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Via E-mail

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Re. AT&T's initial comments to proposed "patch" ordinance



CINCINNATI
CLEVELAND
COLUMBUS
DAYTON
NAPLES
WASHINGTON, DC

Dear Mr. West:

I write on behalf of my client New Cingular Wireless PCS, LLC d/b/a AT&T Mobility (AT&T) to provide initial comments on the city's proposed "patch" ordinance to amend certain sections of Chapter 21.56 concerning wireless telecommunications facilities. It is AT&T's understanding that the purpose of the "patch" ordinance is to allow aesthetically-appropriate small cell projects to proceed under the interim updates while City Staff and the City Attorney's Office develop a more comprehensive update. AT&T appreciates the city's recognition that small cell facilities and traditional macro cell sites merit different processes, and it trusts that the city will consider the wireless industry's input as it proceeds with this important update to its wireless ordinance.

Before discussing section specific comments, it is pertinent to define the collective challenge at hand—residents, businesses, and visitors to the city expect and require high speed mobile data services, and both AT&T and the city want to address this need in a manner consistent with the city's land use values. Accordingly, AT&T plans to incorporate small cell facilities, which have a limited aesthetic impact, into its wireless network to increase throughput and reduce latency in order to provide the next generation of wireless services to its customers. The following provides some context for why small cells are necessary to the evolution of AT&T's wireless network in Long Beach.

Explosive Growth in Wireless Data

AT&T and the entire wireless industry has experienced an unprecedented increase in mobile data use on its network since the release of the iPhone in 2007. Between 2007 and 2015, mobile data

usage increased 150,000% on AT&T's network. AT&T forecasts its customers' growing demand for mobile data services to continue.

The increased volume of data travels to and from customers' wireless devices and AT&T's wireless infrastructure over limited airwaves — radio frequency spectrum that AT&T licenses from the Federal Communications Commission ("FCC"). AT&T uses high-band (i.e., 1.9 GHz, 2300 MHz, 2100 MHz, and 1900 MHz) and low-band (i.e., 850 MHz and 700 MHz) spectrum to provide wireless service. Each spectrum band has different propagation characteristics and may experience varied noise or signal interference based on network characteristics at a given location. To address this dynamic environment, AT&T deploys multiple layers of its licensed spectrum and strives to bring its facilities closer to the customer. When facilities are closer to the user, the customer is presented with a stronger signal and its wireless device creates less noise interference because the device is not trying to locate the strongest signal among multiple weak signals. Signal interference, whether created by environmental clutter or noise from surrounding wireless devices, degrades signal quality in a manner that affects throughput, data rates, service quality, and, ultimately, coverage. Generally speaking, placing facilities closer to the customer creates smaller coverage cells that produce faster data rates.

To address existing and forecasted demand and to support 5G services in the future, AT&T plans to deploy small cell facilities within public rights-of-way. Due to their minimal aesthetic impact, small cell facilities comport with the city's land use values and present an opportunity for the city and AT&T to work together to responsibly bring 5G services to Long Beach.¹

The Role of Small Cells

Small cells will play a critical role in advancing to 5G.² As more than 60% of the data traffic on AT&T's total network was video in 2015, 5G is expected to assist by delivering speeds 10-100 times faster than today's average 4G LTE connections. Customers will see speeds measured in gigabits per second, not megabits. For reference, at one gigabit per second, you can download a TV show in less than 3 seconds. Customers will also see much lower latency with 5G. Latency, for example, is how long it takes after you press play on a video app for the video to start streaming on your device. AT&T expects 5G latency in the range of 1 to 5 milliseconds. You can see multiple use cases on the horizon to tap this next-gen network. Many of these 5G use cases – virtual reality, remote telemedicine, autonomous cars, etc. – are right around the corner. But to work effectively for the mobile customer or a business, you need multi-gigabit bandwidth speeds and low latency, which a small cell network helps provide. By getting the physical antenna closer to the user, hence attaching on a street pole, the user is presented with a dominate signal that provides faster throughput.

¹ A small cell facility consists of a low powered antenna, remote radio unit, and associated fiber and electricity needed to connect the node to the broader network. Depending on the location, AT&T generally deploys a 2' small cell antenna and attaches a 2' remote radio unit to the support structure (i.e., new or existing utility pole, street light, traffic signal).

