ATTACHMENT 14

LETTER FROM AT&T LEGAL COUNSEL

Staff received this letter from AT&T's legal counsel via e-mail at 1:13 pm on Friday February 24, 2012. Requests had been made by members of the public as well as AT&T as to findings and a recommendation prior to the release of the staff report. To be fair, transparent and equitable to all parties involved, no information was released prematurely to AT&T or other interested parties. In fact, all parties were told that the staff report would be published on the City's website on Friday February 24, 2012 so that all interested parties may review it at the same time.

On p. 4 of the letter, reference is made to a staff recommendation in support of the application and another reference is made to "Staff Report at 13." Since information, a recommendation, and the report were not provided to anyone other than City staff and City legal counsel, staff has asked the applicant to provide an explanation regarding these references.

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February 24, 2012

Via Electronic and U.S. Mail

Commissioner Leo Panian
Commissioner Peter Maas
Commissioner David Arkin
Commissioner Phillip Moss
Commissioner Stacy Eisenmann
Planning & Zoning Commission
c/o Nicole Almaguer, City Clerk
City of Albany, CA
1000 San Pablo Avenue
Albany, CA 94706

Re: New Cingular Wireless PCS, LLC, CUP 08-038, 1035 San Pablo Avenue

Dear Commissioners Panian, Maas, Arkin, Moss, & Eisenmann:

I write regarding the application ("Application") of New Cingular Wireless PCS, LLC, d/b/a AT&T Mobility ("AT&T") for a conditional use permit ("CUP") to place a wireless facility on the rooftop of the building located at 1035 San Pablo (the "Site"). The purpose of this letter is to outline the governing legal requirements of the Telecommunications Act of 1996 and to urge you to grant AT&T's Application, which has now been pending for more than three years.

After a review of the background and history of the Application, I outline the basic requirements of the federal Telecommunications Act ("Act") that relate to the company's Application in Part I below. In Part II, I explain how the Act preempts regulation by the city that is based on concerns about radio frequency ("RF") emissions. In Part III, I summarize some of the substantial evidence in the record that supports the Application. In Part IV, I describe the significant service coverage gap that is to be filled by the proposed facility, and the comprehensive alternative site analysis that the company undertook to ensure that the proposed facility is the least intrusive means to fill the gap. Finally, in Part V, I address why California state law prohibits the city from requiring all wireless providers to place their facilities at a single city-owned location on Albany Hill, which is the concept proposed in the Staff Report dated January 17, 2012.

As noted in the Application and in the Staff Reports, AT&T has been requesting authority to install nine (9) new antennas on the north-, south-, and east-facing portions of the Site for years. AT&T's equipment will be housed in stealth enclosures to match the existing roof penthouse. There are existing antennas at the Site that belong to another wireless service provider and are not screened. This Site – AT&T's first wireless site in Albany – is necessary for AT&T to close a significant service coverage gap in its wireless network in this area. AT&T has identified a significant gap in its indoor 3G coverage in a large swath of the southeast portion of the city, an area roughly bounded by Washington Avenue and Solano Avenue to the north; Harrison Street, Dartmouth Street, and Posen Avenue to the south; Ventura Avenue to the east; and Polk Street, Taylor Street, Marin Avenue, and 8th Street to the west. This significant coverage gap is graphically depicted in the "*Existing AT&T Coverage in Albany*" and "*Existing Coverage Data from Drive Test*" maps included in AT&T's Alternatives Analysis. The proposed facility is the least intrusive means to fill this significant coverage gap of the ten alternatives investigated by AT&T.

AT&T's Application – originally filed back in May of 2008 – was continued on multiple occasions. First, in 2009, the Commission continued the project based on the city's daylight shadowing ordinance. After the equipment was moved to address that concern, the Application was once again continued at the Commission's October 26, 2010 meeting, at which time the Commission requested a more robust alternative site analysis and confirmation of the facility's compliance with the city's setback ordinance. AT&T then conducted a more rigorous alternative site analysis, during which AT&T thoroughly investigated nearly a dozen alternative sites for the antennas. Further, the city separately requested a review of the application by an outside consultant, Jonathan Kramer. Most recently, Staff conducted a site visit on January 18, confirming Staff's conclusion that the facility complies fully with the city's setback requirements.

After this extensive history, the Application is on the agenda once again for the Commission's February 28, 2012 meeting. AT&T respectfully urges the Commission to approve it, subject to the conditions that Staff has recommended.

