

**CITY OF BILOXI
AGENDA ITEM
FACT SHEET**

Item No.: 5 I

Council Meeting Date: April 5, 2022

ITEM TITLE: RESOLUTION
INTRODUCED BY: Mayor Andrew "FoFo" Gilich

CONTACT PERSON: E. Michael Leonard, CAO 
Peter Abide, City Attorney

SUMMARY EXPLANATION:

Resolution authorizing entry into Second Amendment to Water Tower Option and Lease Agreement with T-Mobile South, LLC regarding the lease of space on the Margaret Sherry Tower Site (2145 Popps Ferry Road)

Resolution Ordinance _____ Public Hearing _____ Routine Agenda _____

Exhibits for Review

Contract Minutes _____ Plans/Maps _____ Deed _____ Lease _____

Other (Specify): Exhibit A: Second Amendment

Submittal Authorization: Council President _____ Mayor

STAFF RECOMMENDATION: Staff recommends approval

COUNCIL ACTION: Motion By: _____ Second By: _____

Vote:	<u>Councilmember</u>	<u>Yes</u>	<u>No</u>	<u>Other</u>	<u>Councilmember</u>	<u>Yes</u>	<u>No</u>	<u>Other</u>
	Lawrence	___	___	___	Tisdale	___	___	___
	Gines	___	___	___	Glavan	___	___	___
	Newman	___	___	___	Barrett	___	___	___
	Deming	___	___	___				

ACTION TAKEN:

Resolution No.

RESOLUTION AUTHORIZING ENTRY INTO SECOND AMENDMENT TO WATER TOWER OPTION AND LEASE AGREEMENT WITH T-MOBILE SOUTH, LLC REGARDING THE LEASE OF SPACE ON THE MARGARET SHERRY TOWER SITE (2145 POPPS FERRY ROAD)

WHEREAS, by Resolution No. 668-99, the governing authorities of the City of Biloxi (the "City") approved entry into that certain Water Tower Option and Lease Agreement (the "Agreement"), dated November 16, 1999, with Digiph PCS, Inc. for the lease of space located on top of the City's water tower at 2145 Popp's Ferry Road for the purposes of installing and maintaining wireless telecommunication equipment in exchange for compensation in the amount of Eighteen Thousand and 00/100 Dollars (\$18,000.00) per year, with a twelve percent (12%) increase every five (5) years;

WHEREAS, by Resolution No. 799-00, the City's governing authorities approved entry into a Consent and Estoppel Agreement, recognizing the transfer of the Agreement to Eliska Wireless Ventures I, Inc. as a result of Digiph PCS, Inc.'s assignment of interest;

WHEREAS, by Resolution No. 256-09, the City's governing authorities approved an Amendment to the Agreement, dated July 8, 2010, with Powertel/Memphis, Inc. d/b/a T-Mobile ("PowerTel"), as successor in interest to Digiph PCS, Inc. and Eliska Wireless Ventures I, Inc., and providing for the installation of additional equipment in exchange for additional compensation of Six Thousand Four Hundred Eighty and 00/100 Dollars (\$6,480.00) per year, subject to all terms and conditions of the Agreement, including the twelve percent (12%) increase every

five (5) years;

WHEREAS, by Resolution No. 265-14, the City's governing authorities consented to PowerTel's installation of additional equipment, with no increase to the annual rent;

WHEREAS, by Resolution No. 560-19, the City's governing authorities consented to PowerTel's installation of additional equipment, with no increase to the annual rent;

WHEREAS, by Resolution No. 819-19, the City consented to the assignment of all of PowerTel's rights and obligations under the Lease to T-Mobile South, LLC ("T-Mobile");

WHEREAS, by Resolution No. 499-20, the City consented to T-Mobile's removal of certain equipment and the installation of new equipment as part of a technology upgrade, with no increase to the annual rent;

WHEREAS, the Agreement will expire on December 27, 2024;

WHEREAS, the Second Amendment to Water Tower Option and Lease Agreement (the "Amendment"), attached hereto as Exhibit "A," will extend the Agreement for an additional five (5) years, with five (5) renewal terms of five (5) years each, for a total possible term of thirty (30) years, with a two and one-half percent (2.5%) increase in rent each year, beginning in December of 2026; and

WHEREAS, it is the recommendation of Peter C. Abide, City Attorney, that the City enter the Amendment with T-Mobile, extending the lease of space on the City's water tower located at 2145 Popp's Ferry Road.

NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND THE CITY COUNCIL OF THE CITY OF BILOXI, MISSISSIPPI, AS FOLLOWS:

SECTION ONE: The findings, conclusions, and statements of fact contained in the foregoing preamble are hereby adopted, ratified and incorporated herein.

SECTION TWO: The Mayor is hereby authorized to execute, on behalf of the City of Biloxi, the Second Amendment to Water Tower Option and Lease Agreement, attached hereto as Exhibit "A," with T-Mobile South, LLC for the lease of space on the City's water tower located at 2145 Poppo Ferry Road.

SECTION THREE: This resolution shall take effect and be in force from and after adoption.

SECOND AMENDMENT TO WATER TOWER OPTION AND LEASE AGREEMENT

**EXHIBIT
A**

This Second Amendment to Water Tower Option and Lease Agreement (the "**Second Amendment**") is effective as of the last signature below (the "**Effective Date**"), by and between City of Biloxi, a Mississippi corporation ("**Lessor or Landlord**"), and T-Mobile South LLC, a Delaware limited liability company ("**Lessee or Tenant**") (each a "**Party**", or collectively, the "**Parties**").

Lessor and Lessee (or their predecessors-in-interest) entered into that certain Water Tower Option and Lease Agreement dated November 29, 1999 including that certain Amendment to Water Tower Option and Lease Agreement dated July 8, 2010 (including all amendments, collectively, the "**Agreement**") regarding the leased premises ("**Leased Premises**") located at 2499 Popps Ferry Road, Biloxi, Mississippi (the "**Property**").

1. At the expiration of the current term on December 27, 2024, the Lease shall automatically renew for five (5) additional and successive five (5) year terms (each a "**Renewal Term**"), unless Tenant notifies Landlord, in writing, of Tenant's intention not to extend the Lease at least thirty (30) days prior to the expiration of the current Renewal Term.
2. Notwithstanding anything to the contrary in the Agreement, starting on December 28, 2024 (the "**Revised Rent Date**"), Lessee shall pay Lessor Thirty Six Thousand Five Hundred and 51/100 Dollars (\$36,451.61) per year as Rent, partial calendar year to be prorated in advance, by the fifth (5th) day of each calendar month. Thereafter, notwithstanding anything contrary in the Agreement, the Rent will escalate by 2.5% on December 28th, 2026 and each anniversary thereafter. Where duplicate Rent would occur, a credit shall be taken by Lessee for any prepayment of Rent by Lessee.
3. Upon the Effective Date of the Second Amendment, in addition to any rights set forth in the Agreement Lessee and its employees, representatives and agents will have twenty-four (24) hour access, seven (7) days per week to the Leased Premises at no additional charge.
4. Notwithstanding anything to the contrary in the Agreement and as of the Effective Date of this Second Amendment, the Leased Premises may be used for: (a) the transmission and reception of communication signals; and (b) upon notice to Lessor, and for no fee or additional consideration, the construction, installation, operation, maintenance, repair, addition, upgrading, removal or replacement of any and all Communications Facility (collectively, the "**Permitted Uses**").
5. Section 26 of the Water Tower Option and Lease Agreement is hereby deleted in its entirety and replaced with the following:
 - a. Notwithstanding anything to the contrary in the Agreement and as of the Effective Date of the Second Amendment, Lessee may terminate the Agreement without further liability, for any or no reason, upon thirty (30) days' prior written notice to

Lessor and a termination fee of three (3) months' of the current Rent ("**Termination Fee**").

