AGENDA ITEM #5

RECEIVED CORRESPONDENCE

#5

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February 14, 2018

VIA EMAIL

Chair Erick Verduzco-Vega
Vice Chair Richard Lewis
Commissioners Mark Christoffels,
Ron Cruz, Joshua LaFarga,
Andy Perez and Jane Templin
Planning Commission
City of Long Beach
333 West Ocean Boulevard
Long Beach, California 90802

Re: Proposed Code Chapter 15.34
Wireless Telecommunications Facilities in the Public Right-of-Way
Planning Commission Agenda Item 5, February 15, 2018

Dear Chair Verduzco-Vega, Vice Chair Lewis and Commissioners:

We write on behalf of Verizon Wireless to provide comments on proposed Code Chapter 15.34 regulating wireless facilities in the right-of-way (the "Draft Ordinance"). As we explained in preliminary comments to staff sent in November, the Draft Ordinance discourages siting of "small cell" wireless facilities that Verizon Wireless has successfully deployed throughout California. With one short cylindrical antenna and a few small pole-mounted boxes, Verizon Wireless's latest small cell designs pose minimal visual impacts while providing needed network capacity. However, certain Draft Ordinance requirements impede siting of small cells, including the prohibition of pole-mounted equipment and facilities on wood utility poles. These and other provisions, including the implied requirement to underground equipment, conflict with federal or state law. The requirement to submit coverage maps specifically conflicts with judicially-required modifications to the San Francisco ordinance, which staff used as the model for the Draft Ordinance. We urge the Commission to continue this item and direct staff to work with industry on needed revisions to the Draft Ordinance. Our general comments are as follows:

The City Must Allow Pole-Mounted Equipment and Siting on Wood Poles.

The Draft Ordinance does not allow wireless facilities to be placed on wood poles. Draft Ordinance §§ 15.34.130(B)(1)(b)(6)(A), 15.34.130(B)(1)(b)(6)(F)(i). This is in direct conflict with Verizon Wireless's rights as a telephone corporation under California Public Utilities Code Section 7901. In addition, mounting of small antennas

and boxes on existing utility infrastructure such as wood utility poles is a commonsense means to minimize visual impacts. Utility poles offer advantageous height for antennas (unlike light standards or kiosks), reducing the number of facilities required to serve an area. The City must allow for siting on any utility pole, and it should not be disfavored compared to other options. Verizon Wireless intends to exercise its statewide right to use the right-of-way under Section 7901 and its membership in the Southern California Joint Pole Committee to place small cells on wood utility poles in Long Beach.

The Draft Ordinance also prohibits small equipment boxes on any poles, allowing only antennas. Draft Ordinance §§ 15.34.130(B)(1)(b)(6)(B), 15.34.130(B)(1)(b)(6)(D)(iii). However, small radio boxes pose little visual impact if painted to match poles, rotated away from predominant views and concealed behind signs if available. San Francisco has approved hundreds of facilities with multiple small pole-mounted boxes attached to streetlights and other poles. We note an internal inconsistency in the Draft Ordinance as several provisions actually contemplate pole-mounted equipment. For example, Section 15.34.130(B)(1)(b)(6)(E)(iii) requires that pole-mounted equipment be placed above ten feet, and Section 15.34.130(B)(1)(b)(6)(F)(v) requires that "equipment components" mounted to a pole be "small" and "compatible in structure, scale…and proportion" to poles, plus painted to match. These standards suggest the City is comfortable with pole-mounted equipment. At a minimum, equipment boxes that fall under specified size thresholds should be allowed on a pole.

San Francisco's Ordinance Is an Inappropriate Model for Long Beach.

The Draft Ordinance borrows heavily and expands upon concepts and provisions of San Francisco Public Works Code Article 25, which has been challenged as vague and overreaching in a lawsuit pending with the California Supreme Court. While adopting provisions of a code that is currently subject to litigation carries risk, expanding upon those concepts carries even greater risk. If Long Beach is to use the San Francisco model, then subjective standards lifted from San Francisco's right-of-way ordinance must be narrowed, as they have been in San Francisco itself, through detailed definitions and reference to neighborhood characteristics found in San Francisco policy documents and adopted maps and plans. For example, the Draft Ordinance borrows terms such as "excellent" and "good view streets" that are unique to San Francisco which has specifically defined and comprehensively mapped such streets in its General Plan. To our knowledge, such definitions and maps do not exist for Long Beach. Consequently, use of these terms in the Draft Ordinance is meaningless.

Subjective Compatibility Standards are Inconsistent with State Law.

The Draft Ordinance requires special compatibility findings for "Tier B" right-of-way facilities within, or in some cases, adjacent to "protected" locations that encompass much of the City and often overlap: the coastal zone; parks; "planning protected" historic areas, landmarks and particular streets; schools; and "zoning protected" residential or

institutional planned development districts. Other "unprotected" locations are treated as "Tier A" facilities with their own compatibility findings. Staff borrowed the concept of protected location compatibility standards from San Francisco Public Works Code Article 25 and then expanded those standards. As noted, the Draft Ordinance does not include many of the specific definitions provided under San Francisco's regulations that limit the scope of its compatibility standards. Lack of defined terms renders the Draft Ordinance overly subjective.

The school protected standard is a thinly-veiled attempt to regulate radio frequency emissions in violation of federal law. *See* 47 U.S.C. § 332(c)(7)(B)(iv). Schools create enormous demands on network capacity. Small cells provide that capacity and ensure reliable wireless communications for students, teachers, and parents, as well as the surrounding neighborhood, including during emergencies. School locations should not be discouraged by vague, subjective standards such as "significantly degrade the views of the school." Draft Ordinance § 15.34.020(W). School protected locations in particular should be eliminated from the Draft Ordinance.