I. Key Legal Requirements

As a FCC-licensed wireless telecommunications services provider, AT&T's placement of its wireless antenna facilities is subject to the federal Telecommunications Act. That statute reconciles any potential conflicts between the need for deployment of a new wireless communications facility ("WCF") and local land use authority "by placing certain limitations on localities' control over the construction and modification of WCFs." *Sprint PCS Assets, LLC v. City of Palos Verdes Estates,* 583 F.3d 716, 721 (9th Cir. 2009). Specifically, as relevant here, the Telecommunications Act preserves local control over land use decisions, subject to the following explicit statutory restrictions:

- The local government must act on a permit application within a reasonable period of time (47 U.S.C. §332(c)(7)(B)(ii));

- The local government may not regulate the placement, construction, or modification of WCFs on the basis of the environmental effects of radio frequency emissions to the extent such facilities comply with the FCC's regulations concerning such emissions (47 U.S.C. §332(c)(7)(B)(iv));

- Any local government decision to deny a siting request must be in writing and supported by substantial evidence contained in a written record (47 U.S.C. §332(c)(7)(B)(iii));

- The local government may not unreasonably discriminate among providers of functionally equivalent services (47 U.S.C. §332(c)(7)(B)(i)(I)); and

- The local government's decision must not "prohibit or have the effect of prohibiting the provision of personal wireless services" (47 U.S.C. §332(c)(7)(B)(i)(II)).

With this general framework in mind, I address below certain issues that have arisen with respect to AT&T's Application.

II. Federal Law Preempts Regulation Based on Environmental Effects of Radio Frequency Emissions

General concerns have been raised by some residents regarding RF emissions from the Site. As noted above, however, local governments are specifically precluded from considering any alleged health or environmental effects of RF emissions in making decisions as to the siting of WCFs "to the extent such facilities comply with the FCC's regulations concerning such emissions." *See* 47 U.S.C. §332(c)(7)(B)(iv)). Moreover, a federal district court in California has held that in light of the federal preemption of RF regulation, "concern over the decrease in property values may not be considered as substantial evidence if the fear of property value depreciation is based on concern over the health effects caused by RF emissions." AT&T *Wireless Services of California LLC v. City of Carlsbad,* 308 F.Supp.2d 1148, 1159 (S.D. Cal. 2003).

Here, it is beyond dispute that the proposed equipment will operate well below applicable FCC limits. First, AT&T submitted a third-party RF emission report from Hammett & Edison, Inc. dated June 27, 2011. The Kramer firm then conducted its own independent analysis of RF emissions from the Site, and concluded that if AT&T was willing to agree to eight listed conditions, "there will be no RF emissions basis to deny or further condition the project." (*See* Kramer Report at 7.) Staff did the same, and expressly found that the proposed project would not be detrimental to the health, safety, or welfare of those in the area; nor would it adversely impact property, improvements, or potential future development in the area." (*See* Staff Report at 13.)

A copy of these RF reports, along with Staff's findings, are part of the record in support of AT&T's Application. Given AT&T's compliance with the FCC standards, the

Commission's decision on AT&T's Application simply cannot be based on health concerns or objections related to RF emissions. This is true whether those concerns are raised explicitly or indirectly through some proxy such as "property values" or even, in some instances, aesthetics.

III. Substantial Evidence In The Record Supports Granting The Application.

The "substantial evidence" requirement in the Telecommunications Act means that a local government's decision must be "authorized by applicable local regulations and supported by a reasonable amount of evidence." *See Metro PCS, Inc. v. City and County of San Francisco,* 400 F3d 715, 725 (9th Cir. 2005); *see also Sprint PCS,* 583 F.3d at 726 (a local government decision must be valid under local law and supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"). In other words, a local government must have specific reasons that are both consistent with the local regulations and supported by substantial evidence in the record to deny a permit. Generalized concerns or opinions about aesthetics are insufficient to constitute substantial evidence upon which a local government could deny a permit. *City of Rancho Palos Verdes v. Abrams,* 101 Cal.App.4th 367, 381 (2002).

Here, Staff's recommendation that the Planning & Zoning Commission grant the Application, subject to conditions, is amply supported by substantial, relevant evidence. First, the proposed equipment complies with the requirements established by Chapter 20 of the Municipal Code ("Wireless Communication Facilities"). Moreover, as Staff found, the proposed equipment is also consistent with the City's General Plan, which "designates this area for commercial and commercially related development. Additionally, the project meets City zoning standards for location, intensity, and type of development." (*See* Staff Report at 13.) And as Staff also determined, the antennas and equipment will be "in scale and harmony with existing development near the site," co-located with other facilities already on the rooftop, and only "minimally visible" to passers-by. (*Id.* at 13-14.) Significantly, the City's own independent, third-party consultant "*specializing in telecommunications facilities* *** concluded that the project site *is the best suited location for AT&T coverage and that the applicant's justification for the site is sound.*" (*Id.* at 15) (emphasis added). It is difficult to imagine any record, or any more substantial evidence, that could more amply support the company's long-pending Application.

