

INDEPENDENT SCHOOL DISTRICT 271
Bloomington, Minnesota

REQUEST FOR SCHOOL BOARD ACTION

DATE OF BOARD MEETING: May 14, 2018

SUBJECT: Fourth Amendment Lease Agreement

ORIGINATING DEPARTMENT: Business Office


APPROVAL OF ADMINISTRATIVE
CABINET MEMBER Rod Y. Zivkovich, Executive Director of
Finance and Support Services



RESOLUTION FOR BOARD TO ADOPT:

RESOLVED, that the School Board of Independent School District 271 approves a site lease agreement for an extension at the Transportation Center Cell Tower.

RECOMMENDATION OF SUPERINTENDENT:

Approve. 

DETAILED BACKGROUND:

The agreement is for an extension to lease the cell tower site at the Transportation Center. The lease is for a term of five years. Rent paid by tenant will be \$2,417 monthly and adjusted by CPI starting July, 2020. A one-time signing bonus of \$10,000 will be paid within 30 days of full execution of the Fourth Amendment.

The District's attorney and insurance agent have reviewed the lease agreement.

**FOURTH AMENDMENT TO
OPTION AND SITE LEASE AGREEMENT**

THIS FOURTH AMENDMENT TO OPTION AND SITE LEASE AGREEMENT (“Fourth Amendment”) is entered into this ____ day of _____, 20____, by and between the INDEPENDENT SCHOOL DISTRICT #271, with a mailing address of 1350 West 106th Street, Bloomington, Minnesota 55431 (hereinafter referred to as “Landlord”) and NCWPCS MPL 21 - YEAR SITES TOWER HOLDINGS LLC, a Delaware limited liability company, by and through CCATT LLC, a Delaware limited liability company, its attorney in fact, with a mailing address of 2000 Corporate Drive, Canonsburg, Pennsylvania 15317 (collectively referred to as “Tenant”).

RECITALS

WHEREAS, Mr. John Peterson dba Peterson Pontiac GMC (“Original Landlord”) and ACC/McCaw Cellular of Minneapolis, a joint venture organized and existing under the laws of the state of Washington (“Original Tenant”) entered into an Option and Site Lease Agreement dated June 29, 1990 (“Original Agreement”) whereby Original Tenant leased certain real property, together with access and utility easements, located in Hennepin County, Minnesota from Original Landlord (the “Premises”), all located within certain real property owned by Original Landlord (the “Property”); and

WHEREAS, the Original Agreement was amended by that certain First Amendment to Option and Site Lease Agreement dated November 21, 2002, that certain Second Amendment to Option and Site Lease Agreement dated May 29, 2009, and that certain Third Amendment to Option and Site Lease Agreement dated January 26, 2010 (hereinafter the Original Agreement and all subsequent amendments are collectively referred to as the “Agreement”); and

WHEREAS, NCWPCS MPL 21 - Year Sites Tower Holdings LLC is currently the tenant under the Agreement as ultimate successor in interest to the Original Tenant; and

WHEREAS, Independent School District #271 is currently the landlord under the Agreement as ultimate successor in interest to the Original Landlord; and

WHEREAS, the Premises may be used for the purpose of constructing, maintaining and operating a communications facility, including tower structures, equipment shelters, cabinets, meter boards, utilities, antennas, equipment, any related improvements and structures and uses incidental thereto; and

WHEREAS, the Agreement had an initial term of five (5) years that commenced on June 29, 1990. The Agreement provides for five (5) extensions of five (5) years each, all of which were exercised by Tenant. According to the Agreement, the final extension expires on June 30, 2020; and

WHEREAS, Landlord and Tenant desire to amend the Agreement on the terms and conditions contained herein.

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are acknowledged, Landlord and Tenant agree as follows:

1. Recitals; Defined Terms. The parties acknowledge the accuracy of the foregoing recitals. Any capitalized terms not defined herein shall have the meanings ascribed to them in the Agreement.

2. Term. The second sentence of Section 4 of the Original Agreement is hereby deleted in its entirety and the following is inserted in its place:

Tenant shall have the right to extend this lease for eleven (11) additional five (5) year terms (each a "Renewal Term").

Landlord and Tenant hereby acknowledge that Tenant has exercised five (5) Renewal Terms, leaving a balance of six (6) Renewal Terms, with the final Renewal Term expiring on June 30, 2050.

