



MICHAEL VAN
ECKHARDT
Assistant Vice President
Senior Legal Counsel

AT&T Services, Inc.
16631 NE 72nd Way
RTC 1
Redmond, WA 98052

425.580.7033 Phone
michael.vaneckhardt@att.com

January 14, 2019

Via E-Mail

City of Pasadena City Council
City Hall
100 North Garfield Avenue
Pasadena, CA 91101

Re. AT&T's Initial Comments on Proposed Amendment to Pasadena Municipal Code Chapter 12.22

Dear Mayor Tornek, Vice Mayor Kennedy, and Councilmembers Gordo, Hampton, Madison, Masuda, McAustin and Wilson:

I write on behalf of New Cingular Wireless PCS, LLC d/b/a AT&T Mobility (AT&T) to provide initial comments on the city's proposed ordinance to amend Municipal Code Chapter 12.22, regulating telecommunication facilities in the public rights-of-way. AT&T recognizes the need for the city to update its regulations given advances in wireless technologies and changes to applicable state and federal laws, including the Federal Communications Commission's *Infrastructure Order*.¹ And with AT&T's selection by the federal First Responder Network Authority, FirstNet, as the wireless service provider to build and manage the nationwide first responder wireless network, each new or modified facility will strengthen first responder communications. Unfortunately, the proposed permitting process risks hampering deployment of small wireless facilities by establishing a permitting framework at odds with federal law.

Key Issues With Proposed Ordinance

Application Timing Issues

The proposed ordinance likely will violate the FCC's Infrastructure Order. For example, real-world small wireless facilities will be larger than five cubic feet, and thus would be processed under proposed Tier 3 review. Many of these applications will be requests to collocate on existing structures in residential districts, subject to the FCC's 60-day shot clock under the Infrastructure Order. But the proposed Tier 3 review would require a 14-day advanced public notice, a 14-day public comment period, and an appeal right. The notice and comment period alone will take up 28 days, leaving only 32 days for the city to decide the application, handle an appeal (which would be subject to 7-day appeal period), make a final decision and issue all

¹ See *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, FCC 18-133 (September 27, 2018) ("Infrastructure Order")(eff. Jan. 14, 2019).

necessary permits. In addition, this timeline means that the city's 10-day period to review an application for completeness² will expire even before the comment period opens.

AT&T recommends that the city dispense with or significantly shorten the public comment period. After all, small wireless facilities will need to be approved under the FCC's Infrastructure Order if they meet objective and appropriate approval criteria.

AT&T also questions the application of the special notice requirement under Pasadena Municipal Code Sections 12.22.080(A) and 17.76.020. PMC Section 17.76.020(B)(1)(a) requires the notice to be mailed to residents within a 500-foot radius "at least 14 days before the hearing." But Chapter 12.22 does not require a hearing. Moreover, the notice requirement is too broad as it is very unlikely a small wireless facility will be visible to residents so far away. To the extent such notice for Tier 3 facilities is needed, AT&T recommends reducing the notice period to 5 days and limiting the notice distribution radius to 100 feet.

The appeal right for small wireless facilities is also unnecessary. Again, small wireless facilities will need to be approved under the FCC's Infrastructure Order if they meet objective and appropriate approval criteria. And the appeal period will almost certainly prevent the city from meeting a 60-day shot clock. AT&T recommends eliminating the appeal provision with respect to all small wireless facilities.

Other Process Issues

AT&T objects to the limitations on number of applications that can be consolidated, or batched, to be processed together. This is inconsistent with the FCC's Infrastructure Order and the corresponding rule, which do not allow batching limitations.³ And, as a practical matter, allowing batching of only five (or ten or twenty) small wireless facilities may burden deployment efforts and will impose additional burdens on City Staff. Rather than to set arbitrary limits, the proposed ordinance should be tailored to allow batching to the extent applications propose similar designs for small wireless facilities.

The city should establish and publish objectively reasonable cost-based application fees to comply with the FCC's Infrastructure Order. More specifically, AT&T directs the City to the relevant FCC standard for adopting lawful fees: "(1) the fees are a reasonable approximation of the state or local government's costs, (2) only objectively reasonable costs are factored into those fees, and (3) the fees are no higher than the fees charged to similarly-situated competitors in similar situations."⁴

The city must eliminate its requirement, in PMC Section 12.22.070(A), for a justification study to demonstrate "the rationale for selecting the proposed use, a detailed explanation of the coverage gap that the proposed use would serve, and how the proposed use is the least intrusive means for the applicant to provide wireless service." First, we note that the city cannot require

² See 47 C.F.R. § 1.6003(d)(1).

