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Members of the City Council
Land Use & Housing Commission
City of San Diego
202 "C" Street, 10th Floor
San Diego, CA 92101

Karen Lynch-Ashcraft
Land Use & Housing Staff Member
City of San Diego
1222 First Avenue, Suite 501
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Re: Draft City of San Diego Council Policy relating to Wireless
Communication Facilities

Dear Members of the City Council and Ms. Lynch-Ashcroft:

We are writing on behalf of AT&T Wireless in connection with the draft City of San Diego Council Policy relating to Wireless Communication Facilities (the "Policy"). This letter is intended to follow up on our letter dated September 18, 2001. Now that there is a draft Policy, we would like to work with you to ensure that it complies with applicable law.

We are concerned by the following issues raised by the present draft:

1. Regulation based upon "Low Power" which is the sole province of the FCC;
2. Impact of the Policy on facilities in the public right-of-way;
3. Lighting requirements, which are established by applicable zone under current municipal law;
4. Providing an annual list of facilities;
5. Maintenance restrictions;
6. Locating equipment within the existing building envelope;
7. Specifying lease terms in this "Policy" document, rather than by negotiation;
8. Determining the need for a facility, without regard to public utility status;
9. Prohibited locations as an outright ban in violation of the TCA;
10. Regulation of interference which is the sole province of the FCC; and
11. Land valuation issues.

As you are aware, AT&T Wireless is a telephone corporation providing wireless telecommunications services to the general public and to emergency personnel. It has been issued a Certificate of Public Convenience and Necessity (“CPC&N”) by the California Public Utilities Commission (“CPUC”) and is also licensed and regulated by the Federal Communications Commission (“FCC”). The service provided by AT&T Wireless has a long history of providing a necessary method of communication in the event of fires and earthquakes, and is a critical component of many emergency response systems.

To summarize the applicable federal law, the federal Telecommunications Act of 1996 (“TCA”) contains fundamental limits on the right of a local jurisdiction to regulate the placement of wireless facilities. Section 253 of the TCA deals generally with the effect of state and local statutes and regulations on the provision of any interstate or intrastate telecommunications service including personal wireless services such as those supplied by AT&T Wireless. Section 253(a) states that:

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.¹

There are only two limitations on this provision, only one of which is relevant here. Section 253(c) allows state and local governments certain limited authority to “manage use of public rights-of-way”².

In an important 2001 decision, City of Auburn v. Qwest Corporation, 247 F.3d 966, (9th Cir. (Wash. 2001)) (referred to hereafter as “City of Auburn”) the Ninth Circuit was quite clear on the import of this Section 253(a):

Section 253(a) bars all state and local regulations that “prohibit or have the effect of prohibiting” any company’s ability to provide telecommunications services unless the regulations fall within the statute’s “safe harbor” provisions (of which only § 253(c), related to local regulation of rights-of-way, is relevant here). The preemption is virtually absolute and its purpose is clear—certain aspects of telecommunications regulation are uniquely the province of the federal government and Congress has narrowly circumscribed the role of state and local governments in this arena. “Municipalities therefore have a very limited and proscribed role in the regulation of telecommunications.” AT&T Communications v. City of Dallas, 8 F. Supp. 2d 582, 591 (N.D. Tex. 1998); emphasis supplied.³

Another section of the TCA limits the scope of local zoning authority specifically with respect to wireless facilities. Section 332(c)(7)(B) states that local regulations:

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

¹ 47 USC 253(a).

² The other limiting provision, section 253(b), addresses areas in which the state is not preempted from regulating providers of telecommunications service.

³ City of Auburn, at 980.

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.⁴

That same section of the TCA also requires that localities act on siting requests “within a reasonable period of time,”⁵ and that decisions to deny an application must be supported by “substantial evidence.”⁶

Section 332 includes another very important limitation on the scope of local government’s ability to regulate wireless facilities:

No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission’s regulations concerning such emissions.⁷

There is increasing public demand in San Diego for high quality wireless service. This demand can be met only by installation of new antenna facilities. We are concerned that in several ways the proposed Policy may seriously delay or prevent the installation of facilities, and may do so in a manner that does not comply with applicable law. Our overriding concern is that the Policy must comply with both the Telecommunications Act of 1996 and with state law, and in particular California Public Utilities Code Section 7901, governing telephone utility installations along the public rights-of-way.