3. Rent. On the first day of the second full month following execution of this Fourth Amendment, the monthly Rent shall increase to Two Thousand Four Hundred Seventeen and No/100 dollars (\$2,417.00) per month. Following such increase, the monthly Rent shall continue to adjust by CPI pursuant to the terms of the Agreement. The next scheduled increase is on July 1, 2020.

4. Signing Bonus. Tenant will pay to Landlord a one-time amount of Ten Thousand and No/100 Dollars (\$10,000.00) for the full execution of this Fourth Amendment within thirty (30) days of the full execution of this Fourth Amendment (“Conditional Lease Amendment Signing Bonus”). In the event that this Fourth Amendment (and any applicable memorandum) is not fully executed by both Landlord and Tenant for any reason, Tenant shall have no obligation to pay the Conditional Lease Amendment Signing Bonus to Landlord.

5. Termination Fee. If at any time prior to June 30, 2025, (a) Tenant exercises any of Tenant’s rights to terminate the Agreement; or (b) Tenant elects not to renew the Agreement, Tenant shall pay a termination fee (“Termination Fee”) equal to the amount of rent that Tenant would have owed to Landlord under the Agreement, as amended, between the date of such early termination or election not to renew, and June 30, 2025. The Termination Fee will be due and payable in the same manner and on the same dates as set forth in the Agreement. Notwithstanding the foregoing, Tenant will be released from any and all of its obligations under the Agreement as of the effective date of such termination and shall not be required to pay the Termination Fee if Tenant terminates the Agreement due to a Landlord default.

6. Revenue Share. In addition to the Rent currently paid by Tenant to Landlord pursuant to the Agreement, if, after the full execution of this Fourth Amendment, Tenant subleases the Premises to an unaffiliated third party not already a subtenant on the Premises (each a “Future Subtenant”), Tenant agrees to pay Landlord fifteen percent (15%) of the rental payments actually received by Tenant from such Future Subtenant (excluding any reimbursement of taxes, construction costs, installation costs, revenue share reimbursement or other expenses incurred by Tenant) (the “Additional Rent”) within thirty (30) days after receipt of said payments by Tenant. Tenant shall provide written notice to Landlord within sixty (60) days after such sublease or license is fully executed. If any future sublease expires or terminates for any reason, Tenant shall no longer be obligated to pay Additional Rent for such Future Subtenant. Non-payment of such rental, license or other similar payment by a Future Subtenant shall not be a default under the Agreement. Tenant shall have sole discretion as to whether, and on what terms, to sublease, license or otherwise allow occupancy of the Premises and there shall be no express or implied obligation of Tenant to do so. Notwithstanding anything in the

Agreement to the contrary, Tenant will have the right to sublease or license use of the Premises without the consent or approval of Tenant.

7. Right of First Refusal. If Landlord receives an offer from any person or entity that owns towers or other wireless telecommunications facilities (or is in the business of acquiring Landlord's interest in the Agreement) to purchase fee title, an easement, a lease, a license, or any other interest in the lease area, or Landlord's interest in the Agreement, or an option for any of the foregoing, Landlord shall provide written notice to Tenant of said offer, and Tenant shall have a right of first refusal to acquire such interest on the same terms and conditions in the offer, excluding any terms or conditions that are (a) not imposed in good faith; or (b) directly or indirectly designed to defeat or undermine Tenant's possessory or economic interest in the Premises. Landlord's notice shall include the prospective buyer's name, the purchase price and/or other consideration being offered, the other terms and conditions of the offer, the due diligence period, and the proposed closing date. If the Landlord's notice shall provide for a due diligence period of less than sixty (60) days, then the due diligence period shall be extended to be sixty (60) days from exercise of the right of first refusal and closing shall occur no earlier than fifteen (15) days thereafter. If Tenant does not exercise its right of first refusal by written notice to Landlord given within thirty (30) days, Landlord may convey the property as described in the Landlord's notice. If Tenant declines to exercise its right of first refusal, then the Agreement shall continue in full force and effect and Tenant's right of first refusal shall survive any such conveyance. Tenant shall have the right, at its sole discretion, to assign the right of first refusal to any person or entity, either separate from an assignment of the Agreement or as part of an assignment of the Agreement. Such assignment may occur either prior to or after Tenant's receipt of Landlord's notice and the assignment shall be effective upon written notice to Landlord.

8. Letter Agreement. This Fourth Amendment supersedes that certain Letter Agreement by and between Landlord and Tenant dated February 7, 2018, and in case of any conflict or inconsistency between the terms and conditions contained in the Letter Agreement and the terms and conditions contained in this Fourth Amendment, the terms and conditions in this Fourth Amendment shall control.