Generally, each protected location must be pared down to require compatibility findings only for those areas which are truly unique and readily identifiable, such as designated historic landmarks. Locations not protected for either "planning" or "zoning" purposes, defined as "unprotected locations" under Draft Ordinance Section 15.34.020(Z), should not be protected other than through traditional encroachment permit standards.

The Requirement to Submit Coverage Maps Contradicts State Law.

By requiring coverage maps for right-of-way wireless facilities, the Draft Ordinance appears to erroneously reintroduce the requirement that a wireless carrier must prove the "necessity" for its facility. Draft Ordinance § 15.34.130(D)(6). As a result of judicial action, "necessity" standards have been removed from San Francisco Public Works Code Article 25. In November 2014, the trial court in *T-Mobile West LLC v. City and County of San Francisco* (2014), San Francisco Super. Ct. No. CGC–11–510703 at pp. 4 and 11, found that an ordinance provision requiring demonstration of service needs for right-of-way wireless facilities was pre-empted by Section 7901 and therefore unenforceable. *See also T-Mobile West, supra,* 3 Cal.App.5th at pp. 342-343 ("the trial court found portions of the Ordinance, conditioning issuance of a permit on economic or technological necessity, were preempted by section 7901.")

In response to the trial court's decision, in 2015, San Francisco repealed "the provisions that allowed the City to deny a Wireless Permit application or renewal application based on the applicant's technological need for the proposed Wireless Facility." San Francisco Board of Supervisors Legislative Digest, File No. 141297, February 3, 2015, p. 2. While this case is on appeal to the California Supreme Court, its historic impact on San Francisco's Article 25 is relevant to the Draft Ordinance and its

incorporation of Article 25 provisions. Accordingly, any requirement for the submittal of coverage maps or purported review of a wireless facility based upon "necessity" must be deleted in the Draft Ordinance.

Our specific comments on the Draft Ordinance are as follows:

§ 15.34.130 – Requirements and Standards

(B) Permit Requirements

(1) Minimum Permit Requirements

(b) Department of Public Works Requirements

(6) Aesthetic Impacts

We note that by requiring that facilities "be developed with the intent of locating and designing such facilities in the following manner," this provision appears to only allow the locations and designs in the following lists, barring other options.

(A) Antenna Preferences

This ranked list of six allowed antenna locations does not include existing wood utility poles, one of the optimal sites for small cells. As discussed, the City must allow Verizon Wireless to place its equipment on joint utility poles, including wood poles, as state law grants Verizon Wireless the right to place its telephone equipment in the right-of-way and it is a member of the Southern California Joint Pole Committee. If strictly applied, the top preference for facilities on street lights may violate California Government Code Section 65964(c) which bars the City from limiting wireless facilities to sites owned by particular parties. This list must allow for placement of facilities on wood utility poles.

(B) Equipment Preferences

This ranked list of five designs does not allow for pole-mounted equipment. However, as discussed, small equipment boxes pose little visual impact and should be encouraged. Concealment in a pole base or skirt may be infeasible due to space limitations.

Undergrounding of equipment cannot be required as may be the case if the top preference is strictly applied. Under federal law, local regulations must be applied equally to all public utilities using the right-of-way. Federal law recognizes the authority of local governments to "manage the public rights of way" though on a "competitively neutral and nondiscriminatory basis." *See* 47 U.S.C. § 253(c). The Federal

Communications Commission (the "FCC") has stated that local governments may impose conditions only if they are applied "equally to *all* users of the rights-of-way" and may not impose conditions on one user, such as a telecommunications company, in a different manner than imposed on other users. *See Second Report and Order*, CS Docket 96-46, § 209, FCC 96-249, adopted May 31, 1996. If other utilities using Long Beach rights-of-way have placed equipment boxes above ground or on poles, Verizon Wireless must be afforded equal treatment.

(D) Site Location Restrictions

(i) Prohibition in Center Median

In certain areas, small cells located in a center median may pose the least visual impact. The City should instead include the center median as the least-preferred location within the right-of-way.

(ii) Limit to One Facility per 500 Feet in Residential Areas

This 500-foot separation requirement is arbitrary and overly restrictive, and any denial of a proposed facility similar to an existing facility nearby would constitute unreasonable discrimination in violation of the Telecommunications Act. *See* 47 U.S.C. § 332(c)(7)(B)(i)(I). Individual small cells pose such minimal visual impact that there is no cumulative impact of small cells in close proximity, particularly where street trees or other utility infrastructure break up sight lines. Clustering of facilities in inconspicuous locations may avoid the need for placement directly in front of residences. This separation requirement should be eliminated.

(iii) Pole-Mounted Equipment Limited to Antennas

As discussed, small radio boxes should be allowed on poles, particularly if they fall under specified dimension thresholds, and several Draft Ordinance provisions actually provide standards for pole-mounted equipment. This contradictory provision should be stricken.

(v) Ban on New Wood Poles

While Verizon Wireless prefers to site on existing poles, state law grants it the right to place new wood poles to support small cells. Public Utilities Code Section 7901 grants telephone corporations the right to "erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines." A ban on new wood poles would violate Verizon Wireless's rights under state law. It would also lead to mismatched poles in neighborhoods where wood poles best fit local character. Non-wood poles may preclude future attachment of other utility lines that would then require an additional pole. This provision must be eliminated.

