ORDINANCE NO. 16-0487

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF EDGEWOOD, WASHINGTON, GRANTING A RIGHT-OF-WAY USE AGREEMENT TO NEW CINGULAR WIRELESS PCS, LLC, TO OPERATE AND MAINTAIN A SINGLE PRIVATE WIRELESS COMMUNICATIONS FACILITY, TO BE CO-LOCATED ON A PUGET SOUND ENERGY DISTRIBUTION POLE WITHIN CERTAIN PUBLIC RIGHTS-OF-WAY IN THE CITY; SETTING FORTH TERMS AND CONDITIONS; PROVIDING FOR SEVERABILITY; AND ESTABLISHING AN EFFECTIVE DATE

WHEREAS, the public rights-of-way within the City are constructed and maintained at public expense for the use of the general public, the primary purpose of which is public travel, and must be managed and controlled consistent with that intent; and

WHEREAS, New Cingular Wireless PCS, LLC ("AT&T") has made application to the City of Edgewood for a non-exclusive right-of-way use agreement to construct, install, maintain, repair and operate a single Private wireless communications facility, to be co-located on a Puget Sound Energy distribution pole within in the City’s right-of-way, for the purpose of providing wireless communications within the City of Edgewood; and

WHEREAS, AT&T has separately applied for and obtained a City of Edgewood conditional use permit authorizing this action as a regulated land use; and

WHEREAS, AT&T represents that it is a telecommunications company within the meaning of Title 80 RCW and that it may provide telecommunications services within the meaning of Title 80 RCW; and

WHEREAS, based on representations and information provided by AT&T, and in response to its request for the grant of a right-of-way use agreement, the City Council has determined that the grant of a right-of-way use agreement, on the terms and conditions herein and subject to applicable law, is consistent with the public interest; and

WHEREAS, the City is authorized by applicable law to grant such right-of-way use agreements within the boundaries of the City;

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF EDGEWOOD DO ORDAIN AS FOLLOWS:

Section 1. Authority Granted; Term. The City of Edgewood ("the City") hereby grants to AT&T, its heirs, successors, legal representatives and assigns, subject to the terms and conditions hereinafter set forth, the right to construct, operate, maintain, repair, replace and use all necessary equipment and facilities thereto for a single wireless telecommunications system ("AT&T’s Facilities" or "the Facilities"), within the public right-of-way in the general location shown on Exhibit A, and in the configuration shown on Exhibit A-1. Provided, that the precise location of the Facilities installed pursuant hereto shall be approved by the City in accordance with the City’s street use and excavation permit process. Subject to Section 26, this ordinance shall be construed as a binding agreement ("the Agreement") between the Parties upon mutual execution hereof and shall remain in effect until December 8, 2021 unless sooner terminated as provided below.

Section 2. Non-Exclusive Grant. This Agreement shall not in any manner prevent the City from entering into other similar agreements or granting other or further permits and/or franchises in,
under, on, across or over said right-of-way. This Agreement shall further not prevent or prohibit the City from using any of said right-of-way or affect its jurisdiction over the same, and the City shall retain power to make all necessary changes, relocations, repairs, maintenance, establishment, improvement, dedication of same as the City may deem fit, including without limitation the dedication, establishment, maintenance, and improvement of all new rights-of-way, thoroughfares and other public properties of every type and description.

Section 3. Existing Franchise Rights Unaffected; Warranty of Authorization. AT&T and the City (collectively, “the Parties”) acknowledge and agree that the Facilities will be co-located and installed upon a distribution pole owned and operated by Puget Sound Energy (PSE). AT&T represents and warrants that PSE has authorized said co-location and installation. Nothing herein shall be construed as expanding, abridging or otherwise modifying the existing franchise agreement between the City and PSE as granted pursuant to Ordinance No. 08-0300.

Section 4. Relocation of Facilities. A. AT&T shall, upon 120 days written notice and at its sole cost and expense, protect, support, relocate and/or remove the Facilities or any part thereof when reasonably required due to: (i) traffic or public safety conditions; (ii) the creation and/or improvement of new rights-of-way; (iii) the widening and/or improvement of existing rights-of-way; (iv) the change or establishment of street grade; or (v) the construction of any public improvement by any governmental agency acting in a governmental capacity. Provided, that AT&T shall in all such cases have the privilege to temporarily bypass, upon reasonable approval by the City, any section of cable or any other facility required to be temporarily disconnected or removed. Upon request of the City, AT&T shall, within 30 days and at its sole cost and expense, locate and if reasonably necessary, excavate and expose the Facilities for inspection so that the location of the same may be taken into account in the improvement design.

