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Re: Interim Small Cell Design Guidelines

Dear Ms. Edgerton, Mr. Philips & Mr. Wolfe:

Please accept this letter as comments on behalf of Verizon Wireless, AT&T, T-Mobile, Sprint and U.S. Cellular (collectively, the "Providers") relating to the City of Madison's Interim Small Cell Design Guidelines ("Guidelines"). While the Providers appreciate the City's efforts to develop a framework for consideration of small wireless facility (or "small cell") siting applications and criteria for acceptable deployments, the Guidelines conflict in several respects with applicable state and federal law.

As you know, Wisconsin's SB 239, recently enacted into law as 2019 Wisconsin Act 14 (the "Act"), now provides the framework and rules under which local government can regulate small cell facilities in public rights-of-way. In regulating small cell siting, the City is also subject to the FCC's recent Declaratory Ruling and Third Report and Order entitled: *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, FCC 18-133, WT Docket No. 17-79, 85 FR 51867 (the "Order"), which took effect on January 14, 2019. The Order defines "effective prohibition" as any requirement that "materially inhibits" the provision of wireless service, and also expounds upon Sections 332 and

253 of the Federal Telecommunications Act as they relate to permissible fees, application timelines, and aesthetic or other non-fee related requirements applied to small wireless facilities.

Both state and federal law set parameters on local governments' authority to regulate small cell siting, and prohibit regulation that (i) is discriminatory, or (ii) materially inhibits a provider's ability to provide wireless service (including a provider's ability to improve service by densifying its existing network or deploying new technology). Order at ¶ 37; Wisc. Stat. 66.0414(2)(g). The Guidelines conflict with these overarching tenets, as they are part of a burdensome framework applicable only to requests to site small cells in the ROW, and impose a number of unreasonable placement and design restrictions likely to materially inhibit the Provider's small cell deployment in Madison.

In developing and applying the Guidelines, the City must also keep in mind the legal test for permissible design and other aesthetics-related requirements (including separation distances and undergrounding requirements). Such requirements must not only be equally applied, but also "(1) reasonable in that they are technically feasible and reasonably directed to avoiding or remedying unsightly or out-of-character deployments; (2) no more burdensome than those applied to other types of infrastructure deployments; and (3) objective and published in advance." Wisc. Stat. 66.0414(3)(c)(4)(a); FCC Order at ¶¶86-87. As discussed in more detail below, the Guidelines contain several design-related requirements that are discriminatory, fail to account for technical feasibility, involve application of subjective criteria, and in some instances imposes overly prescriptive requirements on providers effectively dictating our technological choices. The City does not possess the necessary expertise nor is it permitted to do so under the Order. Each provider has its own unique deployment and network needs that are function of their individual network design criteria. Compounding the challenge is the fact that the Guidelines do not appear to contain a waiver provision giving the City authority to flex requirements as needed to avoid an effective prohibition of wireless service.

Incorporating these general objections to the Guidelines, we highlight below the most notable instances where provisions conflict with state and/or federal law.

4 Review Process – Public Right-of-Way Permit

The Guidelines affirm that all small cell installations require a Wireless Telecommunications Facility Permit from the City (pursuant to MGO Sec. 10.053), and proposed installations must adhere to the Guidelines. Yet, under the Wisconsin law, the City cannot impose a permit requirement and accompanying set of standards applicable exclusively to small cells and not other uses of the ROW. Wisc. Stat. 66.0414(3)(c)(1). *See also* 66.0414(3)(c)(1)(b) (prohibiting local government from requiring a wireless applicant to provide more information in its permit

application than that required from a communications service provider that is not a wireless provider and that applies for the same type of permit.").

5 General Guidelines

Many of the restrictions and specifications relating to location, height and collocation are both discriminatory and unreasonable, including the following:

Preferred vs. Non-Preferred Locations – The City requires siting in industrial and commercial areas "whenever possible," and lists *seven* different districts throughout the City as "non-preferred locations," which trigger more onerous design criteria and require applicants to satisfy an inappropriate burden of proof upon application submission (*i.e.*, that the applicant cannot maintain or improve services or add new technology without the proposed location). The City's designation of "non-preferred locations" and more burdensome requirements for applications to site in such locations appear to apply only in the context of small cell siting, which violates both state and federal non-discrimination requirements. The City's treatment of non-preferred locations will also give rise to effective prohibition challenges under federal law, as these areas of the city -- residential neighborhoods and the "special interest area districts" -- are the very places where providers have a significant need for small cells to offload network capacity and provide 5G coverage.

