From: Shank, Aaron M. <AShank@porterwright.com>
Date: Monday, June 7, 2021 at 8:03 AM
To: Eric Rodriguez <erodriguez@cityofsanmateo.org>, Rick Bonilla <RBonilla@cityofsanmateo.org>, Joe Goethals <jgoethals@cityofsanmateo.org>, Amourence Lee <alee@cityofsanmateo.org>, Diane Papan <dpapan@cityofsanmateo.org>
Cc: WYLIE, BRIAN D (Legal) <bw9895@att.com>, Caitlin McLester <cmclester@modusllc.com>
Subject: AT&T's comments on proposed wireless facilities regulations

Dear Mayor Rodriguez, Deputy Mayor Bonilla, and Councilmembers Goethals, Lee, and Papan: Please accept the attached comments on behalf of New Cingular Wireless PCS, LLC d/b/a AT&T Mobility (AT&T) in connection with the City of San Mateo's proposed ordinance and design guidelines for wireless facilities. Please consider these comments in connection with Item #25 on this evening's City Council agenda. And please let us know if you have questions. Thank you.

Aaron M. Shank
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AT&T's Comments on San Mateo, CA's Wireless Communications Facilities in the Public Right-of-Way Ordinance and Design Standards

- AT&T thanks the city for considering changes to its wireless regulations. AT&T offers the following comments and summary of key legal concepts to help the city revise its regulations to foster responsible deployments and to fully comply with applicable laws.

Key Legal Concepts

- The Federal Telecommunications Act of 1996 ("Act") establishes key limitations on local regulations. Under the Act, the city must not prohibit or effectively prohibit wireless services. *See* 47 U.S.C. §§ 253(a), 332(c)(7)(B)(i)(II). The city must act "within a reasonable period of time" on each application. 47 U.S.C. § 332(c)(7)(B)(ii).

- The FCC has codified "shot clocks" – presumptive maximum timeframes for processing applications. Violations of the shot clocks may result in unlawful effective prohibitions under the Act, and can result in deemed approval under state law. Cal. Govt. Code § 65964.1(a). Similarly, eligible facilities requests (EFRs) are deemed granted under federal law when the city fails to approve within the shot clock. The FCC has made clear that the city must grant all necessary approvals and authorizations within the applicable shot clock,[1] and the shot clock applies "to all aspects of and steps in the siting process."[2]

- Section 6409(a) of the 2012 Spectrum Act, 47 U.S.C. § 1455(a), requires the city to approve modifications to the extent they do not substantially change the physical dimensions of the existing facilities. The FCC has established objective criteria to determine whether a proposal is an EFR that must be approved (*see* 47 C.F.R. § 1.6100(b)(7)), and the FCC has established procedures, including a 60-day shot clock and a deemed grant remedy for failure to timely approve an EFR (*see* 47 C.F.R. § 1.6100(c)). The FCC also released two orders in 2020 that provide additional interpretation and guidance on EFRs that the city must approve.

- The FCC's *Small Cell Order* established an aesthetic standard for small cells. To be lawful, aesthetic requirements must be reasonable, i.e., technically feasible and published in advance.[3]

- The FCC's *Small Cell Order* also established a standard and safe harbor for lawful fees for small cell applications. To be lawful and passed on to applicants, fees must be reasonable, cost-based, and nondiscriminatory. Excessive fees cannot be charged to applicants even if they represent true costs.[4] The FCC's safe harbor sets the ceiling for

[1] *See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment,* Declaratory Ruling and Third Report and Order, FCC 18-133, 30 FCC Rcd 9088 at ¶¶ 132-137. (September 27, 2018) ("*Small Cell Order*").
[2] *Id.* at ¶ 132.
[3] *Id*. at ¶ 50.
[4] *Id*. at ¶ 70. Federal courts have reached the same conclusion with respect to applications for other wireless facilities as well.

presumptively reasonable fees, and the city bears the burden to show that any additional fees are justified under the fee standard. The Ninth Circuit U.S. Court of Appeals has upheld the FCC's fee standard, including the FCC's safe harbor fee amounts.

