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## AT&T's Applications for Conditional Use Permits on February 22, 2018 Planning Commission Agenda

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Dear Clerk Tim and Commissioners Miller, Williams, Vegna, Hansen, and Shinault,

New Cingular Wireless PCS, LLC d/b/a AT&T Mobility (AT&T) asks the Planning Commission to reconsider its conceptual denial of seven conditional use permits ("Applications") to allow it to construct wireless telecommunications facilities in El Dorado County including:

- (1) Site 1-Cool: Assessor's Parcel Number 071-032-15;
- (2) Site 2-Newtown: Assessor's Parcel Number 077-091-06;
- (3) Site 3-Pleasant Valley: Assessor's Parcel Number 078-180-38;
- (4) Site 4-Soapweed: Assessor's Parcel Number 085-010-13;
- (5) Site 5-Latrobe: Assessor's Parcel Number 087-181-10;
- (6) Site 6-Zee Estates: Assessor's Parcel Number 104-370-24; and
- (7) Site 7-Gold Hill: Assessor's Parcel Number 105-110-81.

AT&T's proposed facilities would bring wireless services, including 4G LTE telecommunications and high-speed broadband services to as many people as possible in this rural portion of El Dorado County. AT&T's applications are part of its multi-million dollar commitment to the Federal Communications Commission's Connect America initiative, an important program that subsidizes the cost of building new infrastructure and network upgrades to provide voice and broadband services in places where it is lacking.

Specifically, by harnessing this unique, economically feasible opportunity to serve rural communities, AT&T proposes to deploy the necessary network infrastructure to bring these services to hundreds of households in this portion of the county.

The Planning Commission previously voted to conceptually deny these permits but we ask the Commission to reconsider that conceptual denial in light of the information in the attached letter.

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El Dorado Planning Commission  
Clerk of the Planning Commission  
2850 Fairlane Court  
Placerville, CA 95667

*Re: AT&T's Applications for Conditional Use Permits on February 22, 2018 Agenda  
File No. 18-0295*

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Specifically, by harnessing this unique, economically feasible opportunity to serve rural communities, AT&T proposes to deploy the necessary network infrastructure to bring these services to hundreds of households in this portion of the county.

The Planning Commission previously voted to conceptually deny these permits but we ask the Commission to reconsider that conceptual denial in light of the information below. Such

action would be consistent with the February 8, 2018 Staff recommendations of approval and the findings they prepared, as well as federal law.

Concerns raised at the February 8, 2018 hearing included concern that other collocation opportunities exist that could be used instead of the sites selected and at issue in the conditional use permits. This is untrue because the only sites within collocation opportunities are Site 1 – Cool, Site 2 – Newtown and Site 3 – Pleasant Valley. The Colocation sites were considered. Site 1 – Cool’s Colocation was rejected because 55% of the targeted LUs would be lost when locating at the available height of 40 feet, furthermore 45% of the targeted LUs would be lost if the tower was modified to allow an 85-foot antenna height. Regarding Sites 2 and 3, one tower exists between the two targeted areas located on Rainbow Ridge Road. By utilizing only one tower to cover both site’s objectives, the tower fails to meet the targeted LUs for both sites by 37% in addition to not filling both area’s LTE coverage gaps. As such there are no other collocation sites available.

Concerns were also raised regarding the adequacy of the alternatives analysis. On a site-by-site basis, alternative sites were looked at during the feasibility stage, however, sites where we encountered uninterested landlords and/or lacked legal real estate rights were not included in the alternative site analysis.

In addition, questions were raised regarding how many more living units will be served by this alternative. In fact, all alternative sites analyzed yielded between a 10% to 55% loss in LUs, amongst other factors being considered. As part of this inquiry, some questioned why the number of units is exactly the qualifying number but that number was just provided to show the site meets the minimum federal standard.

Concerns were raised regarding noise, but as the staff properly found, the equipment will generate noise that is well below the acceptable noise levels under the County Code.

Lastly, some comments were made that the area where the Site-2 Newtown facility is proposed may be significant to Native American tribes. Consultant with tribes was conducted and no tribes responded that any of these areas contain cultural resources for their tribes.