(F) Design

(i) Antenna Specifications; Ban on Use of Wood Poles

These particular specifications for antennas conflict with federal law. The regulation of technical and operational aspects of wireless facility equipment lies exclusively with the FCC. *See New York SMSA v. Town of Clarkstown*, 612 F.3d 97, 106 (2d Cir. 2010) ("While section 332(c)(7) 'preserves the authority of State and local governments over zoning and land use matters'…this authority does not extend to technical and operational matters, over which the FCC and the federal government have exclusive authority.") This federal limitation on the City's authority extends to antenna type as well as size, including diameter. The antenna specifications of this provision should be stricken.

As discussed above, the City may not ban, and should in fact encourage, placement of small cells on wood poles, including new wood poles. The last sentence of this provision also should be eliminated.

(vi) Additional Subjective Design Standards

This provision requires "visually unobtrusive" facility designs that "minimize negative aesthetic impacts." Such subjective standards may be used to deny otherwise compliant facilities. As noted, the City should avoid subjective standards for right-of-way facilities and instead provide objective standards to aid wireless carriers in designing facilities. In the same way, the City should not establish arbitrary aesthetic limitations such as the prohibition on any faux or decorative elements that may camouflage wireless facilities. Wireless facilities have been successfully incorporated into mailboxes, trash cans, and bus stops in other communities with notable success. Arbitrary prohibition of such techniques should be deleted.

(vii) Requirement for Cables To Be Routed through Interior of Pole

Of course, this is not possible for cables and conduits placed on wood poles, which must be allowed. This provision should specify "if feasible."

(D) Application Requirements

(6) Propagation/Coverage Maps

As noted above, under state law, the City cannot require this information, nor can the City deny a right-of-way wireless facility over questions of need. Verizon Wireless has a state-mandated right to use the right-of-way and need not prove the necessity of its

facilities. There is also no relation to standards for approval of right-of-way wireless facilities. This submittal requirement must be stricken.

(14) Noise Study/Analysis

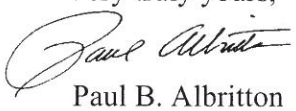
Most small cell equipment does not contain moving parts or emit any sound. For noiseless installations, applicants should be allowed to submit manufacturer specifications affirming no noise emissions rather than a formal noise study.

(Q) Renewal and New Applications
(S) Modification Permit

Under Government Code Section 65964(b), wireless facility permit terms of less than 10 years are presumed to be unreasonable. Modification permits should be issued for a ten-year term, thus extending the term of the underlying permit. There is no reason for a lesser term if applicants demonstrate compliance of the existing facility through required drawings that show existing and proposed conditions. The Draft Ordinance should address the required ten-year term for modification permits.

While we provided comprehensive comments to staff over three months ago, the Draft Ordinance is essentially unchanged aside from a few minor revisions. Internal inconsistencies and unlawful provisions remain. Verizon Wireless is concerned that overly stringent standards will frustrate deployment of small cells where needed in Long Beach. In particular, the bans on pole-mounted equipment and use of wood poles are excessive. We ask the Planning Commission to direct staff to return to the drafting board. Verizon Wireless is willing to continue working with staff to develop reasonable standards accommodating typical small cell designs that pose little visual impact. We look forward to continued discussions with Long Beach officials regarding the Draft Ordinance.

Very truly yours,



Paul B. Albritton

cc: Charles Parkin, Esq.
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February 15, 2018

Via Email
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Re. AT&T's Comments on Proposed Chapter 15.34
Wireless Telecommunications Facilities in the Public Rights-of-Way

Dear Chair Verduzco-Vega, Vice Chair Lewis, and Commissioners Christoffels, Cruz, LaFarga, Perez, and Templin:

I write on behalf of New Cingular Wireless PCS, LLC d/b/a AT&T Mobility (AT&T) to provide comments on proposed Chapter 15.34 of the Long Beach City Code ("Draft Ordinance"). As industry representatives explained last year in the context of the previous "patch ordinance" and earlier iterations of this draft, deployment of micro wireless facilities such as small cells is critical to meet ever-increasing demand for wireless services and to support 5G services in the future. Small cells are low-power, low-profile facilities that AT&T typically installs in public rights-of-way in order to bring signals closer to customers. These facilities present a win-win opportunity for AT&T to provide services to residents with minimal aesthetic impact. But rather than promoting small cells, the Draft Ordinance presents a series of obstacles and subjective standards that hinder efficient, aesthetic deployments.

AT&T echoes the concerns raised by Verizon in its comments submitted to the Planning Commission yesterday. In addition, AT&T highlights some of the hurdles and barriers that would be placed along the path to approval by the Draft Ordinance. The Draft Ordinance's subjective standards, prohibitions, and onerous (many unlawful) filing requirements create a complex and unpredictable process. In fact, several provisions seem to work at cross purposes. For example, while the city clearly intends to protect aesthetics, the Draft Ordinance prohibits stealth designs and discourages collocation. The draft is seriously flawed in many ways, and AT&T recommends that the city retool this draft to provide a streamlined path to approval based on lawful, objective criteria.

Subjective Standards Should Be Eliminated

The Draft Ordinance proposes various protected locations, each with its own compatibility standard to restrict deployment of wireless facilities in these locations. AT&T is committed to working with the city on siting, but worries that the Draft Ordinance's subjective

location standards and incomplete siting preference lists will discourage timely deployment of much-needed wireless infrastructure. Most alarming are the ill-defined compatibility standards like the "Planned Protected Location Compatibility Standard" under Draft Ordinance Section 15.34.020(Q). This compatibility standard prohibits installations that "would significantly degrade the aesthetic attributes" of the subject locations. This vague phrase risks inconsistent interpretation and application because it is subject to so many ad hoc interpretations. Without clear standards, providers will be unable to predict acceptable deployments and staff may have difficulty guiding providers about the city's preferences. Ultimately, these imprecise standards will impede the city's stated objectives as well as providers' deployment needs.

