Item 10-1:
Dear Mayor Nason, Vice Mayor McQuaid, Councilmembers Barnes, Maass and Pilch, Ms. Hersch and Mr. Labadie: Please accept this letter from John di Bene on behalf of AT&T to provide comments on the City’s proposed small wireless facilities regulations. Please let us know if you have any questions. Thank you.

Aaron Shank
Outside Legal Counsel for AT&T

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END OF NOTICE
October 21, 2019

VIA E-MAIL

City of Albany City Council
City Hall
1000 San Pablo Avenue
Albany, CA 94706

Re: AT&T’s Comments on the City of Albany Proposed Regulations for Small Wireless Facilities

Dear Mayor Nason, Vice Mayor McQuaid and Councilmembers Barnes, Maass and Pilch:

I write on behalf of New Cingular Wireless PCS, LLC d/b/a AT&T Mobility (AT&T) to provide comments on the City of Albany’s proposed ordinance and proposed resolution to regulate small wireless facilities ("Proposed Regulations"). AT&T commends the City for its “interest in promoting equitable access to high-quality reliable wireless coverage for the City’s residents, visitors, and businesses.”1 And AT&T appreciates that the City recognizes the need to address changes in applicable state and federal laws, including the Federal Communications Commission’s Infrastructure Order.2 With more than 72% of Americans relying exclusively or primarily on wireless telecommunications, it is especially important to encourage responsible deployments consistent with applicable law.

Unfortunately, the Proposed Policy requires revisions to comply with both state and federal laws and to ensure the City’s residents and businesses have access to vital wireless services. AT&T respectfully asks that the City consider these and other comments from the wireless industry to help make needed changes. AT&T offers the following summary of applicable laws along with specific comments on the Proposed Policy.

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 City’s review of AT&T’s applications. Under the Act, the City must take action on AT&T’s applications “within a reasonable period of time.”3 The FCC has established and codified application “shot clocks” to

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1 Proposed Albany Municipal Code Section 14.7-1(b).
2 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").
implement this timing requirement. And the FCC has made clear that the City must grant all necessary approvals and authorizations within the applicable shot clock. The Act also requires that the City’s review of AT&T’s applications be based on substantial evidence. Under the Act, state and local governments may not unreasonably discriminate among providers of functionally equivalent services.

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. The FCC has ruled that an effective prohibition occurs when the decision of a local government materially inhibits wireless services. 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.”

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.” 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. Higher fees are presumed to violate the Act.

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. Regulations that do not meet these criteria are preempted as they are presumed to effectively prohibit wireless service in violation if the Act.

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4 See 47 C.F.R. §§ 1.6001, et seq.
5 See Infrastructure Order at ¶ 132-137.
10 Infrastructure Order at ¶ 37.
11 Id. at ¶ 50.
12 Id. at ¶ 79.
13 Id.
14 See id. at ¶ 86.
15 See id.
City of Albany  
October 21, 2019  
Page 3 of 6

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.

AT&T’s Comments on the Proposed Regulations

1. Pre-Application Notice Process is Unworkable and Unlawful. Proposed Code Section 14.7-5 requires an applicant seeking a permit for a small wireless facility to provide public notice to owners and residents within 300 feet of the proposed location 30 days before filing the application. And the applicant is required to maintain a log of calls and correspondence received in response to the notice. The City needs to revise and consider eliminating this requirement. Aside from being discriminatory unless this process is required of all other right-of-way users, these requirements are unreasonable and cause serious problems with timing for application reviews. Indeed, these pre-application requirements put the City in an impossible position with respect to the FCC shot clocks, which require the City to take final action in 60 days for applications to collocate small wireless facilities on existing structures, or 90 days for applications to place small wireless facilities on new structures.16

The FCC has made clear that mandatory pre-application requirements trigger the applicable shot clock.17 Once an applicant provides the required public notice, the 60-day or 90-day shot clock will start. But because the application will not be filed for another 30 days, the City will be unable to toll the shot clock for incompleteness (which must be accomplished by providing a written notice within the first ten days of the shot clock). For collocation applications, this leaves the City 30 days to complete review and take final action, inclusive of appeals. But the appeal process under proposed Section 14.7-10 contemplates up to 35 additional days. The math does not work. The City should eliminate the discriminatory and unnecessary public notice requirement. And the City should consider eliminating the appeal process for small wireless facilities in the public rights-of-way.

2. Other Permits Required. The Proposed Regulations require an applicant to apply for and obtain a building permit in addition to other approvals. The FCC has made clear that all associated permits and approvals, inclusive of appeals, are subject to the applicable shot clock.18 Thus, the City should explicitly authorize processes to concurrently review all required permits and approvals.

