PNC **Pasadena Neighborhood Coalition**
P.O. BOX 51022 Pasadena, California 91115
Uniting Pasadena Neighborhood Associations on Issues of Livablity City-wide

January 29, 2009

Mayor Bill Bogaard
City of Pasadena
110 N. Garfield Ave.
Pasadena, CA 91109

Dear Mayor Bogaard:

The Pasadena Neighborhood Coalition, as the representative organization for Pasadena's neighborhood associations, is concerned about two aspects of the wireless ordinance, currently on the city council's calendar for February 2. Both of the problems have direct quality-of-life impacts on our neighborhoods. The proposal for the wireless ordinance has many good and necessary attributes, but we feel that these two deficiencies must be addressed.

The first problem is that the proposal has no meaningful enforcement, especially against wireless vendors who abandon their boxes. The city is littered with the droppings of wireless vendors that have gone out of business – several of the Metrocom boxes still hang over our streets more than a decade after they were abandoned, and the Altrio boxes are only being dismembered now that the cost of copper became so high that Altrio's successor can make a profit by complying with its contract. We already have enough ordinances that have no meaningful enforcement mechanism. Let's not add another.

The second problem is that the proposal eliminates the possibility of review by a hearing officer of vendor proposals concerning locations in rights-of-way. Such hearings are often the public's only chance to make its opposition known, given that the city staff won't inform anyone more than 300' from the proposed installation.

Thank you for your attention to this matter.

Very truly yours,

R. Henry Sherrod, Chair
Pasadena Neighborhood Coalition

cc: Pasadena City Council Members
Michael Beck
John Poindexter

02/02/2009
6.C. 7:30 P.M.

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November 27, 2009

VIA Fax & Hand Delivery

Jose Jimenez
Planner
City of Pasadena
Planning & Development Department
175 N. Garfield Avenue
Pasadena, CA 91101

Re: Comments on proposed changes to PMC Titles 12 "Streets and Sidewalks" and 17 "Zoning" as they pertain to telecommunications facilities.

Dear Mr. Jimenez,

I write in response to your request for comments on the proposed changes to PMC Titles 12 and 17. AT&T California has not, however, been provided a copy of the proposed ordinance(s) themselves. Instead, we received only a copy of a memorandum to the Planning Commission and CEQA-related documentation that generally describe the proposed changes to the municipal code. Our comments are on the memorandum only. Of course, these comments should not be deemed comments on any of ordinance language; our position on the ordinance itself may differ materially from our comments on the memorandum. Also note that in some instances, we could not comment because we need further explanation from the city.

As an initial matter, we highlight our concern with the City attempting to single out telecommunications providers and treating them differently than other users of the public rights-of-way. Instead of singling out telecommunications providers for discriminatory and excessive regulation, the City should be looking to develop uniform, reasonable standards for all above-ground equipment in the public right-of-way, or uniform zoning, reasonable zoning standards for similar structures on private property.

Comments on Title 12.

The memorandum at page 2 states the proposed regulations will apply to structures "used to provide telecommunication or video service" in the public right-of-way (PROW), but traffic signal, gas, power and water are expressly excluded. What is the city's reasoning for treating telecommunication and video providers differently from other entities using the PROW, including the city itself? Public Utilities Code §7901.1(b) requires the city to act in a non-discriminatory manner.

The memorandum at page 3 merely states a "Hold Harmless and Certificate of Insurance" would be required, but provides no other detail. We cannot comment on these provisions, other than to note both would be material to our position on any proposed ordinance language.

The report also notes a requirement for GIS-compatible maps. At page 6 of the report, the city states GIS maps will aide DPW "in future placements and will also assist in monitoring the overall effect of cabinets on a street or neighborhood." How does such a map assist DPW as described? What structures would be subject to the mapping: above-ground structures, below-ground, or both?

The memorandum at page 3 also states that to "the maximum extent feasible the facility has been designed to blend with the surrounding area and the facility is appropriately designed for the specific site." It impossible for us to comment meaningfully on such a broad and vague statement, other than to note the city's authority in this regard is quite limited by state and federal law. We will reserve further comment until we see how the city would propose implementing this provision.

The notification provisions on page 3 of the report are unreasonable and excessive. No provision is made for work that must be done expeditiously, for example to respond to a service outage. Finally, the 30-day notice may impair the city's ability to act on a permit within 60 days as required by law, depending on the facility to be placed.

