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September 21, 2023

Hand Delivered

Andrew Kottkamp
City of Walla Walla Hearing Examiner
435 Orondo Ave.
P.O. Box 1667
Wenatchee, WA 98801

Re: File# CUP-22-0002; SEPA File: SEP-22-0020

Examiner Kottkamp:

Applicant New Cingular Wireless PCS, LLC ("AT&T") submits the following legal argument for your consideration in the above entitled matter to address matters potentially raised by public comment and federal law. Applicant requests that this submittal be made part of the hearing record.

Project Impact on Property Values

The concerns raised by opponents to the stealth monopine tower include a generalized fear that properties in the vicinity will experience a decline in property value if the tower is approved. Testimony regarding the fear of a loss in property value should not be considered because the code does not address potential impact on property values, and does not include this as a criterion for approval by the hearing examiner.

Moreover, most of the opponents' public comment on this subject that do raise this issue appear to quote from a form response that claims, without citation or attribution, that-

The commercial tower is being placed next to properties that are platted for development and existing homes (see attached Exhibit B). This will affect their land in regard to all existing home sales and home values. Transmission equipment and Transmission lines decrease property values by 7 to 20 percent. Some people choose not to buy in that area.

This statement does not constitute substantial evidence that this stealth facility in this location will have a negative impact on property values, especially because the visual impact of electric transmission lines and unstealthed electric transmission equipment is much greater than a well designed 65 foot monopine strategically placed on a church site with existing mature vegetation and with the addition of approximately 20 proposed additional new trees to further enhance

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visual screening of the facility. The elevations in the Zoning Plan Set show proposed visual mitigation, including the proposed evergreen trees along the west and south property lines. The public comments referencing the visual impacts of electric transmission lines advance an apples to oranges comparison that is not germane in this matter.

It should also be noted that the fact that some buyers may choose not to buy in this area is not evidence of a loss of property value, because it is equally likely that there are buyers who would choose this area because the wireless coverage is more robust and reliable. In any event, there has been no evidence presented in the public comment that the potential buyer pool for homes in the vicinity of the church would be impacted one way or the other by the presence of this well designed stealth facility.

One commenter, Kimi Schroeder, does identify (without providing) some articles from a national realtors association. These articles focus on homes in rural Kentucky, Arkansas, and Brisbane Australia without any discussion of the applicability of the conclusions to Walla Walla, or any other cities in the western United States. In contrast, AT&T is providing the attached comprehensive market study of multiple cities in the western United States, as well as a full data set of another study looking at major cities in the US, with hard data indicating there is no appreciable loss in property value for homes in proximity to a cell tower. AT&T requests that these studies be included as an exhibit in the record.

To the extent that the allegations of decline in property value from proximity to a cell tower are based on a potential buyer's fear of perceived health effects, the Telecommunications Act of 1996 precludes decision-makers from considering health effects from RF emissions. Specifically, the local jurisdiction is precluded from considering health effects from RF emissions, as well as declining property values based on fears about those health effects. See AT & T Wireless Servs. Of Cal., LLC v. City of Carlsbad, 308 F.Supp.2d 1148, 1159 (S.D.Cal.2003). See also, e.g. Verizon Wireless (VAW) LLC v. Unified Government of Wyandotte County/Kansas City, Kan., 2013 WL 272761 (D. Kansas, 2013); See also, Seattle SMSA Ltd. P'ship v. San Juan Cty., 88 F. Supp. 2d 1128, 1131 (W.D. Wash. 1997) (Board's denial of cell tower permit based on "vehement opposition" of residents and property owners . . . fears of reduced property values . . . [and] concerns about the health effects of radio frequency emissions from the cellular facilities," must be reversed since such evidence "could not be considered . . . as a matter of law").

Finally, the facility is an allowed use in the zone where the project is proposed and AT&T has submitted substantial evidence that the facility will utilize stealth features such as branching to conceal the antennas and bark on the support pole to make the tower resemble a tree, and has proposed the location onsite that takes greatest advantage of existing mature trees and landscaping to provide additional screening. AT&T is also proposing to plant a row of evergreen trees along the south and west property lines to further mitigate the visual impacts to the greatest extent feasible.

