PUBLIC COMMENTS RECEIVED AFTER THE STAFF REPORT WAS RELEASED FOR THE WIRELESS UPDATE
DRAFT ORDINANCE No. 2021-09
DRAFT ORDINANCE No. 2021-10

Public Comment
(Received AFTER Planning Commission Agenda Packet Publication through Planning Commission Public Hearing on October 13, 2021)

Public Comment #	Name	Subject	Comment Summary
#1	Mackenzie & Albritton LLP On behalf of Verizon Wireless	Public Comment for Agenda Item PH-1	Writing to request revisions to Draft Ordinance No 2021-09 and Draft Ordinance No. 2021-10.
#2	Brian Yamaguchi	Public Comment for Agenda Item PH-1	Recommends modifying or repealing existing Wireless Ordinance.
#3	porterwright on behalf of AT&T	Public Comment for Agenda Item PH-1	Writing to request revisions to Draft Ordinance No 2021-09 and Draft Ordinance No. 2021-10.

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October 7, 2021

VIA EMAIL

Chair Scott Austin
Vice Chair Bill Shieff
Commissioners Darrell Brooke,
Cheryl Rose, Gary Schaeffler,
Aaron Stehura and Mike Vachani
Planning Commission
City of Monrovia
415 South Ivy Avenue
Monrovia, California 91016

Re: Draft Ordinances Amending Title 12 (Wireless Facilities in the Right-of-Way) and Title 17 (Wireless Facilities on Private and Public Property)
Planning Commission Agenda, October 13, 2021

Dear Chair Austin, Vice Chair Shieff and Commissioners:

We write on behalf of Verizon Wireless regarding the proposed ordinances regulating wireless facilities in the right-of-way and on private property. Verizon Wireless appreciates the opportunity to provide comment, and believes that the ordinances would benefit from modest revisions to ensure that they align with federal and state law. We urge the Commission to continue the ordinance item, and direct staff to make the needed revisions that we suggest.

In particular, the right-of-way ordinance requires several changes to avoid conflict with Federal Communications Commission ("FCC") regulations for "small cells," the type of facility typically installed in the right-of-way. Several location standards should be revised to allow small cells where needed, and the City should provide specific design standards that accommodate the small cell designs required for adequate service. The requirement to collocate multiple facilities on a single pole in the right-of-way is infeasible and should be removed. In the private property ordinance, the requirement for an "exception" to locate facilities in discouraged areas should be removed, and instead the City should require only a conditional use permit.

In its 2018 Infrastructure Order, the FCC confirmed that a city's aesthetic criteria for small cells must be "reasonable," that is, technically feasible and meant to avoid "out-of-character" deployments, and also "published in advance." *See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment,* Declaratory Ruling and Third Report and Order, 33 FCC Rcd. 9088, ¶¶ 86-88 (September 27, 2018) (the "Infrastructure

Order"). The FCC also found that that local requirements that "materially inhibit" service improvements and new technology constitute an effective prohibition of service under the Telecommunications Act. *Id.,* ¶¶ 35-37. Last year, the Ninth Circuit Court of Appeals upheld these FCC requirements. This June, the Supreme Court declined to hear an appeal by local governments, so the FCC's Infrastructure Order is settled law. *See City of Portland v. United States,* 969 F.3d 1020 (9th Cir. 2020), *cert. denied*, ___ U.S. ___ (U.S. June 26, 2021) (No. 20-1354).

Our comments on the proposed ordinances are as follows.

Chapter 12.52 – Wireless Facilities in the Right-of-Way

12.52.050 – Permit Requirements

(I)(8). Submittal of geographic service area description and two-year master plan. This information regarding the need for a new right-of-way facility bears no relation to the required findings of Section 12.52.090. Further, the City cannot require such information regarding need because California Public Utilities Code Section 7901 grants telephone corporations such as Verizon Wireless a statewide right to place their equipment along any right-of-way. The FCC determined that small cells are needed to enhance service, introduce new services and densify networks, which are Verizon Wireless's objectives in placing small cells in Monrovia. The FCC also disfavored dated service standards for small cells based on "coverage gaps" and the like, so the service area information sought by this submittal requirement is preempted. Infrastructure Order, ¶¶ 37-40. A master plan of potential future facilities is irrelevant to a pending application; each facility must be evaluated on its own merits. *This submittal requirement should be deleted.*

(I)(11). Authorization of utility pole owner. As a member of the Southern California Joint Pole Committee, Verizon Wireless has a right to attach its equipment to joint utility poles, where it becomes a co-owner. The authorization for use of the pole by a new utility is provided via a form circulated to all the utilities with existing attachments on the pole. *We suggest revising this section to require a joint pole authorization form.*

12.52.060 – Design, Aesthetic and Development Standards

(A), (C). Subjective standards. The right-of-way ordinance includes several subjective and vague standards, such as "minimize visual clutter," "reduce...conflicts with the surrounding community" and "occupy the least amount of space…that is technically feasible." Such inexact standards could be used to deny small cells that otherwise satisfy specific ordinance criteria. Vague, generalized concerns or opinions about the aesthetics of wireless facilities or neighborhood compatibility do not constitute substantial evidence upon which a local government can deny a permit. *See City of Rancho Palos Verdes v. Abrams* (2002) 101 Cal. App. 4th 367, 381.

To make "visual clutter" and "compatibility" determinations at the decision stage would leave applicants guessing at the outcome of their proposals, which the FCC discouraged.