- AT&T has a statewide franchise right to access and construct telecommunications facilities in the public rights-of-way under Public Utilities Code Section 7901.

AT&T's Comments

- Placements of Freestanding Poles. Banning placement of facilities on freestanding poles in residential areas, "near" schools, and parks is too imprecise and creates a substantial risk of effectively prohibiting wireless services. Considering the layout of San Mateo, this requirement will likely result in broad prohibitions of service in violation of the Telecommunications Act of 1996. There are large residential parts of the city where well-designed small cells will need to be sited to meet customer needs, so the city should amend its design standards to express siting preferences rather than prohibitions. Further, to the extent these restrictions amount to an indirect means to address fears about radio frequency emissions, they are preempted by federal law. Moreover, a 250-foot separation between sites on freestanding poles is unreasonable in areas with high network traffic (such as intersections).

- Prohibited Attachments. The design standards improperly ban attachments to non-standard, decorative streetlights, wooden streetlights, or traffic signals. The city must avoid restrictions that could broadly prohibit service in certain parts of the city. Traffic light attachments preserve aesthetics by allowing providers to cover busy areas in multiple directions from one site. And the city should allow new or replacement decorative poles housing wireless facilities that are designed to look similar to nearby decorative poles.

- Fees. The city needs to bring its fees for wireless permits in line with federal law. The fees far exceed the FCC's safe harbor for lawful small cell fees, and the city has not provided justification for the fees. The city also should not incur $4,000 in EFR review costs. Federal law mandates approval of EFRs, and the FCC has provided applicable objective criteria for review of EFRs, so only minimal time and resources would be needed to review EFR requests.

- Eligible Facilities Requests. Many of the city's application requirements apply to EFRs. Federal law, however, expressly limits the scope of the city's review of EFRs, so the city can only require information reasonably related to determining whether a request qualifies as an EFR. The city's application requirements and checklist seek more documents and information than is necessary to determine whether a request is for an EFR. The city must limit its requirements to the Section 6409 Evaluation form outlined in its application checklist.

- Duration of an EFR Permit. The city cannot limit an EFR permit's duration to the term of the underlying permit because California law requires a minimum term of 10 years for wireless siting approvals.

- Project Purpose and Technical Objective (Non-EFRs). The city requires applicants to describe technical objectives, submit propagation maps, and provide a written narrative describing the uses of its facilities as part of an application package. Providers should not need to justify or demonstrate the need of a proposed facility. Indeed, the FCC has rejected all "coverage gap" tests, including specifically rejecting the judicially-created least intrusive means test for filling a coverage gap.[5] Moreover, the required information doesn't make sense for small cell deployments.

- Alternative Site Analysis (Small Cells). Rather than requiring an alternative site analysis for each wireless permit application, AT&T echoes Verizon's suggestion that the city narrow its requirement to evaluating any more preferred locations within 250 feet of the provider's chosen site, and to demonstrate that those locations are technically infeasible or unavailable.

- Accessory Equipment Volume (Small Cells). The city must allow up to 28 cubic feet of accessory equipment to be consistent with 47 C.F.R. § 1.6002(l)(3).

- Neighborhood Meeting. Strongly encouraging a neighborhood meeting is unnecessary, likely unproductive, and serves only to drive up costs and risk shot clock compliance. This is especially so for EFRs, which the city must promptly approve.

- Consultants. The city needs to be careful and limit its use of consultants to technical matters, such as structural analysis. The FCC has cautioned municipalities against excessive charges, including fees for consultant review, which cannot be passed on to applicants.

- Notice. A 500-foot radius for public noticing and a requirement to maintain a log of all communications from residents is excessive for low-power, low-profile small cells. A notice requirement for EFRs is also unnecessary because the city "may not deny, and shall approve" applications for EFRs that meet the requirements of Section 6409(a).

