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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

EUGENE DIVISION

NEW CINGULAR WIRELESS PCS, LLC, Case No.:
D/B/A AT&T MOBILITY, a Delaware
limited liability company,

Plaintiff,

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

v.

AND

CITY OF CORVALLIS, an Oregon
municipal corporation,

Defendant.

**REQUEST FOR EXPEDITED REVIEW
PURSUANT TO 47 U.S.C.
§ 332(c)(7)(B)(v)**

Plaintiff New Cingular Wireless PCS, LLC, d/b/a AT&T Mobility (“AT&T”), a limited liability company organized and existing under the laws of Delaware, complains against Defendant City of Corvallis, Oregon (the “City”) and alleges as follows:

INTRODUCTION

1. AT&T has been attempting to place “small cell” wireless facilities (*i.e.*, small antennas and related equipment) on poles in the City’s rights-of-way, to provide and improve wireless services in the City. Federal law limits the ability of municipalities to block installation of such facilities, based on nationwide goals of promoting the widespread availability of advanced, reliable wireless services. The City has violated this federal law, and AT&T seeks declaratory and injunctive relief, as set forth herein.

JURISDICTION AND VENUE

2. This action arises under the laws of the United States, including the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 U.S.C. §§ 253 and 332. This Court has jurisdiction over these claims pursuant to 28 U.S.C. §§ 1331 (federal question) and 1337 (commerce). The Court’s authority to grant declaratory relief and related injunctive relief is based upon 28 U.S.C. §§ 2201-2202 because an actual controversy exists.

3. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because AT&T’s claims stated herein arose in this judicial district.

INTRADISTRICT ASSIGNMENT

4. Assignment to the Eugene Division of this Court is appropriate pursuant to Local Rule, in that the events that give rise to the claims asserted herein occurred in the County of Benton.

PARTIES

5. Plaintiff AT&T is a limited liability company duly organized, existing, and operating under the laws of Delaware, with its principal place of business in Atlanta, Georgia,

with offices at locations in Oregon. At all times relevant herein, AT&T has been and is qualified to do business in Oregon.

6. Defendant City of Corvallis is an Oregon municipal corporation organized and existing under the laws of the State of Oregon.

LEGAL AND FACTUAL BACKGROUND

7. Under the federal Communications Act of 1934 as amended by the Telecommunications Act of 1996 (the “Act”), municipalities must act upon applications to place wireless facilities within a “reasonable period of time” (47 U.S.C. § 332(c)(7)(B)(ii)); local regulation may not “prohibit or have the effect of prohibiting the ability” of a carrier to provide telecommunications services (47 U.S.C. § 253(a)); and local regulation of the placement of wireless facilities “shall not prohibit or have the effect of prohibiting the provision of personal wireless services” (47 U.S.C. § 332(c)(7)(B)(i)(II)). The Federal Communications Commission (“FCC”) has promulgated orders interpreting and implementing Sections 253 and 332 of the Act, which include specification of reasonable periods of time under Section 332 and identification of the type of local action, or inaction, that may unlawfully prohibit service.

8. AT&T builds, owns, and operates personal wireless service facilities to provide wireless services to consumers, enterprise customers and public safety agencies, among others. One type of personal wireless facility that AT&T constructs for providing wireless services are “small cells,” which typically consist of short, unintrusive antennas and supporting equipment attached to utility poles and other structures in public rights-of-way and which assist in providing coverage for wireless service.

9. In 2020, AT&T has been in the process of negotiating with the City for a master Right-of-Way Use License Agreement (“MLA”) that would govern AT&T’s installation of small cell facilities on utility poles in the public right-of-way. However, the City’s proposed MLA incorporates a schedule of fees, which would be charged in connection with applications for installation of small cell facilities in the City, and which are excessive and violate federal law. As a result, AT&T has been unwilling to sign the City’s proposed MLA.

10. Instead, on August 14, 2020, AT&T filed a complete Small Cell Site Application on the City’s form (the “Application”), to obtain all necessary permits and approvals to replace an existing pole in the public right of way at 2920 SW Western Blvd, Corvallis, OR 97333, and to install a small cell facility on the new pole (the “Proposed Facility”). Thereafter, in response to the Application, the City advised AT&T that it would have to sign and submit the City’s proposed MLA before the City would act on AT&T’s Application, which AT&T is unwilling to do because the MLA contains excessive and illegal fees.

11. On September 27, 2018, the FCC released its “*Small Cell Order*,” *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, 33 FCC Rcd. 9088. In that order, the FCC, among other things, implemented Section 332’s requirement that localities act upon wireless siting applications within a “reasonable period of time” by specifying the presumptive maximum timeframes for small cell applications. In particular, the FCC established a “shot clock” of 60 days for applications seeking to collocate small cells on existing structures (such as an existing utility pole), or to replace those existing structures. 47 C.F.R. § 1.6003(c)(1)(i) & (iii); *Small Cell Order*, ¶¶ 13, 105.

12. The shot clock timeframe applies “to **all authorizations** a locality may require, and to **all aspects** of and steps in the siting process, **including license or franchise agreements** to access ROW, building permits, public notices and meetings, **lease negotiations**, electric permits, road closure permits, aesthetic approvals, and other authorizations needed for deployment.” *Id.* at ¶ 132 (emphases added); *see also id.* at ¶ 144 (“All of these permits are subject to Section 332’s requirement to act within a reasonable period of time, and thus all are subject to the shot clocks we adopt or codify here”).

13. In the *Small Cell Order*, the FCC also promulgated standards for cost-based pole attachment rates and other fees that may be charged in connection with small cell applications and installations. The rates and fees must represent a reasonable approximation of a local government’s objectively reasonable costs of, respectively, maintaining the right-of-way, maintaining a structure within the right-of-way, or processing an application or permit, and be

non-discriminatory. Small Cell Order, ¶¶ 32, 50, 69, 72. The FCC provided safe harbor presumptive maximum application fees and attachment rates, and concluded that excessive fees, including requiring in-kind services or other quid pro quos, constitute an unlawful, effective prohibition of service.

14. The *Small Cell Order* set presumptively reasonable annual recurring right of way access fees that may be charged by state or municipal agencies at \$270 for each small cell pole attachment, and recognized \$500 as the presumptively reasonable application fee for an initial batched application of up to five (5) small cell pole attachments.

15. In contrast to the presumptively reasonable fees promulgated by the FCC, the City seeks to apply, as part of the MLA, the following fees associated with installation of small cell facilities in the City, all of which violate the *Small Cell Order*:

a. 7% of Gross Revenue. The City seeks to charge, as part of the MLA, 7% of **all** gross revenue earned by the applicant within the City. The City's insistence on assessing such a fee amounts to the violation of federal law.

b. Annual Recurring Fee. The City seeks to charge, as part of the MLA, an Annual Recurring Fee of \$728.16 for each small cell facility attached to any pole or structure in the right-of-way.

c. Quarterly License Fee. The City seeks to charge for entering into an MLA with the City for installation of small cell facilities, a licensee fee of \$786.68 per quarter, or \$3,146.72 per year.

d. Site Application Fee. The City seeks to charge, as part of the MLA, a Site License Application Fee of \$1,241.12 per application.

16. The *Small Cell Order* shot clock for the Application expired on October 13, 2020, yet the City has taken no action on the Application. The shot clock on the Application has not been tolled.

17. AT&T is informed and believes that the City's failure to appropriately act on the Application and grant AT&T all permits and approval necessary for construction of the Proposed

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