16 See 47 C.F.R. § 1.6100(c).
17 See Infrastructure Order at ¶ 145 (The FCC specifically concluded “mandatory pre-application procedures and requirements do not toll the shot clocks”).
18 See id. at ¶¶ 132-137, 144 (The FCC made clear that this timeframe applies “to all authorizations a locality may require, and to all aspects of and steps in the siting process, including license or franchise agreements to access ROW, building permits, public notices and meetings, lease negotiations, electric permits, road closure permits, aesthetic approvals, and other authorizations needed for deployment”).
3. **Unlawful Design Criteria.** The Proposed Regulations include several design criteria that must be amended because they are unreasonable, discriminatory, subjective or not published in advance. Proposed Code Section 14.7-6(b) authorizes additional “conditions deemed feasible by the Commission.” Any conditions related to aesthetics must be published in advance before the City can apply and enforce them. Proposed Section 14.7-7(a) incorporates by reference development standards under City Code Section 20.20.100.E. But those standards are largely subjective and they do not apply equally to other infrastructure deployments in the public rights-of-way. Further, Section 14.7-9(c)(3) of the Proposed Regulations requires small wireless facilities to be sized and located in a way that is “desirable for, and compatible with, the neighborhood or the community.” This is entirely subjective and it is impossible for applicants to predict compliance. Thus, these standards cannot be enforced and the City must instead develop appropriate aesthetic guidelines consistent with the FCC’s rules.

AT&T appreciates that the City Council Staff Report acknowledges that some design standards are unlawful. Specifically, the Staff Report admits that setbacks from schools and residential property lines “are inconsistent with federal law” and are not currently being enforced. The Staff Report also says the City plans to address these unlawful standards. Rather than waiting until a later date to legalize its standards, the City should take time now to eliminate those unlawful provisions and avoid enacting additional unlawful provisions.

4. **Concealment.** Many of the City’s design standards require providers to screen small wireless facilities. For example, the design standards under City Code Section 20.20.100.E.1.d require sites to be “substantially screened” and to “appear as natural features found in the immediate area.” Similarly, proposed Section 14.7-7(b)(1) requires antennas and certain equipment to be “concealed within an opaque enclosure.” And proposed Section 14.7-7(b)(2) requires non-antenna accessory equipment (which is vague and not a defined term) to be located underground. But under the FCC’s aesthetic standard for small wireless facilities, concealment cannot be required to a greater extent than imposed on other infrastructure deployments in the right-of-way. For example, non-concealed electric distribution facilities are located on poles around the City. Thus, these design standards must be revised or deleted.

5. **Antenna Height.** Section 14.7-7(a)(1) of the Proposed Regulations limits antenna height of small wireless facilities to five 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.

6. **Electric Meters.** Section 14.7-7(h) of the Proposed Regulations requires applicants to install a shrouded smart meter if flat-rate service is not available. The electric provider provides the types of service available to AT&T. AT&T will certainly work with the City on design, but the City must avoid blanket prohibitions and dictating AT&T’s infrastructure choices.

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19 See id. at ¶ 86-88.
20 See id. at ¶ 88 (explaining need for design guidelines to be objective and published in advance because “Providers cannot design or implement rational plans for deploying Small Wireless Facilities if they cannot predict in advance what aesthetic requirements they will obligated to satisfy to obtain permission to deploy a facility at any given site”).
7. **Radio Frequency Emissions Testing.** Section 14.7-7(h) of the Proposed Regulations requires post-installation testing to ensure compliance with the FCC’s exposure standards. This requirement must exempt facilities that are categorically excluded from the FCC’s reporting standards.

8. **Maintenance Agreement.** Section 14.7-9 of the Proposed Regulations must be deleted. This provision seeks to require wireless providers to enter into a global agreement regarding facility maintenance, removal obligations, cost reimbursement, and other obligations covering all sites in the City. AT&T has a statewide franchise right to place its telecommunications facilities in the public rights-of-way, which does not require any general local grant of authority.

The California Supreme Court has long held that telecommunications service is a matter of statewide concern, not a municipal affair. In the decades that followed, the California Public Utilities Commission and the courts have made clear that this important rule applies to wireless telecommunications services and the installation of wireless telecommunications facilities. Cities cannot require a wireless telecommunications company to obtain a franchise or a license to install its facilities in the public rights-of-way. The California Supreme Court in *T-Mobile West v. San Francisco* explained why local across-the-board regulation is improper:

> Case-by-case regulation is meaningfully different. Requiring a local franchise, as the City did in *Pacific Telephone I*, has the immediate effect of prohibiting the telephone corporations’ use of the public right-of-way, whereas local regulation on a site-by-site basis does not have the same impact.