IV. This Application Must Be Approved Under The Federal "Prohibition" Preemption.

As noted above, a municipality cannot act in such a manner so to create an "effective prohibition" of wireless services. Courts have found that an "effective prohibition" exists where a wireless carrier demonstrates (1) a "significant gap" in wireless service coverage; and (2) that the proposed facility would provide the "least intrusive means," in relation to the land use values embodied in local regulations, to provide the service coverage necessary to fill that gap. *See e.g., Metro PCS,* 400 F.3d at 734-35; *Sprint PCS,* 583 F.3d at 726. If a wireless carrier satisfies both of these requirements, then state and local standards that would otherwise be sufficient to allow denial of the facility are preempted and the municipality must approve the wireless facility. *See T-*

Mobile USA, Inc. v. City of Anacortes, 572 F.3d 987, 999 (9th Cir. 2009). When a wireless provider presents evidence of a significant gap and the absence of a less intrusive alternative, the burden shifts to the local government to prove that a less intrusive alternative exists. In order to meet this burden (and overcome the presumption in favor of federal preemption), the local government must show that another alternative is available that fills the significant gap in coverage, that it is technologically feasible, and that it is "less intrusive" than the proposed facility. *Id.*, 572 F.3d at 998-999.

Here, AT&T has met both of these standards. First, AT&T has shown a significant service coverage gap. The evidence submitted by the company shows undisputable evidence of a wireless service coverage gap. Compelling evidence of the service coverage gap is found in the "Existing" and "Proposed" coverage maps, which were reproduced in the Kramer firm's independent report. (*See* Kramer Report at 3-4.) Additional evidence of the gap is found at pages 3-6 of the company's Alternatives Analysis, which includes maps depicting "*Existing AT&T Coverage in Albany*" and "*Existing Coverage Data from Drive Test.*" AT&T's RF engineers determined that building this Site will close this significant coverage gap and enable AT&T to provide personal wireless services to customers in the area.

AT&T has also proven that the Site would be the least intrusive means by which to fill the significant service coverage gap. In Albany, Section 20.20.100(F)(4) requires applicants to demonstrate "why the proposed site is the most appropriate location under existing circumstances." Here, AT&T examined nearly a dozen alternative sites for the antennas, conducting what Staff described as the "best" alternative site analysis they had ever seen. (*See generally* Alternatives Analysis at 7-22; *see also* Staff Report at 4-5.) As Staff found, the Kramer firm similarly concluded that "the project site is [the] best suited location within the area for AT&T coverage and ... the applicant's justification for the site is sound." (Staff Report at 15; *see also* Kramer Report at 2, noting that "the proposed site (as an existing Sprint wireless facility being expanded to permit collocation with AT&T rather than newly developed) is a logical site.")

Thus, AT&T has established both a significant wireless service coverage gap and that collocating its facilities at the Site would be the least intrusive means by which to close the gap. Under section 332(c)(7)(B)(i)(II) of the Federal Telecommunications Act of 1996 (47 U.S.C.), if these two criteria are shown, the facility must be approved.

V. Cities Cannot Require Wireless Carriers Use City Property.

In a Staff Report dated January 17, 2012, Staff notes that due to recent filings of wireless facility applications, "as well as identifying potential long-term revenue sources for the City, City Council Members preliminarily discussed the idea to explore the feasibility of cellular tower installation on City-owned property, with Albany Hill (Albany Hill Park) being most frequently mentioned." While AT&T appreciates the City's willingness to explore whether wireless facilities might be placed upon Albany Hill, there are two compelling reasons why this concept presents no basis to deny or further delay action on AT&T's long-pending Application. For one, as AT&T representatives have already explained, and as the January 17 Staff Report expressly reflects, placing a facility on Albany Hill "would not serve

the south and southeastern portions of the City where [AT&T] currently [has] an application pending." As such, an Albany Hill site would not fill the significant service coverage gap that the instant Application is designed to fill. Moreover, in promoting City-owned properties, Albany should be aware that California Government Code Section 65964(c) expressly prohibits local jurisdictions from requiring the use of specific landlords by wireless providers. Specifically, Section 65964(c) provides that:

> A city or county shall not do any of the following:...
> (c) Require that all wireless telecommunications facilities be limited to sites owned by particular parties within the jurisdiction of the city or county.

While AT&T appreciates the City considering the idea of making its property available for wireless facilities, and while AT&T may be interested in pursuing leases at city-owned sites if they become available at a later date under reasonable terms and conditions, the City cannot require their use under state law, and the Albany Hill concept presents no basis to deny or further delay the instant Application.

Conclusion

AT&T is diligently trying to expand its network to serve Albany. It is doing so in a manner that takes prudent consideration of the aesthetic impacts of its facilities and the values that the city seeks to promote. As Staff has found, AT&T's application is fully consistent with Albany's land-use regulations and the Wireless Telecommunications Ordinance, and building the proposed site would be the least intrusive means by which AT&T could fill the significant wireless service coverage gap in the area. For these reasons, the Telecommunications Act requires the Commission to approve AT&T's application.

Very truly yours,

John di Bene

cc: Craig Labadie, Esq., City Attorney (clabadie@albanyca.org)
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