B. AT&T will indemnify, hold harmless, and pay the costs of defending the City against any and all claims, suits, actions, damages or liabilities for delays on any public works projects caused by or arising out of the failure of AT&T to relocate its facilities in a timely manner; provided, that AT&T shall not be responsible for damages due to delays caused solely by the City. The provisions of this subsection shall survive the expiration, revocation or termination of this Agreement.

Section 5. AT&T's Maps and Records. After construction and installation of the Facilities is complete, AT&T shall provide to City at no cost, accurate copies of as-built plans for the Facilities.

Section 6. Work in the Right-of-Way. The Facilities shall be constructed and installed in accordance with City of Edgewood approved plans. During any period of installation, operation, maintenance, repair, relocation or removal, AT&T shall at all times use the right-of-way so as to reasonably minimize any interference with the passage of vehicular and pedestrian traffic. AT&T shall post and maintain proper barricades and comply with all applicable safety regulations during any period of construction as required by applicable state and local regulations, including without limitation the City of Edgewood Public Works Construction Standards. Whenever AT&T desires to work in the right-of-way, it shall apply for and receive from the City a permit authorizing such work. AT&T shall pay all duly established permit and inspection fees associated with the processing of said permit. In no case shall any work commence within any public right-of-way without a permit except as otherwise provided in this Agreement.

Section 7. Restoration after Construction. AT&T shall, after performing any work within the right-of-way, reasonably restore the right-of-way to at least the condition extant immediately prior to
any such work. The City’s Public Works Director shall have final approval of the condition of such right-of-way after restoration. AT&T agrees to promptly complete all restoration work and to promptly repair any damage caused by such work to the right-of-way or other affected area at its sole cost and expense.

Separate from and in addition to the foregoing, the Parties expressly acknowledge that the underlying Meridian Avenue/State Route 161 corridor right-of-way is part of the state highway system ("State Highways") and is governed by the provisions of Chapter 47.24 RCW and applicable Washington State Department of Transportation (WSDOT) requirements in addition to local ordinances and other regulations. Without limitation of the other provision of this section, AT&T agrees that:

(1) any pavement trenching and restoration performed by AT&T within State Highways shall meet or exceed applicable WSDOT requirements;

(2) any portion of a State Highway damaged or injured by AT&T shall be restored, repaired and/or replaced by AT&T to a condition that meets or exceeds applicable WSDOT requirements; and

(3) without prejudice to any right or privilege of AT&T, WSDOT is authorized to enforce in an action brought in the name of the State of Washington any condition of this Agreement with respect to any portion of a State Highway.

Section 8. Legal Compliance. AT&T shall comply fully with all applicable permit conditions, licensing requirements, construction codes, laws, ordinances, and regulations now in effect or enacted hereafter. Without limitation of the foregoing, AT&T shall comply fully with the requirements and conditions set forth in the Conditional Use Permit (CUP #16-5622) issued to AT&T by the City of Edgewood Hearing Examiner on December 8, 2016, which is hereby incorporated herein by reference as if fully set forth. If any provision of this Agreement irreconcilably conflicts with any provision of CUP #16-5622, the more restrictive provision shall apply.

Section 9. Emergency Work; Permit Waiver. In the event of any emergency in which the Facilities pose an immediate danger to property, life, health or safety of any individual, AT&T shall immediately take the proper emergency measures to repair the same without first applying for and obtaining a permit as otherwise required by this Agreement. However, this shall not relieve AT&T from the requirement of notifying the City of the emergency work and obtaining any permits necessary for this purpose as soon as practical thereafter. Without limitation of the foregoing, the City may in its sole discretion secure, move to a safe location, cut, modify and/or otherwise relocate the Facility where necessary to address an immediate public health or safety emergency and shall not be responsible to AT&T in any manner therefore except to the extent of the City’s sole negligence.

Section 10. Dangerous Conditions, Authority for City to Abate. Whenever work under this Agreement causes a condition that appears to substantially impair the lateral support of adjoining property, the City’s Public Works Director may direct AT&T, at AT&T's own expense, to take action to protect such adjoining property within a prescribed time. In the event that AT&T fails or refuses to promptly take the actions directed by the City, or if emergency conditions exist which require immediate action, the City may enter upon the property and take such actions as are necessary safety precautions and AT&T shall be liable to City for all costs thereof. The provisions of this section shall survive any termination of this Agreement.
Section 11. Recovery of Costs. AT&T shall remit to the City a one-time administrative fee in the amount of Twenty Five Hundred Dollars ($2,500) to cover the City's costs in drafting and processing this Agreement and all work related thereto. The fee shall be paid within 45 days after the date AT&T and the City execute this Agreement. AT&T shall further be subject to all permit fees associated with activities undertaken through the authority granted in this Agreement or under applicable regulations.