*Id.*, 3 Cal. App.5th at 350. This “immediate effect of prohibiting” AT&T’s use of the public rights-of-way also violates the Telecommunications Act of 1996 as an effective prohibition. See 47 U.S.C. §§ 253(a), 332(c)(7)(b)(i)(II). Accordingly, the city must avoid imposing across-the-board, citywide conditions on AT&T’s franchise right.

Because the city cannot impose global restrictions on AT&T’s right to construct its facilities in the rights-of-way, it cannot require an agreement to cover general terms applicable to all right-of-way installations. The City’s proposed maintenance agreement is simply an unlawful

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21 *See Pac. Tel. & Tel. Co. v. Los Angeles, 44 Cal. 2d 272, 280 (1955) (“business of supplying the people with telephone service is not a municipal affair; it is a matter of statewide concern”); Pac. Tel & Tel. Co. v San Francisco, 51 Cal. 2d 766, 768 (1959) (same).*


23 *Pac. Tel. & Tel. v. San Francisco, 51 Cal.2d at 771 (California Supreme Court explained that the statewide franchise granted to telephone companies by the state comes “without the necessity for any grant by a subordinate legislative body”); T-Mobile West, LLC, 6 Cal.5th at fn. 7 (quoting Black’s Law Dict. (10th ed. 2014) p. 772, col. 2, “[i]n this context, a franchise is a ‘government-conferred right or privilege to engage in specific business or to exercise corporate powers’”).*
local franchise agreement by another name, and by which the City seeks to confer upon AT&T the right to use the public rights-of-way. While the City must delete this requirement, many of the City’s goals can be met through reasonable, nondiscriminatory and competitively-neutral conditions on permit approvals.

**Conclusion**

AT&T appreciates the City’s initial efforts to update wireless siting regulations but urges the City to take time to revise the Proposed Regulations to avoid violating the law. By addressing the items we raise here, the City will go a long way toward encouraging deployments consistent with state and federal policies and to the great benefit of the City’s residents and businesses.

Very truly yours,

/s/ John di Bene

John di Bene

cc: Anne Hersch, Planning Manager
    Craig Labadie, City Attorney
Good morning,
I looked at the ordinances for Fairfax and Mill Valley, CA.
I was copied on an email you received from Phoebe Anne Sorgen with the link
https://mdsafetech.org/cell-tower-and-city-ordinances/
The information there is quite extensive. Please note especially the section Examples of City Small Cell Wireless Facilities Emergency Ordinances and the information just below.
Thank you,
Ed
Hello,

I’m writing to urge you to restrict the roll out of 5G close proximity “small” cell antennae to every extent possible. Ban it from residential areas entirely, as in Mill Valley, and require 1500 foot setbacks anywhere else. 20 or so Ca cities have passed strong laws. Scroll down way below the court cases to see “Examples of City Small Cell Wireless Facilities Emergency Ordinances”:
https://mdsafetech.org/cell-tower-and-city-ordinances/
Calabasas and Los Altos are listed as “very strong.” Mill Valley and Sonoma City as “strong.” There are links to the laws.

5G millimeter wave radiation kills trees and bees. Without pollinators, there will be no human food supply, and 5G would cause an epidemic of cancers. This issue may be even more important than the climate crisis. More info: https://ehtrust.org/science/, https://www.americansforresponsibletech.org/scientific-studies, https://whatis5g.info/health/.

Big Telecom is worse than Big Tobacco, funding bogus studies and planting misleading articles in media. Most folks who are informed are rightly concerned re property devaluations, interference with weather prediction, loss of privacy, fire risk, increased cost and energy use. There IS an alternative, two actually, and both are superior in every way except mobility. Copper wirelines and fiber optics are more reliable, more secure, less expensive in the long run, less prone to obsolescence, and faster too, plus they don’t emit dangerous EMF/RF radiation. (Dr. Timothy Schoechle describes these alternatives in detail in “Re-inventing Wires,” which you may access for free online.) The city of Chatanooga has done very well, financially, with fiber optics rather than wireless.

You probably learned from recent news reports that several commonly used smart phones exceed FCC standards (which standards are ridiculously loose/outdated) for radiation emissions. So I urge you to require annual, unannounced/random testing of ALL telecom wireless equipment within Albany city limits by an RF expert who is independent from industry. The reasonable cost of extensive testing should be covered by the permittees that are profiting from installations that invade our public and private spaces with wireless radiation.

I cannot attend your Nov. 4 City Council meeting. Please inform me of what you decide.

Sincerely,

Phoebe Anne Sorgen of WiRED Wireless Radiation Education & Defense