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VIA E-MAIL

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

Re: AT&T's Comments on the Town of Hillsborough's Amended Design Standards

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 comments on the Town of Hillsborough's amended design standards ("Amended Design Standards"). AT&T appreciates that the Town is taking the time to revisit and revise its design standards to address changes in applicable state and federal laws, including the Federal Communications Commission's *Infrastructure Order*.[1] AT&T specifically commends the Town for removing its location restrictions for facilities near intersections, alleyways, driveways and residential dwellings.

The Amended Design Standards, however, require further revisions to comply with both state and federal laws despite the Town's recent revisions. AT&T offers these additional comments on problematic provisions that remain in the Town's Amended Design Standards. AT&T also respectfully asks that the Town reconsider the comments raised in our February 11, 2019 letter to the City Council where we outline our concerns with the Town's design standards and conditions of approval.

Key Legal Concepts

The Federal Telecommunications Act of 1996 ("Act") establishes key limitations on local regulations. The Act defines the scope and parameters of the Town's review of AT&T's applications. Under the Act, the Town must take action on AT&T's applications "within a reasonable period of time."[2] The FCC has established and codified application "shot clocks" to implement this timing requirement.[3] And the FCC has made clear that the Town must grant all necessary approvals and authorizations within the applicable shot clock.[4] The Act also requires

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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 (September 27, 2018) ("*Infrastructure Order*").
[2] 47 U.S.C. § 332(c)(7)(B)(ii).
[3] *See* 47 C.F.R. §§ 1.6001, *et seq*.
[4] *See Infrastructure Order* at ¶¶ 132-137.

that the Town's review of AT&T's applications be based on substantial evidence.[5] Under the Act, state and local governments may not unreasonably discriminate among providers of functionally equivalent services.[6]

The Act prohibits a local government from denying an application for a wireless telecommunications facility where doing so would "prohibit or have the effect of prohibiting" AT&T from providing wireless telecommunications services.[7] The FCC has ruled that an effective prohibition occurs when the decision of a local government materially inhibits wireless services.[8] 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."[9]

Under the *Infrastructure Order*, the FCC established a standard for lawful fees, which requires that: "(1) the fees are a reasonable approximation of the state or local government's costs, (2) only objectively reasonable costs are factored into those fees, and (3) the fees are no higher than the fees charged to similarly-situated competitors in similar situations."[10] And the FCC provides a safe harbor for presumptively reasonable fees: (a) $500 for non-recurring fees for an application including up to five small cells, plus $100 for each small cell beyond five, or $1,000 for non-recurring fees for a new pole to support small cells; and (b) $270 per small cell per year for all recurring fees.[11] Higher fees are presumed to violate the Act.[12]

The FCC also established a standard for local aesthetic regulations that they must be (1) reasonable (i.e., has to be technically feasible), (2) no more burdensome than those applied to other infrastructure deployments, and (3) objective and published in advance.[13] Regulations that do not meet these criteria are preempted as they are presumed to effectively prohibit wireless service in violation if the Act.[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 Town's reasonable and equivalent time, place, and manner regulations.

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[5] 47 U.S.C. § 332(c)(7)(B)(iii).
[6] 47 U.S.C. § 332(c)(7)(B)(i)(I).
[7] 47 U.S.C. § 332(c)(7)(B)(i)(II).
[8] *See Infrastructure Order* at ¶¶ 35-42; *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).
[9] *Infrastructure Order* at ¶ 37.
[10] *Id.* at ¶ 50.
[11] *Id.* at ¶ 79.
[12] *Id.*
[13] *See id.* at ¶ 86.
[14] *See id.*

AT&T's Comments on the Amended Design Standards

1. Pre-Approved Designs. AT&T applauds the Town for its willingness to work with wireless providers to develop pre-approved designs for small cells and other infrastructure deployments as stated in Section (R) of the Amended Design Standards. AT&T requests that the Town provide more information on how AT&T can be involved in the pre-approved design process, and AT&T would be happy to provide the Town with designs for this purpose. In addition, the Town should craft a process by which an application that is substantially consistent with pre-approved designs will be deemed approved. And as wireless technologies advance, and as providers' needs change, providers will need to alter designs to meet specific needs, so the Town needs to build flexibility into its pre-approved design process.

2. Subjective Standards. The Town's Amended Design Standards contain multiple subjective aesthetic standards that cannot be the basis for denial for small cell applications. For example, Section (A)(1) says that facilities should "employ the smallest and lowest profile equipment," and Section (F)(4) requires pole-mounted components to "be placed and oriented to minimize the overall visual profile." The Town needs to develop objective criteria to comply with the FCC's aesthetic standard for small cells.[15]

3. Accommodating Collocation. Facilities should accommodate collocation as stated in Section (A)(2), Section D and Section Q. The Town needs to exercise caution here as collocations will sometimes be unfeasible. And while AT&T will certainly work with the Town and other providers as practical, the Town cannot force a provider to overbuild a facility to allow for future facilities.