1. Regulation of Placement based upon “Low Power”

As currently drafted, the “Locational Criteria” of the Policy establish Process One, Two or Three review of public right-of-way facilities depending on (1) location, and (2) whether or not a facility is “Low Power.” The “Low Power” distinction is clearly based upon emissions, and therefore violates the TCA.

The definition of “Low Power Facility” states in part that these facilities, such as a microcell, have “limited signal range and capacity” and are “attached to an existing power source.” On its face, therefore, the provision regulate placement based upon strength or output of frequency emissions, which runs directly counter to the TCA which states:

No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission’s regulations concerning such emissions.⁸ (Emphasis added.)

To be valid, the definition should not relate to power or signal strength, but rather to “low impact” or the common definition of a right-of-way microcell facility, which typically

⁴ 47 USC 332(c)(7)(B)(i)

⁵ 47 USC § 332(c)(7)(B)(ii).

⁶ 47 USC § 332(c)(7)(B)(iii).

⁷ 47 USC 332(c)(7)(B)(iv).

⁸ 47 USC 332(c)(7)(B)(iv).

includes one to two antennas and a small equipment cabinet or container. Please note also that microcell installations normally require something more than the existing power source on a streetlight.

2. Use of the Public Rights-of-Way.

Section C of the Policy begins by stating that the public right-of-way “serves as a unique solution” for wireless siting. We agree with this premise, but we disagree that public right-of-way sites can be subject to the CUP process. Under the present Policy, we believe the appropriate solution is to apply the Process One standards, with City staff review of aesthetic and traffic issues, to all three categories of right-of-way sites.

Both State and federal law support AT&T Wireless’ ability to use public rights-of-way with only very limited regulation by local jurisdictions. Federal limits to a city’s ability to restrict wireless facilities in public rights-of-way under Section 253 of the TCA were discussed in some detail by the Ninth Circuit in the City of Auburn decision, and in Qwest Communications Corp. v. City of Berkeley, 146 F.Supp.2d 1081 (N.D. Cal. 2001). Under Sections 7901, 7901.1 of the California Public Utilities Code, the Telecommunications Act, and the City of Auburn and City of Berkeley cases, a local jurisdiction does not have authority or discretion to reject or deny a telephone corporation access to a public right-of-way, but only to reasonably regulate the time, place and manner in which that access occurs.

Right-of-way facilities, often on existing utility poles or light standards, are generally very small. As in the case of all public utility installations, the usual procedure is to obtain a non-discretionary encroachment permit from the Public Works Department. Planning Commission and City Council hearings are not required for wireless or comparable utility installations within the right-of-way — for example for facilities installed by land line telephone companies or by SCE.

Requiring something more than Process One review presumes that the City has the legal right to deny or simply reject a right-of-way site, which it does not, as set forth below.

A. California State Law.

AT&T Wireless is a telephone corporation under the California Public Utilities Code. A “telephone corporation” includes:

every corporation or person owning, controlling, operating, or managing any telephone line for compensation within this state. . .
Public Utilities Code § 234

“Telephone line” includes:

all conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate communication by telephone, whether such communication is had with or *without* the use of transmission wires. [Emphasis added.] Public Utilities Code § 233.

The Public Utilities Code therefore includes within the definition of telephone corporation

AT&T Wireless' provision of wireless telephone service, and the installation of antennas and cable runs necessary to provide such service. The CPUC has ruled that a cellular carrier is a type of "telephone corporation," and has the right, under Code Section 7901, to install cellular facilities "along any public road and highway." In re: GTE MobilNet of San Jose, L.P., etc., 22 C.P.U.C. 2d 25 (Cal. Pub. Util. Comm. 1986).

Public Utilities Code §7901 provides the state statutory franchise to telephone corporations to use the public right of way:

Telegraph or telephone corporations may construct lines of telegraph or telephone along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters.