Infrastructure Order, ¶ 88. Rather, it is the City's responsibility to publish small cells standards in advance that are intended to avoid "out-of-character" deployments and are technically feasible. This advance direction allows applicants to design compliant facilities that are sure to be approved. *These vague standards and findings should be stricken.*

(D). Location. To avoid a prohibition of service, the structure preferences and location standards should be accompanied by a reasonable review radius to limit the search distance for any preferred options. In the right-of-way, small cells serve targeted areas with a limited coverage footprint. Steering a small cell too far from a proposed location within its service area would leave some of the target coverage area underserved or unserved, constituting a prohibition of service in violation of federal law.

The search distance for preferred options should be limited to ensure that each small cell can serve its coverage objective. Many cities have added a 500-foot review radius to their right-of-way policies; San Mateo did so in June. *We suggest adding a search distance to the following items under Section (D).*

(D)(1). Structure preference. This prefers use of existing infrastructure (utility poles and streetlights), and should specifically allow for a new pole if there is no feasible existing pole within 500 feet. We note that this provision appears to bar small cells on traffic signal poles, which may be the only option along some streets, as discussed below with respect to the historic commercial downtown zone. *The last sentence of this section should be replaced as follows: "An applicant may place a new pole if there is no feasible existing utility pole or streetlight pole within 500 feet along the subject right-of-way."*

(D)(2). Living area setbacks. This provision requires setbacks from residential living areas (25 feet if located in the right-of-way along a front yard, 10 feet if along a side yard or alley). Setbacks along most Monrovia rights-of-way are sufficient to satisfy this requirement, but occasionally the only feasible pole in an area may fall within this forbidden setback area. (Utility poles in particular are subject to state safety regulations and electric utility rules that render many poles to be infeasible for wireless attachments; *see* Public Utilities Commission General Order 95, Rule 94.) In some cases, the setback could contradict Public Utilities Code Section 7901 that grants telephone corporations a statewide right to place their equipment along any right-of-way. Instead of requiring an exception to this setback, the City should incorporate the search distance we describe above. *We suggest adding the following language: "An applicant may use a location within the listed setbacks if there is no other feasible location within 500 feet that is outside the setbacks."*

(D)(5)(a). Prohibition on decorative poles in historic commercial downtown zone. Decorative poles along South Myrtle Avenue in Old Town are short in stature and topped with globe light fixtures, and by design are unlikely candidates for small cell antennas. However, the only other poles along this high-demand street are traffic signal poles, apparently barred by Section 17.46.060(D)(1), as noted above. With no other option for antennas to direct signal along this high-demand commercial street, Verizon Wireless would need to place a new pole. *The City should consider a design option for small cells on decorative poles, while allowing small cells on select traffic signal poles if needed.*

(D)(5)(b). Prohibition along historic Route 66. As drafted to prohibit "any decorative lighting or poles," this provision appears to bar facilities on any pole along historic Route 66 in Monrovia—a total of three miles. The streetlight and utility poles along this route (Huntington Drive, Shamrock Avenue and Foothill Boulevard) are conventional, not decorative or historic, and small cells attached to this existing infrastructure would not diminish the historic nature of Route 66. Further, barring small cells along long stretches of busy roadways with high demand, or requiring a burdensome "exception" approval, would "materially inhibit" service improvements in contradiction of the FCC's Infrastructure Order. This ban also would violate Public Utilities Code Section 7901 which grants telephone corporations such as Verizon Wireless a statewide right to use any right-of-way. *This provision should be clarified or deleted.*

(D)(9). Equipment and cables underground. Despite the exception for feasibility, blanket requirements to underground small cell equipment are unreasonable in two ways. First, undergrounding is indeed generally infeasible due to sidewalk space constraints, utility lines already routed underground, and undue environmental and operational impacts of required active cooling and dewatering equipment. Second, small radios and other network components are not "out-of-character" on existing poles, compared to other right-of-way infrastructure. Utility poles commonly support utility equipment such as electric transformers. *The City allow a reasonable volume of associated (non-antenna) equipment on the side of a pole before undergrounding is considered: nine cubic feet on a utility pole, and five cubic feet on a streetlight pole.*

The requirement to place cables underground cannot apply to utility poles that already support aerial electric and communication lines. In Monrovia, some streetlights poles are also connected by aerial electric lines. Additional lines would not be "out-of-character." *The City should allow new aerial lines for a wireless facility if there are already lines attached to the pole or in the vicinity.*

(E). Concealment/stealth elements. These vague criteria do not provide sufficient design direction for prospective applicants, and could be used to deny small cells that satisfy other specific standards. "Integration…into existing utility infrastructure" suggests that antennas and equipment would be enclosed within narrow streetlight or utility poles, which is impossible. For new small cell poles, "matching existing infrastructure in the area surrounding" is inappropriate if the nearby poles do not support wireless equipment. The City is best served by adopting reasonable, specific volume thresholds that accommodate needed small cell equipment. This provides clear design direction for applicants. *Verizon Wireless can provide examples of its small cell designs for Monrovia to be the basis of reasonable design standards.*

(F). Collocation requirement. While collocating multiple wireless facilities may be appropriate for "macro" facilities on buildings or towers on private property, it is not feasible for poles in the right-of-way. On utility poles, antennas and communications equipment are strictly regulated by General Order 95, which allots much of the usable pole space exclusively to electric supply equipment, and mandates separation distances from all existing electric and communication utility lines. These factors limit the pole space available for wireless attachments. For both utility and streetlight poles, multiple wireless facilities are infeasible due to space and structural capacity limits, as well as antenna signal interference issues. The

ordinance should not presume that collocation is feasible and then require applicants to show otherwise. We note that some of the language in this section applies only to sites on private property, not in the right-of-way (e.g., "parking areas, access roads" and "equipment buildings"). *This provision should be deleted.*