6. If Lessor desires to redevelop, modify, remodel, alter the Property or make any improvements thereon ("**Redevelopment**") and both Parties agree that the Redevelopment necessitates relocation of Communications Facility, then: (i) Lessor may require Lessee to relocate Communications Facility once during the Term of the Agreement; (ii) Lessor shall give Lessee not less than twenty-four (24) months' written notice prior to relocation; (iii) both Parties shall agree upon a suitable area for the relocation; (iv) all costs and expenses associated with or arising out of the relocation, including approval and permitting costs, shall be paid by Lessor; (v) the relocation shall be performed exclusively by Lessee or its agents; (vi) the relocation shall not limit or interfere with Lessee's Permitted Uses of the Leased Premises; (vii) the relocation shall not result in any interruption, impairment or alteration of the communications services or quality thereof provided from the Communications Facility; and (viii) if the Parties cannot agree upon a suitable area for relocation, then Lessee may terminate the Agreement in its reasonable judgment upon written notice to Lessor, without penalty or further obligation.
7. Should temporary relocation of the Communications Facility be required for Lessor repairs to a Water Tower or the Leased Premises, then: (i) Lessor may require Lessee to temporarily relocate Lessee's Communications Facility once per each Renewal Term of the Agreement ("**Temporary Relocation**"); (ii) Lessor shall provide Lessee at least six (6) months' prior written notice of any repairs, maintenance or other work (the "**Work**"), which would require the Temporary Relocation; (iii) the Work will not limit or interfere with Lessee's Permitted Uses; and (iv) Lessor will reimburse Lessee for all expenses incurred by Lessee required to accommodate the Work. Lessee may elect to install a temporary communications facility (e.g. a "cell on wheels," or "COW") in another mutually agreeable location on the Property that provides Lessee coverage and service levels similar to those of the Communications Facility at the original location, while the Work is being performed. Lessee shall have the right to reinstall the Communications Facility immediately upon the completion of the Work.
8. All notices, requests, demands and other communications shall be in writing and shall be deemed to have been delivered upon receipt or refusal to accept delivery, and are effective only when deposited into the U.S. certified mail, return receipt requested, or when sent via a nationally recognized courier to the addresses set forth below. Lessor or Lessee may from time to time designate any other address for this purpose by providing written notice to the other Party.

If to Lessee:

T-Mobile USA, Inc.
12920 SE 38th Street
Bellevue, WA 98006
Attn: Lease Compliance/ 9MT0043A

If to Lessor:

City of Biloxi
140 Lemeuse St
Biloxi, Mississippi 39533

9. Lessee and Lessor will reasonably cooperate with each other's requests to approve permit applications and other documents related to the Property without additional payment or consideration.
10. Lessor will execute a Memorandum of Agreement at Lessee's request. If the Property is encumbered by a deed, mortgage or other security interest, Lessor will also execute a subordination, non-disturbance and attornment agreement.
11. Any charges payable under the Agreement other than Rent shall be billed by Lessor to Lessee within twelve (12) months from the date in which the charges were incurred or due; otherwise the same shall be deemed time-barred and be forever waived and released by Lessor.
12. Except as expressly set forth in this Second Amendment, the Agreement otherwise is unmodified. To the extent any provision contained in this Second Amendment conflicts with the terms of the Agreement, the terms and provisions of this Second Amendment shall control. Each reference in the Agreement to itself shall be deemed also to refer to this Second Amendment.
13. This this Second Amendment may be executed in duplicate counterparts, each of which will be deemed an original. Signed electronic, scanned, or facsimile copies of this this Second Amendment will legally bind the Parties to the same extent as originals.
14. Each of the Parties represents and warrants that it has the right, power, legal capacity and authority to enter into and perform its respective obligations under this Second Amendment. Lessor represents and warrants to Lessee that the consent or approval of a third party has either been obtained or is not required with respect to the execution of Second Amendment. If Lessor is represented by any property manager, broker or any other leasing agent ("Agent"), then (a) Lessor is solely is responsible for all commission, fees or other payment to Agent and (b) Lessor shall not impose any fees on Lessee to compensate or reimburse Lessor for the use of Agent, including any such commissions, fees or other payments arising from negotiating or entering into this Second Amendment or any future amendment.
15. This Second Amendment will be binding on and inure to the benefit of the Parties herein, their heirs, executors, administrators, successors-in-interest and assigns.

IN WITNESS, the Parties execute this Second Amendment as of the Effective Date.

Lessor:

City of Biloxi, a municipal corporation

By: _____

Print Name: _____

Title: _____

Date: _____

Lessee:

T-Mobile South LLC, a Delaware limited liability company

By: _____

Print Name: _____

Title: _____

Date: _____