



**JEFFREY SLADE**  
Assistant Vice President -  
Senior Legal Counsel

AT&T Services, Inc.  
208 S Akard Street  
Room 3002  
Dallas, TX 75202

214.782.3858 Phone  
jeff.slade@att.com

February 11, 2019

*Via E-Mail*

Town of Hillsborough City Council  
1600 Floribunda Avenue  
Hillsborough, CA 94010

Re. AT&T's Initial Comments to the Town of Hillsborough's Proposed Policy on  
The Location and Design of Wireless Communications Facilities

Dear Mayor Christianson, Vice Mayor Royse and Councilmembers Benton, Chuang and May:

I write on behalf of New Cingular Wireless PCS, LLC d/b/a AT&T Mobility (AT&T) to provide initial comments on the town's proposed policy for the location and design of wireless communications facilities ("Proposed Policy"). AT&T appreciates the town's efforts to update its wireless siting regulations, particularly in light of changes to applicable state and federal laws, including the Federal Communications Commission's *Infrastructure Order* and new regulations.<sup>1</sup> With more than 70% of Americans relying exclusively or primarily on wireless telecommunications, it is especially important to encourage responsible deployments. And with AT&T's selection by FirstNet as the wireless service provider to build and manage the nationwide first responder wireless network, each new or modified facility will strengthen first responder communications.

Unfortunately, the Proposed Policy would establish rules at odds with state and federal laws, and the town is missing an opportunity to encourage investment in small wireless facilities. The town should carve out a separate process to foster deployment of small cells and to fully comply with the FCC's recent *Infrastructure Order*. AT&T respectfully requests the town pause briefly in its deliberations to meet with members of the wireless industry in order to take into consideration important practical and legal issues towards developing an appropriate set of regulations. AT&T offers the following comments on the Proposed Policy.

***Specific Comments on the Proposed Policy Design Standards***

Installation on Wood Poles. The Proposed Policy, Section (C)(1), prohibits installation on any new, non-replacement wood poles unless the wood pole is integrated into a fully concealed pre-approved design. This prohibition is unnecessary, risks violating state law, and could be counterproductive in some instances. AT&T has a statewide franchise right to access and construct telecommunications facilities in

---

<sup>1</sup> See *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, FCC 18-133 (September 27, 2018) ("*Infrastructure Order*"); 47 C.F.R. § 1.6001, *et seq.*

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 town’s reasonable and equivalent time, place, and manner regulations as to how AT&T constructs in the public rights-of-way. Thus, the town cannot dictate the utility infrastructure that AT&T deploys. In addition, prohibiting installations on new wood poles could adversely impact aesthetics in situations where a new pole must be installed and wood poles would be most aesthetically appealing based on nearby existing wood poles

Installing Metal or Composite Decorative Poles. Likewise, the town may prefer, but cannot require, AT&T to install metal or composite decorative poles as it does under Section (C)(3). Not only does such a rigid rule violate the law, wood poles may be more aesthetically pleasing in residential neighborhoods, for example. The Proposed Policy should build in flexibility to comply with state law and to avoid prohibiting more favorable installations.

Subjective Standards. Several of the town’s design requirements violate federal law with respect to regulating aesthetics of small cells in the right-of-way. The FCC authorizes such regulations only to the extent they are (1) reasonable, (2) no more burdensome than those applied to other infrastructure deployments, (3) objective and published in advance.<sup>2</sup> For example, Section J(1) requires WCFs to employ “the smallest and lowest profile equipment, placed in the least conspicuous location when viewed from properties from which the WCF is visible.” This type of subjective requirement must be revised with respect to small cells.