12.52.090 – Findings

(A)(7), (11). Subjective findings. These vague, subjective findings that a facility "minimize its visual and environmental impacts" and "achieve compatibility with the community" should be deleted, and the City should instead rely on clear, specific criteria as described in our comment above on Section 12.52.060(A). *These findings should be deleted.*

(A)(12), (B). Finding of willingness to collocate, additional findings for facilities not collocated. As explained above, collocation is infeasible for right-of-way facilities, and the City should not require applicants to prove otherwise. *These findings should be deleted.*

12.52.150 – RF Emissions Monitoring

(A). Five-year reports. While the City can require one post-installation RF monitoring report, it cannot require repeat monitoring reports once an installed facility has been shown to comply with the FCC's exposure guidelines. Such regulation of the ongoing operational requirements of wireless facilities is preempted by federal law. 47 U.S.C. § 332(c)(7)(B)(iv); see also *Crown Castle USA Inc. v. City of Calabasas* (Los Angeles Superior Court BS140933, 2014) ("...the regulation of a facility's planned or ongoing operation constitutes an unlawful supplemental regulation into an area of federal preemption.") *The phrase "and every five years from the date the facility began operations" should be deleted.*

Chapter 17.46 – Wireless Facilities on Private and Public Property

17.46.040 – Location Preference Requirements

(B). Discouraged locations. While the City can exercise reasonable control over the location of wireless facilities on private property, the requirement for an exception is excessive if the City already requires a major conditional use permit (which is the highest bar for a zoning permit). The burdensome exception findings of Section 17.46.200 inappropriately place the Planning Commission in a position to evaluate complex technical feasibility matters, or to make quasi-judicial determinations about federal and state law that should be left to the courts. *The requirement for an exception should be deleted.*

(C). Prohibited locations. While there may be limited opportunities to site in single-family residential zones, the City should not prohibit such a large area of the City outright, because that would directly violate the federal Telecommunications Act. Likewise, planned developments and specific plans should not forbid wireless facilities altogether. *See* 47 U.S.C. § 332(c)(7)(B)(i)(II). *These prohibited locations should be reclassified as discouraged locations.*

17.46.050 – Permit Requirements

(C). Types of permits required. For discouraged locations, the permit required is listed as "DL/E," for which the legend refers to a Section 17.46.050(F) that does not exist in the ordinance. As noted above, the City should simply require a conditional use permit for discouraged locations, not an exception.

17.46.060 – Application for Permit

(H)(8). Submittal of geographic service area description and two-year master plan. As with the right-of-way ordinance, these bear no relation to the findings of Section 17.46.090 for private property sites. As noted above, the FCC disfavored dated coverage information requirements for small cells. A speculative master plan cannot be a decision factor for a current application. *This section should be deleted.*

17.46.070 – Design and Development Standards

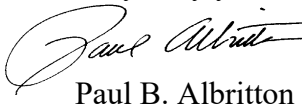
(F)(2)(b). 200% setback from right-of-way. This setback for tower facilities is excessive and could eliminate most or all siting opportunities in a target coverage area, given small lot sizes. The City could address aesthetic impacts and incentivize stealth designs by reducing the setback. *This provision should be restated to reduce the required setback from the right-of-way if a tower facility is of stealth design.*

17.46.080 – Conditions of Approval

(A)(1)(b). Reconstruct or replace facilities with newer technology. The City cannot compel wireless permittees to underground or redevelop their facilities if it believes that new technology would reduce visual impact. Not only would this violate the vested rights of permittees who constructed their facilities in reliance on approved plans, it would directly contradict California Government Code Section 65964(b) that guarantees a 10-year permit term for wireless facilities. Further, the City cannot dictate the type of technology used by wireless providers, as this intrudes on the exclusive federal authority over the technical and operational aspects of wireless technology. *See New York SMSA Ltd. Partnership v. Town of Clarkstown*, 612F.3d 97, 105-106 (2nd Cir. 2010). *This condition should be deleted.*

Verizon Wireless appreciates the opportunity to review the proposed ordinances, and urges the Commission to continue this item to allow staff to make needed revisions.

Very truly yours,



Paul B. Albritton

cc: Craig Steele, Esq.
Sheri Bermejo

[redacted]

Subject: FW: Public Comment - Monrovia Planning Commission 10/13/2021
Attachments: Verizon 5G Antenna.jpg; Monrovia Cell Towers.jpg

From: Brian Yamaguchi [redacted]
Sent: Monday, October 11, 2021 11:14 AM
To: planning <planning@ci.monrovia.ca.us>
Cc: Brian Yamaguchi <[redacted]>
Subject: Public Comment - Monrovia Planning Commission 10/13/2021

Dear Commissioners,

Attached is a map of current cellular towers from the 3 major carriers gleaned from cellmappers.net. Please note a lack of towers north of Foothill Boulevard. In 2011, the Monrovia City Council passed an ordinance that split the city into "preferred" and "discouraged" zones designed to keep cell antennas inside commercial and manufacturing areas and out of residential areas. Unfortunately, this coincided with the national build out of 4G LTE infrastructure. The result of discouraging towers when the carriers were rapidly expanding services is that now most of the Monrovia foothills have far less than modern and optimal cellular services from all carriers.