Unlawful Prohibitions Must Be Eliminated

Under California Public Utilities Code Section 7901, AT&T has state law franchise rights to access and construct facilities in public rights-of-way in order to furnish wireless telecommunications services. This right is tempered only insofar as proposed facilities would incommode, or obstruct, the public rights-of-way, and subject to the city's reasonable time, place, and manner regulations as to access under Section 7901.1. AT&T objects to the extent the Draft Ordinance interferes in any manner with AT&T's right to deploy facilities in the public way under Sections 7901 and is inconsistent with Section 7901.1. Thus, for example, the city cannot prohibit use of wood poles, cannot require conduit to be routed in interiors of poles, and cannot prohibit pole-mounted equipment.

In fact, as a practical matter, using wood poles and pole-mounting equipment will often be the most aesthetic solution. This is especially so for small cell facilities that can be efficiently deployed with minimal visual impact. And pole-mounting the small equipment for small cells can help avoid proliferation of more intrusive ground cabinets. Similarly, prohibiting use of wood pole is not only unlawful – it may result in a proliferation of poles, especially given the city's curious deterrence of collocations under the Draft Ordinance Section 15.34.130(B)(2). Equally curious (and unlawful) is the city's prohibition of stealth installations under Draft Ordinance Section 15.34.130(B)(1)(b)(6)(F)(iv).

Application Requirements Are Onerous and Should Be Retooled

Given the technological benefits of small wireless facilities that easily blend with other utility infrastructure in rights-of-way, many state and local governments are adopting relatively simple application requirements. These enactments not only encourage deployment of low-profile facilities, they lift unnecessary burdens on city staff and providers alike. Conversely, overly burdensome application requirements can deter small cell investments by introducing excessive costs and time. In addition to the many reasons the city should not discourage small cells that AT&T and other industry stakeholders have explained in the context of this and previous drafting efforts, AT&T's deployments will foster public safety. With AT&T's selection by the federal First Responder Network Authority, FirstNet, as the wireless services provider to build and manage the first-ever nationwide public safety wireless network, each of its new and modified sites will enhance its capability to improve first responder communications.

It is surely appropriate for the city to require scaled site plans, evidence of attachment rights, and compliance with generally applicable health and safety codes. But additional requirements are unnecessary and cumbersome for both staff and applicants. For example, Draft Ordinance Section 15.34.130(D)(6) requires coverage maps for all proposed facilities. In its comments, Verizon has explained why this requirement is unlawful. From a practical perspective, this level of detail is not appropriate for small cells which are often deployed to densify networks and to provide 5G services in the very near future. And typical coverage maps often do not tell the story of network conditions such as capacity, interference or lack of dominant signals in the area. There simply is no basis for requiring providers to take on this added burden to justify small cells, which costs time and money.

AT&T also questions the need for a narrative analysis and feasibility study of alternative locations. Because small cells propagate a signal over a much shorter range (often only several hundred feet) than traditional macro facilities, siting choices are limited. These can be assessed on site walks and should not entail deep analysis and feasibility studies. In fact, the city misconstrues the appropriate standard for any analysis of alternatives. Draft Ordinance Section 15.34.130(D)(8) seeks an explanation for why lower preference alternatives "cannot be feasibly implemented." 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.

Required Conditions Are Inappropriate & Unconstitutional

The Draft Ordinance imposes myriad permit conditions, many of which are unlawful and even more are overly burdensome. Worse, Draft Ordinance Section 15.34.130(F)(2) prohibits issuance of a permit unless the applicant accepts all of the conditions, whether or not they are lawful and whether or not they are reasonable. This set of adhesion conditions needlessly risks legal disputes and discourages small cell investments in the city.

For instance, Section 15.34.130(G) of the Draft Ordinance authorizes the city to require an applicant to plant and maintain street trees as a condition of approval. First, this clearly violates AT&T's rights under Section 7901. Also, AT&T cannot be required to take on tree maintenance activities in the city. Moreover, this requirement would amount to an unconstitutional condition under applicable federal law. But under the Draft Ordinance, AT&T cannot obtain a Wireless Right-of-Way Permit without accepting this illegal condition.

Other conditions that are problematic and should be subject to discretion and negotiation include the scope of the city's draft indemnity condition, which is outrageously overbroad, and the city's draft policy with respect to insurance and self-insurance. In addition, the Draft Ordinance affords unfettered discretion to the Department of Public Works to add any other condition, which again must be accepted no matter how ill-suited, unreasonable, or even discriminatory. The city should rein in the scope of conditions to foster deployments free of the sort of coercive and unreasonable conditions that the United States Supreme Court has invalidated.

Conclusion

AT&T appreciates the city's continuing efforts to develop an appropriate wireless siting ordinance in light of the pace of technological advancements. Because several provisions of the Draft Ordinance are patently unlawful, and other provisions will be unlawful or unreasonable as applied, the city should step back from this Draft Ordinance. Doing so, and working with industry stakeholders, will afford the city an opportunity to develop a lawful, win-win ordinance that will provide greater benefits to the city in terms of aesthetics and clear guidance to providers for responsibly achieving deployment goals. We look forward to continuing to work with the city to that end.