Section 12. Indemnification. AT&T hereby releases, covenants not to bring suit and agrees to fully indemnify, protect, defend and hold harmless the City, its officers, employees, agents and representatives from and against any and all claims, costs, judgments, awards or liability to any person (collectively, “Claims”), including attorneys’ fees, arising out of or in connection with the Facilities and/or any activities or operations performed by AT&T or its agents, servants, officers or employees. The forgoing specifically includes without limitation any Claims involving injury, sickness or death of any person or damage to property of which the negligent or wrongful acts or omissions of AT&T, its agents, servants, officers or employees are a proximate cause. The provisions of this section, however, are not to be construed to require AT&T to hold harmless, defend or indemnify the City as to any Claims arising out of the sole negligence or wrongdoing of the City. In the event that this contract is subject to the provisions of RCW 4.24.115, the indemnity provisions hereunder shall be deemed amended to conform to said statute and liability shall be allocated as provided therein. The provisions of this section shall survive the expiration, revocation or termination of this Agreement.

Section 13. Insurance. AT&T shall procure and maintain for the duration of the Agreement, insurance against claims for injuries to persons or damages to property which may arise from or in connection with the exercise of the rights, privileges and authority granted hereunder to AT&T, its agents, representatives or employees. AT&T shall provide an insurance certificate, together with an endorsement listing the City, its officers, elected officials, agents, employees, representatives, engineers, consultants and volunteers as additional insureds, and such insurance certificate shall evidence:

A. Automobile Liability insurance with limits no less than $2,000,000 Combined Single Limit per accident for bodily injury and property damage; and

B. Commercial General Liability insurance, written on an occurrence basis with limits no less than $1,000,000 combined single limit per occurrence and $2,000,000 aggregate for personal injury, bodily injury and property damage.

C. Comprehensive form premises-operations, explosions and collapse hazard, underground hazard and products completed operation hazard policies with limits of not less than $2,000,000.

AT&T's insurance shall be primary insurance as respects the City, its officers, officials, employees and volunteers. Any insurance maintained by the City, its officers, officials, employees or volunteers shall be in excess of AT&T's insurance and shall not contribute with it. The insurance policy or policies required by this clause shall be endorsed to state that coverage shall not be canceled except after AT&T endeavors to provide ninety (90) days' prior written notice to the City. Within 60 days of any such notice, and in no event later than 30 days prior to the effective date of any cancellation of its existing insurance, AT&T shall obtain and furnish to the City proof of replacement insurance policies satisfying the requirements of this section.

AT&T’s maintenance of insurance as required by this section shall not be construed as limiting the liability of AT&T to the coverage provided by such insurance, or as otherwise limiting the City’s recourse to any remedy available at law or in equity.
Section 14. Abandonment and Removal of AT&T's Facility. No Facilities may be abandoned within the right-of-way without the express written consent of the City. Any plan for abandonment of AT&T's facilities must require removal of the facilities within 90 days of abandonment or by such other date acceptable to the City and must be first approved by the City's Public Works Director. Any necessary permits must first be obtained before such abandonment. The provisions of this section shall survive the expiration, revocation or termination of this Agreement.

Section 15. Default. If AT&T breaches or otherwise fails to comply with any of the material provisions of this Agreement within forty five (45) days after written notice and opportunity to cure, then AT&T shall, at the election of the Edgewood City Council, forfeit all rights conferred hereunder and this Agreement may be terminated.

Section 16. Remedies to Enforce Compliance. In addition to any other remedy provided herein, City reserves the right to pursue any remedy available at law or in equity.

Section 17. Police Powers. Nothing herein shall be construed as a waiver, abridgment or limitation of the City's regulatory authority and police power, which the City hereby expressly reserves in full. Without limitation of the foregoing, nothing herein shall be deemed to direct or restrict City's ability to adopt and enforce all necessary and appropriate ordinances regarding the police powers of the City in the interest of public safety and for the welfare of the public.

Section 18. Assignment. This Agreement may not be assigned or transferred without the written approval of City, which approval shall not be unreasonably withheld or delayed, except AT&T may freely assign this Agreement in whole or in part to a parent, subsidiary, or affiliated corporation or as part of any corporate financing, reorganization or refinancing.

Section 19. Notice. Any notice or information required or permitted to be given to the parties under this Agreement may be sent to the following addresses unless otherwise specified:

 Mayor  
 City of Edgewood  
 2224 104th Ave. East  
 Edgewood, WA 98372  

 New Cingular Wireless PCS, LLC  
 Attn: Network Real Estate Administration  
 Re: Surprise Lake (WA406)  
 Fixed Asset #:  
 575 Morosgo Drive NE, 13F, West Tower  
 Atlanta, GA 30324

 With a copy to:  
 New Cingular Wireless PCS, LLC  
 Attn: Legal Department – Network Operations  
 Re: Surprise Lake (WA406)  
 Fixed Asset #:  
 208 S. Akard Street  
 Dallas, TX 75202-4206

