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To: Members, Land Use Committee, Board of Representatives

From: Burt Rosenberg, Asst. Corporation Counsel

Re: 5G Agreement with AT&T and Verizon
File No. A21-0364
FEDERAL PREEMPTION OF STATE AND MUNICIPAL REGULATION RE 5G TECHNOLOGY

As promised at the September, 2023 meeting of the Land Use Committee, the Law Department submits this memorandum regarding federal preemption of municipal control of the installation of 5G apparatus.

Federal Authority Over Broadband Communications

Substantial federal regulation of internet services began with the Telecommunications Act of 1996, enacted to “promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage rapid deployment of new telecommunications technologies.” Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), hereinafter sometimes referred to as “the TCA”. The Act delegated authority to the FCC to regulate broadband and promote internet access for all Americans. This was the first major revision in the field of telecommunications law that shifted the way Congress regulated telecommunications since the 1934 Communications Act. In 1996, Congress changed its regulatory approach from economic-based regulation to competition-based regulation. The main objective of this new body of law was the development of competitive markets that would “accelerate deployment of advanced information technologies and services to all Americans.” H.R. REP. NO. 104-458, at 1 (1996) (Conf. Rep.).

What is the Authority of the City of Stamford to Restrict or Regulate the Deployment of 5G Installations?

Access to Municipal Infrastructure

Recent 9th Circuit law holds that even with respect to municipal rights-of-way (e.g. utility poles adjacent to a city street), the FCC's rules that municipal regulation of the municipal right- of-way is pre-empted by the Telecommunications Act of 1996. "The FCC's regulations in the Small Cell Order were premised on the agency's determination that municipalities, in controlling access to rights-of-way, are not acting as owners of the property; their actions are regulatory, not propriety, and therefore subject to preemption. Small Cell Order ¶ 96." *City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020).

Municipal Infrastructure

The Telecommunications Act requires cities to make a decision on applications for 5G installation within a reasonable period of time. See 47 U.S.C. § 332(c)(7)(B)(ii) ("A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time....". The Spectrum Act provides that the local government must grant all qualifying applications. 47 U.S.C. § 1455(a)(1).

Aesthetic Regulation

To the extent that a municipality has any regulatory authority at all that has not been pre-empted by federal law, it is aesthetic, but even then, the aesthetic regulation must be reasonable. The TCA expressly permits some difference in the treatment of different providers, so long as the treatment is reasonable. The courts have previously recognized that Section 332(c)(7)(B)(i)(I) of the Telecommunications Act "explicitly contemplates that some discrimination among providers ... is allowed." *MetroPCS, Inc . v. City & Cty. of S.F.* , 400 F.3d 715, 727 (9th Cir. 2005) (internal quotation marks omitted), *abrogated on other grounds by T-Mobile S., LLC v. City of Roswell*, 574 U.S. 293 (2015). To establish unreasonable discrimination, providers "must show that they have been treated differently from other providers whose facilities are similarly situated in terms of the structure, placement or cumulative impact as the facilities in question." *Id* . (citation and internal quotation marks omitted). This "similarly-situated" standard is derived from the text of Section 332, and "strike[s] an appropriate balance between Congress's twin goals of promoting robust competition and preserving local zoning authority." Id . at 728; *City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020)

A review of current law on strategies being attempted by municipal entities nationwide indicates that the FCC has responded to these attempts with orders interpreting the TCA and the Spectrum Act as prohibiting any meaningful attempt to regulate wireless infrastructure generally, including small cells which is the primary type of installation deploying 5G. The FCC's order and rulings have largely been upheld by the federal courts, though in certain limited

aspects - those related to aesthetic standards - the federal courts have ruled that the FCC overreached. *City of Portland v. United States, supra*.

Health Impacts of 5G

"In the Telecommunications Act, Congress preempted all municipal regulation of radiofrequency emissions to the extent that such facilities comply with federal emissions standards. 47 U.S.C. § 332(c)(7)(B)(iv)." *City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020).

The Federal Communications Commission has broad authority to regulate the use of radio communications and the operation of equipment capable of producing electromagnetic energy. 47 U.S.C. 301, 302a, 303(a)-(f). Under the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, the Commission has adopted regulations that specify safe radio-frequency exposure limits. See, *e.g.*, *Environmental Health Trust* v. *FCC*, 9 F.4th 893, 900-901 (D.C. Cir. 2021). Under those regulations, before the FCC authorizes the construction or use of any wireless facility, the applicant must first determine whether the facility will expose people to radio-frequency emissions in excess of those limits. 47 C.F.R. 1.1307(b). If no such exposure will occur, then no further action is required. But if the facility will result in such exposure, the applicant must prepare an environmental assessment describing the facility's likely effects. *Ibid.* An environmental assessment is a detailed accounting of the expected consequences of a specific action that may have a significant environmental impact— in this case, an FCC authorization of a transmitter or facility that exceeds the radio-frequency guidelines. See 47 C.F.R. 1.1308. The FCC then evaluates the environmental assessment—and potentially, an environmental impact statement—to determine whether and under what conditions to allow construction of the facility. See 47 C.F.R. 1.1314, 1.1315, 1.1317, 1.1319.