#### *Applicable Federal Law – Telecommunications Act of 1996*

The federal Telecommunications Act of 1996, 47 U.S.C. § 332 (“Act”) provides rights to wireless service providers and establishes limitations upon state and local zoning authorities with respect to applications for permits to construct personal wireless service facilities. This important law was enacted in part to prioritize and streamline proliferation of wireless technologies on a national basis.<sup>1</sup> Thus, the Act fosters increased infrastructure deployments, such as the proposed facilities, and programs like the FCC’s Connect American initiative.

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<sup>1</sup> See *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115-16 (2005) (explaining that Congress intended to promote rapid deployment of wireless technologies by removing impediments to construction imposed by local governments).

The Act provides that the county must consider AT&T's applications based on "substantial evidence."<sup>2</sup> The "substantial evidence" requirement means that a local government's decision must be "authorized by applicable local regulations and supported by a reasonable amount of evidence."<sup>3</sup> In other words, the County must have specific reasons that are both consistent with its municipal code or other published regulations and supported by substantial evidence in the record to deny a permit. Here, however, the objections that have been raised by a few residents do not qualify as substantial evidence. Accordingly, the Planning Commission should approve AT&T's applications.

In addition, under the Act, local authorities are not permitted to consider complaints or concerns about potential health effects in deciding siting applications.<sup>4</sup> Likewise, allegations of property value loss based on fears over radio frequency emissions are not substantial evidence that can support a decision on a wireless siting applications.<sup>5</sup>

Specifically, most of the comments raised by nearby residents have objected to the proposed facilities based on fears about environmental effects of radio frequency emissions. Several letters have submitted articles from the internet and urged the County to deny the permits on the basis of radio frequency emissions. One comment also raised concerns regarding the effect of radio frequency on birds and other animals. As discussed below, the site is well below federal levels and that is not a permissible reason to deny the permits.

Similarly, several property owners have stated fears negative impact on property values. This also is not an appropriate basis to deny the permits under federal law.

One additional issue that was raised related to the feasibility of access for Site 5 – Latrobe. Under AT&T's lease with the owner of the site, AT&T has express access rights to the site. That owner has a recorded appurtenant easement to the site for access and other purposes as set forth therein.<sup>6</sup> Under established California law, appurtenant easements can never be interpreted as personal to the Grantee.<sup>7</sup> Indeed, the easement expressly contemplates access by others. Specifically, the easement is to "Grantee, its successors and assigns" and the indemnity

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<sup>2</sup> 47 U.S.C. § 332(c)(7)(B)(iii).

<sup>3</sup> *Metro PCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 725 (9th Cir. 2005), *abrogated on other grounds, T-Mobile S., LLC v. City of Roswell*, 135 S. Ct. 808 (2015).

<sup>4</sup> 47 U.S.C. § 332(c)(7)(B)(iv) provides "No State or local government thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communications] Commission's regulations concerning such emissions."

<sup>5</sup> *See, e.g., AT&T Wireless Svcs. of Cal. LLC v. City of Carlsbad*, 308 F. Supp. 2d 1148, 1159-62 (S.D. Cal. 2003) (property value claims based on radio frequency emissions fears not substantial evidence); see also H.R. Conference Report No. 104-458, 201 (1996) (intent of Act is to prohibit local governments from basing wireless siting decisions "directly or indirectly on the environmental effects of radio frequency emissions").

<sup>6</sup> The recorded appurtenant easement is entitled "Grant of Easement" and recorded on June 27, 1992 in the Official Records of the County of El Dorado Recorder's Office at Document No. 2002-0046499.

<sup>7</sup> *See, e.g., St. Louis v. Debon* (1962) 204 Cal.App.2nd 464, *Leggio v. Haggerty* (1965) 231 Cal.App.2d 873

expressly requires Grantee to indemnify for a range of users of the easement, including Grantee's "invitees." AT&T will be both the Grantee's assign and invitee. Moreover, AT&T's anticipated use of the appurtenant easement will be limited to AT&T's access during initial construction and then for periodic maintenance and repair which is estimated to be once or twice a month or less. Lastly, while AT&T has secured this access, the scope of the easement is an issue beyond the land use jurisdiction of this Commission.

