

# HEBER PUBLIC UTILITY DISTRICT

## REPORT TO BOARD OF DIRECTORS

**MEETING DATE:** November 17, 2016

**FROM:** Laura Fischer, General Manager

**SUBJECT:** Adopt Resolution Number 2016-13 Approving First Amendment to Lease Agreement Between the Heber Public Utility District and Cellco Partnership d/b/a/ Verizon Wireless.

**ISSUE:**

Shall the Board of Directors adopt Resolution Number 2016-13 approving the First Amendment to Lease Agreement between Heber Public Utility District and Cellco Partnership d/b/a/ Verizon Wireless?

**GENERAL MANAGER'S RECOMMENDATION:**

It is recommended that the Board of Directors adopt Resolution Number 2016-13 approving the First Amendment to Lease Agreement between HPUD and Cellco Partnership d/b/a/ Verizon Wireless.

**FISCAL IMPACT:**

Possible signing bonus of \$25,000, which could be used for any purpose.

**BACKGROUND:**

In June of this year, the HPUD Board authorized the General Manager to negotiate an amendment to the Lease Agreement Between the HPUD and Cellco Partnership d/b/a/ Verizon Wireless.

The HPUD currently leases a section of property located across from the wastewater treatment plant in the 19 acres of vacant land to American Tower Co. The lease is for five years and is renewable upon agreement by both parties. The proposed summary of changes to the lease agreement are as follows:

**Terms:**

Current: Agreement renewed every five years.

Proposed: Automatic renewal for 30 years (6 renewals of a 5 year contract).

**Rent Escalator:**

Current: Lease agreement has an escalating rent increase of 15% every five years. Our next rent increase will not go in effect until 2019.

Proposed: Lease agreement would have a 3% increase each year, which would allow for compound lease revenues. The annual rent increase would not start until 2019.

**Signing Bonus:**

American Tower is offering a \$25,000 signing bonus paid to HPUD within 30 of signing the lease extension and new Agreement.

**DISCUSSION:**

After review by the District's attorney and General Manager, changes in the Lease Amendment as presented by American Tower have been tentatively agreed upon through negotiations. The changes include an increase in the signing bonus, removal of the Confidentiality section, rewriting of the Tenant's Securitization Rights; Estoppel, rewriting and eliminating the section regarding payment of Taxes, and the execution date.

American Tower is requesting a lease extension to ensure stability with their cell tower leases. Having a long term lease on the tower allows cell companies the security they need to invest money for technology improvements. This helps cell customers with better service and coverage. Currently they are leasing the tower to Verizon and the lease is set to expire in 2019 and without the assurance that the cell tower will be available for the long term, Verizon is hesitant to invest money in new technology at this tower.

**CONCLUSION:**

The Modified Lease Agreement as attached to this document has been reviewed by HPUD staff and our attorney. As this Amendment to the Lease Agreement has a favorable outcome for HPUD and has been reviewed by our attorney, staff recommends adoption of Resolution Number 2016-12 approving First Amendment to Lease Agreement between the Heber Public Utility District and Cellco Partnership d/b/a/ Verizon Wireless.

**ALTERNATIVES:**

- 1) Do not approve First Amendment to Lease Agreement between the Heber Public Utility District and Cellco Partnership d/b/a/ Verizon Wireless, and provide alternate direction to staff regarding negotiating terms and conditions.
- 2) Provide alternate direction to staff regarding cell tower lease.

