

May 18, 2010

**Sent Via E-Mail**

City of Long Beach  
City Hall Office  
Civic Center Plaza  
333 West Ocean Blvd., 14th Floor  
Long Beach, CA 90802

**Re: Proposed Urgency Ordinance Establishing Temporary Moratorium on Approval of Applications to Construct, Modify or Place Wireless Communication Facilities (“Interim Ordinance” or “moratorium”)**

Dear Mayor and City Council:

We are counsel to Clearwire, which offers a robust suite of advanced high-speed wireless broadband services to consumers and businesses. One of the company’s key goals is to bring affordable broadband to all segments of each community it serves. Clearwire is in the process of building its new wireless broadband network in Southern California, and Long Beach is one of the key cities in that build. The company has already been granted a number of permits to construct its network in Long Beach, but it has a number of applications for zoning approvals and building permits that are currently pending. The issuance of this moratorium comes at a critical juncture in Clearwire’s deployment schedule. Clearwire is concerned that if the moratorium is adopted it will impede Clearwire’s rollout of highspeed broadband services to the citizens of Long Beach.

For the reasons set forth below, we respectfully request that the City Council reject the proposed moratorium. At a minimum the City should modify the proposed Interim Ordinance to narrow its scope.

**1. A Moratorium is Unnecessary**

It appears that the Council believes a moratorium is necessary due to three principal concerns: (i) the potential health risks to the citizens of Long Beach posed by RF exposure; (ii) the potential for cell tower placement to negatively impact the aesthetic beauty of the City; and (iii) the Council’s desire to exert greater control over the deployment of wireless facilities inside the City.

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Clearwire appreciates the City's desire to protect its citizens, and Clearwire does not dispute the City's right to revise its wireless ordinance. However, Clearwire submits that there is no need for the City to adopt a moratorium in order to accomplish that rewrite. The City can and should work on proposed ordinance revisions while at the same time continuing to issue permits. Any concerns about specific sites that arise in the interim can and should be addressed in the context of those individual siting applications, through the imposition of conditions or voluntary commitment by applicants. For example, concerns regarding RF emission could be addressed by the conditioning of approval on the conduct of RF studies to demonstrate compliance with FCC regulations.

This type of targeted approach makes more sense and is more equitable. The Council should not hold up decisions on individual sites that do not raise any significant concerns. This is especially true for sites like Clearwire's which have a very small footprint, are usually collocated with other wireless facilities or an existing structure and are often stealthed.

## **2. The Proposed Moratorium is Violates State and Federal Law**

As is explained in more detail in the accompanying letter to Mr. Michael Mais, Assistant City Attorney, any moratorium on the expansion of personal wireless services is suspect and prone to challenge under federal law, especially when a functioning ordinance is in place. The risk that such a moratorium will be successfully challenged is significantly increased in a case such as this where: (i) the legality of the proposed moratorium under state law is questionable at best (Government Code 65858 limits moratoria to 45 days)<sup>1</sup>; (ii) the primary driver of the moratorium *as reflected in the record* is a concern about the health effects of RF emissions from the sites (an area in which local regulation is clearly preempted)<sup>2</sup>; and (iii) the duration of the moratorium means that numerous pending applications will not be processed in accordance with the timelines set forth in the FCC's recently adopted Shot Clock Ruling, which requires localities to act on wireless facility siting requests within 90 or 150 days (depending on the type of site).<sup>3</sup>

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<sup>1</sup> Section 65858(a) provides that local legislatures can only adopt interim ordinances to protect public safety, health and welfare and that such ordinances may remain in effect for **45 days** from adoption.

<sup>2</sup> See Section 332(c)(7)(B)(iv) of the Telecommunications Act of 1996 ("No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.").

<sup>3</sup> Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, WT Docket No. 08-165, FCC 09-99, ¶ 4 (Nov. 18, 2009).

**3. At a Minimum the Scope of the Moratorium (Interim Ordinance) Should be Narrowed**

**a. Pending Applications Should Be Excluded from the Scope of the Moratorium (Interim Ordinance)**

Section 4 of the proposed Interim Ordinance states that it shall apply to “all pending and new applications” submitted on, before or after April 20, 2010. We would request that the City limit the applicability of the moratorium to applications submitted on or after April 20, 2010, so that pending applications can still be processed and approved subject to the terms of the current ordinance.<sup>4</sup> Pending applications are clearly subject to the FCC Shot Clock Ruling and Permit Streamlining Act timelines, and should be removed from the scope of the moratorium so that the City can meet its obligation to process these applications in a timely manner under that FCC Ruling and state law. In addition, Clearwire and other wireless carriers reasonably relied on the terms of existing ordinances in preparing and filing their applications. It is unreasonable, improper and violative of state law to subject applications to new regulations adopted after they filed their applications. Rather, key concerns in the ordinance regarding aesthetics and confirming compliance with FCC RF guidelines could be addressed through conditions in permits.

**b. The Scope of the Moratorium (Interim Ordinance) Should be Limited to Certain Zones**

The City should also more narrowly tailor the application of the moratorium to certain types of zones about which there may be most concern. For example, the City could limit the moratorium to wireless applications to be located in residential zones, thus excluding commercial and/or industrial zones from the scope of the moratorium. This would be particularly beneficial to the City, as it would allow the wireless industry to continue developing its networks within other parts of Long Beach during the City’s revision of its municipal code.

**c. The Moratorium (interim Ordinance) Should be Clarified to Exempt Building Permits That Have Already Received Land Use Approval**

It is clear that the purpose of the moratorium set forth in the Interim Ordinance is to allow the City to revise the *zoning code provisions* related to wireless applications.<sup>5</sup> Nevertheless the proposed Interim Ordinance indicates that the moratorium would also apply to the issuance of

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<sup>4</sup> While proposed Interim Ordinance states in Section 5B that the City will continue to process pending applications, that is not sufficient because the City will not grant them until the moratorium is lifted and will subject those applications to new regulations yet to be adopted.

<sup>5</sup> Proposed Interim Ordinance, Section 1.A, states that: “Section 21.45.115. (Special Development Standards for attached/roof-mounted cellular and personal communications systems) and Section 21.52.210 (Cellular and personal communication services (with monopoles) of the Long Beach Municipal Code together with the relevant “Use” Tables contained in the City’s zoning code currently govern the City’s regulation of wireless telecommunications facilities.”

building permits (Interim Ordinance, Section 5A). The inclusion of this provision could have the unintended consequence of preventing the issuance of building permits *for sites that already have validly issued use permits (zoning approvals)*. We do not believe that this was what the City intended, especially since the Interim Ordinance clearly indicates that it intends to exempt "All facilities that have previously received a final entitlement permit or approval from the City such as a Conditional Use Permit or Site Plan Review Permit." This extension of the moratorium to building permits for already permitted sites also puts Clearwire in a particularly untenable position. Clearwire has several sites for which the City of Long Beach has granted use permits but not yet issued building permits.

Accordingly Clearwire would ask that the council clarify that the Interim Ordinance is not meant to apply to building permits for projects that have already received valid use permits.

Clearwire would welcome the opportunity to speak to the City Council and work with its staff on a resolution to the City Council's concerns in a manner that adheres to federal and state law.

Very truly yours,



Suzanne Toller  
Davis Wright Tremaine LLP

cc: Michael Mais  
Derek Burnham