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Via E-mail

City of Monterey City Council
City Hall
580 Pacific Street
Monterey, CA 93940

Re. AT&T's Initial Comments to Proposed Amendments to Section 38-112.4 to the Monterey Municipal Code

Dear Mayor Roberson, Vice Mayor Barrett, and Councilmembers Albert, Haffa and Smith:

I write on behalf of New Cingular Wireless PCS, LLC d/b/a AT&T Mobility (AT&T) to provide AT&T's initial comments on the City's proposed ordinance to amend the Monterey Municipal Code to adopt procedures and standards applicable to wireless facility siting applications ("Proposed Ordinance"). AT&T appreciates the need for the City to broadly address wireless siting, which is surely needed based on recent advancements in wireless technologies and laws affecting wireless facility siting. In order to take advantage of the latest wireless technologies within the context of applicable laws, however, the City should take care to carve out separate processes for small cell wireless facilities and right-of-way siting.

The City Should Encourage Small Cells

A key purpose for the Proposed Ordinance, according to the recitals, is to update the City Code to accommodate small cells. This is important not merely so that the City will comply with applicable laws, including the Federal Communications Commission's (FCC) recent order when it becomes effective, but also because small cells will be amenities to the community, improving critical wireless services in the City. Small cells give residents and businesses access to the latest and greatest wireless technologies without cluttering the public rights-of-way.

This is especially important in today's world where so many people rely on wireless services to do more in their homes. The Center for Disease Control and Prevention (CDC) tracks the rates at which American households are shifting from landlines to wireless telecommunications. According to the CDC's latest Wireless Substitution Report, more than 70

percent of Americans rely exclusively or primarily on wireless communications in their homes.[1] In addition, the FCC estimates that 70 percent of all 911 calls are made from wireless devices.[2] And with AT&T's selection by FirstNet as the wireless service provider to build and manage the nationwide first responder wireless network, each new or modified facility will help strengthen first responder communications.

The City should implement a streamlined review process for small cells rather than applying the same use permit process as for traditional macro facilities. Some standards and application requirements are unnecessary for small cells. For example, the City should not require construction of mock-ups for every small cell. Photos or photosimulations of a sample site of similar design along with the site-specific plans should suffice. And the City should adopt the FCC's definition for "small wireless facility" in order to clarify the scope of its regulations and to be consistent with applicable federal law.

AT&T's Siting Rights

The City also should apply a streamlined review process for wireless siting in the public rights-of-way. AT&T has a statewide franchise right to place poles and its telecommunications facilities in the rights-of-way. Under California Public Utilities Code Section 7901, this right is limited only to the extent AT&T's facilities incommode the rights-of-way. And this right is subject to the City's reasonable and nondiscriminatory time, place, and manner regulations governing construction activities pursuant to Section 7901.1.

Not only is the use permit process overly burdensome as applied to right-of-way siting requests, several requirements of the Proposed Ordinance exceed reasonable regulation authorized under Section 7901.1. For example, to the extent aesthetic standards, concealment, landscaping and undergrounding requirements under Section 38-112.4(F)(6) are not applied to all right-of-way users, they cannot be applied to wireless providers. Such discriminatory regulations are unreasonable under Section 7901.1(b), and they must be eliminated.

The City Should Avoid Prohibiting Design Categories

AT&T understands that the City favors certain types of facility designs. But by setting rigid standards, the City may inadvertently prohibit more favorable designs. For example, the City should reconsider its blanket ban on use of decorative poles. Many jurisdictions have embraced small cells that mimic decorative poles or are incorporated within them, subject to specific design parameters. Similarly, the City should reconsider its requirement that all equipment be housed within a single equipment cabinet. In some circumstances, separate pole-mounted components offer a more streamlined appearance.

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[1] *See Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2017*, available at http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201806.pdf.

[2] *See 911 Wireless Services*, available at https://www.fcc.gov/consumers/guides/911-wireless-services.

In addition, the City should not limit pole-top extensions to two feet as it would under Section 38-112.4(F)(6)(e)(i) of the Proposed Ordinance. This sort of limit may actually harm aesthetics by preventing AT&T's ability to deploy its most stealthy pole-top small cell facilities. For instance, where on-pole spacing requirements and a rigid two-foot extension maximum prevent a stealth pole-top small cell, AT&T may need to place a new pole.