Undergrounding. Several provisions of the Proposed Policy mandate undergrounding of equipment under both the town’s design standards and conditions of approval. These requirements must be revised to avoid discrimination or effectively prohibiting wireless services. The Federal Telecommunications Act of 1996, 47 U.S.C. § 332 (“Telecommunications Act” or “Act”) provides rights to wireless service providers and establishes limitations upon state and local zoning authorities with respect to wireless facility siting applications. The Act prohibits a local government from denying an application for a wireless facility where doing so would “prohibit or have the effect of prohibiting the provision of personal wireless services.”<sup>3</sup> The FCC has ruled that an effective prohibition occurs when the decision of a local government materially inhibits wireless services.<sup>4</sup> Wireless facilities cannot operate with all equipment underground. For instance, radio units must be placed above ground in order to be near enough to the antennas to function properly. Undergrounding requirements also must be reconsidered to avoid discriminating among infrastructure deployments.

Pole-Mounted Components. AT&T objects to Section (E)(3), which states that pole-mounted components of wireless communications facilities in the public rights-of-way cannot protrude from the surface of the

---

<sup>2</sup> See *Infrastructure Order*, at ¶ 86.

<sup>3</sup> 47 U.S.C. §332(c)(7)(B)(i)(II).

<sup>4</sup> See *Infrastructure Order* (FCC rejected the significant gap/least intrusive means test for an effective prohibition that many courts, including the Ninth Circuit, have applied); see also, *In the Matter of California Payphone Association Petition for Preemption, Etc.*, Opinion and Order, FCC 97-251, 12 FCC Red 14191 (July 17, 1997).

pole more than 18 inches. This requirement is discriminatory to the extent that it is not applied to other infrastructure deployments.

Technical Feasibility Concerns. Some of the design limitations in the Proposed Policy raise technical feasibility concerns, which are not reasonable to the extent they materially inhibit AT&T's ability to provide and improve wireless services. Section (E)(4), for example, requires that a right-of-way facility must be "concealed within a shroud that has been painted and textured to be consistent with other existing natural or manmade features in the public rights-of-way near the location where the infrastructure is to be located." The town should add "to the extent technically feasible," to the beginning of these sections that require shrouding or other camouflaging, so that the requirement will not effectively prohibit frequencies that would be materially inhibited by a shroud.

Pole Height. AT&T objects to Section (C)(3), which prohibits a new, non-replacement pole's height above ground level adjacent to the base of the pole from exceeding 32 feet. This height requirement is unreasonable to the extent such a requirement materially inhibits the provision of wireless services.

Streetlight Pole Requirement. AT&T objects to the sections of the Proposed Policy requiring a right-of-way facility to be located on an existing or replacement streetlight pole when feasible. State law prohibits requiring placements on sites owned by particular parties.<sup>5</sup>

Volume. Several volumetric requirements cannot be applied to small wireless facility deployment. Section (E)(6) of the Proposed Policy, which limits the volume of accessory equipment, must be revised to allow up to 28 cubic feet of equipment to be consistent with the federal standard for small wireless facilities.<sup>6</sup> And Section (E)(5) of the Proposed Policy limits the overall height of facilities above an existing support structure in the public right-of-way to four feet above the existing support structure. While AT&T appreciates the town's interest in protecting aesthetics, the limit may actually harm aesthetics by preventing AT&T's ability to deploy its most stealthy facilities.

Electric Service. AT&T objects to Section (E)(9) of the Proposed Policy stating that applicants install a shrouded smart meter if flat-rate service is not available. The electric provider provides the types of service available to AT&T. Further, this requirement may materially inhibit the provision of wireless services.

Landscaping. The town requires landscaping be restored when damaged, to which AT&T does not object in Section (E)(10). But the town should not require maintenance of replacement landscaping, which is inappropriate. This is unreasonable and the town must eliminate the maintenance requirement.

Placement of a Wireless Communications Facility. The town should remove the requirement that a facility in the public right-of-way be placed "at least 15 feet away from any intersection, alleyway, driveway or established pedestrian pathway to a residential structure appurtenant to the public rights-of-way" in Section (E)(16). AT&T's state law franchise right to place poles and equipment in the rights-of-way cannot be foreclosed by unreasonable or discriminatory regulations like this. And, as a practical matter, it makes sense to allow small wireless facilities at or near intersections. Such placements permit

---

<sup>5</sup> See Cal. Govt. Code Section 65964(c).

