

PLANNING COMMISSION

Meeting Date: 01/17/23

ADDITIONAL ITEM ADDED AFTER DISTRIBUTION OF PACKET (# 1)

AGENDA ITEM # 3

Applicant/Project Name: Ordinance Amendment to Wireless Communication
Facilities

Project Number: TMP-1834, TA19-0002, EX22-043

Brief Description: Public Comment from Mackenzie & Albritton, LLP

Date 01/17/23

Time 8:35 a.m.

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January 16, 2023

VIA EMAIL

Planning Commission
City of San Marcos
1 Civic Center Drive
San Marcos, California 92069

Re: Draft Small Cell Policy and Wireless Facilities Ordinance
Planning Commission Agenda Item 3, January 17, 2023

Dear Commissioners:

We write on behalf of Verizon Wireless regarding the draft *Policy on Small Wireless Facilities within the Public Rights-of-Way* (the “Draft Policy”) and the draft ordinance regulating wireless facilities (the “Draft Ordinance”). Verizon Wireless appreciates the City’s initiative to develop new regulations in order comply with recently-adopted federal requirements. A few Draft Policy provisions should be revised to eliminate contradictions and to ensure consistency with Federal Communications Commission (“FCC”) regulations, which require reasonable standards for small cells. For example, certain equipment dimension limits should be expanded to accommodate the radio models required for adequate service. The Draft Policy should provide for new carrier-owned poles if needed, with radio equipment concealed in a base shroud. We urge the Commission to incorporate our suggested revisions prior to recommending the Draft Policy and Draft Ordinance to the City Council.

The FCC’s Infrastructure Order

In its 2018 Infrastructure Order, the FCC confirmed that a local government’s aesthetic criteria for small cells must be “reasonable,” that is, technically feasible and meant to avoid “out-of-character” deployments, and also “published in advance.” See *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, 33 FCC Rcd. 9088, ¶¶ 86-88 (September 27, 2018) (the “Infrastructure Order”). The FCC also found that that for small cells, local requirements that “materially inhibit” service improvements and new technology constitute an effective prohibition of service under the Telecommunications Act. *Id.*, ¶¶ 35-37; see also 47 U.S.C. §§ 253(a), 332(c)(7)(B)(i)(II). Federal courts have upheld these FCC requirements. See *City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020), *cert. denied*, 141 S.Ct. 2855 (Mem) (U.S. June 26, 2021).

Our comments on the Draft Policy and Draft Ordinance are as follows.

Draft Policy – Small Cells in the Right-of-Way

6(c). Submittal appointments. Requiring a pre-scheduled appointment could delay formal application submittal by up to one week. The FCC confirmed that the “Shot Clock” time period for application review and decisions commences upon any mandatory pre-application procedure. 47 C.F.R. § 1.6003(e). *Verizon Wireless will calculate the Shot Clock to commence on the day it requests an appointment.*

6(d). Incomplete applications deemed withdrawn. The City cannot terminate an application if an applicant does not respond to a notice of incomplete application (“NOI”) within 60 days (or any period of time). The FCC’s rules plainly state that the Shot Clock restarts or resumes running on the date an applicant responds to a timely NOI. 47 C.F.R. §§ 1.6003(d)(1), (d)(3)(ii). FCC rules do not allow early, unilateral termination. *This provision should be deleted.*

10(b). Support structure preferences. This list prefers streetlight poles owned by the City over utility poles and new carrier-owned poles. If strictly applied, preferring City-owned poles would contradict state law that bars cities from limiting wireless facilities to sites owned by particular parties. Government Code § 65964(c). Verizon Wireless can apply for attachment to SDG&E electric utility poles or communications-only utility poles. Further, Public Utilities Section 7901 grants telephone corporations such as Verizon Wireless a statewide right to place their equipment along any right-of-way, including new poles. New poles may be required if nearby streetlight or utility poles are infeasible for wireless attachments, particularly if City design standards render those poles impractical for certain installations.