Very truly yours,

/s/ John di Bene

John di Bene

cc: Charles Parkin, Esq., City Attorney

T-Mobile

T-Mobile USA, Inc.
12920 SE 38th Street, Bellevue, WA 98006

February 15, 2018

VIA EMAIL

Chair Erick Verduzco-Vega
Vice Chair Richard Lewis
Commissioners Mark Christoffels,
Ron Cruz, Joshua LaFarga, Andy
Perez, and Jane Templin
Planning Commission City of Long Beach
333 West Ocean Boulevard
Long Beach, California 90802

Re: T-Mobile's Comments on Proposed Code Revisions to Regulate Wireless Telecommunications Facilities in the Public Right-of-Way (Code Ch. 15.34)

Dear Chair Verduzco-Vega, Vice Chair Lewis and Commissioners:

I write on behalf of T-Mobile USA, Inc. ("T-Mobile"), to comment on the proposed code revisions related to wireless facilities in the right-of-way, City of Long Beach ("City") Code Chapter 15.34 (the "Draft Ordinance"), currently under consideration by the Commission. As outlined below, we continue to have significant concerns with the draft and respectfully request it be returned for additional work.

As you know, T-Mobile provides wireless communication services across the City to its residents, business community, and visitors. While traditional macro deployments will remain important, ever growing data demands require new infrastructure (e.g., small cells). While this new infrastructure is smaller, it needs to be deployed more densely and closer to the end user. Unfortunately, the Draft Ordinance as currently constructed will frustrate the deployment of this important infrastructure and is not reflective of its actual impacts. For example, T-Mobile's small cell solution consists of a compact shroud that contains our antennas and other associated equipment in one enclosure that can be mounted inconspicuously on an existing pole. This design poses minimal visual impacts while ensuring we have capacity necessary to offload network demand.

While T-Mobile and other carriers provided comprehensive comments to staff over three months ago identifying our concerns, the Draft Ordinance remains unchanged aside from a few minor revisions. We also share the continuing concerns identified by Verizon Wireless in a letter, dated February 14, 2018.

One significant concern we continue to have is that the Draft Ordinance still borrows substantially from one adopted by the City of San Francisco (*see* Public Works Code Article 25). As you know, the San Francisco ordinance is currently the subject of a challenge brought by T-Mobile and others. That suit is presently before the California Supreme Court, and a decision is expected this year. *See T-Mobile West*

T-Mobile

T-Mobile USA, Inc.
12920 SE 38th Street, Bellevue, WA 98006

LLC v. City and County of San Francisco, 3 Cal.App.5th 334 (2016) (under review by the California Supreme Court, Case No. S238001). In addition, we also have significant concerns about the Draft Ordinance's:

1) **Subjective compatibility and design standards:** The State franchise grants broad access to rights-of-way throughout the State. *See* Pub. Util. Code §§ 7901, 7901.1 ("Section 7901"). Contrary to those rights, the Draft Ordinance allows for the denial of access pursuant to open-ended and subjective standards.

2) **Impermissible constraints on Network Design:** The Draft Ordinance still establishes hierarchies for placement, restrictions on height, and prohibits new wood poles. As we explained previously, the net effect of these requirements is to unfairly burden wireless facilities and impermissibly limit technological choices that wireless providers make. Such limitations are a violation of federal law and practically limit technological innovation making deployment harder. *See, e.g., See New York SMSA LP v. Town of Clarkstown*, 612 F.3d 97 (2d Cir. 2010)

Considering the foregoing, we respectfully request that the Commission return the ordinance to staff so that it can work with industry and other stakeholders to develop standards that will support the deployment of 21st Century Wireless Infrastructure across the City. If you have any questions, please feel free to contact me, at (425) 383-6295, or Rod De La Rosa, Site Advocacy Manager - West Region, at (925) 521-5948.

Thanks for your time and consideration.

Sincerely,

Dylan M. Fuge
Sr. Corporate Counsel - Land Use

cc: Rod De La Rosa., Site Advocacy Manager – West Region, T-Mobile
Hollie Maldonado, Site Development Manager, T-Mobile

ATTACHMENT: T-Mobile USA, Inc.'s November 6, 2017 Comments on the City of Long Beach's Proposed Code Revisions to City Code Ch. 15.34 Concerning Wireless Telecommunications Facilities in Public Rights of Way.

T-Mobile

T-Mobile USA, Inc.
12920 SE 38th Street, Bellevue, WA 98006

November 6, 2017

VIA EMAIL

Meredith Elguira
Capital Projects Coordinator
Public Works Department
City of Long Beach
333 West Ocean Blvd
Long Beach, California 90802

Re: T-Mobile's Comments on Code Revisions to Regulating Wireless Telecommunications Facilities in the Public Right-of-Way (Code Ch. 15.34)

Dear Ms. Elquira:

I write on behalf of T-Mobile USA, Inc. ("T-Mobile"), to provide some initial comments on the proposed code revisions related to wireless facilities in the right-of-way, Code Chapter 15.34 (the "Draft Ordinance"), currently under consideration by the City of Long Beach ("City"). We are providing these comments in connection with today's stakeholder meeting to facilitate discussion. However, given the limited notice we received of the meeting and the short period of time we have had with the draft, we will be supplementing these comments after we have had a chance to complete a more detailed review.

As you know, T-Mobile provides wireless communication services across the City to its residents, business community, and visitors. Like the City, we are constantly striving to provide the services our customers, and your constituents, expect while also responding to the ever-changing demands and expectations placed on wireless infrastructure in the 21st century. This means, among other things, ensuring that polices are put in place that support the deployment of the infrastructure necessary to develop a 21st century wireless network.

While traditional macro deployments will remain an important component of that network, supporting customers who increasingly rely on wireless services exclusively and have ever growing data demands requires the deployment of new infrastructure (e.g., small cells). This new infrastructure is much smaller than traditional wireless facilities, but needs to be deployed more densely and closer to the end user to realize the full benefits of 5G technology. Full realization of these benefits will require facilitating efficient wireless deployments in rights-of-

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way across the City and the country. We do not believe the proposed ordinance will help achieve this objective.