4. Installation on Wood Poles. Section (C)(1) of the Amended Design Standards prohibits installation on any new, non-replacement wood poles unless the wood pole is a pre-approved concept design. Any provision that may prohibit installations on new wood poles could adversely impact aesthetics in situations where a new pole must be installed and wood poles would be the most aesthetically appealing based on nearby existing wood poles. And while AT&T intends to work with the Town on pre-approved designs, the Town cannot prohibit wireless attachments that are not pre-approved. Doing so runs a substantial risk of violating the Act by materially inhibiting or prohibiting services or requiring new poles.

5. Concealment. Many of the Town's Amended Design Standards require providers to use concealment. But under the FCC's aesthetic standard for small cells, concealment cannot be required to a greater extent than imposed on other infrastructure deployments in the right-of-way.[16] For example, non-concealed electric distribution facilities are located on poles around the Town.

6. New, Non-Replacement Poles. Section (C)(3) allows the Town to require that a new, non-replacement pole be a streetlight, and if there are no existing street lights nearby, applicants

[15] *See Infrastructure Order* at ¶ 86.
[16] *See id.*

may only install a metal or composite decorative pole. The Town cannot force AT&T to install street lights, and cannot ban use of other pole materials. These restrictions are unlawful to the extent they are more burdensome than rules applied to other infrastructure deployments.

7. Height. Section (C)(3) also limits pole height, including all components, to 35 feet in overall height above ground level adjacent to the base of the pole. AT&T notes that the Town's 35-foot limitation may not be appropriate in certain places throughout the Town, and this height limit is certainly not needed for concealed sites. This will likely result in an effective prohibition. This section should be revised to allow for pole height of up to 50 feet to be consistent with 47 C.F.R. § 1.6002(l)(1).

In addition, Section (E)(6) limits the overall height for installations on structures in the public rights-of-way to four feet above the existing support structure. This limit may actually harm aesthetics by preventing AT&T's ability to deploy its most stealthy facilities. For example, AT&T's typical streetlight-top design extends up to six feet above the pole top.

8. Undergrounding. Several provisions in the Amended Design Standards mandate undergrounding of equipment. These requirements must be revised to the extent necessary to avoid unlawful discrimination or effectively prohibiting wireless services in violation of the Act. Wireless facilities cannot operate with all equipment underground. Antennas must be above ground to broadcast and receive and radio units must be placed above ground near antennas to function properly.

9. Pole-Mounted Components. AT&T objects to Section (E)(4), which states that pole-mounted components of a wireless facility in the right-of-way cannot protrude from the surface of the pole more than 18 inches. This requirement is discriminatory to the extent that it is not applied to other infrastructure deployments in the rights-of-way. And to avoid effective prohibitions of wireless services, the Town should revise this requirement.

10. Antenna Volume. Section (E)(7) says that a facility in the public right-of-way "shall not be permitted with any combination of antennas that exceeds six cubic feet in volume," which is inconsistent with the *Infrastructure Order* and 47 C.F.R. § 1.6002(l)(2) (capping individual antenna volume at three cubic feet but not placing a limit on total antenna volume). Additionally, under the FCC rule the Town cannot include radios, mounting hardware and a shroud or radome as a part of its antenna volume calculation. Moreover, this limit risks effectively prohibiting wireless services. The Town should build more flexibility into the Amended Design Standards to better accommodate current and future technology.

11. Volume of Accessory Equipment. AT&T objects to Section (E)(8), which limits the volume of accessory equipment. This section should be revised to allow up to 28 cubic feet of equipment to be consistent with 47 C.F.R. § 1.6002(l)(3) to avoid an effective prohibition.

12. Maintaining Landscaping. Throughout the Amended Design Standards, the Town requires AT&T to maintain replacement landscaping. While AT&T will replace landscaping

damaged during construction, AT&T cannot be required to maintain landscaping. Such a requirement is inappropriate and unreasonable.

Conclusion

AT&T appreciates the Town's intent to develop legislation to balance community and industry needs but asks the Town to take time to further revise the Amended Design Standards to avoid violating the law. AT&T would be happy to work with the Town to develop the Amended Design Standards in a manner that will foster rather than frustrate responsible wireless facility deployments.

Very truly yours,

/s/ John di Bene

John di Bene

cc: Christopher Diaz, City Attorney