The California Supreme Court has stated that this language "is a continuing offer extended to telephone and telegraph companies to use the highways, which offer when accepted by the construction and maintenance of lines constitutes a binding contract based on adequate consideration and that the vested right established thereby cannot be impaired by subsequent acts of the Legislature." (Emphasis added) County of L.A. v. Southern Cal. Tel. Co., (1948) 32 C2d 378, 384; 196 P2d 773, appeal dismissed, 336 US 929 (1949) (citations omitted). The rights acquired are "vested rights which the constitutions, both state and federal, protect." Id. at 385 (citations omitted).

In explaining the public policy behind Public Utilities Code § 7901, one court has stated that the grant of state easements along roads, highways and waterways spares

the [telephone] companies the expense of acquiring easements over privately owned lands; to cause them wasteful expense would have been contrary to the State's purpose to encourage their entrance into the State County of Los Angeles v. General Telephone Co., 249 CA2d 903, 907-8 (1967).

In County of L.A. v. Southern Cal. Tel. Co., supra, 32 C2d at 384, the court noted: "Obviously, the state receives a substantial benefit from the continued operation of such a system." The entire point of the state franchise is to assist telephone corporations in locating their facilities in the public right-of-way;⁹ this purpose is frustrated by introducing discretionary review.

B. Federal Law.

In addition to the restrictions under California state law, under the TCA, state and local government requirements may not "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."¹⁰ Under the "safe harbor" provision of Section 253(c) of the Telecommunications Act, states and local

⁹ County of Los Angeles v. General Telephone Co., 249 Cal. App. 2d 903, 907-8 (1967).

¹⁰ 47 USC § 253(a).

governments retain the right to "manage the public rights-of-way" on a "competitively neutral and nondiscriminatory basis."¹¹

Local regulations that "manage the public right-of-way" with respect to the placement and construction of wireless facilities that do not fall within the Section 253(c) "safe harbor" are preempted by federal law and regulation. City of Auburn, at 983. The Court identified certain areas in which the ordinances under review did not fall within the "safe harbor" of Section 253(c) (Id. at 983-984). After discussing four points in some detail, the Court stated that "[w]e have specifically discussed only those aspects of the ordinances that most seriously violate § 253(c), but others are objectionable as well." (Id. at 984). As an example of such an "objectionable" provision, the Court cites a requirement for a public hearing before granting a local right to use the public right-of-way. (Id. at Fn 19, at 984).

There is also a federal issue relating to discriminatory impact. Interpreting another functionally related section of the Telecommunications Act, the FCC has stated that local governments may impose conditions only if they are applied "equally to *all* users of the rights-of-way"¹² and may not impose conditions on one user, such as a telecommunications company, in a different manner than imposed on other users. The other users relevant here include SDG&E and Pacific Bell (the land-line telephone company).

3. Lighting Requirements

Section A(5) of the Operational Guidelines contains certain security lighting requirements. AT&T Wireless' representative on the Telecommunications Subcommittee has pointed out that this provision is inappropriate because current law for every zone already contains lighting requirements.

4. Providing an Annual List of Facilities

Under Section B(1)(b) of the Administration provision, each wireless carrier must provide, on an annual basis, a spreadsheet documenting all existing and approved site locations. AT&T Wireless' representative has pointed out that this is a duplicative requirement in that (1) the City has this information in its own files, and (2) the application requirements already require a description of existing sites. The requirement therefore imposes an unjustified burden within the meaning of City of Auburn v. Qwest Corporation, 247 F3d 966 (9th Cir.(Wash. 2001).

5. Maintenance Limitations.

We request that Section A(7)(b) relating to maintenance begin with the following phrase:

"Except in the event of an emergency or to avoid an adverse impact on coverage, routine maintenance...."

6. Locating Equipment within the Existing Building Envelope

¹¹ 47 USC § 253(c).

¹² Second Report and Order, CS Docket 96-46, ¶209, FCC 96-249, adopted May 31, 1996.