- Appeals. The city's appeal process sets the city up to violate the shot clock on a regular basis resulting in effective prohibition for small cells and deemed grants for EFRs.

- Less Obtrusive Designs. AT&T asks that the city clarify that it will not require providers to upgrade small cells using "less obtrusive" designs in the middle of a permit term (which cannot be shorter than ten years per state law). AT&T also cautions the city against dictating technology, which is preempted by federal law.

[5] *Small Cell Order* at ¶ 40, n.94.

- Pole Top Antennas. The city should reconsider requiring antennas to be placed on top of poles, which will unlawfully prohibit wireless service by unduly limiting technology and equipment configurations. And side-mounted antennas are sometimes required due to space constraints on existing utility poles.

- Network Map. The city should not require an applicant's network map identifying future facilities planned within two years. AT&T does not have a list of facilities planned far into the future as its facility plans are constantly developing to address network needs.

- Locating Hardware Inside the Pole. The city requires conduit, wires, and other hardware to be located within the pole. To avoid prohibitions, these types of requirements should be revised by adding "to the extent feasible."

- Undergrounding. Requirements that equipment be installed underground need to be limited to the extent reasonably feasible and practical. Antennas and radios need to be above ground near enough to one another to function properly. And undergrounding requirements are unnecessary for stealth sites.

- Electric Meters. One of the city's conditions of approval requires providers to swap out electric meters in the middle of a permit term under certain circumstances. Once AT&T installs a separate or ground-mounted electric meter, the facility is permitted to remain for the permit term.

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Sent: Monday, June 7, 2021 11:13 AM
To: Eric Rodriguez <erodriguez@cityofsanmateo.org>; Rick Bonilla <RBonilla@cityofsanmateo.org>; Joe Goethals <jgoethals@cityofsanmateo.org>; Amourence Lee <alee@cityofsanmateo.org>; Diane Papan <dpapan@cityofsanmateo.org>; City Council (San Mateo) <CityCouncil@cityofsanmateo.org>; Clerk <clerk@cityofsanmateo.org>
Cc: Barbara Choi <bchoi@abc-law.com>; Tracy Scramaglia <tscramaglia@cityofsanmateo.org>
Subject: Verizon Wireless Comments on Ordinance and Design Standards, Wireless Facilities in the Right-of-Way - Tonight's Council Agenda Item 25 [San Mateo]

Dear Councilmembers, attached please find our letter prepared on behalf of Verizon Wireless providing comment on the draft ordinance and design standards regulating wireless facilities in the right-of-way. This item will be heard on you agenda this evening.

We urge the Council to make our suggested revisions prior to final adoption.

Thank you.

Paul
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June 7, 2021

VIA EMAIL

Mayor Eric Rodriguez
Deputy Mayor Rick Bonilla
Council Members Joe Goethals,
Amourence Lee, and Diane Papan
City Council
City of San Mateo
330 West 20th Avenue
San Mateo, California 94403

Re: Draft Ordinance, Design Standards and Application Requirements
Wireless Facilities in the Right-of-Way
Council Agenda Item 25, June 7, 2021

Dear Mayor Rodriguez, Deputy Mayor Bonilla, and Council Members:

We write on behalf of Verizon Wireless regarding the draft ordinance regulating wireless facilities in the right-of-way and the accompanying *Design Standards and Application Requirements* (the "Draft Standards"). Verizon Wireless appreciates the City's initiative to expedite review of small cell applications through code amendments that streamline the permit process. As we explain, a few requirements of the Draft Standards should be revised to align with Federal Communications Commission ("FCC") regulations and state law. In particular, pole height and pole-top antenna requirements contradict state safety regulations of Public Utilities Commission General Order 95, and propagation maps cannot be required for small cells in the right-of-way. We urge the Council to implement our suggested revisions prior to final adoption of the ordinance and Draft Standards.