Avoidance of Significant Buildings and View Sheds – The Guidelines require avoidance of Significant Buildings and View Sheds (terms not defined in the document or ordinance) and prohibit interference with "prominent vistas" or "significant public view corridors" or "contributing vistas and views." These restrictions are vague, overbroad, and subjective, leaving applicants to guess at what will pass muster and giving the City wide latitude to reject small cell applications for non-compliance. *See* Order at ¶¶ 86 & 88 (requiring that any rules relating to aesthetic impact be objective, reasonable, non-discriminatory, and published in advance, and recognizing that "Providers cannot design or implement rational plans for deploying Small Wireless Facilities if they cannot predict in advance what aesthetic requirements they will be obligated to satisfy to obtain permission to deploy a facility at any given site").

5.2 Collocation (with non-Municipal Facilities) - The Guidelines mandate collocation on structures capable of accommodating a new wireless facility absent "substantial evidence" that the location is unsuitable or evidence that the structure owner is unwilling to authorize collocation. The Guidelines do not elaborate on what might constitute "substantial evidence" in this context. As drafted, this requirement is an overreach by the City that will give rise to effective prohibition claims as a provider cannot be forced to collocate on a structure that is not viable in terms of technical feasibility and objectives, as well as economic and business terms.

Moreover, requiring a showing of "substantial evidence" of unsuitability allows the City to improperly evaluate and second-guess a provider's technology choices, network design, and service objectives. *See* Order at ¶36, n. 84 & ¶40, n. 95 (recognizing that local jurisdictions do not have the authority or expertise to dictate the design or a provider's network).

Spacing (Table 5-1) – This table sets out spacing of support structures to specific right-of-way features. Such restrictions are discriminatory and therefore unlawful to the extent they are not equally applied to other ROW occupants.

5.4 Height Restrictions and Requirements –The height parameters described in the Guidelines must be brought into alignment with those prescribed by state law. See 66.0414 (2)(e)(2).

6 General Aesthetic Standards

Aesthetics-related requirements, which include minimum spacing requirements, violate state and federal law unless they are (i) reasonable, (ii) no more burdensome than those applied to other types of infrastructure deployments, and (iii) objective and published in advance. Order at ¶¶ 86, 91; Wisc. Stat. 66.0414(3)(c)(5). Most of the aesthetic requirements set forth in this section are inconsistent with both state and federal law because they are discriminatory and unreasonable by failing to account for technical feasibility or the requirements imposed on other right-of-way users. Examples include the following:

Antenna Concealment – The Guidelines require that antennas located at the top of support structures be incorporated into the structure or placed within shrouds such that the antennas appear to be part of the support structure. The Guidelines should be revised to recognize the fact that shrouding and other antenna concealment measures may not be technically feasible given the nature of the technology and features of the equipment available for deploying that technology. These requirements may also be discriminatory, as other telecom and utility ROW occupants are not required to implement similar concealment measures.

Historic and Urban Design Districts – Section 6.5.1 of the Guidelines prohibits deployment of a wireless facility in a historic district or urban design district if it "will be contrary to or destructive to the character of the district," without the approval of the Landmarks or Urban Design Commissions. This extremely subjective standard and the vesting of 100% discretion in the Commission are unlikely to withstand challenge under state or federal law.[1]

[1] While Section (3)(c)(5) of the Act allows the city to prohibit in a non-discriminatory manner new structures in the ROW of a historic district, it cannot prohibit collocations or the replacement of existing structures. The City's application of this Section 6.1.5, as well as 7.2.1 (setback requirement), may well result in preventing collocation in violation of Section (3)(c)(5).

Spacing (Table 6-2) – This table restricts the quantity of small cell facilities based on block face interval lengths. Such restrictions are discriminatory and therefore unlawful to the extent they are not equally applied to other ROW occupants. They are also unreasonable in that they fail to account for RF propagation characteristics and impact of the spacing restriction on a small cell's ability to achieve its technical objectives.

7 Guidelines Regarding Areas of Special Interest

The Guidelines define significant pockets and swaths of the City as "Areas of Special Interest" -- Historic Districts, Historic Landmarked Properties, Areas included within Urban Design Districts, UMX, DC, and Downtown Capital Corridor, Undergrounding Districts, or Other Areas of Interest (as defined in maps embedded in the Guidelines document).

