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May 12, 2010

VIA EMAIL & FACSIMILE (562) 570-6789
Mayor Robert Foster
& Members of the City Council
c/o Larry Herrera, City Clerk
City of Long Beach
333 West Ocean Blvd.
Long Beach, CA 90802-7974

VIA EMAIL & FACSIMILE (562) 436-1579
Michael Mais, Esq.
Deputy City Attorney
City of Long Beach
333 West Ocean Blvd., 11th Floor
Long Beach, CA 90802-4664

Re: **May 18, 2010: City Council Agenda**
Verizon Wireless's Objection to Moratorium on Wireless Facilities
Our reference: VZW Long Beach Moratorium

Dear Mayor Foster, Councilmembers, and Mr. Mais:

We write on behalf of our client Verizon Wireless in connection the Council's public hearing concerning the present moratorium on the approval of "all applications and building permits for wireless telecommunications in the City." The City enacted an interim moratorium by minute order on April 20 and will consider a proposed continued moratorium on May 18. We understand that the City intends to develop new wireless land use regulations while any moratorium is in effect.

At the outset, we appreciate the opportunity to work with the City Attorney and Council to develop new regulations that contain workable criteria for the installation of wireless infrastructure. However we strongly urge the Council to reject a broad moratorium in the meantime, which is not urgent or necessary in light of current regulations, and would unreasonably delay improved service, even in cases where pending applications have already received land use approval.

In the event the City enacts a continuing moratorium, we ask you to limit its scope and duration. Specifically we request that any enacted moratorium: (1) exempt any applications for the modification of existing facilities; (2) exempt any applications for which land use approval has already been obtained; (3) include a process allowing for the

exemption of other facilities; (4) require that the City continue to accept and process applications during any moratorium in order to avoid further delay once the moratorium ends; and (5) be limited to a short duration, with a view to a very swift conclusion.

A moratorium on all wireless facilities will clearly have an adverse effect upon the use of wireless technologies within the City. Ultimately it will serve only to delay improved wireless service in Long Beach while surrounding communities forge ahead to improve their own infrastructure. Quite apart from the legal implications, the ban will have a financial impact on the City and upon businesses, emergency personnel, and individual users, all of whom rely on improved wireless technology.

As a telecommunications carrier licensed by the Federal Communications Commission and as one of the two largest carriers serving California, Verizon Wireless is charged with providing adequate service to the public, including emergency and E911 services. Consequently, our client is very concerned about delays. As you are no doubt aware, more than one in three members of the public now depend solely on their wireless phones for all telephone communication, and this proportion continues to grow. This of course means that the supporting infrastructure must be improved rapidly.

In addition, any moratorium will interfere with the national goal of increased broadband deployment and access stated in the Federal Communications Commission's recently issued National Broadband Plan. This national initiative demands *acceleration* in the improvement of wireless infrastructure – quite the opposite of a moratorium.

I. Exemptions for Existing Facilities and Applications with Zoning Approval.

We understand from the recorded hearing on April 20 that the current interim moratorium had its genesis in two controversial applications for new facilities, neither of which involved Verizon Wireless. Nonetheless, Verizon Wireless is seriously affected by the current ban.

Verizon Wireless presently has several applications pending with the City, all of which involve necessary upgrades to *existing* facilities, and all of which have already obtained zoning approval and are currently in plan check awaiting building permits. We do not believe there is any basis, either in law or logic, to continue to withhold issuance of the remaining ministerial permits (building and electrical) for these applications.

The Verizon Wireless upgrades to its existing sites involve such things as: addition of a generator to provide back-up power in the event of an emergency (e.g., a power outage caused by fire, earthquake or other disaster), replacement of existing antennas, and the placement of certain equipment cabinets – all to upgrade the service provided.

Even if the City were to adopt an extended moratorium, it should not affect the processing of pending permit applications, and particularly those already approved through the land use process. It is precisely in order to prevent this sort of moving target that the Permit Streamlining Act (the "PSA") requires the City to advise an applicant at the outset of all information and criteria which will be used to review its project. See Cal. Gov. Code, §§ 65940 – 942. The PSA specifically states that an applicant cannot be subjected to new requirements enacted while an application is pending:

> Any revisions shall apply prospectively only and shall not be a basis for determining that an application is not complete pursuant to Section 65943 if the application was received before the revision is effective . . . .

Section 65942, Cal. Gov. Code (emphasis added). In short, the City is required to process and act on pending applications without regard to the moratorium.

Federal law requires the same result. The federal Telecommunications Act of 1996, as amended (the "Act") requires the City to act on siting requests "within a reasonable period of time." In a recent declaratory ruling, the Federal Communications Commission determined that a "reasonable period of time" generally does not exceed 90 days in the case of a collocation, and 150 days for all other applications. *See In Re: Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review, Etc.,* FCC 09-99 (FCC November 18, 2009) (the "Ruling"). Even the 150-day deadline has expired for all the Verizon Wireless applications that currently require issuance of final building permits by the City's Building Department. By delaying beyond the deadlines established by the Ruling, the City would violate the Act.

In addition, several decisions under the Act have held that changes in local ordinances may *not* be applied retroactively to pending applications. *See, e.g., Sprint Spectrum, L.P. v. Jefferson County*, 968 F.Supp. 1457, 1469 (N.D. Ala. 1997) (finding moratorium violated the Act, and holding that "plaintiffs are entitled to have their pending applications decided on the basis of those [regulations] in effect on the date such applications were filed, rather than proposed zoning provisions not yet adopted"); *Virginia Metronet, Inc. v. Board of Supervisors,* 984 F.Supp. 966, 974, n. 14 (E.D.Va. 1998) (criticizing use of newly enacted criteria to reject pending applications). See, also, *AT&T Wireless Services of California LLC v. City of Carlsbad*, 308 F. Supp. 2d 1148, 1163 (S.D. Cal. 2003), and cases cited therein ("the city may not arbitrarily impose new CUP criteria not in place at the time of plaintiff's application").