Section 20. No Third-Party Beneficiaries. This Agreement is executed for the exclusive benefit of the signatory Parties and may be enforced only by the same. Except as otherwise expressly provided herein, nothing in this Agreement is or was intended to confer third-party beneficiary status on any person or any member of the public.
Section 21. Governing Law; Venue. This Agreement shall be governed by and construed in accordance with the laws of the State of Washington and the ordinances of the City of Edgewood. Any action brought relative to enforcement of this Agreement, or seeking a declaration of rights, duties or obligations herein, shall be initiated in Pierce County Superior Court, and shall not be removed to a federal court, except as to claims over which such Superior Court has no jurisdiction. Any removal to federal court shall be to the Federal Court of the Western District of Washington. The prevailing party in any action arising under this Agreement shall be entitled to an award of its reasonable attorneys’ fees and costs.

Section 22. Nonwaiver. No failure by either party to insist upon the performance of any of the terms of this Agreement, to insist upon the compliance with any applicable ordinance, code, statute or regulation, or to exercise any right or remedy consequent upon a breach thereof, shall constitute a waiver of any such breach, compliance or of any of the terms of this Agreement. None of the terms of this Agreement to be kept, observed or performed by either party, or no breach thereof, shall be waived, altered or modified except by a written instrument executed by the injured party. No waiver of any breach shall affect or alter this Agreement, but each of the terms of this Agreement shall continue in full force and effect with respect to any other than existing or subsequent breach thereof. No waiver of any default of the defaulting party hereunder shall be implied from any omission by the injured party to take any action on account of such default if such default persists or is repeated, and no express waiver shall affect any default other than the default specified in the express waiver and then only for the time and to the extent therein stated. One or more waivers by the injured party shall not be construed as a waiver of a subsequent breach of the same covenant, term or conditions.

Section 23. Integration. This Agreement constitutes the entire understanding and agreement between the Parties as to the subject matter herein and supersedes all prior oral negotiations and written agreements between the Parties.

Section 24. Independent Review; Signatory Warranty. The Parties each acknowledge that they have had opportunity to receive independent legal advice in entering into this Agreement and that both the City and AT&T understand and fully agree to each and every provision of this Agreement. Each signatory below represents and warrants that he/she is authorized to execute this document on behalf of the party for whom he/she is signing.

CITY OF EDGEWOOD

By: Mayor

Signature

Daryl Hadinger
Name

Mayor
Title
Date

NEW CINGULAR WIRELESS PCS, LLC
a Delaware limited liability company

By: AT&T Mobility Corporation
a Delaware corporation
Its: Manager

Signature

Name

Title
Date
Section 25. Severability/Savings. If any section, sentence, clause, or phrase of this ordinance or Agreement should be held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of any other section, sentence, clause or phrase of this ordinance.

Section 26. Effective Date. A summary of this ordinance consisting of its title shall be published in the official newspaper of the City, and shall take effect and be in full force five (5) days after the date of publication.

Presented to Council for its Second Reading on December 13th, 2016

ADOPTED BY THE CITY COUNCIL ON THIS 13TH DAY OF DECEMBER, 2016

By: ____________________________
Daryl Eidinger, Mayor

ATTEST/AUTHENTICATED:

______________________________
Rachel Pitzel, City Clerk

APPROVED AS TO FORM:

______________________________
J. Zachary Lell, City Attorney

Date of Publication: December 15, 2016
Effective Date: December 20, 2016
LEGAL NOTICE

Date: December 14, 2016

NOTICE OF ORDINANCE PASSED BY EDGEWOOD CITY COUNCIL

The following is a summary of an Ordinance adopted by the City of Edgewood City Council on the 13th day of December, 2016, and shall take effect and be in full force five (5) days from the date of publication in the City’s official newspaper.

ORDINANCE NO. 16-0487

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF EDGEWOOD, WASHINGTON, GRANTING A RIGHT-OF-WAY USE AGREEMENT TO NEW CINGULAR WIRELESS PCS, LLC, TO CONSTRUCT, OPERATE AND MAINTAIN A SINGLE PRIVATE WIRELESS COMMUNICATIONS FACILITY, TO BE CO-LOCATED ON A PUGET SOUND ENERGY DISTRIBUTION POLE WITHIN CERTAIN PUBLIC RIGHTS-OF-WAY IN THE CITY; SETTING FORTH TERMS AND CONDITIONS; PROVIDING FOR SEVERABILITY; AND ESTABLISHING AN EFFECTIVE DATE.

The full text of the Ordinance is available at the City Clerk’s office, Edgewood City Hall, 2224 - 104th Ave. East, Edgewood, WA 98371 (253) 952-3299.

Rachel Pitzel, City Clerk

Date of Publication: December 15, 2016