The proposed Facility is the minimum height necessary to fulfill AT&T's service objectives within the targeted service area and has been designed to provide space for future collocations in order to minimize the need for additional new WCF structures in the area, as outlined in EX 15, AT&T's Revised RF Justification, submitted in July 2023. The evidence shows the facility has been designed to blend with the surrounding neighborhood. With a well designed stealth facility such as this, set amidst mature trees onsite, the aesthetic impacts are mitigated and any claim of loss of property value would only be based on potential buyers' fear of RF health effects and could not be considered by the decision maker.

Effective Prohibition

A denial of the application for the proposed facility would constitute an effective prohibition under federal law¹. In the record before the Examiner, AT&T has established the need for this facility to fill a significant gap in coverage and capacity, as outlined in the Revised RF Justification submitted in July 2023. AT&T has also demonstrated that the facility proposed is the least intrusive means to fill that gap, both by the careful design of the facility, placement on the parcel and additional proposed landscaping which minimizes the visual impacts, and as evidenced by a thorough search for alternative sites, outlined in the Revised Alternatives Analysis, submitted in July 2023.

¹ An effective prohibition occurs whenever the decision of a local government materially inhibits wireless services. *In the Matter of Cal. Payphone Assoc. Pet. for Preemption, Etc.*, 12 FCC Rcd. 14191 (FCC rel. July 17, 1997); *Sprint Telephony PCS, L.P., v. Cnty. of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008) (noting Ninth Circuit's analysis of effective prohibition "is consistent with the FCC's" standard under *California Payphone*). The FCC has more recently reiterated the validity of its material inhibition standard, which the Ninth Circuit reaffirmed and upheld. *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv., Etc.*, 33 FCC Rcd. 9088 (FCC rel. Sept. 27, 2018) ("Infrastructure Order") (material inhibition occurs whenever a denial prevents a wireless provider from providing new services or improving existing services); *City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020), cert. denied, *City of Portland v. FCC*, 141 S.Ct. 2855 (2021). This "effective prohibition analysis focuses on the service the provider wishes to provide, incorporating the capabilities and performance characteristics it wishes to employ, including facilities deployment to provide existing services more robustly, or at a better level of quality, all to offer a more robust and competitive wireless service for the benefit of the public." *Infrastructure Order*, n.95.

A wireless carrier may also demonstrate an effective prohibition by showing that a permitting entity has denied an application for a wireless facility despite (1) evidence of a "significant gap" in the carrier's service and (2) a showing by the carrier that the proposed installation is the "least intrusive means" for closing that gap. *MetroPCS, Inc. v. City & Cnty. of San Francisco*, 400 F.3d 715, 734-35 (9th Cir. 2005), abrogated on other grounds in *T-Mobile S. LLC v. City of Roswell, Ga.*, 574 U.S. 293 (2015) (adopting least intrusive means test because "it promises to ultimately identify the best solution for the community, not merely the last one remaining after a series of application denials"); *T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987, 995 (9th Cir. 2009) (quotation marks and citation omitted). Under this judicial test, once a wireless provider presents prima facie evidence of a significant gap and that its proposal is the least intrusive means for closing that gap, the burden shifts to the local government to prove that an available, feasible, and less intrusive alternative exists. *Id.* at 998-99. To meet this shifted burden, the local government must show that another alternative is (a) available, (b) technologically feasible, and (c) less intrusive than the carrier's proposed gap solution. *Id.* The applicant then has the opportunity to rebut the availability and feasibility of any alternatives identified by the local government. *Id.*

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Conclusion

AT&T respectfully asserts that all of the criteria for approval have been met and requests that the Hearing Examiner approve the application. AT&T will comply with the proposed conditions of approval.

Best regards,

A handwritten signature in cursive script, appearing to read "Richard J. Busch".

Richard J. Busch
Busch Law Firm
Applicant Representative