² AT&T recently tested its 5G service in Austin, TX. <https://www.engadget.com/2016/12/05/ATT-5g-wireless-austin-test/>

To capture the economic development, cultural, and educational opportunities linked to 5G, the city should strive to remove deployment impediments and attempt to attract, rather than restrict, capital investment within its boundaries. High-speed wireless networks are quickly emerging as the bedrock for the next generation of technology, services, and economic development. Communities that have this critical network infrastructure in place become more attractive locations to live and do business. High-speed wireless and wireline networks are a tremendous advantage for communities trying to attract businesses across many sectors, from manufacturing and data centers, to software developers and high-tech companies. Additionally, these high-speed networks nurture the tech start-ups and entrepreneurs that will provide tomorrow's jobs and help drive economic growth.

AT&T encourages the city to adopt a policy that promotes deployment of the wireless infrastructure necessary for ubiquitous 5G coverage in the coming years. The policy must be consistent with the applicable federal and state laws that aim to promote and expedite deployment of wireless telecommunications services, as well as limit the city's authority to regulate placements in public rights-of-way. The proposed "patch" amendments to Chapter 21.56 do a good job of striking this balance, but AT&T has the following initial concerns.

Initial Concerns with Proposed "Patch" Amendments

1. Under Cal. Pub. Utils. Code §§ 7901 & 7901.1, AT&T has an affirmative right to deploy its facilities in public right-of-way subject to the city's police power to control the location and manner of an installation. A California appeals court recently affirmed that a local jurisdiction can utilize this narrow power by applying aesthetic review to facilities placed in rights-of-way. *See T-Mobile West LLC v. City and County of San Francisco*, 3 Cal.App.5th 334 (2016) (upholding San Francisco's regulations that are based on objective aesthetic standards)(currently on appeal before the California Supreme Court). The city police power, however, is limited, and it must exercise this authority in a reasonable and nondiscriminatory manner. *See* 7901.1.

Several of the proposed amendments exceed the city's authority. For example, the following requirements are unlawful if they only apply to wireless facilities: (a) the proposed location preferences in 21.56.130(D) for installations in rights-of-way; (b) the 300' minimum spacing requirement for Residential Zoning Districts or Residential Planned Development Districts in 21.56.130(D)(3); (c) the ban on deployment in undergrounding districts in 21.56.130(D)(3); (d) the prohibition on new wood poles and attachments on existing wood poles in 21.56.130(D)(5)(a); and (e) the requirement that all cables and wires be routed through the interior of subject poles in 21.56.130(D)(5)(h). And any requirement that an applicant seeking to place a wireless facility in rights-of-way demonstrate need or provide a business justification (*e.g.*, 21.56.130(C)(5) ("The applicant shall provide a written justification as to the need. . . .") and 21.56.130(F)(5) requirement for propagation/coverage maps) are unlawful. *See T-Mobile* at 342-343. The ordinance should be revised to remove any unlawful provisions.

2. The city should not strike traffic signals from the Chapter, as intersections are often an ideal location for small cell facilities both in terms of existing structures in which to collocate and network design needs to accommodate capacity issues. The city, as proprietor of the traffic lights, would negotiate rent, location, and aesthetics, so such structures should remain an option under the Chapter.
3. The proposed location preferences in 21.56.130(D) for installations in rights-of-way require an applicant to make a factual showing that all higher preferences are “infeasible.” See 21.56.130(D)(2) and 21.56.130(F)(7) (concerning application requirements). This standard, however, is inconsistent with the relevant legal standard. In the Ninth Circuit, a denial of a permit for an individual location constitutes an effective prohibition based upon “a two-pronged analysis requiring (1) the showing of a ‘significant gap’ in service coverage and (2) some inquiry into the feasibility of alternative facilities or site locations.” *MetroPCS, Inc. v. City & County of San Francisco*, 400 F.3d 715, 731 (9th Cir.2005). And once the applicant has made that two-part showing, the city must either accept it or offer an available and feasible alternative that is less intrusive than the applicant’s proposed facility. *T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987, 997-98 (9th Cir. 2009). There is no requirement that an applicant demonstrate that an alternative location is “infeasible.” The city should exchange “infeasible” with “less intrusive” so its standard is consistent with the Ninth Circuit’s test.

Conclusion

AT&T appreciates the city’s effort to update its wireless siting ordinance in light of the significant technological advances in the wireless industry. Especially as technologies advance and the types of facilities needed to meet increasing demands change, the city and wireless providers will be better served by policies that foster flexibility in siting wireless technologies. Specifically, calibrating both the application requirements and related process associated with an application to the size of wireless facility is appropriate. AT&T welcomes the opportunity to work with the city to that end.

Very truly yours,

/s/ Andrew Emerson

Andrew Emerson

cc: Mike Mais