The foothills are the most vulnerable to mudslides and wildfires. Several recent extended Edison power outages have left foothill residents with no Frontier, Spectrum nor Giggle internet service. This left these citizens with only their cellular devices for internet services. Poor cellular voice and data services expose a major safety gap in case of emergencies as well as every day quality of life frustrations. In the last fifteen years, cell phones have moved from being novelties to being necessities of modern life.

During the Bobcat Fire, anecdotal reports during conversations with other residents had many people not receiving critical text alerts like those from Los Angeles County and Nixle. Recurring social media posts on platforms like Nextdoor and Facebook demonstrate an ongoing issue.

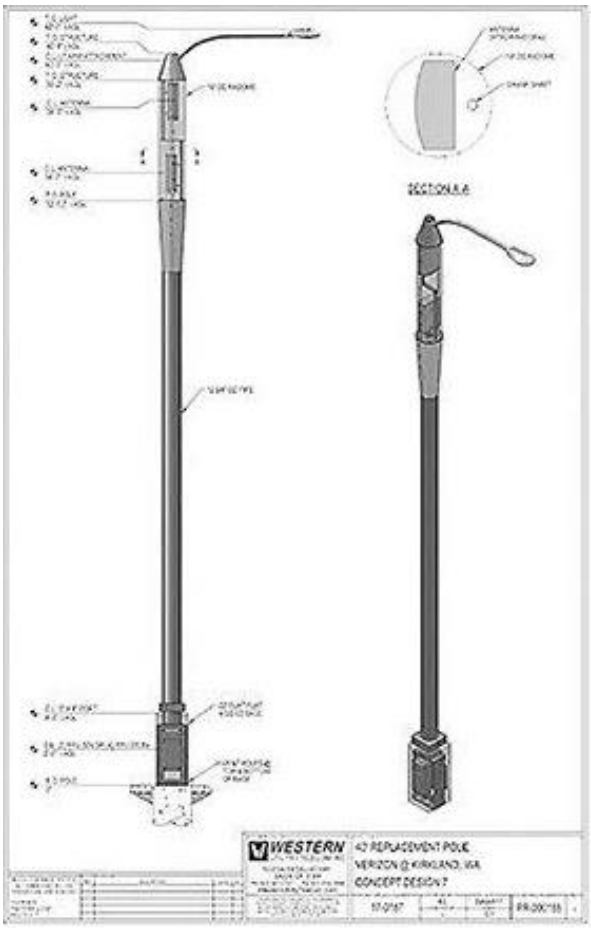
As carriers are building out their new 5G networks, they will be needing to install significantly more antennas because while 5G has much more speed, the shorter wavelength of the signal translates to a much, much shorter transmission range. My industry contacts tell me there will be close to 200 5G antennas for every current 4G one. Additionally, they will need to be placed every 500-1000 feet.

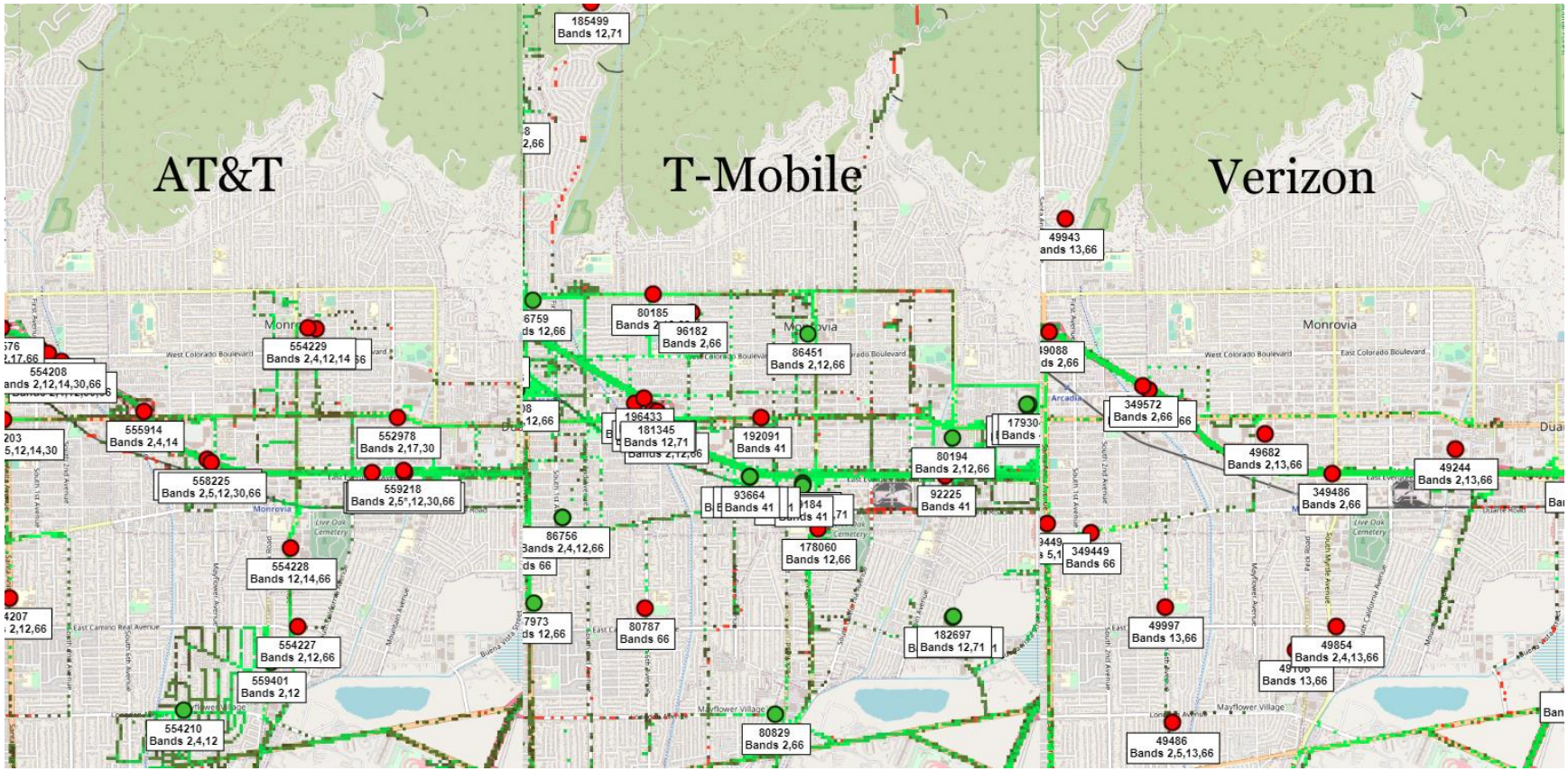
Fortunately the 5G antennas are much smaller and far less ugly than the massive ones for 4G. The ones that I have seen in Los Angeles are smaller than most transformers on utility poles. They can also be integrated into light poles as shown in the 2nd attachment of a Verizon installation.