One overarching concern we have with the Draft Ordinance is that it borrows substantially from one adopted by the City of San Francisco (*see* Public Works Code Article 25). As you know, the San Francisco ordinance is currently the subject of a challenge brought by T-Mobile and others. The suit, which alleges that the ordinance is discriminatory and unlawfully infringes on carriers' state-granted right to access the rights of way, is presently before the California Supreme Court, and a decision is expected next year. *See T-Mobile West LLC v. City and County of San Francisco*, 3 Cal.App.5th 334 (2016) (under review by the California Supreme Court, Case No. S238001). Considering the foregoing, we respectfully suggest that the City should table the proposed ordinance so that it can work with industry and other stakeholders to develop standards that will support the deployment of 5G technology across the City, or, at a minimum, so that it can consider the proposal following resolution of the pending litigation.

We share the concerns identified by Verizon Wireless in its letter, dated November 3, 2017. Among other things, we are concerned about:

1) **Subjective Compatibility and Design Standards:** The State franchise grants telephone corporations, like T-Mobile, broad access to rights-of-way throughout the State. *See* Pub. Util. Code §§ 7901, 7901.1 ("Section 7901"). Contrary to that right of access, the Proposed Ordinance is replete with provisions that allow the City to deny access to the rights of way entirely, pursuant to open-ended and subjective standards. For example, the Proposed Ordinance requires that all facilities be "designed and located to eliminate or substantially reduce their visual and aesthetic impacts upon the surrounding public rights-of-way and public vantage points." *See* Sec.15.34.130(b)(6); 15.34.130(b)(6)(F)(7) (requiring facilities to be as "visually unobtrusive as possible" and designed to minimize "visual clutter" and "negative aesthetic impacts"). These requirements are not only burdensome, they are also discriminatory, in that they apply only to wireless facilities and not to other communications infrastructure. As such, they appear designed to exclude wireless facilities from large swaths of rights of way across the City in violation of State and Federal law.

2) **Constraints on Network Design:** The Proposed Ordinance establishes hierarchies for: (i) the placement of wireless antennas (Sec.15.34.130(b)(6)(A)); (ii) appurtenant equipment (Sec. 15.34.130(b)(6)(B)); and (iii) site location (Sec. 15.34.130(b)(6)(C), (D)). It also imposes significant restrictions on facility height (Sec. 15.34.130(b)(6)(E)) and the placement of new wood poles (Sec. 15.34.130(b)(6)(D)(v)). In addition to unfairly

T-Mobile

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burdening wireless facilities, the net effect of these requirements will be to limit the technology choices that wireless providers make, ultimately impacting network designs. Enacting a preference for certain technological choices, or otherwise attempting to regulate the technological means by which wireless carriers offer service, would be a violation of federal law. *See, e.g., See New York SMSA LP v. Town of Clarkstown*, 612 F.3d 97 (2d Cir. 2010) (holding that local governments are preempted from regulating or dictating a provider's choice of wireless technologies and equipment). Such preferences would also limit technological innovation, because they make it much harder for a provider to deploy new technology that does not fit within the City's narrowly prescriptive requirements.

In conclusion, T-Mobile believes that the Proposed Ordinance requires substantial revisions to ensure consistency with State and Federal law before adoption. T-Mobile welcomes the opportunity to discuss the Proposed Ordinance with you further. If you have any questions, please feel free to contact me, at (425) 383-6295, or Rod De La Rosa, Site Advocacy Manager – West Region, at (925) 521-5948.

Thanks for your time and consideration.

Sincerely,

Dylan M. Fuge
Sr. Corporate Counsel - Land Use

cc: Rod De La Rosa., Site Advocacy Manager – West Region
Hollie Maldonado, Site Development Manager, T-Mobile

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File No.:
2464.100

February 15, 2018

VIA HAND DELIVERY AND
EMAIL: HEIDI.EIDSON@LONGBEACH.GOV

Erick Verduzco-Vega, Chair
and Members
c/o Heidi Eidsdon
City of Long Beach Planning Commission
333 West Ocean Blvd.
4th Floor
Long Beach CA

Re: Wireless Telecommunications Facilities in the Public Rights-of-Way: Zoning Code Amendment and Local Coastal Plan Amendment (ZCA 17-008; LCPA 17-001)

Dear Chair Verduzco-Vega,

This office represents Crown Castle NG West LLC ("Crown Castle") with respect to the above-referenced matter. This letter presents Crown Castle's preliminary comments on the proposed zoning code and local coastal plan amendments for wireless telecommunications facilities in the public rights-of-way ("Ordinance"). Crown Castle reserves the right to supplement these comments on the Ordinance up to the date the Ordinance is scheduled for adoption by the City Council.

1. Introduction.

Crown Castle is a "competitive local exchange carrier" ("CLEC"). CLECs qualify as a "public utility" and therefore have a special status under state law. By virtue of the California Public Utilities Commission's issuance of a "certificate of public convenience and necessity," CLECs are authorized to "erect poles, posts, piers, or abutments" in the public rights-of-way ("ROW") subject only to local municipal control over the "time, place and manner" of access to the ROW. (Pub. Util. Code, §§ 1001, 7901; 7901.1; see *Williams Communication v. City of Riverside* (2003) 114 Cal.App. 4th 642, 648 [upon obtaining a CPCN, a telephone corporation has "the right to use the public highways to install [its] facilities."].)

Pursuant to its CLEC status, Crown Castle currently operates a series of small cell antenna nodes in the ROW of City of Long Beach ("City"). Because Crown Castle may seek to modify or expand its ROW network, it has an interest in the legislative proceedings currently before the Planning Commission.