Respectfully Submitted,

Laura Fischer,  
General Manager

Attachment: Resolution Number 2016-13 Approving First Amendment to Lease Agreement between the Heber Public Utility District and Cellco Partnership d/b/a/ Verizon Wireless

RESOLUTION NO. 2016-13

RESOLUTION AUTHORIZING A FIRST AMENDMENT TO  
LEASE AGREEMENT BETWEEN HEBER PUBLIC UTILITY  
DISTRICT AND CELLCO PARTNERSHIP DBA VERIZON  
WIRELESS

WHEREAS, Heber Public Utility District entered into a land lease with Cellco on or about February 17, 2009; and

WHEREAS, said lease agreement is for a portion of Heber Public Utility District property, generally located at the southwest corner of Correll Road and Rockwood Street, Heber, California, for the purpose of installing and maintaining a cell tower site; and

WHEREAS, Heber Public Utility District and Cellco desire to amend the land lease agreement as described in the First Amendment to Lease Agreement, a copy of which is attached hereto and made a part hereof; and

NOW, THEREFORE, HEBER PUBLIC UTILITY DISTRICT RESOLVES THAT:

1. Consent is given to enter into the First Amendment to Lease Agreement on the terms and for the compensation described therein as Exhibit A.
2. Except as modified by the First Amendment to Lease Agreement, all other terms and conditions of the land lease agreement of February 17, 2009, remain in full force and effect.

**PASSED AND ADOPTED** at a regular meeting of the Board of Directors of the Heber Public Utility District held on the 17<sup>th</sup> day of November, 2016.

AYES:

NOES:

ABSENT:

**HEBER PUBLIC UTILITY DISTRICT**

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Tony Sandoval, Board President

**APPROVED AS TO FORM:**

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Steven M. Walker, General Counsel

**ATTEST:**

I, Raquel R. Carrillo, Secretary to the Board of the Heber Public Utility District, County of Imperial, State of California, DO HEREBY CERTIFY that the foregoing resolution was dully passed, approved and adopted by the Board of Directors of the Heber Public Utility District at its regularly scheduled meeting held on the 17<sup>th</sup> of November 2016.

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Raquel Carrillo, Secretary of the Heber Public Utility District Board

ATC Site No: 414041 VZW Site No: 159983 Site Name: Heber CA SQA

### THE FIRST AMENDMENT TO LEASE AGREEMENT

This First Amendment to Lease Agreement (this "**Amendment**") is made effective as of the latter signature date hereof (the "**Effective Date**") by and between **Heber Public Utility District ("Landlord")** and **Cellco Partnership d/b/a Verizon Wireless ("Tenant")** (Landlord and Tenant being collectively referred to herein as the "**Parties**").

### RECITALS

**WHEREAS**, Landlord owns the real property described on **Exhibit A** attached hereto and by this reference made a part hereof (the "**Parent Parcel**"); and

**WHEREAS**, Landlord (or its predecessor-in-interest) and Tenant (or its predecessor-in-interest) entered into that certain Land Lease Agreement dated February 17, 2009 (as the same may have been amended, collectively, the "**Lease**"), pursuant to which the Tenant leases a portion of the Parent Parcel and is the beneficiary of certain easements for access and public utilities, all as more particularly described in the Lease (such portion of the Parent Parcel so leased along with such portion of the Parent Parcel so affected, collectively, the "**Leased Premises**"), which Leased Premises are also described on **Exhibit A**; and

**WHEREAS**, Tenant, Verizon Communications Inc., a Delaware corporation, and other parties identified therein, entered into a Management Agreement and a Master Prepaid Lease, both with an effective date of March 27, 2015 and both with ATC Sequoia LLC, a Delaware limited liability company ("**American Tower**"), pursuant to which American Tower subleases, manages, operates and maintains, as applicable, the Leased Premises, all as more particularly described therein; and

**WHEREAS**, Tenant has granted American Tower a limited power of attorney (the "**POA**") to, among other things, prepare, negotiate, execute, deliver, record and/or file certain documents on behalf of Tenant, all as more particularly set forth in the POA; and

**WHEREAS**, Landlord and Tenant desire to amend the terms of the Lease to extend the term thereof and to otherwise modify the Lease as expressly provided herein.