I managed the group responsible for expanding the cellular coverage and capacity for the University of Southern California campuses and the Los Angeles Memorial Coliseum. My firsthand experience is that with limited build budgets, the carriers will always spend first where there are fewer obstacles, regulations and "discouraged" zones. That has certainly been the case with the inconsistent cellular void created in North Monrovia since 2011.

It is my recommendation that the 2011 ordinance be modified or repealed and the carriers directly notified. This will allow our city and its regulations to keep pace with current technology; to increase cellular coverage and capacity in all parts of the city; to improve safety and emergency preparedness; and to strongly encourage AT&T, Verizon and T-Mobile to spend more of their limited 5G build out budgets in Monrovia.

Sincerely,
Brian Yamaguchi


SECTION A-A
WESTERN
40 REPLACEMENT POLE
VERIZON @ KIRKLAND, WA
CONCEPT DESIGN 7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T-Mobile
Verizon
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Bands 12,71
554229
Bands 2,4,12,14
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Bands 2,4,14
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Bands 2,17,30
558225
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559218
554228
Bands 12,14,66
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Bands 2,12,66
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554210
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October 13, 2021

VIA EMAIL

Planning Commission
(planning@ci.monrovia.ca.us)
City of Monrovia
415 South Ivy Avenue
Monrovia, CA 91016

Re: AT&T's Comments on City of Monrovia's Wireless Telecommunications Regulations, Amending Titles 12 & 17

Dear Chair Austin, Vice-Chair Shieff, and Commissioners Brooke, Rose, Schaeffler, Stehura, and Vachani:

I write on behalf of New Cingular Wireless PCS, LLC d/b/a AT&T Mobility (AT&T) to provide comments on the two referenced proposed ordinances to update the City's wireless telecommunications regulations. AT&T appreciates the City recognizes it must update its wireless regulations to meet the needs of developing technologies and to comply with applicable laws. The City should take additional time to reconsider and revise several of the draft provisions to avoid violating state and federal laws.

This letter aims to provide the City with suggestions for fostering responsible wireless facility deployments within the applicable legal framework. The proposed ordinances require several revisions to avoid prohibiting or effectively prohibiting wireless services. Specifically, AT&T recommends the City focus on reasonable expansions to locations preferences to avoid likely prohibitions and disputes. And the City needs to carve out eligible facilities requests ("EFRs") that must be approved under federal law from aesthetic and related requirements.

Key Legal Concepts

The Federal Telecommunications Act of 1996 ("Act") establishes key limitations on local regulations. Under the Act, the city must not prohibit or effectively prohibit wireless services. *See* 47 U.S.C. §§ 253(a), 332(c)(7)(B)(i)(II). The city must act "within a reasonable period of time" on each application. 47 U.S.C. § 332(c)(7)(B)(ii).

An effective prohibition that violates the Act occurs whenever the decision of a local government materially inhibits wireless services.[1] Under the Act, wireless providers must be permitted to deploy facilities to offer more robust and competitive wireless services for the benefit of the public. The FCC explained that a local government "could materially inhibit service in numerous ways – not only by rendering a service provider unable to provide existing service in a new geographic area or by restricting the entry of a new provider in providing service in a particular area, but also by materially inhibiting the introduction of new services or the improvement of existing services."[2]

The FCC has codified its "shot clocks" – presumptive maximum timeframes for processing applications. The FCC has made clear that the shot clock begins when an application is submitted,[3] and explained that the siting authority must act on all necessary approvals and authorizations within the applicable shot clock.[4] This means the shot clock applies "to all aspects of and steps in the siting process," including negotiating any license or attachment agreement on lawful terms.[5] In addition, the FCC flatly prohibits any express or de facto moratoria on filing or processing applications as an unlawful prohibition on wireless facilities.[6] And the FCC shot clocks are not tolled by any moratorium.[7] Municipalities must take care to comply with the shot clock rules and avoid moratoria because violations of the shot clocks may result in unlawful effective prohibitions under the Act and deemed approvals under state law.[8]

