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December 17, 2018

VIA EMAIL

Mayor Terry Tornek
Vice Mayor John Kennedy
Councilmembers Tyron Hampton,
Margaret McAustin, Gene Masuda,
Victor Gordo, Steve Madison and Andy Wilson
City Council
City of Pasadena
100 North Garfield Avenue
Pasadena, California 91101

Re: Proposed Amendments to Municipal Code Chapter 12.22
Telecommunication Facilities in the Public Right-of-Way
Council Agenda Item 14, December 17, 2018

Dear Mayor Tornek, Vice Mayor Kennedy and Councilmembers:

We write on behalf of Verizon Wireless regarding proposed amendments to Chapter 12.22 of the Pasadena Municipal Code (the "Code") addressing wireless facilities in the right-of-way. Verizon Wireless has participated in a City meeting to discuss Code proposals, and we provided suggestions in our letter to staff of September 21, 2018 (attached). Thereafter, in late September, the Federal Communications Commission (the "FCC") issued an order addressing appropriate approval criteria for small cells, which generally are the type of wireless facility deployed in the right-of-way. We provide comment on certain Code provisions and proposals that contradict the FCC's guidance, and we urge the Council to direct the City Attorney to prepare amendments that comply with new federal regulations.

To expedite deployment of small cells and new 5G technology, the FCC adopted an order in September that provides guidance on appropriate approval criteria for small cells. See *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, FCC 18-133 (September 27, 2018) (the "Infrastructure Order").¹ Among other topics, the FCC addressed aesthetic criteria for approval of qualifying small cells, concluding that they must be: "(1) reasonable, (2) no more burdensome than those applied to other types of

¹ While the Infrastructure Order and Code of Federal Regulations referenced in this letter were released on September 27, 2018, they will not be effective until January 14, 2019.

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infrastructure deployments, and (3) objective and published in advance.” *Id.*, ¶ 86. “Reasonable” standards are “technically feasible and reasonably directed to avoiding or remedying the intangible public harm of unsightly or out-of-character deployments.” *Id.*, ¶ 87. “Objective” standards must “incorporate clearly-defined and ascertainable standards, applied in a principled manner.” *Id.* at ¶ 88.

Several Code provisions invite subjectivity in contradiction with the FCC’s direction to provide objective criteria. One finding to coordinate siting location with the Director provides no specific guidance and could be used to deny otherwise-compliant facilities. Code § 12.22.060(C). However, aesthetic criteria, including location standards, should provide clear standards such that applicants can design compliant facilities prior to submittal with no need for consultation with staff. The “least intrusive means” standard invites endless comparisons and subjectivity, and it should be stricken from findings. Code § 12.22.070(A).

While Verizon Wireless appreciates the proposed three-tiered approach to permitting, the requirements for public notice and comment windows are not appropriate for objective review of small cells. Code §§ 12.22.080, 12.22.100. Public input introduces subjectivity to decision-making for small cell applications which must be reviewed under objective criteria. Soliciting public comment frustrates both the public and decision-makers. The public’s subjective personal concerns simply cannot be addressed by decision-makers implementing what must be an objective process.

With respect to any appeals to the City Manager, the appeal record should be restricted to the materials that were considered by the Director, and the scope of review should be limited to confirming whether the Director’s decision was based on reasonable, objective criteria. Code § 12.22.100.

The Code’s required justification and coverage gap study violates California Public Utilities Code Section 7901, as explained in our prior letter, and with respect to small cells, it contradicts the Infrastructure Order. Code § 12.22.070(A). The FCC found that local regulations that materially inhibit “densifying a wireless network, introducing new services, or otherwise improving service capabilities” constitute an effective prohibition of service in violation of the Telecommunications Act. *See* 47 U.S.C. § 253(a), Infrastructure Order ¶ 37. It should be sufficient for wireless carriers to inform the City that new small cells meet these objectives, which alone justify placement of small cells in the right-of-way. The FCC disagreed that the Telecommunications Act limits the federal prohibition of service standard to “protecting only against coverage gaps or the like” as determined through “coverage gap-based approaches,” and the FCC disregarded federal circuit court interpretations relying only on a significant gap in coverage. *Id.*, ¶¶ 38, 40. Because it violates both federal and state law, the justification requirement should be stricken.

Another provision violating both federal and state law is the ban on new poles. Code § 12.22.120(A). Our prior correspondence explains the conflict with Section 7901

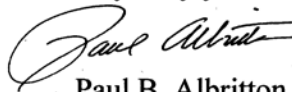
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which grants telephone corporations the right to erect new poles in the right-of-way. The FCC's Infrastructure Order also clearly contemplates that small cells may be placed on new poles, in part by defining "small cell" to address height of any new structures and discussing permit fees and Shot Clocks for new poles. *See* Infrastructure Order ¶ 79, 47 C.F.R. § 1.6002(l)(1)(i-ii), 47 C.F.R. § 1.6003(c)(1)(iii). Instead of forbidding new poles, the City must provide reasonable and objective criteria for their design. We note that both existing Code and the proposal for allowed height increases are inconsistent with the height allowance in the FCC's definition of small cell, which is no less than 50 feet. Code § 12.22.120(C), 47 C.F.R. § 1.6002(l)(1).

The proposal for limiting batching of certain facilities under one application (e.g., to five facilities) is inconsistent with new FCC Shot Clock rules. The FCC does not limit the number of small cells or the specific designs that can be batched under one application. 47 C.F.R. § 1.6003(c)(2).

Verizon Wireless appreciates the opportunity to participate in the Code amendment process. Certain Code provisions must be removed or revised to avoid conflicts with federal and state law, including the recent FCC Infrastructure Order. The approval process and design standards must rely on criteria that are reasonable, non-discriminatory and objective. We urge the Council to direct the City Attorney to prepare amendments that comply with the FCC's guidance.

Very truly yours,



Paul B. Albritton

Attachment

cc: Michele Bagneris, Esq.
Javan Rad, Esq.
Ara Maloyan
Yannie Wu