**NOW THEREFORE**, in consideration of the foregoing recitals and the mutual covenants set forth herein and other good and valuable consideration, the receipt, adequacy, and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

1. **One-Time Payment.** Tenant shall pay to Landlord a one-time payment in the amount of **Twenty Five Thousand and No/100 Dollars (\$25,000.00)**, payable within thirty (30) days of the Effective Date and subject to the following conditions precedent: (a) Tenant's receipt of this Amendment executed by Landlord, on or before December 16, 2016; (b) Tenant's confirmation that Landlord's statements as further set forth in this Amendment are true, accurate, and complete, including verification of Landlord's ownership; (c) Tenant's receipt of any documents and other items reasonably requested by Tenant in order to effectuate the transaction and payment contemplated herein; and (d) receipt by Tenant of an original Memorandum (as defined herein) executed by Landlord.

2. **Lease Term Extended.** Notwithstanding anything to the contrary contained in the Lease or this Amendment, the Parties agree the Lease originally commenced on December 1, 2009 and, without giving

effect to the terms of this Amendment but assuming the exercise by Tenant of all remaining renewal options contained in the Lease (each an “**Existing Renewal Term**” and, collectively, the “**Existing Renewal Terms**”), the Lease is otherwise scheduled to expire on November 30, 2034. In addition to any Existing Renewal Term(s), the Lease is hereby amended to provide Tenant with the option to extend the Lease for each of six (6) additional five (5) year renewal terms (each a “**New Renewal Term**” and, collectively, the “**New Renewal Terms**”). Notwithstanding anything to the contrary contained in the Lease, (a) all Existing Renewal Terms and New Renewal Terms shall automatically renew unless Tenant ATC Site No: 414041 VZW Site No: 159983 Site Name: Heber CA SQA notifies Landlord that Tenant elects not to renew the Lease at least sixty (60) days prior to the commencement of the next Renewal Term (as defined below) and (b) Landlord shall be able to terminate this Lease only in the event of a material default by Tenant, which default is not cured within sixty (60) days of Tenant’s receipt of written notice thereof, provided, however, in the event that Tenant has diligently commenced to cure a material default within sixty (60) days of Tenant’s actual receipt of notice thereof and reasonably requires additional time beyond the sixty (60) day cure period described herein to effect such cure, Tenant shall have such additional time as is necessary (beyond the sixty [60] day cure period) to effect the cure. References in this Amendment to “**Renewal Term**” shall refer, collectively, to the Existing Renewal Term(s) and the New Renewal Term(s). The Landlord hereby agrees to execute and return to Tenant an original Memorandum of Lease in the form and of the substance attached hereto as **Exhibit B** and by this reference made a part hereof (the “**Memorandum**”) executed by Landlord, together with any applicable forms needed to record the Memorandum, which forms shall be supplied by Tenant to Landlord.

3. **Rent and Escalation.** The Parties hereby acknowledge and agree that the rental payment under the Lease is currently and shall remain **One Thousand Four Hundred Ninety Five and 00/100 Dollars (\$1,495.00)** per month (the “**Rent**”). On December 1, 2019, Rent payable from Tenant to Landlord under the Lease is hereby increased to **One Thousand Five Hundred Thirty Nine and 85/100 Dollars (\$1,539.85)** per month. Commencing on December 1, 2020 and on each successive annual anniversary thereof, Rent due under the Lease shall increase by an amount equal to **three percent (3%)** of the then current Rent. Notwithstanding anything to the contrary contained in the Lease, all Rent and any other payments expressly required to be paid by Tenant to Landlord under the Lease and this Amendment shall be paid to **HEBER CA PUBLIC UTILITY DIST.** The escalations in this Section shall be the only escalations to the Rent and any/all escalations in the Lease are hereby null and void and of no further force and effect.