Another issue that was raised is radio frequency emissions. AT&T's proposed facilities will comply with applicable environmental regulations, including the FCC's regulations of radio frequency emissions. Pursuant to FCC regulations, the proposed facilities are categorically exempt from analysis of radio frequency emissions. Even so, AT&T commissioned a study of emissions. According to the engineering analysis report by EBI Consulting that AT&T submitted in connection with the Applications, the proposed facilities will operate well within (and actually far below) all applicable FCC public and occupational exposure limits. Thus, AT&T's applications cannot be rejected whether health concerns are raised explicitly or indirectly through some proxy such as speculative fears about property values.

Moreover, there is no substantial evidence to support speculation that property values might decrease after the proposed facilities are constructed. Courts within the Ninth Circuit and elsewhere have long agreed that a "generalized fear of decline in property values" does not constitute substantial evidence supporting the denial of a permit to install telecommunications facilities.<sup>8</sup> Indeed, despite the assumption that people do not want to live near wireless telecommunications facilities, wireless connectivity is increasingly important to property owners and prospective purchasers. As demand for wireless connectivity continues to grow at exponential rates, more and more Americans are relying exclusively or primarily on wireless communications. The FCC estimates that 70% of 911 calls are placed by people using wireless phones. And the Center for Disease Control and Prevention (CDC) tracks "wireless substitution" rates as part of its National Health Interview Survey, and the CDC publishes the statistics every six months in its Wireless Substitution reports. The most recent report, issued in December 2017, finds that 52.5% of American homes have only wireless telephones, and another 15.1% receive all or almost all calls on wireless telephones despite also having a landline.<sup>9</sup> With approximately two-thirds of households relying exclusively or primarily on mobile communication devices at home, access to wireless services may actually drive up property values.

Finally, consistent with the Act, AT&T seeks to locate the proposed facilities by the least intrusive means from among available and feasible locations identified in a good-faith review of

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<sup>8</sup> See *California RSA No. 4 v. Madera County*, 332 F.Supp.2d 1291, 1308-09 (E.D. Cal. 2003) (collecting cases and holding "generalized expressions of concern regarding aesthetics or the effect on property values" fail to meet the substantial evidence threshold); *T-Mobile USA, Inc. v. The City of Anacortes*, No. C07-1644RAJ, 2008 WL 3412382, \*5 (W.D. Wash. July 18, 2008) (held citizen comments regarding a proposed facility's effect on property values did not constitute substantial evidence upon which to deny a permit), affirmed 572 F.3d 987 (9th Cir. 2009).

<sup>9</sup> CDC's December 2017 *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January-June 2017* is available at <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201712.pdf>.

properties in the area that can address the coverage objectives.<sup>10</sup> Here, as part of an important federal program, AT&T's Proposed Facilities will provide high-speed broadband service to many hundreds of county residents. In addition, AT&T submitted with its Applications propagation maps depicting its significant gaps in 4G LTE service coverage and how the proposed facilities will close those gaps. As part of its Applications, AT&T also submitted its Project Support Statement, which shows that the proposed facilities are the least intrusive means to address the gaps from among candidate sites analyzed. Thus, approving AT&T's appeal and application will also satisfy this provision of the Act.

## **Conclusion**

AT&T is diligently trying to upgrade its network to meet the growing wireless telecommunications demands within this portion of El Dorado County. It is doing so in a manner that takes prudent and careful consideration of the values the county seeks to promote. Moreover, the proposed facilities are the least intrusive means by which AT&T can fill its significant wireless service coverage gaps and bring much needed high-speed broadband services to this area.

Very truly yours,

*/s/ John di Bene*

John di Bene

cc:

Evan Mattes, Community Development Services, Planning and Building Department

David Livingston, Deputy County Counsel

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<sup>10</sup> See 47 U.S.C. §332(c)(7)(B)(i)(II); *Metro PCS, Inc.*, 400 F.3d at 734-35 (local government prohibited from denying wireless siting application where provider investigated alternatives and identified the least intrusive means to address its significant service coverage gap); *Sprint PCS Assets, LLC v. City of Palos Verdes Estates*, 583 F.3d 716, 726 (9th Cir. 2009).