9. Eminent Domain. Section 11 of the Original Agreement is hereby deleted in its entirety, and the following is inserted in its place:

If Landlord receives notice of a proposed taking by eminent domain of any part of the land upon which the Premises or the easements are situated, Landlord will notify Tenant of the proposed taking within five (5) days of receiving said notice and Tenant will have the option to: (i) declare the Agreement null and void and thereafter neither party will have any liability or obligation hereunder; or (ii) remain in possession of that portion of the Premises and easements that will not be taken, in which event there shall be an equitable adjustment in rent on account of the portion of the Premises and easements so taken. With either option Tenant shall have the right to contest the taking and directly pursue an award.

10. Landlord's Cooperation. If requested by Tenant, Landlord will execute, at Tenant's sole cost and expense, all documents required by any governmental authority in connection with any development of, or construction on, the Premises, including documents necessary to petition the appropriate public bodies for certificates, permits, licenses and other approvals deemed necessary by Tenant in Tenant's absolute discretion to utilize the Premises for the purpose of constructing, maintaining and operating communications facilities, including without limitation, tower structures, antenna support structures, cabinets, meter boards, buildings, antennas, cables, equipment and uses incidental thereto. Landlord agrees to be named applicant if requested by Tenant. Landlord shall be entitled to no further consideration with respect to any of the foregoing matters.

11. Ratification.

a) Landlord and Tenant agree that Tenant is the current tenant under the Agreement, the Agreement is in full force and effect, as amended herein, and the Agreement contains the entire agreement between Landlord and Tenant with respect to the Premises.

b) Landlord agrees that any and all actions or inactions that have occurred or should have occurred prior to the date of this Fourth Amendment are approved and ratified and that no breaches or defaults exist as of the date of this Fourth Amendment.

c) Landlord represents and warrants that Landlord is duly authorized and has the full power, right and authority to enter into this Fourth Amendment and to perform all of its obligations under the Agreement as amended.

d) Landlord acknowledges that the Premises, as defined, shall include any portion of the Premises on which communications facilities or other Tenant improvements exist on the date of this Fourth Amendment.

12. Notices. Tenant's notice addresses as stated in Section 13 of the Original Agreement are amended as follows:

Tenant: NCWPCS MPL - 21 Year Sites Tower Holdings LLC
Legal Department
Attn: Network Legal
208 S. Akard Street
Dallas, TX 75202-4206

With a copy to:
CCATT LLC
Attn: Legal Dept.
2000 Corporate Drive
Canonsburg, PA 15317

13. IRS Form W9. Landlord agrees to provide Tenant with a completed IRS Form W9, or its equivalent, upon execution of this Fourth Amendment and at such other times as may be reasonably requested by Tenant. In the event the Premises is transferred, the succeeding landlord shall have a duty at the time of such transfer to provide Tenant with a completed IRS Form W9, or its equivalent, and other related paper work to effect a transfer in the rent to the new landlord. Landlord's failure to provide the IRS Form W9 within thirty (30) days after Tenant's request shall be considered a default and Tenant may take any reasonable action necessary to comply with IRS regulations including, but not limited to, withholding applicable taxes from rent payments.

14. Remainder of Agreement Unaffected. The parties hereto acknowledge that except as expressly modified hereby, the Agreement remains unmodified and in full force and effect. In the event of any conflict or inconsistency between the terms of this Fourth Amendment and the Agreement, the terms of this Fourth Amendment shall control. This Fourth Amendment may be executed simultaneously or in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same agreement.

15. Survey. Tenant reserves the right, at its discretion and at its sole cost, to obtain a survey ("Survey") specifically describing the Premises and any access and utility easements associated therewith. Tenant shall be permitted to attach the Survey as an exhibit to this Fourth Amendment and any related memorandum for recording, which shall update and replace the existing description, at any time prior to or after closing of this Fourth Amendment.

[Execution Pages Follow]

This Fourth Amendment is executed by Landlord as of the date first written above.

LANDLORD:
INDEPENDENT SCHOOL DISTRICT #271

By: _____
Print Name: _____
Title: _____

[Tenant Execution Page Follows]

This Fourth Amendment is executed by Tenant as of the date first written above.

TENANT:
NCWPCS MPL 21 - YEAR SITES TOWER
HOLDINGS LLC,
a Delaware limited liability company

By: CCATT LLC,
a Delaware limited liability company,
Its: Attorney in Fact

By: _____
Print Name: _____
Title: _____