While the Providers are prepared to comply with reasonable regulations designed to preserve the character of historic properties and those areas where existing utilities are already undergrounded, Section 7 is unduly broad and subjects a significant number of applications to more restrictive location and aesthetic standards, with the aggregate impact likely leading to the effective prohibition of the Providers' ability to implement service improvements where they are most needed.

For example, for any Special Interest Area, "where allowed," all non-antenna equipment must be either 17 feet above the ground or placed completely underground. The Guidelines provide little insight into how the City goes about determining whether a small cell equipment will be "allowed" in a Special Interest Area, and there is evidence that the City is not imposing these same requirements and subjective standards on all other uses of the ROW.

The Guidelines also require that new small cell infrastructure in certain areas of the city be completely concealed (other than the antenna) in a decorative street amenity or housed in an underground vault. This requirement is vague, discriminatory and unreasonable in that does not acknowledge technical and economic feasibility considerations. The Guidelines fail to explain what constitutes a "decorative street amenity," and housing equipment in underground vaults is not only cost-prohibitive but exposes equipment to water damage and creates safety hazards. It also may void OEM warranties on sensitive equipment.

8 General Requirements for Small Cell Equipment

All specifications relating to small cell components and size, including those included in Table 8-2, should be revised to match with state and federal law. As certain terminology (*e.g.*,

reference to "cantenna") and other aesthetic and technical specifications addressed in this Section no not appear to accurately reflect industry standards, the Providers strongly recommends that the City meet and confer with industry engineers and revise Section 8 accordingly. The requirements should also recognize that individual providers make different deployment choices based on their unique network design criteria, existing coverage in a given area and available spectrum. For example, the City's standard cannot dictate that T-Mobile utilize the same equipment configuration as Verizon or vice versa.

Attachment to City Streetlight Poles – The Guidelines note that these attachments will be covered under separate agreements between the City and the provider and subject to additional requirements. The City's streetlight poles are "utility poles" and subject to the rates, processes, and shot clocks delineated in the Act. Under the existing legal framework, it is unclear why a separate negotiation is necessary or what additional requirements might be imposed given the limitations under state law. Under applicable law, the absence of an agreement does not prevent the shot clock from commencing upon application submission.

Ordinance Creating §10.053 – Wireless Telecommunication Facilities in the Right-of-Way

In addition to the feedback herein relating to the Guidelines, the Providers wish to reiterate several concerns with the underlying Ordinance and recommend that the City revise the Ordinance accordingly in order to Facilitate 5G deployments:

- Revise the ordinance to allow for attachment to city poles, as excluding city poles will likely result in providers having to install more new poles to provide service.
- Streamline the application requirements at 105.053(6)(b), as currently adopted they are discriminatory, unreasonable, overly burdensome and not authorized by applicable law (*e.g.* site plan requirements requiring granular details, and the 300-foot notification requirement).
- Clarify application processing deadlines to ensure consistency with state and federal law.
- Eliminate the requirement for prospective submission of effective prohibition evidence as a gating requirement for an application, as this is unduly burdensome and not authorized by applicable law.
- Revise restriction on placement of poles in residential areas found in 105.053(7)(c), as such a restriction is technically inconsistent with the nature of 5G deployments, which will require putting infrastructure closer to where people live, work and recreate; and
- Modify section 105.053(7)(d)(14) to carve out claims arising from the City's own negligence from the indemnity obligations.

* * *

Should Madison decline to revise the Guidelines (and Ordinance) and proceed with evaluating small wireless facility applications in strict accordance therewith, it will not only violate state and federal law but jeopardize the likelihood of bringing both improved and new wireless services to its residents. We ask that the City give deference to this industry feedback as it works to finalize the Guidelines and request the opportunity to work jointly to implement an efficient process that protects and serves the interests of the City in a manner consistent with applicable law.

While we are not aware that Madison is formally represented by counsel concerning the Guidelines, we are providing City Attorney May with a copy of this letter to make him aware of this communication and our position herein.

Respectfully and sincerely,

HUSCH BLACKWELL LLP

Rodney W. Carter

RWC/wp

cc: City Attorney Michael May
Verizon Wireless
AT&T
T-Mobile
Sprint
U.S. Cellular