Section A(5) states that whenever possible, equipment should be located within the existing envelope. We believe this provision is too specific to be helpful -- it may be, for example, that the best solution in a given location is to conceal equipment by placing it behind a building.

The overall objective in this Section is achieved with the Policy statement that visual impact should be "minimized" as set forth in A(2). We believe the very specific statement regarding the building envelope should be deleted.

7. Specifying Lease Terms in a "Policy" Document

Section B(2) of the Administration provision contains a number of restrictions on the specific terms of a lease negotiated by the Real Estates Assets Department and a wireless carrier. We believe the lease terms should be the subject of negotiation between the parties and should not be laid out with specificity in this Policy.

In particular, we object to Section (B)(2)(c), which restricts the length of a leasehold term to 5 years with one 5-year option to renew. The term of a wireless facilities lease is often very important, largely because of the large investment required to install a facility. And on certain City properties, it may be to the City's advantage to negotiate more than one option to renew. This Policy should not preclude that possibility.

We suggest that specific lease requirements be deleted from the Policy and left to negotiation with the City's lease representatives.

8. Determining the "Need" for a Facility, Without Regard to Public Utility Status

Under Section A of the Application Guidelines, applicants who cannot use a "High Preference" location must:

"Demonstrate why the effort to secure one of these locations was unsuccessful and provide evidence that the proposed location is essential..."

And under Section B(5) of Administration, the City will assess the technical data.

AT&T Wireless does not object to providing a submittal in the application supporting the location and antennas to be installed. However, the City is not an entity that may lawfully determine AT&T Wireless' appropriate infrastructure. We therefore want to ensure that the City does not exceed its jurisdiction and undertake the task of deciding whether facilities should be built. The situation is similar in the case of a water utility licensed by the Public Utilities Commission -- cities do not have the ability or jurisdiction to determine the necessity for a new water facility.

The public need for AT&T Wireless' services, and any extension or installation supporting that service, is well established under California state law, and has been specifically determined by the California Public Utilities Commission. As noted above, the CPUC has granted AT&T Wireless a Certificate of Public Convenience and Necessity (a "CPC&N") to operate in California providing wireless telecommunications services to the general public. See California Public Utilities Code Section 1001. In confirming its preemption of local authority in such determinations the CPUC has specifically determined that:

various forms of telephone service is not a municipal affair; it is a matter of statewide concern, and the Legislature, pursuant to the authority contained in Section 23 of Article XII of the California Constitution, has vested in this Commission the exclusive jurisdiction to supervise and regulate telephone utilities (Pac.Tel. & Tel.Co. v City of Los Angeles (1954) 44 C 2d 272). In re: GTE MobilNet of San Jose, L.P., etc., 22 C.P.U.C. 2d 25, 1986 Cal. PUC LEXIS 568, pp. 15-16.

Having received a Certificate of Public Convenience and Necessity, it is up to AT&T Wireless to determine the infrastructure required to provide the service for which the CPC&N has been granted. The City simply retains certain land use controls over the placement of such facilities.

The decision to install particular facilities is based upon increasing demand for service balanced against the high cost of implementing such installations. The public need for investment in basic infrastructure is not the subject of review for public utility services such as water, sewer, electricity, gas or land-line telephone and similarly should not be the subject of review here. Any other result is discriminatory, and would violate both state and federal law.

To avoid issues of proof and “mini-trials” on the question of necessity, which run counter to AT&T Wireless’ status as a licensed public utility, we believe the appropriate solution in Section A is to retain the provisions relating to (1) good faith effort to use a preferred location and (2) the site selection process, but delete the sentence that begins: “Demonstrate why the effort to secure one of these locations was unsuccessful and provide evidence that the proposed location is essential...”

9. Prohibited Locations as an Outright Ban in Violation of the TCA

Section D of Locational Criteria contains a complete prohibition on certain locations. This ban ignores the possibility that in a given situation, a wireless carrier may be able to install a small, unobtrusive facility, and cannot provide coverage without that site. In this case, the absolute limitation ban will have the “effect of prohibiting the provision of personal wireless services” in a given area, and would therefore violate the Telecommunications Act. See Section 332(c)(7)(B) of Title 47. We therefore suggest that this absolute prohibition be deleted.