Because there are multiple pole types in some areas of San Marcos, this structure preference list would benefit from the same 300-foot search distance as the location preferences of Section 10(a). *We suggest that the City simply favor existing poles of any owner over a new pole, while allowing a new pole if there is no feasible existing pole within 300 feet.*

11(a)(1). Stealth/concealment. For wireless facilities in the right-of-way, particularly those on utility poles, it would be difficult or infeasible to meet vague criteria such as “mimic or blend with the underlying support structure and surrounding environment.” Because the FCC requires reasonable aesthetic criteria for small cells, the Draft Policy should rely on more precise standards, such as feasible dimension thresholds. *This provision should be deleted.*

11(a)(2). Least visible equipment. Requiring the “smallest and least visible” antennas and equipment places the City in the position to dictate the technology used by wireless carriers, given that larger antennas and radios are required for certain frequencies licensed by the FCC. Reducing antenna size would limit a facility’s coverage footprint,

requiring more small cells on more poles. By dictating technology choices, the City would intrude on the exclusive federal authority over the technical and operational aspects of wireless technology, which are under the jurisdiction of the FCC. *See New York SMSA Ltd. Partnership v. Town of Clarkstown*, 612 F.3d 97, 105-106 (2nd Cir. 2010). To avoid legal conflict, the City should avoid this vague criterion. *This provision should be deleted.*

11(b), (c). Streetlight design standards. The referenced *Street Lighting Standards and Specifications* require antennas to be attached only to the top of a pole and prohibit antennas attached to the side. *Specifications*, p. 10. However, that would unreasonably prohibit the side-mounted configurations shown in the example photos on Draft Policy Pages 26-27, which are commonly used for antennas that operate at higher frequencies. *The Draft Policy should allow for multiple side-mounted antennas on streetlight poles and new carrier-owned poles.*

11(d)(1)(B). Horizontal projection. As discussed above, side-mounted antennas may be required for certain frequencies. To deny them would be unreasonable, so they should not be discouraged. *The first sentence requiring that side-mounted antennas be “avoided” should be deleted.*

11(d)(2). Pole-mounted accessory equipment. For new, stand-alone carrier-owned poles, radios and other accessory equipment can be concealed within a shroud surrounding the pole base. *We suggest adding a provision for stand-alone poles allowing a base equipment shroud up to 48” H x 20” W x 20” D.*

11(d)(2)(A). Preferred stealth/concealment techniques (equipment shroud dimension limits). For facilities on utility poles, Verizon Wireless typically places radios and other accessory equipment within a concealing shroud. However, the Draft Policy’s maximum dimensions of 46” H x 18” W x 14” D could limit the number and size of radios, given that a shroud must also enclose power supplies, other network components and cables, while providing room for air circulation. With adequate radio power, a small cell can serve a larger area. *For a reasonable criterion, we suggest expanding the allowed shroud dimensions to 72” H x 20” W x 20” D.*

11(d)(2)(C)(i). Horizontal projection. This protrusion limit of 14 inches from the pole surface would not accommodate equipment shrouds as little as 14 inches deep because the corners would protrude beyond 14 inches. As noted above, Verizon Wireless may deploy shrouds of even greater depth. Further, if SDG&E requires that equipment be separated from a utility pole surface rather than flush-mounted, there would be additional protrusion. Instead of an overall protrusion limit, the Draft Policy should rely on the shroud dimension limits of Section 11(d)(2)(A), revised as we propose. *This provision should be deleted.*

11(e)(1). Ground-mounted stealth/concealment (pole-mounted equipment volume limit). The first sentence would limit pole-mounted accessory equipment to 12 cubic

feet, but that would curtail the size of concealing shrouds, thereby limiting the number and size of radios, as discussed above. The FCC's definition of small cell provides for accessory (non-antenna) equipment up to 28 cubic feet. 47 C.F.R. § 1.6002(1)(3). *We suggest increasing this volume limit to 20 cubic feet.*

11(f). Underground accessory equipment. This requires undergrounding of accessory equipment in underground utility areas (where generally the only poles are streetlights) or anywhere the Director believes that above-ground equipment would “incommode” the public use. However, that would contradict the *Street Lighting Standards and Specifications*, which allow pole-mounted equipment enclosures up to six cubic feet. *Specifications*, p. 10. For new, carrier-owned poles that may be required in underground utility areas, radios and other accessory equipment can be concealed within a shroud surrounding the pole base, as discussed above.