One of the means by which the FCC sought to accomplish the goal of facilitating the installation of 5G apparatus was "the reduction of the impediments imposed by local governments upon the installation of facilities for wireless communications." *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 115 (2005).

The TCA did not entirely divest state and local governments of their traditional "control over the siting of towers and other facilities that provide wireless services." *360° Commc'ns Co.* v. *Board of Supervisors*, 211 F.3d 79, 86 (4th Cir. 2000). Rather, the TCA states that, "[e]xcept as provided in [47 U.S.C. 332(c)(7)], nothing in [the statute] shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. 332(c)(7)(A).

The limitations on local zoning authority appear in 47 U.S.C. 332(c)(7)(B). Among other things, the TCA requires that state and local governments act on wireless-facility applications "within a reasonable period of time"; and mandates that decisions denying such applications "be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. 332(c)(7)(B)(i)(I), (ii), and (iii). In addition, the TCA provides that any suit to challenge a state or

local government's "final action or failure to act" in such matters must be brought in a "court of competent jurisdiction" within 30 days. 47 U.S.C. 332(c)(7)(B)(v); see generally *City of Rancho Palos Verdes*, 544 U.S. at 116.

The limitation in 47 U.S.C. 332(c)(7)(B)(iv), known as "Section 704," states:

Although Section 704 limits state and local zoning authorities, it does not dictate the outcome of any state or local zoning decision. See *Cellular Phone Taskforce* v. *FCC*, 205 F.3d 82, 96 (2d Cir. 2000), cert. denied, 531 U.S. 1070 (2001). Rather, "[t]he only onus placed on state and local governments exercising their local power is that they may not regulate personal wireless service facilities that conform to the FCC Guidelines on the basis of environmental effects of [radio-frequency] radiation." *Ibid.*

In *Santa Fe Alliance for Public Health and Safety v. City of Santa Fe,* Civ. 18-1209 KG/JHR (D.N.M. Jul. 6, 2021), suit was brought against the City of Santa Fe, the Attorney General of Mexico, and the United States by an organization representing individuals who claimed to have been injured by radio-frequency emissions due to the placement of wireless facilities in their communities, and who feared further proliferation of wireless facilities in and around Santa Fe, New Mexico. See *id.* at 91-96, ¶¶ 23- 27. The organization was particularly concerned with wireless facilities that may be located in public rights of way, including streets and sidewalks. See *id.* at 77, ¶ 3; *id.* at 100-106, ¶¶ 37-45.

The U.S. District Court dismissed the case on the grounds that it failed to state a claim for relief. *Id.* The U.S. Court of Appeals affirmed that decision, but remanded the case to the District Court to allow it to dismiss some claims for lack of standing. *Santa Fe All. for Pub. Health and Safety v. City of Santa Fe, New Mexico*, 993 F.3d 802 (10th Cir. 2021). Thus, there is legal precedent that a suit to prohibit 5G installations on the basis of health concerns cannot withstand the scrutiny of federal preemption.

The State of Connecticut Department of Public Health has issued the following memorandum regarding the health issues concerning RF exposure, which can be found at https://portal.ct.gov/-/media/Office-of-the-Governor/ct5g/5G-and-Public-Health.pdf:

5G and Public Health

5G (fifth generation wireless technology) provides vastly faster internet connectivity than 4G and 3G networks that cell phones currently operate on.

The Federal Communications Commission (FCC) sets exposure limits for radiofrequency (RF) exposures from cell phones and antennas. The limits are based on health guidelines developed by national and international organizations (including the US Food and Drug Administration, the World Health Organization and the International Commission on Non-Ionizing Radiation Protection) that protect from the heating effects of RF energy. Heating of body tissues is the health effect that is the basis for current health standards for RF radiation.

Some scientists around the world have raised concerns about 5G exposure, noting the lack of peer-reviewed research on the health effects from exposure to 5G emissions.

5G signals are higher frequency (shorter wavelength) than cell phones currently in use (3G and 4G). The higher frequency 5G signals are reflected by the skin to a greater extent than lower frequencies. This means that 5G energy absorption is more confined to surface layers of the skin rather than deeper tissues and therefore exposure to deeper tissues should be less.

In December 2019, the FCC concluded a six-year inquiry into whether its radio frequency standards should be updated. The FCC reviewed an extensive record of public comment, presentations, and peer-reviewed scientific papers in response to the inquiry. The FCC, made up of bi-partisan commissioners, voted unanimously to leave in place its existing standards for RF exposure limits deeming that they continue to be protective of public health. The FCC conclusion is consistent with the FDA statement in April 2019 that based on the totality of scientific evidence, existing RF exposure limits are protective of public health. RF emissions from 5G technology fall within the acceptable exposure range covered by FCC limits.