The FCC's *Infrastructure Order* established an aesthetic standard for small cells. To be lawful, such rules must be reasonable, technically feasible, and published in advance.[9] The FCC also established a standard for lawful fees for small cell applications. Similar to state law requirements, such fees must be reasonable, cost-based, and non-discriminatory. To help municipalities avoid imposing unlawful fees, the FCC's *Infrastructure Order* also established a safe harbor for presumptively reasonable fees: (a) $500 for the total of all nonrecurring fees for an application including up to five small cells, plus $100 for each small cell beyond five, or $1,000 for the total of all nonrecurring fees for a new pole to support small cells, and (b) $270

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[1] *See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment,* Declaratory Ruling and Third Report and Order, FCC 18-133, 30 FCC Rcd 9088 at ¶¶ 35-42 (September 27, 2018) ("*Infrastructure Order*"); *see also, In the Matter of California Payphone Assoc. Petition for Preemption, Etc.*, Opinion and Order, FCC 97-251, 12 FCC Rcd 14191 (July 17, 1997).
[2] *Infrastructure Order* at ¶ 37.
[3] *See* 47 C.F.R. § 1.6003; *Accelerating Wireless Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, FCC 14-153, 29 FCC Rcd 12865 at ¶ 258 (October 21, 2014) ("Spectrum Act Order").
[4] *See Infrastructure Order* at ¶¶ 132-137.
[5] *Id.*
[6] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment,* Declaratory Ruling and Third Report and Order, FCC 18-111 (August 3, 2018), at ¶¶ 147, 149 (local actions that "effectively halt or suspend the acceptance, processing, or approval of applications or permits for telecommunications services or facilities … prohibit or have the effect of prohibiting deployment of telecommunications services" in violation of the Telecommunications Act of 1996).
[7] *See* Spectrum Act Order at ¶ 265.
[8] *See Infrastructure Order* at ¶ 118; Cal Gov Code § 65964.1(a).
[9] *Infrastructure Order* at ¶ 50.

per small cell per year for the total of all recurring fees.[10] In fact, the FCC explained that these fees would be exceeded in "only very limited circumstances."[11]

The FCC further has explained that excessive fees improperly inhibit wireless deployments. For example, the FCC made clear that excessive consulting costs cannot be passed on to applicants. Indeed, the FCC has ruled that "any unreasonably high costs, such as excessive charges by third party contractors or consultants, may not be passed on through fees even though they are an actual 'cost' to the government.[12] If a locality opts to incur unreasonable costs, Sections 253 and 332(c)(7) do not permit it to pass those on to providers."[13] The Ninth Circuit U.S. Court of Appeals has upheld the FCC's fee standards and safe harbor amounts.[14]

AT&T has a statewide franchise right to access and construct telecommunications facilities in the public rights-of-way. Under Public Utilities Code Section 7901, AT&T has the right to access and construct facilities in public rights-of-way in order to furnish wireless services, so long as it does not "incommode" the public use of the public right-of-way. And under Section 7901.1, AT&T's right is subject only to the City's reasonable and equivalent time, place, and manner regulations as to how AT&T constructs in the public rights-of-way.

AT&T's Comments on Both Ordinances:

Collocation Definition The City's definitions of "collocation" needs to be consistent with FCC shot clock rules to avoid inadvertent violations. Specifically, the FCC has clarified that "for purposes of the Section 332 shot clocks, attachment of facilities to existing structures constitutes collocation, regardless whether the structure or the location has previously been zoned for wireless facilities."[15]

Concealment Definition Rather than leaving the interpretation of "concealment" open to reinterpretation on a case-by-case basis, the City's definitions of "concealment" should reference the FCC's June 2020 ruling, which made clear that "concealment elements are elements of a stealth-designed facility intended to make the facility look like something other than a wireless tower or base station."[16]

Exceptions The proposed ordinances set up uncertainties as to when exceptions may be required, in large part due to numerous subjective design and development criteria. The City cannot require an exception to be sought at the beginning of the application process, especially given these uncertainties. The siting authority must consider exception requests as they arise, and forcing an applicant to start over would amount to an unlawful moratorium.

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[10] *Id.* at ¶ 79.
[11] *Id.* at ¶ 80.
[12] *Id.* at ¶ 70.
[13] *Id.*
[14] *City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020), *cert. denied*, *City of Portland v. United States*, No. 20-1354, 2021 U.S. LEXIS 3538, at *1 (U.S. June 28, 2021).
[15] *Infrastructure Order* at ¶ 140.
[16] *See In the Matter of Implementation of State and Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012,* Declaratory Ruling, FCC 20-75, 35 FCC Rcd 5977 at ¶ 34 (June 10, 2020) ("June 2020 EFR Ruling").

Shot Clock Risks The proposed ordinances risk shot clock compliance in several ways, including misstating some mechanics of the shot clocks. The City should be careful in stating when the shot clock commences for EFRs, which are triggered by first required action plus submittal of materials for an application.[17] The City needs to revise proposed section 12.52.050(G)(3), which incorrectly indicates the concept that a shot clock "resets to zero" for major wireless facilities permit applications. That rule only applies after a valid first incomplete notice for a small cell application.[18] For other types of wireless facility applications, the shot clock does not reset to zero after an incomplete notice. Instead, these clocks are tolled (i.e., paused) while an applicant responds to an incomplete notice for non-small cell applications.[19] The City also requires responses to incomplete notices to be submitted in "one submittal." But all-in-one resubmittals are not required by shot clock rules. Moreover, requiring an applicant to assemble all materials before responding may often be inefficient (i.e., staff may at times be better served by receiving information on a rolling basis).

Ad Hoc Requirements Regarding application contents, the City should eliminate provisions authorizing the director to require other additional information, which violates the rule that application requirements must be published in advance. These sorts of ad hoc requirements are improper and they risk delays, discrimination, and effectively prohibiting wireless services.