Page 3 of the report states:

- Facilities must "be colored to blend with other streetscape or surrounding features to the extent feasible." This requirement is subjective, vague, and unreasonable. The color of an above-ground facility does not "incommode" the public's use of the PROW.
- "As new technology becomes available and when feasible, underground the equipment." Again, this is unreasonable and exceeds the city's authority to regulate the PROW.
- "Landscaping shall be installed if requested by the abutting property owner." The lack of landscaping does not "incommode" the public use of the PROW. We are open to providing landscaping, but only where it makes sense and would contribute to the overall streetscape. A per se rule based on a request by an abutting property owner is unreasonable.

Many of the items listed on "Attachment B, Proposed Installation Standards" are described elsewhere in the memorandum. In addition to our earlier comments, we offer the following:

- Item 1. How is feasible defined and who determines it?
- Item 3. What is meant by "modifications to existing above-ground facilities"?
- Item 4. Again, this is an unreasonable requirement, particularly to the extent it purports to require undergrounding of existing facilities.
- Item 5. What is the basis for limiting one telecom "facility" per residential frontage?
- Item 6. What is the basis for requiring a facility to be placed on the side yard rather than in front?

- Item 7. Again, we are open to landscaping where it is reasonable and where it would contribute to the overall streetscape. We cannot agree to maintain the landscaping. What is meant by "alternate screening"?
- Item 10. What is the definition of "telecommunication facility" used here? The proposed standard states such a facility may not be located on a structure that is less than 25 feet in height, which suggests a wireless application.

We offer the following comments on "Attachment B, Proposed Maintenance Standards":

- Item 1a-f. The requirements are unreasonable. Minor "dents and blemishes", "dirt and grease", and "chipped and cracked" paint, for example, would not affect the functioning of an above ground structure. These are normal wear-and-tear issues and it is unreasonable to require a provider to repair or replace an above ground structure for these reasons.
- Item 4a. 48 hours is an unreasonably short period of time to respond to a request to make "necessary repairs" or to remove graffiti. A "commercially reasonable time" standard should be used instead.
- Item 4b. 10 days may be too short depending on the circumstances. Again, a "commercially reasonable time" standard should be used.
- Item 4c. The reference to "at the time of installation" suggests the city intends to preclude normal wear-and-tear on above-ground structures. This is not reasonable.

Comments on Title 17.

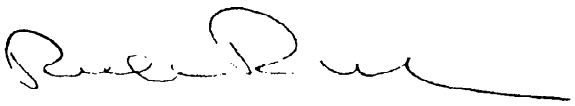
Wireless communication is fast becoming the primary means of communication for the public. As they walk in their neighborhoods, visit parks or do neighborhood watch - people carry their wireless devices and expect them to work. Public safety and public works personnel increasingly use wireless devices for myriad essential work functions - whether they are working in commercial areas, residential or open space. When we seek to place a new wireless facility, it is to address one of two things: a coverage gap, which prevents seamless communication; or a capacity need, which means existing sites become fully loaded, and we need to add infrastructure to meet public demand. By proposing to limit placement of wireless facilities (by location or height), the city is hampering the aforementioned needs from being fully serviced.

We understand the city's concerns, but arbitrary limits such as proposed do not take into account the engineering needs of the network. Limiting poles to a certain height, such as fifty feet, may simply cause more poles to be needed. For example, in a co-location situation, a carrier located at fort feet on the pole may not obtain the same coverage as the carrier located at fifty feet. The carrier at forty feet would need to erect additional poles in adjacent areas to obtain sufficient coverage.

How does the city propose to address the use of faux trees in areas where there may be no natural trees? It would be unreasonable to require a faux tree pole, along with the planting of other trees, to create a tree line where none existed before.

Finally, we question the reasonableness of requiring proof of engineering needs. Certainly, would be open to discussing with the city why a new facility may be necessary, but that mu done in a way to protect proprietary business information.

Yours sincerely,



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Refer To File #: 290297-0243

December 10, 2008

Gary Johnston, Chair
Planning Commission, City of Pasadena
100 N. Garfield Avenue
Pasadena, CA 91101

Re: Updates to Titles 12 and 17 of the City's Municipal Code (Permitting of Wireless Telecommunications Facilities)

Dear Chair Johnston:

This law firm represents Omnipoint Communications, Inc., dba T-Mobile ("T-Mobile"), for the purpose of providing comments on the proposed updates to Titles 12 and 17 of the City's Municipal Code, concerning the permitting of wireless telecommunications facilities.

The comments set forth below are preliminary, and are not meant to be exhaustive. It is our understanding that the City Council will not be acting on the amendments to the Code until January or February of 2009. We reserve the right to submit further comments prior to, and at the time of, the action of the City Council on the proposed amendments.

Generally, there are a number of terms of art employed in the proposed amendments that are ambiguous. We will discuss the ambiguities with Javan Rad of the City Attorney's office and elaborate on our concerns, if necessary, in a subsequent letter.