³ See 47 C.F.R. § 1.6003(c)(2)(iii).

⁴ See Infrastructure Order at ¶ 50.

such a justification study for AT&T's installations in the public rights-of-way. AT&T has a state law franchise right under Section 7901 of the Public Utilities Code to place its facilities in the public right-of-way so long as it does not incommode the public way.⁵

Further, the FCC has rejected the "significant gap/least intrusive means" test and requirements for proof of coverage need.⁶ Instead, under the FCC Infrastructure Order, the city must approve siting applications for small wireless facilities that comply with local criteria that "are (1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments, and (3) objective and published in advance."⁷

Because both state and federal law preempt local requirements that a wireless provider justify need for wireless facility siting requests in the public rights-of-way, the city should delete PMC Section 12.22.070(A).

Additional Issues

As the city works to update its regulations of wireless facilities in the rights-of-way, it should also take this opportunity to address several additional problems with the current code. AT&T recommends that the city take these additional steps in developing the proposed ordinance:

- The city should revise PMC Section 12.22.110(D), which requires placing telecommunications facilities below ground where feasible. The FCC's aesthetic criteria also applies to undergrounding requirements.⁸ Thus, this provision will only be lawful if these requirements are reasonable and no more burdensome to wireless infrastructure than the requirements that are applied to other types of infrastructure deployments.⁹ Additionally, this section should be limited to avoid unlawfully prohibiting wireless services in portions of the city. Moreover, PMC Section 12.22.100(D) conflicts with PMC Section 13.14.080(F), which excepts from the scope of undergrounding resolutions "[a]ntennae, associated equipment and supporting structures used by u a utility for furnishing communication services."
- The city should revise or eliminate landscaping requirements under PMC Section 12.22.110(G). These requirements are unlawful to the extent they materially inhibit deployments or are more burdensome than those imposed on other right-of-way users.

⁵ See also *T-Mobile West, LLC v. City and County of San Francisco*, 3 Cal.App.5th 334, 342-43 (1st Dist. 2016) (local requirement conditioning issuance of wireless facility siting permit on technological necessity is preempted under Section 7901).

⁶ See Infrastructure Order at ¶ 40, n.94.

⁷ *Id.* at ¶ 86.

⁸ See *id.* at ¶¶ 90-91.

⁹ See *id.* at ¶ 90 ("Further, a requirement that materially inhibits wireless service, even if it does not go so far as requiring that all wireless facilities be deployed underground, also would be considered an effective prohibition of service.").

- The city should eliminate the authority for the Public Works Director to engage a consultant. While AT&T appreciates the city's desire to thoroughly review applications, consultants can unnecessarily increase the cost of deployment and they often slow down the permitting process because it is in their interest to find problems to increase their fees. Any provision that allows the use of consultants should limit review to appropriate and objective criteria, such as a structural safety assessment or compliance with FCC regulations of radio frequency emissions. And the city should be mindful that the cost of a consultant may not pass through to an applicant as the FCC has established threshold fees, and even within those fees only objectively reasonable costs can be imposed.
- The city should eliminate PMC Section 12.22.120(A), which prohibits support structures in the public right of way. Again, AT&T has a state law franchise right to place facilities in the public rights-of-way. While the city may impose reasonable restrictions on AT&T's access, under Section 7901.1, this flat prohibition is unreasonable.
- The city should revise 12.22.120(C), which restricts antenna height to "7 feet beyond the top of the pole." To be consistent with the FCC's definition for small wireless facilities,¹⁰ and to avoid prohibiting installations, the city should authorize additional height.

Conclusion

AT&T appreciates the city's initial efforts to adapt its wireless facility siting regulations to accommodate new and emerging technologies and changes in law. In this process, the city should make sure to develop an ordinance that will comport with applicable law. By addressing the items we raise here, the city will go a long way toward encouraging responsible deployment of wireless facilities consistent with state and federal policies and to the great benefit of the city's residents and businesses.

Very truly yours,

/s/ Michael van Eckhardt

Michael van Eckhardt

¹⁰ See 47 C.F.R. § 1.6002(l).