<sup>6</sup> See 47 C.F.R. § 1.6002(1)(3).

the wireless provider to cover multiple directions from one location, which a mid-block location may not support.

Residential Dwellings. AT&T objects to Section (E)(19) of the Proposed Policy, which states that facilities in the right-of-way are not permitted “in any location that is closer to any residential dwelling than the average front yard setback for properties within 250 feet from the proposed site.” This requirement is discriminatory as applied to other right-of-way users. And, as a practical matter, the town should reconsider its preferences and prohibitions against siting wireless facilities near residential areas because small cells, for example, need to be placed near customers to provide and improve service.

Avoiding Flat Surfaces. AT&T objects to Section G(4) of the Proposed Policy requiring that ground-mounted components of a wireless communications facility must have equipment shrouds that do “not have any flat surface area on the top of the shroud greater than two square inches to prevent objects from being placed on the shroud.” This requirement is unreasonable because it is not clear that a wireless provider could install an equipment shroud to meet this requirement. Furthermore, this provision is discriminatory compared to other users of the rights-of-way unless the town requires all users of the rights-of-way to avoid flat surfaces on their installations in the rights-of-way.

#### ***Specific Comments on the Proposed Policy Conditions of Approval***

Compliance Reports. Section (A) requires facilities to comply with FCC standards and regulations concerning radio frequency exposures. The town, however, cannot require regular compliance reports during the operation of the facility. While the town can require proof of compliance with FCC’s exposure rules in connection with a siting application, the town is preempted from imposing its own ongoing rules in this regard.

Consultants. Section (A)(3) allows the town to retain qualified professionals to investigate and requires the applicant to agree to pay the cost. Any provision that allows the use of consultants should limit review to appropriate and objective criteria, such as a structural safety assessment or compliance with FCC regulations for human exposure to radio frequency emissions. And the town should be mindful that for small cells the cost of a consultant may not pass through to an applicant because only objectively reasonable costs can be imposed.

Additional Permits and Approvals. Sections (C) and (E) of the Proposed Policy mandate additional permits and approvals. Under the *Infrastructure Order*, all associated permits and approvals are subject to the applicable federally-mandated shot clock.<sup>7</sup> Thus, the town must take final action within 60 days on all necessary permits and approvals, inclusive of appeals, with respect to requests to collocate small wireless facilities, and within 90 days for non-collocation small wireless facility requests.<sup>8</sup>

Indemnification. The town should not seek indemnity from an underlying private property owner, as it does under Section (H) of the Proposed Policy. Not only does this risk interfering with existing leases, it also has the effect of interfering with prospective economic relations between AT&T and property owners

---

<sup>7</sup> See *Infrastructure Order* at ¶¶ 132-137, 144.

<sup>8</sup> See 47 C.F.R. § 1.6003.

within the town. In addition, the indemnification provisions need to carve out exceptions to indemnity in instances of the town's own negligence. And AT&T must retain the right to select its own counsel.

Bond. Section (J) requires that an applicant secure a performance bond or other surety to cover facility removal. Both federal and state law prohibit discrimination, so a bond can only be required from wireless providers to the extent it is required of other right-of-way users.

Ground-Mounted Electric Meter. AT&T objects to Section Z of the Proposed Policy. Once AT&T installs a ground-mounted electric meter, the meter is permitted to remain for ten years. AT&T will discuss removal of a ground-mounted electric meter in the context of a permit renewal.

### ***Conclusion***

AT&T appreciates the town's initial efforts to adapt its wireless facility siting regulations to fall in line with recent changes in law. The town should make sure to develop a policy that will comport with applicable law. By addressing the items we raise here, the town will go a long way toward encouraging deployments consistent with state and federal policies and to the great benefit of the town's residents and businesses.

Very truly yours,

*/s/ Jeffrey M. Slade*

Jeffrey M. Slade

CC: Christopher Diaz, City Attorney  
(Christopher.Diaz@bbklaw.com)