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June 24, 2019

VIA EMAIL

Chair Daniel Howard
Vice Chair David Simons
Commissioners Sue Harrison,
John Howe, Ken Rheaume,
Ken Olevson and Carol Weiss
Planning Commission
City of Sunnyvale
456 West Olive Avenue
Sunnyvale, California 94086

Re: Draft Design Criteria for Wireless Communication Facilities
in the Public Right-of-Way
Commission Hearing Item 2, June 24, 2019

Dear Chair Howard, Vice Chair Simons and Commissioners:

We write on behalf of Verizon Wireless regarding the draft *Design Criteria for Processing Wireless Communication Facilities in the Public Right-of-Way* (the “Draft Criteria”). We previously provided comment on the Draft Criteria and appreciate the City’s participatory approach to revisions. However, the Draft Criteria continue to rely on subjective standards that are inconsistent with the recent Federal Communications Commission (“FCC”) order addressing appropriate small cell approval criteria. In particular, the “least intrusive” standard is indefinite and invites discretionary decisions, whereas small cell criteria must be objective and clear. Location requirements are prohibitive in conflict with the FCC’s order and state law granting telephone corporations the right to use the right-of-way. We encourage the Commission to direct staff to revise the Draft Criteria prior to a recommendation to the City Council.

To expedite deployment of small cells and new wireless technology, the FCC adopted an order in September 2018 that provides guidance on approval criteria for small cells. *See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, FCC 18-133 (September 27, 2018) (the “Small Cells Order”). Among other topics, the FCC addressed appropriate aesthetic criteria for of qualifying small cells, concluding that they must be: “(1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments, and (3) objective and published in advance.” *Id.*, ¶ 86.

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“Reasonable” standards are “technically feasible” and meant to avoid “out-of-character deployments.” *Id.*, ¶ 87. Objective standards must “incorporate clearly-defined and ascertainable standards, applied in a principled manner.” *Id.*, ¶ 88.

Our comments on the Draft Criteria are as follows.

Prohibitive Location Restrictions Contradict State and Federal Law.

The Draft Criteria bar right-of-way facilities within a “primary view,” a broad area in front of a residence or non-residential building on the same side of the street. Draft Criteria §§ II(5), III(A)(3), IV(A)(1). The depiction in the definitions illustrates how overlapping primary views could exclude facilities from long stretches of right-of-way; at a 30 degree angle, the view plane passes beyond property lines. Other restrictive location standards disfavor facilities within 50 feet of a street corner or next to a reducible front yard near a property line. Draft Criteria § IV(A)(3)(a-b). (As we explain below, the subjective “least intrusive” standard tied to these standards is preempted by the Small Cells Order.)

Location restrictions that exclude long stretches of right-of-way contradict state and federal law. California Public Utilities Code Section 7901 grants telephone corporations the right to place their equipment along *any* right-of-way. Standards that eliminate long stretches of right-of-way would also constitute a prohibition of service under the federal Telecommunications Act, as the FCC affirmed that small cells are critical to densifying wireless networks and enhancing service. 47 U.S.C. §§ 253(a), 332(c)(7)(B)(i)(II); Small Cells Order, ¶¶ 37-40.

To avoid prohibitive treatment, the City should provide an exception where there are no other options for a small cell to serve a target area. *To be reasonable, the location preferences of Section IV(A)(3) and the primary view restriction of Section IV(A)(1) should be qualified “unless there is no alternative within 200 feet along the subject right-of-way that is technically feasible.”*

Subjective Standards Cannot Apply to Small Cells.

The Draft Criteria lean heavily on a subjective “least intrusive feasible” standard. Draft Criteria §§ II(3), IV, IV(A)(3), IV(A)(5), IV(B)(1), IV(C)(1). Several of these provisions recite examples of “least intrusive” design options, but note that considerations “are not limited to” those, implying that there may be other factors not published in the Draft Criteria. The “least intrusive” standard is subjective, whereas the FCC requires objective review of small cells with clear criteria that are published in advance. Applicants cannot be left to guess what the City may prefer or consider to be “intrusive.” The FCC discouraged such guesswork. Small Cells Order, ¶ 88. *The “least intrusive” standard should be stricken from the Draft Criteria, leaving technical feasibility as a factor.*

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Other criteria are subjective by employing vague terms such as “smallest” feasible antennas or equipment and “minimizing the number of equipment cabinets.” Draft Criteria §§ IV(A)(5)(a), IV(B)(1)(a-b), IV(C)(1)(a). These indefinite standards are unclear and confound objectivity. Several standards cite “streamlining” and “matching” of pole shape, which are matters of opinion and therefore subjective. Draft Criteria §§ IV(A)(5)(b), IV(B)(1)(e). Further, the subjective antenna restrictions would limit antenna options and place the City in a position to dictate the technology used by Verizon Wireless, which intrudes on the exclusive federal authority over the technical and operational aspects of wireless technology. *See New York SMSA Ltd. Partnership v. Town of Clarkstown*, 612 F.3d 97 (2nd Cir. 2010). *Subjective standards must be stricken. The City should consult with wireless carriers regarding reasonable, objective equipment standards for small cells, such as maximum dimension thresholds.*

All Qualifying Small Cells Must Be Approved Administratively.

The Draft Criteria allow for noticed administrative review in limited circumstances, even if a facility qualifies as a small cell as defined by the FCC. For example, placement within 300 feet of parks or schools or within the broad “primary view” of a residence would disqualify a small cell from administrative review; a Planning Commission hearing would be required. Draft Criteria § III(A).

Because the Small Cells Order requires objective review, all small cells should be approved administratively with no notice or hearing. At most, construction notice should be provided to neighboring property owners for informational purposes only. Public notice, public comment, and Commission review introduce discretion to the process and invite subjective determinations. Under objective standards, any decision body should reach the same conclusions, and Commission review is unnecessary. Public comment and personal concerns cannot be a factor for objective standards which must be published in advance.

The FCC’s new “Shot Clock” timelines for local approval of small cells require a decision within 60 days for existing poles, or 90 days for new/replacement poles. 47 C.F.R. § 1.6003(c). An administrative process is appropriate for the objective, expedited review required by the FCC. *We suggest that all qualifying small cells be reviewed by the Director of Community Development with no notice. At most, review of appeals must be limited in scope to confirming whether a small cell meets reasonable, objective standards.*


The City Must Allow New Overhead Lines for Small Cells on Utility Poles.

The ban on new overhead power or communications lines is unreasonable. Draft Criteria §§ III(A)(4), IV(A)(7). New aerial lines are not “out-of-character” where there are existing aerial lines, particularly on utility poles. Provided by different companies, those service lines are beyond the scope of a small cell as defined by the FCC, and they should not be considered during review of a small cell application. *Draft Criteria Sections III(A)(4) and IV(A)(7) must be stricken.*

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The Draft Criteria require several revisions to avoid conflict with the FCC's Small Cells Order and state law. Location restrictions must be revised to avoid prohibition of small cells along certain rights-of-way. The Commission should direct staff to work with wireless carriers to develop reasonable, objective criteria that are clear at the outset, without relying on vague, subjective standards. Verizon Wireless looks forward to working with the City to revise the Draft Criteria.

Very truly yours,

A handwritten signature in black ink, appearing to read "Paul Albritton", written in a cursive style.

Paul B. Albritton

cc: Rebecca Moon, Esq.
Melissa Tronquet, Esq.
Andy Miner
Mary Jeyapragash