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June 29, 2016

Craig Collins, Chair
Longview Planning Commission
City of Longview
P.O. Box 128
Longview, WA 98632-7080

SENT VIA EMAIL: steve.langdon@ci.longview.wa.us

Re: Case No. PC 2015-4; Remand from City Council
Proposed Updates to City's Wireless Facilities Codes

Dear Chair Collins and Commissioners:

These comments on Case No. PC 2015-4 (Proposed Updates to City's Wireless Facilities Codes) and suggested changes to the City's draft wireless codes are submitted on behalf of AT&T.

Thank you for your consideration of these suggestions prior to your upcoming work session on this matter.

AT&T suggests these changes to make the codes consistent with federal law, provide incentives for the types of facilities that the Longview community prefers, and simplify the codes, where appropriate. In addition to the following comments, we have enclosed a redline of proposed LMC 16.75 (Wireless Communication Facilities) and a copy of Spokane's Eligible Facilities Modifications chapter adopted last year.

Skyrocketing Demand for Wireless Service

AT&T and other carriers are responding to a significant increase in demand for wireless services. For example:

- Since 2007, AT&T has seen data usage on its network increase by 150,000 percent.[1]
- Nearly half (47.4%) of American homes no longer use traditional landline telephone service and instead choose to be wireless only.[2]
- More than two-thirds of American adults aged 25–29 (69.2%) and aged 30-34 (67.4%) live in households with only wireless telephones.[3]

[1] http://about.att.com/news/wireless-network.html

[2] CDC Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, January-June 2015 (released December 2015).

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In addition, businesses increasingly depend on strong wireless service to carry them and their employees through the workday. Sixty-six percent (66%) of small businesses surveyed said they could not survive – or it would be a major challenge to survive – without wireless technology.[4]

And, public safety is improved by the power of mobile communications as a critical tool for first responders in emergency situations. According to the Federal Communications Commission ("FCC"), nearly 70 percent of 911 calls are made from wireless phones and that percentage is expected to continue growing.[5] Mobile phones provide caller location and callback information, enabling quick and accurate emergency reporting.

To meet the skyrocketing demand, better serve businesses, and enhance public safety, carriers need viable options for siting new facilities in a way that will provide meaningful coverage and high-quality service.

Revised Chapter 16.75 – Wireless Communication Facilities Generally

In the redlined draft enclosed with this letter, AT&T has suggested changes consistent with the following comments on draft Chapter 16.75.

Procedural incentives. A well-crafted code provides reasonable options and procedural incentives for tower locations and visual impacts preferred by the jurisdiction. One of the most effective incentives is an administrative review process whereby a staff person evaluates the project location and design subject to objective criteria, without requiring public hearings, third-party technical review, and/or a showing that federal law would otherwise require the jurisdiction to approve the proposal. The incentive is effective because the applicant can avoid much of the uncertainty and cost of the review process. Such incentives are beneficial to neighboring property owners and the larger community because they establish more consistency and certainty in the zoning process. As drafted, the City's code relies unnecessarily on a case-by-case showing in *all* zones of whether the City *must* approve a tower under federal law (because to deny the proposal would amount to a prohibition of service).

Some suggestions for incentives in Longview's code include:

- Administrative review for new towers in industrial zoning districts, the jurisdiction's preferred location for new towers;
- Allow concealed towers in commercial districts (now listed as "not suitable"); and

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[3] CDC Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, January-June 2015 (released December 2015).

[4] AT&T Small Business Technology Poll, 2013 http://about.att.com/mediakit/2013techpoll

[5] FCC 911 Wireless Services Consumer Guide https://www.fcc.gov/consumers/guides/911-wireless-services

- Limit the significant gap test so the code provides a procedural incentive for carriers to place towers in more preferred locations, such as in industrial and commercial zones. Preferred alternatives, such as a concealed tower in a nonresidential zone, should be easier and less costly to permit so applicants will have an incentive to place cell sites in these zones.

