



MEDINA, WASHINGTON

AGENDA BILL

Monday, September 23, 2024

Subject: American Towers Franchise (ATC) Franchise Agreement

Category: Public Hearing

Staff Contacts: Stephen R. Burns, City Manager and Tripp May, Shareholder and Managing Partner, Telecom Law Firm, PC

Summary:

ATC Outdoor DAS LLC (“ATC”) seeks a franchise from the City of Medina (“City”) to provide telecommunications services via the City’s public rights-of-way (“ROW”). ATC currently operates 10 small wireless facilities on wood utility poles in the ROW under a prior franchise that expired in December 2020. ATC must obtain a new franchise to continue its operations.

Staff recommends the City Council approve Ordinance No. 1032 (**Attachment 1**), which would approve a new franchise agreement between the City and ATC (the “Proposed Franchise”) (**Exhibit A to Attachment 1**) for 10 years.

The Proposed Franchise would largely maintain the status quo with additional protections for the City against potential liabilities that could arise from the agreement. Like the expired franchise agreement, the Proposed Franchise would: (1) require ATC to reimburse the City for all its costs; (2) not exempt ATC from any licenses, permits or other regulatory authorizations needed to conduct business, deploy new wireless facilities or expand existing wireless facilities in the City; and (3) preserve the City’s police powers to implement new ordinances in the future and require ATC’s compliance with such new ordinances.

Background:

Ordinance No. 863 – The Original Franchise to be Renewed

On November 8, 2010, the City Council adopted Ordinance No. 863 (the “Original Franchise”) (see **Attachment 2**). The Original Franchise granted ATC the nonexclusive right to access the City’s ROW and operate small wireless facilities to provide telecommunication services, subject to the terms and conditions in the Original Franchise and applicable provisions within the MMC.

The Original Franchise did **not** exempt ATC from any:

- business licenses or other authorizations required to transact or operate a business within the City;
- utility permits or other agreements/authorizations in connection with other ROW users;
- leases, licenses or other agreements required to access any private property or infrastructure owned by the City or third parties (e.g., poles, vaults, conduits, etc.);

- zoning permits or similar authorizations required to construct and operate telecommunication facilities within the City's ROW;
- police powers held by the City, which included without limitation the City's authority to adopt and enforce future ordinances necessary to protect public health, safety and welfare.

Although certain federal and state laws limit the City's ability to charge a revenue-generating franchise fee for small wireless facilities in the ROW and/or from telephone businesses, the Original Franchise entitled the City to recover all its costs in connection with the agreement. The Original Franchise also included broad insurance, indemnification and financial security requirements to protect the City and the ROW.

The Original Franchise expired on December 9, 2020. ATC needs a renewed franchise agreement to continue its operations within the City's ROW.

Existing Facilities Deployed by ATC

Under the Original Franchise, ATC deployed 10 small wireless facilities on wood utility poles within the ROW (see **Attachment 2**). The locations for these facilities are shown in **Figure 1**, below:

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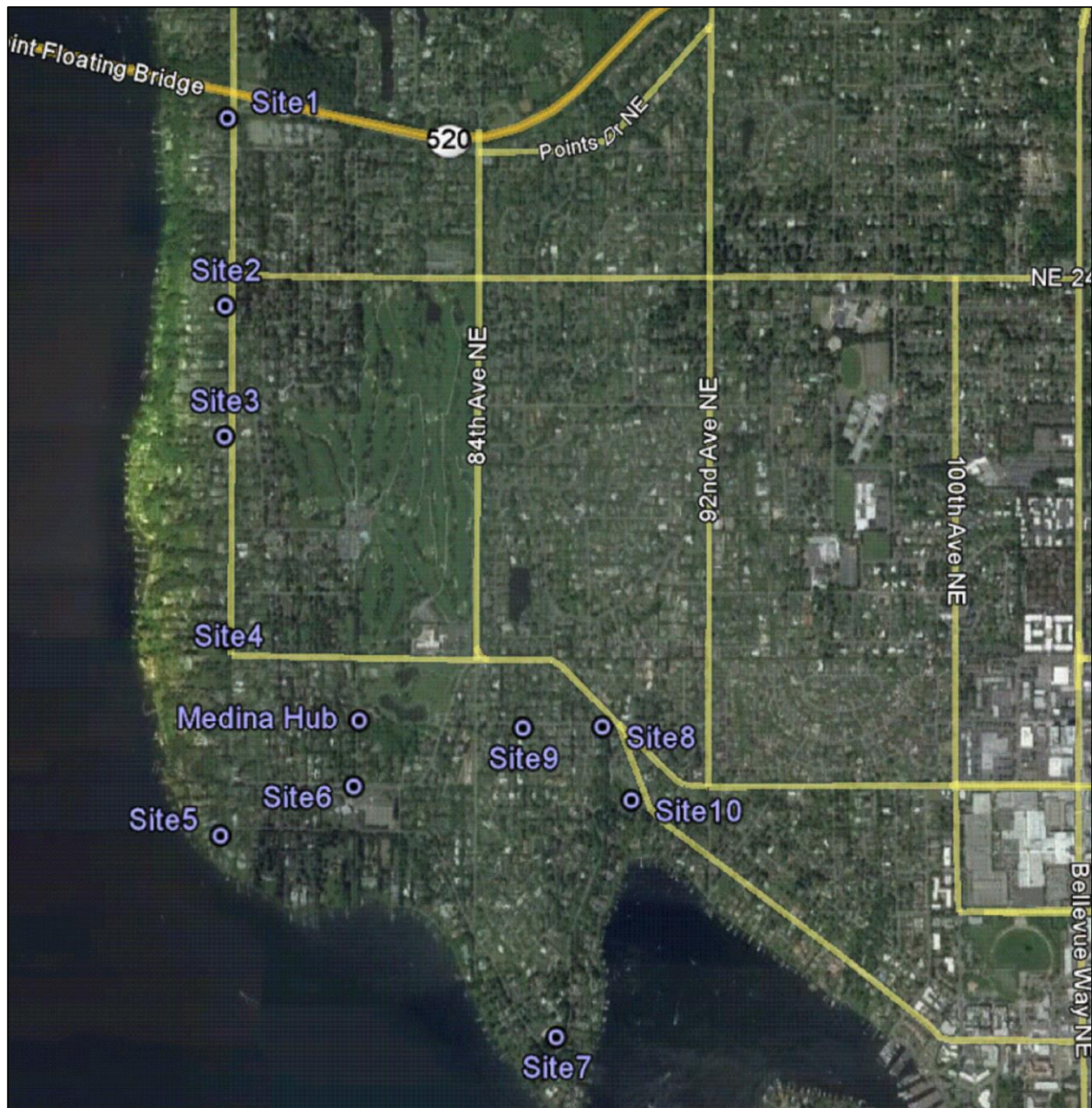


Figure 1: Existing ATC Small Cell Locations

ATC operates as an “infrastructure provider” that leases space at its node locations and capacity on its data transport network to “service providers” (e.g., AT&T, Verizon, T-Mobile and similar entities that offer personal wireless services directly to end users). Each node can be used to collocate (i.e., host) multiple service providers. Collocation can be an effective method to avoid additional obstructions in and burdens on the ROW.

Prior City Council Discussion Item

On September 9, 2020, the City Council received a report from staff about the Proposed Franchise. Key points from that report include:

- The City can (and does) require a franchise from providers like ATC as a precondition for access to the right-of-way (“ROW”), which is needed to install facilities and deliver telecommunications services.
- The franchise can (and does) require the provider to comply with generally applicable laws for: (1) public health, safety and welfare; (2) land-use approvals and compliance with aesthetic regulations; (3) the City’s general ROW management authority; and (4) fair and reasonable compensation in exchange for the right to use the ROW for telecommunication facilities, which includes both reimbursement for the City’s costs to implement and enforce the franchise and payment for generally applicable taxes and fees.
- The proposed franchise would renew ATC’s ability to operate 10 existing facilities within the City’s ROW. However, the proposed franchise does not directly or indirectly authorize ATC or its customers to any expanded or additional facilities, which would require separate applications and approvals under a separate review process.

The City Council had the opportunity to ask questions and allowed one member of the public to comment and present questions. Questions for staff broadly concerned (1) whether the City Council’s approval of the Proposed Franchise directly or indirectly authorized any new or expanded wireless facilities; and (2) the extent to which “liquidated damages” payable to the City under the Proposed Franchise could or should be increased.