2. Applicable Legal Principles.

A. State Law.

State law, including Public Utilities Code sections 1001 and 7901, governs the permitting of wireless telecommunications facilities in the ROW. Pursuant to those statutes, Crown Castle qualifies as a "telephone corporation" with a "vested right" to occupy the ROW throughout the state. That vested right supersedes local franchise requirements and is guaranteed by both the state and federal constitutions. (*Williams Communications v. City of Riverside*, *supra*, 114 Cal.App.4th at p. 648; see also, *Petaluma v. Pacific Tel. & Tel. Co.* (1955) 44 Cal.2d 284, 288-289 [statewide franchise of section 7901 is a "vested right"; no local franchise is necessary to enter municipal streets]; *County of L. A. v. Southern Cal. Tel. Co.* (1948) 32 Cal.2d 378, 384 [same principle cited]; *Postal Tel. Cable Co. v. Railroad Com.* (1927) 200 Cal. 463, 472 ["[t]he rights acquired by ... the provisions of the section, are vested rights which the constitutions, both state and federal, protect."].)

The rights afforded by section 7901 are a matter of "statewide concern" that supersede -- and therefore obviate the need for -- a discretionary municipal grant of entry to the ROW. (*City of Petaluma v. Pac. Tel. and Tel. Co.*, *supra*, 44 Cal.2d at pp. 287-289; see also *Williams Communication v. City of Riverside*, *supra*, 114 Cal.App.4th at p. 653 ["the construction and maintenance of telephone lines in the streets and other public places within the City is today a matter of state concern and not a municipal affair."].) Given the vested nature of the section 7901 right, Crown Castle contends that a discretionary use permit constitutes an unlawful precondition for a CLEC's entry into the ROW. (See, e.g., Michael W. Shonafelt, Whose Streets? California Public Utilities Code Section 7901 in the Wireless Age, 35 HASTINGS COMM. & ENT. L. J. 371 (2013).)[1]

Moreover, Government Code section 50030 applies to telephone corporations seeking to install their facilities in the public rights-of-way. That section provides that a city cannot impose an exaction that exceeds the "reasonable costs of providing the service for which the fee is charged" (*Williams Communications v. City of Riverside*, *supra*, 114 Cal.App.4th at p. 648.)

The California Legislature echoed the courts' oft-repeated declaration that "the construction and maintenance of telephone lines in the streets and other public places within the City is today a matter of state concern and not a municipal affair." (*Williams Communication v. City of Riverside*, *supra*, 114 Cal.App.4th at p. 653.) It did so in the context of enacting AB 57 in October 2015. AB 57 is codified as Government Code section 65964.1. Under section 65964.1, if a local government fails to act on an application for a permit to construct a wireless telecommunications facility within the prescribed Shot Clock timeframes (150 days for a standalone site and 90 days for a collocation site), the application is deemed approved by operation of law. When it enacted section 65964.1, the Legislature observed that:

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[1] In a recent case, *T-Mobile West LLC v. City and County of San Francisco* (2016) 3 Cal.App.5th 334 [2016 Cal. App. LEXIS 769], the First Appellate District, Division Five, determined that aesthetic considerations are appropriate in determining whether a facility "incommodes" the ROW. That case is being appealed to the California Supreme Court. The court did not decide the specific issue of whether obtaining a discretionary use permit is a lawful precondition to exercising the section 7901 franchise rights.

> The Legislature finds and declares that a wireless telecommunications facility has a significant economic impact in California and is not a municipal affair as that term is used in Section 5 of Article XI of the California Constitution, but is a matter of statewide concern.

(Gov. Code, § 65964.1, subd. (c).)

The above statutes and case law give rise to three principles that should inform the City's deliberations about the siting of Crown Castle's ROW facilities:

(1) Crown Castle has vested right to utilize the City's ROW;

(2) Crown Castle need not obtain a local "franchise" to enter the City's ROW; and

(3) The City is prohibited from imposing any fee to use the ROW, beyond what is required to address the "reasonable costs of providing the service for which the fee is charged" (i.e., the City cannot assess a general revenue fee for use the ROW).

B. Federal Law.

This matter also is governed by the federal Telecommunications Act of 1996, Pub. L. No 104-104, 110 Stat. 56 (codified as amend in scattered sections of U.S.C., Tabs 15, 18, 47) ("Telecom Act"). When enacting the Telecom Act, Congress expressed its intent "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." (110 Stat. at 56.) As one court noted:

> Congress enacted the TCA to promote competition and higher quality in telecommunications services and to encourage the rapid deployment of new telecommunications technologies. Congress intended to promote a national cellular network and to secure lower prices and better service for consumers by opening all telecommunications markets to competition.

(*T-Mobile Central, LLC v. Unified Government of Wyandotte*, 528 F.Supp. 2d 1128, 1146-47 (D. Kan. 2007). One way in which the Telecom Act accomplishes these goals is by reducing impediments imposed by local governments upon the installation of wireless communications facilities, such as antenna facilities. (47 U.S.C. § 332(c)(7)(A).) Section 332(c)(7)(B) provides the limitations on the general authority reserved to state and local governments. Those limitations are set forth as follows:

(1) State and local governments may not unreasonably discriminate among providers of functionally equivalent services (§ 332(c)(7)(B)(i)(I)).

(2) State and local governments may not regulate the placement, construction or modification of wireless service facilities in a manner that prohibits, or has the effect of prohibiting, the provision of personal wireless services (better known as the "effective prohibition clause") (§ 332(c)(7)(B)(i)(II)).

(3) State and local governments must act on requests for authorization to construct or modify wireless service facilities within a reasonable period of time (§ 332(c)(7)(B)(ii)).

(4) Any decision by a state or local government to deny a request for construction or modification of personal wireless service facilities must be in writing and supported by substantial evidence contained in a written record (§ 332(c)(7)(B)(iii)).

