default notice.

17. Successors and Assigns. This Lease shall run with the Property, and shall be binding upon and inure to the benefit of the parties, their respective successors, personal representatives and assigns.

18. Waiver of City's Lien. City hereby waives any and all lien rights it may have, statutory or otherwise, concerning the Antenna Facilities or any portion thereof which shall be deemed personal property for the purposes of this Lease, regardless of whether or not same is deemed real or personal property under applicable laws, and City gives Cingular Wireless the right to remove all or any portion of same from time to time in Cingular Wireless's sole discretion and without City's consent.

19. Confidentiality.

a. Pursuant to this Lease, City will receive Cingular Wireless's confidential materials. Such Cingular Wireless's Confidential Materials (hereinafter defined), may be of a non-public, confidential or proprietary nature and this paragraph 19 pertains to maintaining the confidentiality of such information and materials. The

phrase "Cingular Wireless's Confidential Materials" shall include all information and materials furnished by Cingular Wireless or its officers, directors, employees, agents or attorneys in connection with this Lease, whether furnished before or after the date hereof, and regardless of the manner in which such information or materials are obtained by or delivered to City.

b. City agrees that Cingular Wireless's Confidential Materials shall be kept strictly confidential by City and its officers, directors, employees, agents, consultants, accountants, attorneys and any other party in any way related to City. City further agrees that Cingular Wireless's Confidential Materials are being delivered to City solely for the purposes set forth in this Lease.

c. City hereby acknowledges that it is aware that money damages may not be a sufficient remedy for a violation or threatened violation of this paragraph 19 and that Cingular Wireless may be entitled to specific performance or other equitable relief for any such violation or threatened violation. City shall be responsible for any violation or threatened violation of this provision by any of its representatives or by or through any other party receiving Cingular Wireless's Confidential Materials from or through City.

d. All agreements contained in Section 19. Confidentiality, paragraphs a, b, and c, are subject to Title 51 O.S. 1991 § 24A.1, *et seq.*

20. Miscellaneous.

a. The substantially prevailing party in any litigation arising hereunder shall be entitled to its reasonable attorneys' fees and court costs, including appeals, if any.

b. Each party agrees to furnish to the other, within ten (10) days after request, such truthful estoppel information as the other may reasonably request.

c. This Lease constitutes the entire agreement and understanding of the parties, and supersedes all offers, negotiations and other agreements. There are no representations or understandings of any kind that are not set forth herein. Any amendments to this Lease must be in writing and executed by both parties.

d. If either party is represented by a real estate broker in this transaction, that party shall be fully responsible for any fee due such broker, and shall hold the other party harmless from any claims for commission by such broker.

e. Each party agrees to cooperate with the other in executing any documents (including a Memorandum of Lease in the form attached hereto) necessary to protect its rights or use of the Premises. Either party may record the Memorandum of Lease in place of this Lease.

f. This Lease shall be construed in accordance with the laws of the State of Oklahoma. Exclusive original jurisdiction for any action relating to this Lease shall be solely in the United States District Court for the Northern District of Oklahoma or in the District Court of Tulsa County, where the Property is located.

g. The provisions of this Lease are severable and if, for any reason, any one or more of the provisions contained in the Lease shall be held invalid, illegal or unenforceable in any respect, the invalidity, illegality or unenforceability shall not affect any other provision of this Lease and this Lease shall remain in effect and be construed as if the invalid, illegal or unenforceable provision had never been contained in the Lease.

h. This Lease may be executed in any number of counterparts and all such counterparts shall be deemed to constitute a single document and the execution of one counterpart by City shall have the same force and effect as if it had signed all the other counterparts.

i. Neither party shall be held responsible for any delay or failure in performance under this Lease to the extent that such delay or failure is caused by circumstances beyond the control of such party, including without limitation, acts of God, fire, flood, explosion, war, acts or omissions or carriers or other similar conditions. If a

Force Majeure condition occurs, the party whose performance is affected shall notify the other party immediately and shall resume performance as soon as reasonably possible.

j. The captions in this Lease are for reference only and shall not limit the meaning of the provisions of this Lease. The exhibits referred to herein and attached to this Lease are incorporated into this Lease and made a part hereof.

IN WITNESS WHEREOF, said parties have caused this Lease to be duly executed as of the date first above written.

Approved as to Form:


April D. Parrish
 Assistant City Attorney

City of Broken Arrow, an Oklahoma municipal corporation

By *Richard M. Carter*
 Richard M. Carter, Mayor

Attested:

Rosm. Reynolds
 City Clerk [Seal]



New Cingular Wireless PCS, LLC

By *LeeAnn Fager*
 LeeAnn Fager
 Manager-Real Estate & Construction

Tax I.D. Number _____

State of Oklahoma)
) ss.
 County of Tulsa)

On this _____ day of _____, 2005, before me a Notary Public in and for the State of Oklahoma personally appeared Richard M. Carter, known to me to be the Mayor of the City of Broken Arrow, an Oklahoma municipal corporation and to be the same person that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned, and an oath stated that he was authorized to execute said instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

My Commission Expires: _____
 Notary Public

State of Arkansas)
) ss.
 County of Pulaski)

On this 10th day of November, 2005, before me a Notary Public in and for the State of Arkansas personally appeared Lee Ann Fager, known to me to be the Manager of Real Estate and Construction of New Cingular Wireless PCS, LLC and to be the same person that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned, and an oath stated that he was authorized to execute said instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

My Commission Expires: 07-27-2015

Anthony L Hines
 Notary Public