4. **Landlord and Tenant Acknowledgments.** Except as modified herein, the Lease and all provisions contained therein remain in full force and effect and are hereby ratified and affirmed. The Parties hereby agree that no defaults exist under the Lease. To the extent Tenant needed consent and/or approval from Landlord for any of Tenant’s activities at and uses of the site prior to the Effective Date, including subleasing to American Tower, Landlord’s execution of this Amendment is and shall be considered consent to and approval of all such activities and uses and confirmation that no additional consideration is owed to Landlord for such activities and uses. Landlord hereby acknowledges and agrees that Tenant shall not need consent or approval from, or to provide notice to, Landlord for any future activities at or uses of the Leased Premises, including, without limitation, subleasing and licensing to additional customers, installing, modifying, repairing, or replacing improvements within the Leased Premises, and/or assigning all or any portion of Tenant’s interest in this Lease, as modified by this Amendment. Tenant and Tenant’s sublessees and customers shall have vehicular (specifically including truck) and pedestrian access to the Leased Premises from a public right of way on a 24 hours per day, 7 days per week basis, together with utilities services to the Leased Premises from a public right of way. Upon request by Tenant and at Tenant’s sole cost and expense, Landlord hereby agrees to promptly execute and return to Tenant building permits, zoning applications and other forms and documents, including a memorandum of lease, as required for the use of the Leased Premises by Tenant and/or Tenant’s customers, licensees, and sublessees. The terms, provisions, and conditions of this Section shall survive the execution and delivery of this Amendment.

5. **Limited Right of First Refusal.** Notwithstanding anything to the contrary contained herein, this paragraph shall not apply to any fee simple sale of the Parent Parcel from Landlord to any prospective purchaser that is not a Third Party Competitor (as herein defined) or to American Tower. If Landlord receives an offer or desires to offer to: (i) sell or convey any interest (including, but not limited to, leaseholds or easements) in any real property of which the Leased Premises is a part to any person or entity directly or ATC Site No: 414041 VZW Site No: 159983 Site Name: Heber CA SQA indirectly engaged in the business of owning, acquiring, operating, managing, investing in or leasing wireless telecommunications infrastructure (any such person or entity, a **“Third Party Competitor”**) or (ii) assign all or any portion of Landlord’s interest in the Lease to a Third Party Competitor (any such offer, the **“Offer”**), Tenant shall have the right, exercisable in Tenant’s sole and absolute discretion, of first refusal to purchase the real property or other interest being offered by Landlord in connection with the Offer on the same terms and conditions. If Tenant elects, in its sole and absolute discretion, to exercise its right of first refusal as provided herein, Tenant must provide Landlord with notice of its election not later than forty-five (45) days after Tenant receives written notice from Landlord of the Offer. If Tenant elects not to exercise Tenant’s right of first refusal with respect to an Offer as provided herein, Landlord may complete the transaction contemplated in the Offer with the Third Party Competitor on the stated terms and price but with the express condition that such sale is made subject to the terms of the Lease, as modified by this Amendment. Landlord hereby acknowledges and agrees that any sale or conveyance by Landlord in violation of this Section is and shall be deemed to be null and void and of no force and effect. The terms, provisions, and conditions of this Section shall survive the execution and delivery of this Amendment. For the avoidance of doubt, American Tower, its affiliates and subsidiaries, shall not be considered a Third Party Competitor and this provision shall not apply to future transactions with American Tower, its affiliates and subsidiaries.

6. **Landlord Statements.** Landlord hereby represents and warrants to Tenant that: (i) to the extent applicable, Landlord is duly organized, validly existing, and in good standing in the jurisdiction in which Landlord was organized, formed, or incorporated, as applicable, and is otherwise in good standing and authorized to transact business in each other jurisdiction in which such qualifications are required; (ii) Landlord has the full power and authority to enter into and perform its obligations under this Amendment, and, to the extent applicable, the person(s) executing this Amendment on behalf of Landlord, have the authority to enter into and deliver this Amendment on behalf of Landlord; (iii) no consent, authorization, order, or approval of, or filing or registration with, any governmental authority or other person or entity is required for the execution and delivery by Landlord of this Amendment; (iv) Landlord is the sole owner of the Leased Premises and all other portions of the Parent Parcel; (v) to Landlord’s knowledge, there are no agreements, liens, encumbrances, claims, claims of lien, proceedings, or other matters (whether filed or recorded in the applicable public records or not) related to, encumbering, asserted against, threatened against, and/or pending with respect to the Leased Premises or any other portion of the Parent Parcel which do or could (now or any time in the future) adversely impact, limit, and/or impair Tenant’s rights under the Lease, as amended and modified by this Amendment; and (vi) the square footage of the Leased Premises is the greater of Tenant’s existing improvements on the Parent Parcel or the land area conveyed to Tenant under the Lease. The representations and warranties of Landlord made in this Section shall survive the execution and delivery of this Amendment. Landlord hereby does and agrees to indemnify Tenant for any damages, losses, costs, fees, expenses, or charges of any kind sustained or incurred by Tenant as a result of the breach of the representations and warranties made herein or if any of the representations and warranties made herein prove to be untrue. The aforementioned indemnification shall survive the execution and delivery of this Amendment.