1. Unreasonable Discrimination As Between Wireless Telecommunications Service Providers and Providers of Other Utility Service.

According to the Staff Report of November 12, 2008, the proposed new requirements for the public rights-of-way will "exclude equipment such as traffic signal cabinets, and gas, power and water equipment."

Nowhere in the Code does there appear to be any attempt to justify this admitted discrimination, which, on its face, violates the "equivalent manner" requirement of section 7901.1, subdivision (b), of the California Public Utilities Code. Such discrimination would also violate the equal protection clauses of the California and United States Constitutions, as well as the federal statutory prohibition against unreasonable discrimination set forth in 47 U.S.C. section 332(c)(7)(B) (i)(I), and the requirement, set forth in 47 U.S.C. section 253(b) and (c), of neutrality in the management of the rights-of-way.

2. The City Has No Legal Authority to Regulate Right-of-Way Access on Aesthetic Grounds.

According to the Staff Report, as confirmed by the attachments thereto, the City also intends to regulate permitting of telecommunications facilities in the public rights-of-way on aesthetic grounds, which is not a legally authorized basis of right-of-way management under sections 7901 and 7901.1 of the Public Utilities Code.

Public Utilities Code section 7901 gives all telephone companies a statewide franchise to construct telephone lines in the public rights-of-way:

> Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts, piers or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such a manner and at such points as not to incommode the public use of the road or highway or to interrupt the navigation of the waters.

(Pub. Util. Code, § 7901.)

Section 7901 applies to "telephone corporations." For the purpose of section 7901, "'[t]elephone corporation' includes every corporation or person owning, controlling, operating, or managing any telephone line for compensation in this State." (Pub. Util. Code, § 234, subd. (a).) Public Utilities Code section 233 defines "telephone lines" to include

> all conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate communication by telephone, ***whether such communication is had with or without the use of transmission wires***.

(Pub. Util. Code, § 233, emphasis added.) The courts and the California Public Utilities Commission have long interpreted this definition to include wireless telecommunications facilities. (See *Coml. Communications v. Public Util. Com.* (1958) 50 Cal.2d 512, 523 [extending definition of "telephone lines" to wireless radio telephone technology]; see also Cal.P.U.C., Decision No. 88513 (Feb. 22, 1978) [finding in its conclusions of law section that "[r]adiotelephone utilities are telephone corporations under § 234 of the Public Utilities Code."].) Section 7901 therefore gives wireless service providers such as T-Mobile a statewide franchise to place its facilities in the public rights-of-way.

To accept the offer of a statewide franchise, a carrier need only construct and maintain telephone facilities in the right-of-way. (*County of Los Angeles v. Southern Cal. Tel. Co.* (1948) 32 Cal. 2d 378, 384.) As clearly evidenced by its existing right-of-way facilities throughout California, T-Mobile has accepted the statewide franchise. State franchises are created by an act of the sovereign power of the state. (*T&T.T. Road Co. v. Campbell* (1872) 44 Cal. 89, 91.) The right granted by a franchise represents a vested property right, protected by the state and

federal constitutions, and, once accepted, may not be taken away, even by subsequent acts of the Legislature. (*Williams Communications v. City of Riverside* (2003) 114 Cal.App.4th 642, 648.)

Further, the California Supreme Court has held that in light of the statewide franchise, the right to construct and maintain telephone lines in city streets is a state affair, rather than a municipal one, and no municipality may exclude telephone lines from its streets, on the theory that it is a municipal affair, by requiring that a local franchise be obtained. (*Pacific Tel. & Tel. Co. v. San Francisco* (1959) 51 Cal. 2d 766, 778, 774.) Section 7901 therefore insulates telephone companies such as T-Mobile from franchise requirements imposed by local governments for the use of public land to lay lines and equipment. (*Qwest Communications Corp. v. City of Berkeley* (N.D. Cal. 2001) 146 F. Supp. 2d 1081, 1101; see also *San Diego v. Southern California Tel. Corp.* (1954) 42 Cal. 2d 110, 116.)

In the face of the broad franchise rights afforded telecommunications companies by section 7901, a local jurisdiction's authority is limited to the regulation of the time, place, and manner ***of access*** to the public rights-of-way. (See Pub. Util. Code, § 7901.1 [specifying the right-of-way management authority of local jurisdictions].) And a municipality's regulation of the "time, place, and manner" is limited to controlling the "access" of the public rights-of-way so as not to incommode the public's use of the roads. (See Pub. Util. Code, §§ 7901, 7901.1.) "Access," in the context of section 7901.1, means excavation (construction) activities. (See Sen. Rules Comm., Office of Senate Floor Analyses, S. 1994-95 Reg. Sess. (Cal. 1995).) Thus, for telecommunication companies like T-Mobile, which have a statewide franchise under section 7901, local permitting requirements that go beyond regulating the public rights-of-way so as not to incommode the public's use of the roads are invalid.