10. Regulation of Interference, which is the Sole Province of the FCC

Under Section B(5)(c) of the Administration provision, the City is to determine whether any facility will interfere with The City’s public safety system. It is clear under applicable law that the FCC has entirely preempted any determination of interference, and that this interference oversight provision should therefore be deleted.

The federal Communications Act of 1934, as amended, makes clear that the Federal Communications Commission is the only policeman of the radio frequency spectrum. Indeed, the scope of the Communications Act covers all interstate and foreign communications by radio, all interstate or foreign transmission of energy by radio, as well as the licensing of all such radio stations. 47 U.S.C. §152(a). Moreover, one of the express purposes of this legislation was to centralize authority over interstate and foreign radio communications under one agency – the FCC. 47 U.S.C. §151. The centralized authority that the FCC is empowered to exercise

includes maintaining control over all channels of radio transmission, including the authority to assign frequencies and determine station power limits, regulate transmission equipment, and prevent RF interference. 47 U.S.C. §§301, 303(c), (d), (e) and (f).

Given this statutory mandate, the Supreme Court has ruled that the FCC's jurisdiction "over technical matters" associated with the transmission of radio signals "is clearly exclusive." Head v. New Mexico Board of Examiners in Optometry, 374 U.S. 424, 430 n.6 (1963). Thus, lower courts have had little trouble preempting state and local regulations that interfere with the operations of FCC licensees. As one federal appellate court has stated, "[w]e have no doubt that Congress may preempt state and local governments from regulating the operation and construction of a national telecommunications infrastructure, including construction and operation of personal wireless communications facilities." Cellular Phone Task Force, et al. v. Federal Communications Commission, 205 F.3d 82, 96 (2d Cir. 2000), cert. denied, 2001 U.S. LEXIS 127 (2001). Indeed, in circumstances where local agencies have sought to regulate the operation of wireless carriers and broadcast stations through the imposition of RF interference conditions, the courts have virtually all held that such local operational regulations -- including RFI conditions imposed by local police agencies -- are preempted under federal law.¹³

Accordingly, we believe this provision creating interference oversight should be deleted.

¹³ See, e.g., Southwestern Bell Wireless, 199 F.3d at 1192-93 (preempting a county zoning regulation that prohibited communications towers and antennae from operating in a manner that allegedly interfered with public safety); Freeman v. Burlington Broadcasters, Inc., 204 F.3d 311, 320 (2d Cir. 2000), cert. denied, 2000 U.S. LEXIS 6516 U.S. (2000) (federal communications law preempts a local zoning permit condition requiring permittee to remedy any RF interferences caused by the tower to devices in neighboring homes); Schroeder v. Municipal Court for the Los Cerritos Judicial District of Los Angeles County, 141 Cal. Rptr. 85, 88 (Cal. Ct. App. 1977) ("[Appellant's] assertion that the FCC's detailed regulation of interference phenomena has preempted that aspect of regulation of radio transmission is correct...."), appeal denied, 435 U.S. 990 (1978); Fetterman v. Green, 689 A.2d 289, 294 (Pa. Super. Ct. 1997) (RFI "involves the resolution of technical matters ceded to the FCC due to the need for national uniformity and consensus."); Helm v. Louisville Two-Way Radio Corp., 667 S.W.2d 691, 693 (Ky. 1984) (holding that a police chief's remedy for interference with police broadcasts is with the FCC).

11. Land Values

Lastly, Section B(2) of the Performance Standards requires that a wireless facility not affect the value of the land. In the event aesthetic and land use issues are addressed in compliance with the Policy, the only possible justification for this provision is health-related; in other words, this is an indirect manner of regulating based upon frequency emissions. We therefore believe this provision should be deleted.

* * * *

These are our comments at this stage of the process. We would be very happy to discuss these and any other issues further.

Very truly yours,

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Sarah L. Burbidge

c: Priscilla Dugard, Esq., Dep. City Attorney
Daniel E. Smith, Esq.,
Leslie Daigle