7. **Notices.** All notices must be in writing and shall be valid upon receipt when delivered by hand, by nationally recognized courier service, or by First Class United States Mail, certified, return receipt requested to the addresses set forth herein: to Landlord at: 1078 Dogwood Road, Suite 103, Heber, CA 92249; to Tenant at: Verizon Wireless, Attn. Network Real Estate, 180 Washington Valley Road, Bedminster, NJ 07921; with

copy to: American Tower, Attn: Land Management, 10 Presidential Way, Woburn, MA 01801; and also with copy to: Attn Legal Dept. 116 Huntington Avenue, Boston, MA 02116. Any of the Parties, by thirty (30) days prior written notice to the others in the manner provided herein, may designate one or more different notice addresses from those set forth above. Refusal to accept ATC Site No: 414041 VZW Site No: 159983 Site Name: Heber CA SQA delivery of any notice or the inability to deliver any notice because of a changed address for which no notice was given as required herein, shall be deemed to be receipt of any such notice.

8. **Counterparts.** This Amendment may be executed in several counterparts, each of which when so executed and delivered, shall be deemed an original and all of which, when taken together, shall constitute one and the same instrument, even though all Parties are not signatories to the original or the same counterpart. Furthermore, the Parties may execute and deliver this Amendment by electronic means such as .pdf or similar format. Each of the Parties agrees that the delivery of the Amendment by electronic means will have the same force and effect as delivery of original signatures and that each of the Parties may use such electronic signatures as evidence of the execution and delivery of the Amendment by all Parties to the same extent as an original signature.

9. **Governing Law.** Notwithstanding anything to the contrary contained in the Lease and in this Amendment, the Lease and this Amendment shall be governed by and construed in all respects in accordance with the laws of the State or Commonwealth in which the Leased Premises is situated, without regard to the conflicts of laws provisions of such State or Commonwealth.

10. **Tenant's Securitization Rights; Estoppel.** Landlord hereby consents to the granting by Tenant and/or American Tower of one or more leasehold mortgages, collateral assignments, liens, and/or other security interests (collectively, a "**Security Interest**") in Tenant's (or American Tower's) interest in this Lease, as amended, and all of Tenant's (or American Tower's) property and fixtures attached to and lying within the Leased Premises and further consents to the exercise by Tenant's (or American Tower's) mortgagee ("**Tenant's Mortgage**") of its rights to exercise its remedies, including without limitation foreclosure, with respect to any such Security Interest. Landlord shall recognize the holder of any such Security Interest of which Landlord is given prior written notice (any such holder, a "**Holder**") as "Tenant" hereunder in the event a Holder succeeds to the interest of Tenant and/or American Tower hereunder by the exercise of such remedies. Landlord further agrees to execute a written estoppel certificate within thirty (30) days of written request of the same by Tenant, American Tower or Holder.

[SIGNATURES COMMENCE ON FOLLOWING PAGE]

ATC Site No: 414041 VZW Site No: 159983 Site Name: Heber CA SQA

**LANDLORD:**

**Heber Public Utility District**

Signature:

\_\_\_\_\_  
Print Name:

\_\_\_\_\_  
Title:

\_\_\_\_\_  
Date:

\_\_\_\_\_