Undergrounding requirements are unreasonable in two ways in conflict with the Infrastructure Order. First, undergrounding generally is technically infeasible due to sidewalk space constraints, utilities already routed underground and undue environmental and operational impacts for required cooling and dewatering equipment. Second, small cell accessory equipment is not “out-of-character” among other right-of-way infrastructure.

Leaving the choice of undergrounding to the Director at the decision stage poses another conflict with the Infrastructure Order, which requires that small cell standards be published in advance so applicants can plan their designs accordingly. *This provision should allow up to six cubic feet of accessory equipment on a streetlight pole, or equipment concealed within a stand-alone pole base shroud, before undergrounding is considered. The provision allowing the Director to require undergrounding anywhere should be deleted.*

13. Exceptions. Verizon Wireless appreciates the option for exceptions, but we note that the City should not rely on this provision to excuse unreasonable Draft Policy standards. By relying on an exception, the City would concede that a standard is unreasonable or otherwise preempted. Instead, the City should ensure that its small cell standards are reasonable at the outset and published in advance, as required by the FCC.

Draft Ordinance

20.465.030(B)(1), 20.465.040(D)(1), 20.465.050(B). Effective prohibition standard (significant gap). Revisions to these sections would require applicants siting in discouraged areas or on parcels less than one acre to prove that those limitations would result in an effective prohibition of service, essentially continuing the code's requirement to prove a “significant gap” in service. However, this would place the City in the position to disagree with an applicant's gap data, which could lead to court challenges. There is no reason to require the extra hurdle of a “significant gap” determination because the ordinance already imposes strict camouflaging requirements that would apply in discouraged areas, and it requires applicants to prove that no preferred alternative

locations are feasible. For small cells, including those on private property, the FCC has disfavored the “significant gap” standard and instead adopted the “materially inhibit” standard. Infrastructure Order, ¶¶ 37, 40. *References to “significant gap” should be deleted.*

20.465.050(A). Preferred locations. As revised, this preference list mixes small cell and macro facility types as well as right-of-way and private property sites. As noted above, a city cannot dictate the technology used by wireless providers, so San Marcos could not deny a macro facility needed for broad coverage due to a preference for one or more small cells. *The proposed references to small cells (Items 2, 3 and 7) should be deleted.*

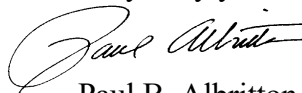
This preference list would generally apply to macro wireless facilities, and it would benefit from a reasonable search distance for any preferred locations, similar to the Draft Policy location preferences. This would provide clear direction to applicants and staff alike. *We suggest revising Section 20.465.050(A) to limit the search distance for any preferred locations on private property to one-quarter mile. The City could consider a lesser search distance for small cells on private property under Section 20.465.050(D).*

20.465.060(C). Pre-submittal appointment. As noted above, Verizon Wireless will consider the Shot Clock to start on the day it requests a required pre-submittal appointment.

20.465.080(I)(1). Annual RF compliance report. This existing code provision requires permittees to provide a technical report of radio frequency exposure compliance for facilities not excluded by FCC regulations. However, once an installed wireless facility is shown to comply with the FCC’s radio frequency exposure guidelines, the City cannot require repeat compliance reports. The Telecommunications Act bars such ongoing local regulation of compliant facilities. *See* 47 U.S.C. § 332(c)(7)(B)(iv); *see also Crown Castle USA Inc. v. City of Calabasas* (Los Angeles Superior Court BS140933, 2014) (“...the regulation of a facility’s planned or ongoing operation constitutes an unlawful supplemental regulation into an area of federal preemption”). *The requirement to provide reports every 12 months should be deleted.*

Verizon Wireless appreciates the opportunity to provide comment, and we urge the Commission to incorporate our suggested revisions prior to recommending the Draft Policy and Draft Ordinance to the City Council.

Very truly yours,



Paul B. Albritton

cc: Helen Holmes Peak, Esq.
Sean del Solar
Saima Qureshy