(5) Finally, no state or local government or instrumentality thereof may regulate the placement, construction or modification of personal wireless service facilities on the basis of the perceived environmental effects of radio frequency emissions to the extent that such facilities comply with federal communications commission's regulations concerning such emissions (§ 332(c)(7)(B)(iv)).

3. Specific Concerns.

In light of the above principles, Crown Castle submits the following comments concerning specific provisions of the Ordinance:

(a) Discretionary Approval.

To the extent the Ordinance purports to subject ROW facilities to a discretionary approval it may conflict with time-honored state law confirming the existence of a vested right to enter and use the ROW without having to obtain a local franchise. (*Williams Communications v. City of Riverside*, *supra*, 114 Cal.App.4th at p. 648; see also *Western Union Telegraph Co. v. Hopkins* (1911) 160 Cal. 106 [observing "that the state in its sovereign capacity has the original right to control all public streets and highways" and that the section 536 franchise "included the right to such exclusive occupation by the company of portions of the streets as is maintained for the purpose of its system, leaving nothing in that behalf to be granted by the municipality."].)

(b) Site Location Restrictions (15.34.130(B)(1)(b)(6)(D)).

The Ordinance contains categorical prohibitions on certain types of ROW facilities, including (1) facilities sited in the center median; (2) cable or "strand-mount" facilities; and (3) facilities in residential zones located within a 500-foot radius of other sites. Such categorical restrictions can result in a prohibition of service. For instance, in many cases, especially where topography, foliage and/or curvature of the ROW present challenges to achieving radio frequency ("RF") objectives, more than one facility may be needed within a 500-foot radius. With respect to strand-mounted facilities, such facilities generally represent the least intrusive design solution, due to their small size and inconspicuous placement on overhead lines. Indeed, strand-mounted facilities represent the cutting-edge on minimizing aesthetic impacts.

The restrictions in the Ordinance tend to place hurdles in the way of allowing sufficient flexibility to achieve the City's goal of working with entities like Crown Castle to implement the City's innovative and forward-looking Fiber Master Plan and its 21st century connectivity goals. (See, e.g., http://www.lbbizjournal.com/single-post/2017/11/06/Can-Long-Beach-Bridge-The-Digital-Divide.) We recommend that the Ordinance allow for a palette of options for small cell designs and configurations -- including strand-mounted facilities -- so that maximum flexibility

can be achieved on a case-by-case basis to implement the City's connectivity goals. At a minimum, the Ordinance should feature "safety valve" exceptions for technical considerations, allowing staff and City decision-makers to provide for exceptions if technical feasibility considerations and RF constraints warrant implementation of otherwise restricted locations and/or designs.

(c) Design Requirements (15.34.130(F)). The Ordinance prescribes a number of technical design requirements on ROW facilities, such as restrictions on the dimensions of the facilities and the placement of antenna panels and cables. As with the Site Location Restrictions, the Ordinance should feature "safety valve" exceptions for technical considerations, allowing staff and City decision-makers to provide for exceptions if technical feasibility considerations and RF constraints warrant implementation of otherwise restricted locations and/or designs.

(d) Ten-Year Term/Sunset Clauses (15.34.130(P)). To the extent the Ordinance imposes time limits on the rights purportedly granted thereunder, it may contravene established vested rights doctrine expressed by the courts in such cases as *Goat Hill Tavern v. City of Costa Mesa* (1992) 6 Cal. App. 4th 1519, 1530, and case law interpreting Public Utilities Code section 7901 and its predecessor statute, Civil Code section 536.

(e) Fees (15.34.130(W)). The fee requirements -- especially the open-ended discretionary fee requirement -- may conflict with Government Code section 50030, which states:

> Any permit fee imposed by a city, including a chartered city, a county, or a city and county, for the placement, installation, repair, or upgrading of telecommunications facilities such as lines, poles, or antennas by a telephone corporation that has obtained all required authorizations to provide telecommunications services from the Public Utilities Commission and the Federal Communications Commission, shall not exceed the reasonable costs of providing the service for which the fee is charged and shall not be levied for general revenue purposes.

The courts have interpreted this statute to mean that local governments cannot impose fees that exceed the amount "to mitigate or defray the cost of any alleged impacts on public improvements or facilities." (*Williams Communications v. City of Riverside* (2003) 114 Cal.App.4th 642, 656.) Section 50030 constitutes a legislative determination that any fee or exaction that exceeds the cost of addressing actual impacts arising from the construction of a telephone network is unlawful because it fails to satisfy the nexus and rough proportionality requirements under the dual Supreme Court cases of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

In this case, a fee that is meant to defray the costs of employing staff (including city attorneys) arguably is a general revenue exaction, since local governments generally fund staff resources through their general revenues.

(f) Indemnities: The ordinance should not require the applicant to indemnify or defend the City to the extent that the claims and/or damage arise from the City's negligence or willful misconduct.

(g) Other Concerns: To the extent the Ordinance requires a demonstration of "significant gap" and "least intrusive means," such requirements may violate Public Utilities Code section 7901 and otherwise constitute a misreading of section 332 of the Telecom Act, which nowhere imposes such a demonstration on an applicant as a pre-requisite to entry into a local market or the ROW. The Ordinance also features several RF compliance and inspection requirements, which conflict with the FCC's express preemption of RF compliance issues and tend to convert the City into a regulatory arm of the FCC.

4. Conclusion.

We appreciate the City Council's consideration of the matters contained in this letter. We are on hand to answer any questions you may have or to work with the Planning Commission and City Staff to address the concerns herein.

Very truly yours,

Michael W. Shonafelt

MWS:mws
cc:
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