In its 2018 Infrastructure Order, the FCC confirmed that a city's aesthetic criteria for small cells must be "reasonable," that is, technically feasible and meant to avoid "out-of-character" deployments, and also "published in advance."[1] The FCC also found that

[1] *See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment,* Declaratory Ruling and Third Report and Order, 33 FCC Rcd. 9088, ¶¶ 86-87 (September 27, 2018). Last year, the Ninth Circuit Court of Appeals upheld these FCC requirements. *See City of Portland v. United States,* 969 F.3d 1020 (9th Cir. 2020), petition for cert. pending, No. 20-1354 (filed March 22, 2021).

that local requirements that "materially inhibit" service improvements and new technology constitute an effective prohibition of service under the Telecommunications Act.[2]

Our comments on the Draft Standards are as follows.

Draft Standards (pp. 4-6)

1. Least obtrusive. Despite a revision striking a reference to installations in other jurisdictions, this criterion is still problematic. The vague "least obtrusive" criteria could be used to deny small cells that otherwise satisfy the City's more specific design standards. Such denials frustrate staff in their faithful implementation of the standards, as well as applicants, and also "materially inhibit" service improvements in violation of federal law. *This item should be deleted.*

2. Pole heights minimized. While this provision properly acknowledges the antenna separation distance above utility pole conductors required by General Order 95, it also must allow for the antenna itself. Further, pole-top antennas may be placed on utility poles that do not carry electricity and are not subject to General Order 95. *The phrase should be revised to read: "…four feet, plus the minimum separation from supply lines required by CPUC General Order 95…."*

13. Antennas. This provision requires placement of antennas at the top of a pole. However, for utility poles that carry electricity, antennas may be mounted to the middle of the pole in the communication utility zone, below electric conductors. If a mid-mount is required per General Order 95 or PG&E safety rules, then mandating a pole-top antenna would be technically infeasible and unreasonable. *This provision must be revised to accommodate mid-mount antennas on utility poles. The utility pole standards (pp. 21-22) should be revised accordingly.*

17. Utilities. The City cannot forbid new aerial lines where there are already lines attached to a utility pole. An additional line is not "out-of-character" among existing aerial lines, and the standard would be unreasonable according to the FCC. This attempts to regulate the electric and communication backhaul lines belonging to other companies, installed under separate franchises or permits. *The City should allow new aerial lines where already attached to utility poles.*

Application Requirements

Project purpose and technical objectives. This information bears no relation to the required findings and standards for approval right-of-way facilities. Further, the City cannot require such information regarding need because Public Utilities Code Section 7901 grants telephone corporations such as Verizon Wireless a statewide right to place their equipment along any right-of-way. The FCC determined that small cells are needed to enhance service, introduce new services and densify networks, which are Verizon

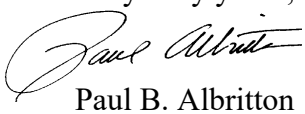
[2] *Id.*, ¶¶ 35-37.

Wireless's objectives in placing small cells in San Mateo. The FCC also disfavored dated service standards based on "coverage gaps" and the like, so the coverage/capacity information, propagation maps, drive test data and network maps sought by this submittal requirement are preempted.[3] *This submittal requirement should be deleted.*

Alternative site analysis. If a proposed small cell is in the most-preferred location according to the Design Standards' site location preferences, there is no reason to analyze alternatives. As noted, propagation maps are inapplicable to small cells in the right-of-way, and should not be required. *This item should be revised so an alternatives analysis is not required if siting in a preferred location, and the reference to propagation maps should be deleted.*

Verizon Wireless appreciates the City's collaborative approach to updating is code and standards for wireless facilities in the right-of-way. We urge the Council to implement our suggested revisions prior to final adoption of the ordinance and Draft Standards.

Very truly yours,



Paul B. Albritton

cc: Barbara Choi, Esq.
Tracy Scramaglia

[3] *Id.*, ¶¶ 37-40.