Nothing in sections 7901 and 7901.1 authorizes local agency regulation of right-of-way access on aesthetic grounds.

3. Certain Aspects of the City's Proposed Amendments to Titles 12 and 17 of the Municipal Code Are Preempted by Federal and State Law.

(a) "Opportunities Map".

The amendments to the City's Municipal Code provide for significant incentives, in the form of expedited processing, for facilities proposed to be installed at sites identified by the City on an "Opportunities Map." The only properties identified in the map are, in the City's own words, City-owned property, which suggests that the purpose of the program is to increase City revenues, which is not a recognized zoning criterion. As the City itself acknowledges, moreover, "there are many factors involved in finding a location that will address the installation needs of carriers." If that is the case, on what lawful basis does the City discriminate as between those providers who are, because of their network design, able to take advantage of the benefits of siting at an Opportunities Map location, and those who are unable to do so? For the reasons already stated above, it is not possible for the City to defend the discrimination, which suffers not only from state and federal constitutional infirmities, but also because it violates the federal Telecommunications Act of 1996, at 47 U.S.C. section 332(c)(7)(B)(i)(I).

Further, to the degree that the pressure exerted by the City to employ properties identified on the Opportunities Map represents a facilities-based restriction, such restriction is preempted by the federal Communications Act of 1934.

(b) The "Justification Study".

The Staff Report states that one of the proposed amendments pertaining to those districts where monopoles will be permitted (as discussed below, monopoles in residential districts will be precluded altogether), is a "[r]equirement for a Justification Study to demonstrate why co-location on an existing building or facility will not provide the carriers [sic] service requirements, and details that provide the number of customers the new facility will serve." The City apparently intends, by means of its amendments to Title 17, to enter the business of designing telecommunications networks, and assessing the need for particular facilities, a usurpation of authority that belongs, under the Communications Act of 1934, to the FCC, and as a matter of operational prerogative, to T-Mobile and other service providers.

(c) Preclusion of Monopoles in Residential Districts and in the Public Rights-of-Way.

The City apparently proposes to preclude the installation of monopoles in residential districts and in the public rights-of-way. There is no attempt made by the City to justify such preclusion, which, once again, appears to be a facilities-based restriction that is preempted by the Communications Act of 1934, and, with respect to the public rights-of-way, by sections 7901 and 7901.1 of the California Public Utilities Code.

As stated above, we reserve the right to provide additional comments. We will be discussing with Javan Rad of the City Attorney's office our concerns about the proposed amendments, and their implications. It may be that further discussion and clarification will resolve at least some of our concerns.

Thank you for your consideration of our letter.

Very truly yours,

John J. Flynn III
of Nossaman LLP

JJF/rrg
cc: Michele Beal Bagneris, City Attorney
Javan Rad, Deputy City Attorney

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Refer To File #: 280297-0243

VIA FACSIMILE AND U.S. MAIL

February 2, 2009

Bill Bogaard, Mayor and Members of the City Council
City of Pasadena
100 N. Garfield Avenue
Pasadena, CA 91101

Re: Updates to Titles 12 and 17 of the City's Municpal Code (Permitting of Wireless Telecommunications Facilities)

Dear Mayor Bogaard and Members of the City Council:

This law firm represents Omnipoint Communications, Inc., dba T-Mobile ("T-Mobile"), for the purpose of providing comments on the proposed updates to Titles 12 and 17 of the City's Municipal Code, concerning the permitting of wireless telecommunications facilities.

As you know, we submitted a letter to the Planning Commission on behalf of T-Mobile on December 10, 2008, setting forth objections to the City's proposed wireless ordinance. The objections we stated in our December 10 letter still stand, with one exception: It is our understanding that the "number-of-customers" requirement set forth in a previous version of the ordinance, relating to a "justification study," has been eliminated. Otherwise, our objection to such a study, and all other previously stated objections, still stand.

It is also our understanding, after discussion with Deputy City Attorney Javan Rad, that the definition of "monopoles," for the purpose of the ordinance, does not include wireless facilities attached to light standards or utility poles.

We appreciate your consideration of our December 10, 2008 letter, which we ask to be added to the record on the updates to Titles 12 and 17, as well as the opportunity to voice our concerns to the City Council.

Very truly yours,

John J. Flynn III
of Nossaman LLP

JJF/rg
cc: Michele Beal Bagneris, City Attorney
Javan Rad, Deputy City Attorney

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