Need To Comply With Shot Clocks

The Proposed Ordinance should incorporate the time limitations for the City's review of applications consistent with the FCC's "shot clocks." The Federal Telecommunications Act of 1996 requires a local government to act on an application to place or construct a wireless telecommunications facility "within a reasonable period of time." *See* 47 USC § 332(c)(7)(B)(ii). The FCC's Shot Clock Orders establish legal presumptions for what is a "reasonable period of time" for specific types of wireless siting applications. Last week, the FCC issued its Declaratory Ruling and Third Report and Order in its Accelerating Wireless Broadband Deployment dockets, which provides additional shot clock rules and two new shot clocks specific to small cell siting applications. And state law provides that the failure to comply with the FCC decisions results in a deemed approval upon notice. *See* Cal. Gov't Code § 65964.1(a). Although these latest additional presumptions do not go into effect until 90 days after publication of the final rule, it only makes sense for the City to include them now in the Proposed Ordinance.

Unfortunately, some aspects of the Proposed Ordinance are inconsistent with the FCC's decisions. For example, companion permits should not be "deemed denied" when the use permit application is found to be incomplete. And while AT&T recognizes the need to work with the City on wireless siting applications, the City cannot prohibit AT&T from submitting applications outside of submittal appointments.

Additional Section-Specific Concerns

Section 38-112.4(D)(2) of the Proposed Ordinance, which defines the separate process for review of Section 6409(a) approvals, should clarify that Section 6409(a) covers replacements of transmission equipment. This can be accomplished by adding a reference to replacements in the first sentence of this provision, or by defining "modification" to include such replacements.

Section 38-112.4(H)(3) provides for a limited exception to required findings in order to make sure the City avoids effectively prohibiting wireless service, which would violate federal law. First, the City should not merely except proposals that would violate the law. The Proposed Ordinance should authorize exceptions as needed to provide residents, businesses and visitors robust wireless services throughout the City. In addition, the City cannot impose standards and processes that are inconsistent with federal law. Under applicable federal case law, the applicant does not always bear the burden of proof on an effective prohibition claim under the Telecommunications Act of 1996. Once the wireless provider demonstrates that it is closing a significant service coverage gap by the least intrusive means, the burden shifts to the local

government to prove there is a potentially available and technically feasible solution that is less intrusive.[3]

Section 38-112.4(I) authorizes the City to engage a consultant to review various aspects of wireless siting applications. AT&T's experience is that 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. But unreasonably high costs cannot be passed on to wireless providers as these may materially inhibit provision of wireless services. Consultants also should not be used to second guess AT&T's business decisions regarding the design of its network. Any provision that allows the use of consultants should clearly define the scope of work and limit review to appropriate and objective criteria, such as a structural safety assessment or compliance with FCC regulations for human exposure to radio frequency emissions.

Section 38-112.4(J)(1)(e) and Section 38-112.4(J)(2)(g) impose conditions of approval for indemnity. These provisions go too far in two key respects. The City should not require indemnification from private property owners, and AT&T must retain its right to select counsel. In addition, the City must carve out from these indemnity provisions liability related to the City's negligence.

Finally, in order to avoid confusion and delays, the City should revise its proposed definition of "collocation" to be consistent with the FCC's definitions. Specifically, outside of the limited context of Section 6409(a), collocation includes attaching wireless facilities onto existing structures, such as utility poles or street lights, whether or not the structures already house wireless facilities and whether or not they have been previously approved for wireless use. Given the existing 90-day collocation shot clock and the 60-day shot clock for small cell collocations that will become effective in the near future, the City's proposed definition for collocation risks violating the shot clocks, and risks potential deemed approvals under state law.

Conclusion

AT&T encourages the City to consider ways to meet its stated goal of updating its Code to adapt to small cells and other technological advances. To that end, the City should carve out a separate and streamlined process for small cells and other right-of-way installations. We welcome the opportunity to work with the City as it finalizes the Proposed Ordinance.

Very truly yours,

/s/ John di Bene

John di Bene

[3] See *T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987, 998 (9th Cir. 2009).