Limit Purpose Statements The City needs to revise proposed sections 12.52.050(I)(2) and 17.46.060(H)(2) because it cannot require statements of purpose for EFRs.[20]

Coverage Maps The City should delete proposed sections 12.52.050(I)(8) and 17.46.060(H)(8), which require identification of the area to be served and a "two-year master plan" of future facilities. The FCC has rejected the need for applicant to demonstrate specific coverage gaps, so there is no need to specify the service area for a proposed facility.[21] The FCC explained that focus on coverage gaps "reflect[s] both an unduly reading of the [Act] and an outdated view of the marketplace."[22]

Noise Regulations The City should carve out an exception to the requirement for noise studies for projects that do not propose to add noise-generating equipment. Additionally, the proposed noise regulations in these ordinances need to be revised to be consistent with other City regulations. The Noise Element in City's General Plan identifies 60 dB as "normally acceptable" even in low density residential neighborhoods. Section 9.44.040 of the Monrovia Municipal Code allows 55 dB during the daytime and 50 dB at night in residential areas. Thus, the City cannot impose the proposed 40 dB limit on wireless facilities as under proposed section 12.52.060(G)(2), nor can City impose a 50 dB limit at all times as under proposed section 17.46.070(K)(1)(a). And certainly the City cannot require complete silence as proposed section 17.46.070(K)(1)(a) seeks to do by prohibiting anything "audible" at certain locations.

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[17] *See* June 2020 EFR Ruling at ¶ 16.
[18] See 47 C.F.R. § 1.6003(d).
[19] *Id.*
[20] *See* 47 C.F.R. § 1.6100(c)(1).
[21] *See* Infrastructure Order at ¶ 40, n.94 (
[22] *Id.*

Consultants While AT&T appreciates the City's desire to thoroughly review applications, consultants can unnecessarily increase the cost of deployment and slow down the permitting process. Again, the City should be mindful that the cost of a consultant may not automatically pass through to an applicant as only objectively reasonable costs can be imposed.[23] For example, at least one federal court struck down a city's ordinance provision requiring the use of consultants and ordered a disgorgement of consulting fees where a consultant needlessly delayed an application.[24] The City should limit the use of consultants to technical and objective criteria, such as a structural safety assessment or compliance with FCC regulations of radio frequency emissions, and only to the extent these topics exceed the capabilities of City staff.

No Mid-Term Modifications The City should revise or delete proposed sections 12.52.060(I), 17.46.070(M), and 17.46.080(A)(1)(b), which seek to require facility modifications during a permit term. The City cannot require mid-term modifications as wireless facilities must be approved for minimum terms under state law. Moreover, the City is preempted from dictating the facilities that AT&T may or must deploy.

Indemnity The proposed indemnification provisions should not apply to situations where the City is negligent, and AT&T must retain its right to select counsel. Further, the City cannot require AT&T to agree not to sue based on conditions it decides to impose, particularly if the conditions violate applicable law as enacted or as applied.

EFR Findings The City needs to carve out EFRs from several of its required findings for approval, including aesthetic or compatibility findings. AT&T recommends the City develop a separate and simpler set of findings for EFRs.

Power Supply & EFRs The City needs to revise proposed sections 12.52.230 and 17.46.220 to allow new power supply in connection with an EFR, which the City cannot deny absent a substantial change.[25]

Removal Timing Provisions regarding removals should allow at least 90 days for removal. Shorter time periods are often impractical.

Generator Application Requirements Application requirements for emergency standby generators qualifying under Cal Gov Code 65850.75 must be limited to information required for other emergency standby generators.[26]

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[23] *See Infrastructure Order* at ¶ 70 (FCC warned that "any unreasonably high costs, such as excessive charges by third party contractors or consultants, may not be passed on through fees even though they are an actual 'cost' to the government").
[24] *See MetroPCS N.Y., LLC v. City of Mt. Vernon*, 739 F.Supp.2d 409, 424-27 (S.D.N.Y. 2010).
[25] *See* 47 C.F.R. 1.6100(b)(8) (regulation included "regular and backup power supply" in the definition of "transmission equipment," which may be a component of an EFR that the City must approve under Section 6409(a)).
[26] *See* Cal Gov Code 65850.75(c)(2).

Generator Shot Clock All reviews for emergency standby generators need to be handled concurrently and take place within the 60-day shot clock, including Fire Department reviews, which are called out separately in the proposed ordinances.

Deemed Approvals In the event of a deemed approval, the City's process should include mechanics to issue the permits so approved.

EFR Limits The City should not apply its various catchall rules to EFRs. For example, the City should except EFRs from scope of proposed sections 12.52.260 and 17.46.230.

AT&T's Specific Comments on Monrovia's Proposed Title 12 Amendments

Fees The City must ensure its application fees are competitively neutral and do not exceed objectively reasonable costs, taking into account the limitations of reimbursing consultants and the FCC's small cell fee standard and safe harbor.

Setbacks The City should limit application of the setbacks under proposed section 12.52.060(D)(2) "to extent feasible" to avoid improperly limiting or prohibiting rightful deployments in the public rights-of-way.

Decorative Poles The City should allow – even prefer – small cell deployments as attachments to decorative poles. Many jurisdictions prefer such deployments subject to a condition that the replacement pole be substantially similar in appearance to existing decorative poles in the area. Not only do these deployments offer some of the best aesthetic solutions, this is an appropriate way to avoid prohibiting wireless services in districts that are otherwise very difficult for deployments.