PRIOR STAMFORD LITIGATION

The Law Department has previously provided the Land Use Committee with records of the State of Connecticut Public Utilities Regulatory Authority in Docket No. 21-11-14, which involved an application of New Cingular Wireless, a subcontractor of AT&T, to install 5G equipment on a non-City owned utility pole in front of a residence located at 301 Shippan Avenue. The adjoining property owner, Len Bucaj, filed an objection to the installation, based upon issues pertaining to health effects relating to radio frequency emissions and the proposed location.

RIGHTS OF ADJOINING PROPERTY OWNERS

In its decision, PURA noted that CGS Section Conn. Gen. Stat. § 16-247h requires PURA approval of all small cell installations. In addition, telecoms seeking to erect fixtures and apparatus in the municipal right-of-way must also obtain the consent of property owners adjoining the proposed installation. Conn. Gen. Stat. § 16-234(f). The Authority has determined that, under Conn. Gen. Stat. § 16-234(f), "adjoining property owners" (APO) includes those residing within the 140-foot sight line of the relevant pole. The Authority requires that service providers "notify the immediate adjoining property owners in accordance with the specific language contained in Conn. Gen. Stat. § 16-234(f)." The term "immediate adjoining property owners" includes property owners whose property is physically contiguous to the affected section of the municipal right-of-way as well as property owners across the street from the affected section. If an adjoining property owner withholds consent, the person or company seeking to install fixtures in the public right-of-way may seek the Authority's approval in lieu of such consent. Conn. Gen. Stat. § 16-234(f). If, after a hearing, the Authority

finds that public convenience and necessity so require, the Authority may authorize the installation.

PURA REVIEW OF RF RADIATION MEASUREMENTS

In its decision, PURA made the following finding:

The Authority finds that the RF emissions for the proposed installation at Pole No. 11749 will be below MPE limits as prescribed by the Federal Communications Commission (FCC):

AT&T had RF engineers conduct an analysis of the RF emissions from the Facility and compared the emissions to the current MPE limits as prescribed by the FCC Office of Engineering and Technology Bulletin No. 65 (Bulletin 65, August 1997 Cumulative Power Density Table). Application, Attachment 2; Interrog. ADJ-02; LFE-2. These standards for exposure to RF emissions from wireless telecommunications facilities were adopted pursuant to 47 C.F.R. § 1.1310.

Significantly, PURA observed that federal law limits its authority regarding radio frequency emissions:

In its Decision dated April 5, 2017, in Docket No. 16-07-45, Application of Cellco Partnership d/b/a Verizon Wireless For Approval Of A Construction Plan To Install Wireless Facilities Within Certain Public Rights-Of-Way – Stamford SC1 CT, the Authority determined that the FCC has the sole legal authority for establishing and/or amending the RF emissions limits for wireless telecommunications equipment. The Authority also determined that 47 U.S.C. § 332(c) preempts the states from regulating the placement, construction, or modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emission to the extent that such facilities comply with FCC regulations. Id., pp. 7-8. Consequently, the Authority's review of RF emissions is limited to determining whether the RF exposure levels are within the standards prescribed by the FCC.

PURA then reviewed the evidence submitted by the carrier:

AT&T's expert witness testified that the RF exposure on the ground anywhere around the proposed installation is less than one-tenth of 1 percent of the maximum permissible exposure limit, or about 1,000 times below that limit, and that the predicted exposure limit at 294 Shippan Avenue, using very worst-case exposure predictions, came out to 0.3 or three-tenths of 1 percent of the exposure limit. Tr. 3/10/22, pp. 62-63. At the nearest home, exposure would be less than one-half of 1 percent of the maximum permissible exposure limit. Id. Consequently, the Authority finds that a person standing underneath the antenna on Pole No. 11749 and Ms. Bucaj's property at 294 Shippan Avenue will not be exposed to RF emissions approaching or in excess of the permissible limits.

Based on the evidence above, the Authority found that the RF emissions found that the proposed installation conformed to the standards established by the FCC.

In sum, PURA makes diligent efforts to ensure that 5G installations comply with the FCC's standards as to RF emissions. The telecoms must submit measurements of RF radiation to the City for proposed 5G locations. If there is any doubt as to dangers of harmful RF radiation to the public, the City has recourse to file objections to the proposed installation with PURA.

CONCLUSIONS

Pursuant to the Communications Act of 1996, any state or local laws regulation based on the environmental (including health) effects of radio frequency emissions is preempted. Case law has supported the preemption that FCC has sole federal authority to set health emissions standards. The FCC has standards in place for RF radiation and has a docket to update the standards.

As demonstrated by the PURA case discussed above, PURA vigorously requires telecom companies to comply with the FCC standards regarding RF emissions. If the City is not satisfied with the carriers' certification of compliance with those standards, it can file objections to the 5G installation with PURA.

It is clear from the foregoing statutory and case law that the City does not have authority to reject the Agreement with AT&T and Verizon based upon claims that 5G apparatus represents a threat to the public health and safety, as that issue is preempted by federal law.

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