II. The Far-Reaching Moratorium is not authorized under State Law.

As a matter of state law and the City Charter, it is not necessary or "urgent" that the City suspend the issuance of all wireless permits while reviewing and possibly adopting new regulations. Under the Charter, section 211, there must be an explanation and finding of an actual "emergency" and under Government Code Section 65858(c) the City may not adopt or extend any moratorium absent a finding of a "*current and immediate threat* to the public health, safety, or welfare" and that approval of additional use permits "would result in that threat to public health, safety, or welfare." (Emphasis added.) In other words, a moratorium is not authorized absent a serious urgency.

The City has successfully processed and issued wireless permits for many years using the current regulations (see, e.g., Sections 21.45.115 and 21.52.210 of the Municipal Code). As discussed above, new standards may not be applied to pending (much less approved) applications. In short there is no immediate threat that would justify a complete halt on the improvement of Long Beach's telecommunications infrastructure.

III. The Moratorium itself would violate the Telecommunications Act of 1996.

Quite apart from the issue of exemptions, the moratorium itself would violate the federal Act. While preserving local government control over traditional land use issues, the Act sets forth certain important limitations. Those most relevant here include the following:

- As we have pointed out, the City must act on permit applications "within a reasonable period of time," taking all relevant factors into consideration. (47 U.S.C. § 332(c)(7)(B)(ii).) As noted above, the FCC has determined that a "reasonable time" is 90 days for collocations and 150 days for other placements.

- The City's land use controls "shall not prohibit or have the effect of prohibiting the provision of personal wireless services." (47 U.S.C. § 332(c)(7)(B)(i)(II).)

Based on the foregoing provisions, courts have almost uniformly held that local moratoria violate the Act. "Generally, courts have found that the institution of moratoriums violate the Telecommunications Act." *Sprint Spectrum, L.P. v. Town of North Stonington*, 12 F. Supp. 2d 247, 256 (D. Conn. 1998). "[A] moratorium against the expansion of personal wireless services would violate the Telecommunications Act." *Omnipoint Communications, Inc. v. City of Scranton*, 36 F. Supp. 2d 222, 232-233 (M.D. Pa. 1999).

In fact, moratoria both long and short have been struck down by courts throughout the country. In *Sprint Spectrum, L. P. v. Town of Farmington*, 1997 WL 631104, *6 (D.

Conn. 1997), the federal district court held that a nine month moratorium violated the Act. *See also Sprint Spectrum, L. P. v. Jefferson County*, 968 F. Supp. 1457 (N. D. Ala. 1997)(court struck down third in series of moratoria); *Sprint Spectrum, L. P. v. Town of West Seneca*, 659 N.Y.S. 2d 687, 172 Misc. 2d 287, 289 (N.Y. Sup. 1997)(six month time period from application date without decision – including 90-day moratorium – deemed unreasonably long).

A very early case decided just after the Act was enacted did uphold a six-month moratorium. *See Sprint Spectrum v. City of Medina*, 924 F. Supp. 1036 (W.D. Wash. 1996). However, the *Medina* decision has in almost every instance been strictly limited to its facts. The most critical fact relied upon by the *Medina* court is that the City of Medina imposed its six-month moratorium just *five days* after enactment of the Telecommunications Act of 1996, when it expected a sudden "flurry of applications" and had no criteria for reviewing them. *Medina*, 924 F. Supp. at 1037. The courts in *Farmington* and *Jefferson County* reviewed the *Medina* decision and found it inapplicable to moratoria enacted fifteen months and sixteen months after the passage of the Act.

More recent decisions have also followed this approach. *See, e.g., Masterpage Communications v. Town of Olive,* 418 F.Supp.2d 66, 78 (N.D.N.Y. 2005) (distinguishing *Medina*, holding that 25-month moratorium adopted more than a year after Act "was unreasonable in violation of the Act").

In light of this precedent, a federal court would require an exceedingly strongly justification for a moratorium imposed more than *fourteen years* after the Act was passed, and where existing review criteria are currently used to approve or reject telecommunications sites.

Finally, we understand that this moratorium stems from certain fears related to the proximity of radio frequency emissions. It is well established that federal law, which sets the applicable safety standards, preempts local jurisdictions from regulating wireless facilities based upon the environmental effects of radio frequency emissions. Section 332 states:

> 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.[1]

[1] 47 USC § 332(c)(7)(B)(iv).

Conclusion

There is no need for the City to halt all new or updated infrastructure while the City moves forward to develop new wireless guidelines. If the Council declines to adopt an extended moratorium, the City would simply continue to process the applications on a case-by-case basis, as it has in the past. At the same time, the City can of course move forward to develop new regulations. But based upon our past experience, a moratorium may well last one or two years; at the end of that time the City's residents and local work force will have suffered considerably from the lack of improved wireless service.

For all the reasons set forth in this letter, we respectfully urge the Council to reject an extended moratorium, and, if new regulations are deemed necessary, to develop lawful regulations while the City continues to review facilities using its existing criteria.

If the Council determines it will enact a continuing moratorium, we request that it clearly exempt modifications to existing facilities, exempt applications for which land use approval has already been obtained, include a process allowing for the potential exemption of other facilities, and require that the City continue to accept and process applications during the moratorium. We request that any moratorium be very short in duration.

We look forward to working with you, and please let me know if you have any questions or whether you would like to discuss this important matter.

Sincerely yours,

Sarah L. Burbidge

cc (via email):
Verizon Wireless