Undergrounding The City's requirements to place equipment underground in some circumstances must be limited to the extent reasonably feasible and nondiscriminatory. For example, radio units need to be above ground because they need to be near enough to antennas to function properly.

Concealment The City's various requirements for concealment elements or stealth deployments need to be limited "to extent feasible."

Number of Antennas The City must delete proposed section 12.52.060(F)(4) as the City cannot limit number of antennas deployed. The FCC has ruled that it is "an unlawful prohibition for a state or locality to specify 'the means or facilities' through which a service provider must offer

service."[27] Furthermore, the City is preempted by federal law from dictating technologies, network architecture, and technical and operational characteristics of wireless facilities.[28]

Minimum 10-Year Term State law requires all wireless facility permits to be subject to a term of no less than 10 years. Thus, EFRs must be granted for a minimum 10-year term.

Appeals The appeal process under proposed section 12.52.080(D) risks shot clock compliance, especially for EFR, small cell, and collocation applications that require final action within 60 or 90 days.

Deemed Approvals Deemed approvals should include all necessary applications, such as encroachment permits. The City cannot withhold permits of a deemed approved application as suggested under proposed section 12.52.090(C)(4)(b).

AT&T's Specific Comments on Monrovia's Proposed Title 17 Amendments

Location & ERFs The location requirements under proposed section 17.46.040 are not applicable to EFRs, and the City should consider broadly exempting EFRs from these and other requirements.

Discouraged Locations The broad scope of discouraged locations runs a significant risk for effectively prohibiting wireless services in violation of the Act because they will make it extremely difficult or impossible to place facilities in most of the City. The proposed ordinance goes too far by discouraging deployments in all residential zones and uses, as well as any locations with 100 feet of such locations. Taken together, this will operate as a general ban on wireless facilities throughout the vast majority of City. Specifically, reviewing the City's zoning map alongside these discouraged locations, it is clear there will be significant portions of the City where wireless can only be permitted through the overly burdensome exception process. Moreover, that exception process requires showing "no feasible alternatives, which is more restrictive than any test under applicable federal law. The City should reimagine its location preferences and revamp the exception process to comport with federal law and avoid violating federal law.

Material Inhibition The City needs to delete proposed section 17.46.080(A)(1)(b), which improperly suggests all wireless facilities are visual intrusions and establishes a policy that directly violates federal law. Specifically, this provision seeks to limit the scope of authorized wireless telecommunications facilities in the City. This violates federal law as a material inhibition of services. The FCC has clearly ruled – and federal courts have upheld its rulings –

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[27] *Infrastructure Order* at ¶ 37, n.87; *In the Matter of The Public Utility Commission of Texas, Etc., Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, Memorandum Opinion and Order, FCC 97-346, 13 FCC Rcd. 3460 (October 1, 1997), at ¶ 74 ("we find that section 253(a) bars state or local governments that restrict the means or facilities through which a party is permitted to provide service").

[28] *See New York SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 105-106 (2d Cir. 2010) (locality may not regulate a preference for, or direct deployments of, certain technologies or types of facilities to provide wireless services because the FCC "has long preempted the field of technical and operational aspects of wireless telephone service").

that wireless providers, in addition to deploying facilities to close coverage gaps, are expressly authorized to construct and modify facilities among other reasons to (a) deploy more robust and competitive wireless services, (b) densify wireless networks, and (c) improve wireless service capabilities. Were the City to deny any application based on its assessment that a facility is not necessary to provide services, the city will be violating federal law. The City should instead focus its regulations on how nest to accommodate deployments.

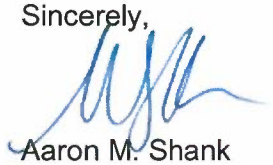
RF Emissions Reporting The City should delete proposed section 17.46.080(A)(1)(h), which provides a loose standard for requiring a new compliance report for RF emissions. The FCC regulates RF emissions to the exclusion of local governments.[29] The City has no authority to impose RF emissions measurements beyond the original, predictive pre-construction assessment. Further, this requirement is superfluous as the evidence of compliance provided with an application assumes "worst-case" operating conditions that will not be exceeded absent modification. And when modified, the City can require compliance testing in connection with that application.

Bond The City should revise propose section 17.46.080(A)(1)(i) to limit the amount of the required bond to cover the cost of removal only.

Conclusion

AT&T recommends that the City take additional time to develop its proposed ordinances in order to consider these comments and to develop an overall more effective and lawful set of regulations. Doing so will help the City meet its goals of encouraging technology developments while best serving its aesthetic goals. AT&T is happy to work with the City as it works to update its regulations.

Sincerely,



Aaron M. Shank

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[29] *In the Matter of Targeted Changes to the Commission's Rules Regarding Human Exposure to Radiofrequency Electromagnetic Fields,* ET Docket No. 19-226, 34 FCC Rcd 11687 (rel. Dec. 4, 2019) (FCC 19-126) at ¶114; *Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934*, WT Docket No. 97-192, 15 FCC Rcd 22821 (rel. Nov. 13, 2000) (FCC 00-408) at ¶ 17 ("State and local governments are broadly preempted from regulating the operation of personal wireless service facilities based on RF emission considerations. * * * We note that the Commission's plenary authority in this area has recently been upheld by the courts."); *Bennett v. T-Mobile United States, Inc.*, 597 F. Supp. 2d 1050, 1053 (C.D. Cal. 2008) (Explaining local goverments are preempted from regulating radio frequency emissions standards, "Congress has given the FCC exclusive authority over every technical aspect of radio communications").