Again, the most effective way for the City to influence the build-out of wireless infrastructure is to provide viable options that can be constructed at a lower cost (in both application fees and the costs of preparing required application materials), and in less time. An effective use of the significant gap test is in the code section allowing exceptions to the code's standards. Please see suggested changes to Sections 16.75.040, -.130, and -.150 in the enclosed redline.

Strict limitations on maximum heights. Draft Chapter 16.75 limits heights of towers and rooftop installations to the maximum building height in each zone, which appears to be in the range of 48-60 feet for industrial districts and more intense commercial districts. Heights limited to the building height in the underlying zone cannot reasonably be relied on to provide the clearance necessary to provide wireless coverage. Also, the additional height needed for a utility pole extension most often exceeds the draft 12-foot standard because in addition to the space for the antennas, the extension must provide adequate separation from the electric utility's facilities, according to safety codes. Such strict height standards would require a height exception for nearly every new facility, contrary to a well-designed code that balances a community's interests in its generally applicable standards, without relying on an exception that will likely be proposed in most applications. Please see suggested changes to Sections 16.75.070, -.090, -.100, -.120, and -.140 in the enclosed redline.

Exceptions. AT&T suggests an exceptions section that considers the circumstances specific to wireless carriers and is available for all dimensional standards in the code. AT&T suggests the criteria such as adopted by Salem, Oregon, Spokane, and other jurisdictions, shown in suggested changes to Section 16.75.150.

Inconsistency with federal law. Draft Chapter 16.75 is inconsistent with federal law. The City's preferences for alternative technology and microcell systems (Section 16.75.130) should be removed because local preferences for alternate technologies, and specifically preferences for microcells and DAS, are preempted by federal law. *New York SMSA Ltd. Partnership v. Town of Clarkstown*, 612 F.3d 97, 105-07 (2nd Cir. 2010). Please see suggested changes to Section 16.75.130,

Other suggestions. Some of the draft's development standards are simply not feasible. For example, Section 16.75.100(2) requires that architectural screening of antennas be made of the same material as the building. Screening must be RF transparent in order to function. AT&T can provide further suggestions for several development standards that should be modified in order to work for a typical wireless facility. Please see suggested changes to Sections 16.75.100 and -.120.

New Chapter 16.80 – Eligible Facilities Requests

New Chapter 16.80 is intended to govern the review and approval of requests for modifications to existing wireless facilities that are made pursuant to a rule the FCC adopted last year.[6] Such modifications are often referred to as "Section 6409 changes," after the federal statute that authorized the facility changes in 2012.[7]

AT&T supports a new ordinance that implements the federal law simply, such as the City of Spokane did last year. We have enclosed a copy of SMC Chapter 17C.356 for your information. Further, it would not make sense to adopt more stringent requirements than the City imposes for entirely new wireless facilities, particularly when review under the new FCC rule is very limited in scope and subject to objective criteria.

From our review of draft Chapter 16.80, we note the following issues of concern:

- The proposed draft Chapter 16.80 is unnecessarily complex and contains provisions that conflict with the FCC rule. AT&T suggests that the City instead consider the model ordinance drafted by a working group of national municipal and industry groups (i.e., the National Association of Counties (NACo), the National League of Cities (NLC), the National Association of Telecommunications Officers and Advisors (NATOA), the PCIA – the Wireless Infrastructure Association, and CTIA—The Wireless Association). The Working Group model is straightforward (only 6 pages in length), reflects the FCC's interpretation of Section 6409, and is easier to apply to proposed non-substantial wireless facility modifications. The City of Spokane has adopted an Eligible Facilities Modifications chapter that generally follows the Working Group's model. SMC Chapter 17C.356.
- Draft Chapter 16.80 conflicts with the FCC rules, extends well beyond the scope of the FCC's rules, and/or departs from the existing wireless policy and code in many jurisdictions. The following are specific examples:

    - Third-party review. The draft has provisions for third-party expert review and additional studies that typically (a) are reserved for the most intrusive types of facilities and (b) address subject matters beyond the local jurisdiction's expertise. Third-party review is not needed for a modification made under Section 6409 as the FCC rules expressly prohibit jurisdictions from requiring the applicant to show need. The draft extends third-party review to building code compliance, which is extraordinary. The usual purpose of third-party review is to engage a special consultant for matters that are outside the expertise of the jurisdiction's staff. All building and structural code matters can and should be evaluated by the jurisdiction's building department.
    - Submittal Requirements. The draft includes an extensive list of submittal requirements, many of which go beyond the FCC rules and/or are not

[6] 47 C.F.R. §1.40001.

[7] Middle Class Tax Relief and Job Creation Act of 2012, codified at 47 U.S.C. §1455(a).

relevant to the review of a Section 6409 non-substantial modification. Specific examples of unnecessary or overly burdensome submittal requirements include:

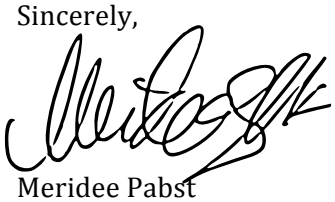
- RF Interference Compliance Statement. The regulation of radio frequency ("RF") interference is preempted by federal law. *New York SMSA Limited Partnership v. Town of Clarkstown*, 612 F.3d 97, 105 (2nd Cir. 2010). AT&T suggests removing this requirement from the draft chapter.
- Copies of Prior Approvals. The draft requires copies of every prior approval for an existing facility. The City is in control of records of its own prior approvals. Prior approval submittals should be limited to circumstances in which the facility was approved by another jurisdiction (perhaps prior to annexation) and then, in that situation, only the most recent zoning approval should be required.
- As-Built Surveys. A boundary survey will not illustrate the extent to which the dimensions of the existing tower or base station have changed, and its submittal should be limited to those instances in which the applicant is proposing excavation.
- Copies of Federal Environmental Documents. Federal environmental documents are not relevant to determining compliance with Section 6409.

- Unusual and Difficult Procedural Requirements. AT&T suggests that the City follow its ordinary process (that is familiar to both applicants and staff) unless it is contrary to the new FCC rule/Section 6409. Specific examples of unusual and difficult procedural requirements in the draft include:
  - In person submittal. There is no reason to require an in person submittal of a Section 6409 application.
  - Written waiver of submittal requirements. Waivers should not be required to be in writing – this requirement is essentially a *de facto* pre-application process. Any waiver can be confirmed through the fully complete review.
  - Modification of pending application. The draft provides that the review clock restarts with any modification of a pending application. This is simply unreasonable and disregards the usual iterative process of planning review.
- Term of Permit. The draft limits permit approval to 180 days, which is substantially shorter than the terms for many preliminary approvals. The term section also fails to describe the event required to vest development rights (such as construction) or provide for typical extensions of the preliminary approval.
- Nonconformities. The draft's provisions allowing for the termination of "nonconforming structures" in the event that Section 6409 and/or the FCC rules are held to be unconstitutional are contrary to Washington's longstanding vested rights laws and regulation of legal nonconformities. First, Washington has strong protections for development rights, extending vested rights to the submittal of an application. Second, local jurisdictions typically have zoning codes allowing the continuation of legally nonconforming structures and expansion under certain circumstances, recognizing that the structure's owner has protected rights. Third, even if the general concept could withstand a legal challenge, the scope of the draft's

termination section is far too broad and the section fails to provide for a cure in appropriate circumstances. Last, this section is contrary to preferences for facility modifications over the construction of entirely new wireless facilities. The City's new review process and submittal requirements should reflect the nature of the proposed change to an existing facility.

Thank you for your consideration of these comments and enclosed suggested changes. I plan to attend your upcoming work session to address any questions you may have and elaborate on AT&T's comments where requested

Sincerely,



Meridee Pabst
Attorneys for AT&T

Enclosures

cc: Steve Langdon, Planning Manager
Jim McNamara, City Attorney