Staff responds to these questions as follows:

- (1) No, the Proposed Franchise does not directly or indirectly authorize ATC to deploy new or expanded wireless facilities because the Proposed Franchise sets “ground rules” for the relationship between the City and ATC, which includes ATC’s obligation to comply with all applicable permitting requirements in the Medina Municipal Code (“MMC”). Accordingly, any new or expanded wireless facilities would be subject to a separate permit-review process set out in the MMC.
- (2) The liquidated damages required under the Proposed Franchise are equal or greater than the monetary penalties for code enforcement violations under the MMC.¹ For example, both the Proposed Franchise and the MMC imposes a \$100 fine per day for general noncompliance issues, but the Proposed Franchise imposes a fine between 1.4 and 1.74 time greater for stop-work order violations in the ROW. The greater fines are reasonable based on the seriousness of unpermitted work in the ROW and likelihood that City staff would need to immediately respond to violations, and the additional costs the City would likely incur as a result.

Legal Considerations:

Local authority over telecommunication facilities deployment—especially deployment within the ROW—is subject to multiple legal frameworks imposed at the federal, state and local levels. The subsections below summarize applicable legal considerations.

Federal Law Considerations

¹ See MEDINA, WASH., CODE § 1.15.330.

Federal law preempts local laws or acts that prohibit or effectively prohibit any entity's ability to provide personal wireless services or telecommunication services.² However, these statutes included protections for local authority. Federal law preserved local land-use authority, which included aesthetic discretion over wireless facilities placement and appearance.³ Federal law also creates a "safe harbor" for local laws or acts in connection with competitively neutral and nondiscriminatory requirements for: (1) ROW management and (2) fair and reasonable compensation from telecommunications providers.⁴

In 2018, the Federal Communications Commission ("FCC") interpreted these federal statutes. The key interpretations most relevant to this matter before the City Council are:

- **"Material Inhibition" Standard:** Any "local statute, regulation . . . or local legal requirement" qualifies as an "effective prohibition" if it "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."⁵ Under this standard, the FCC found that an effective prohibition could occur when a local government prevents new services or improvements to existing services.⁶
- **Cost-Based Fees for Small Wireless Facilities in the ROW:** The FCC found that fees for small wireless facilities in the ROW (both one-time and recurring) that exceed cost recovery effectively prohibit entity's ability to provide telecommunication services. Based on this view, state and local fees for small wireless facilities in the ROW must be reasonably approximate to the local government's objectively reasonable costs and imposed on a nondiscriminatory basis.⁷ However, this federal limitation does not extend to fees for wireline facilities in the ROW that connect small wireless facilities to the broader communications network.
- **Moratorium Ban:** Moratoria on telecommunications deployment generally qualifies as an effective prohibition.⁸ This interpretation includes *de jure* moratoria (i.e., express restrictions on new deployments adopted into local law) and *de facto* moratoria (i.e., practices or policies that, in effect, prevent a provider's ability to reasonably anticipate when deployments will be allowed to proceed).⁹

Although the FCC also attempted to curtail local discretionary authority over aesthetics, the Ninth Circuit invalidated those limitations.¹⁰

State Law Considerations

² See 47 U.S.C. §§ 253(a), 332(c)(7)(B)(i)(II).

³ See 47 U.S.C. § 332(c)(7)(A); *T-Mobile S. LLC v. City of Roswell*, 574 U.S. 293, 300 (2015); see also *City of Portland v. United States*, 969 F.3d 1020, 1040–1043 (9th Cir. 2020).

⁴ See 47 U.S.C. § 253(c).

⁵ See *In RE Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, FCC 18-133, 33 FCC Rcd. 9088, ¶ 37 (Sep. 27, 2018) (quoting *In RE California Payphone Ass'n*, FCC 97-251, 12 FCC Rcd. 14191, ¶ 31 (Jul. 17, 1997)) [hereinafter, the "*Small Cell Order*"].

⁶ See *Small Cell Order*, 33 FCC Rcd. 9088 at ¶ 37.

⁷ See *id.* at ¶ 50.

⁸ See *In RE Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, FCC 18-111, 33 FCC Rcd. 7705, ¶ 144 (Aug. 3, 2018) [hereinafter the "*Moratoria Order*"]; *Portland*, 969 F.3d at 1047–1048 (upholding the *Moratoria Order*).

⁹ See *Moratoria Order*, 33 FCC Rcd. 7705 at ¶¶ 145–151.

¹⁰ See *Portland*, 969 F.3d at 1040–1043.

State law authorizes cities to require telecommunications providers to obtain a “master permit” (i.e., a “franchise”) before the provider uses the local ROW.¹¹ However, cities may not “[u]nreasonably deny” a provider’s ability to use the local ROW for telecommunications services.¹² Unreasonable denials generally include any denials that would violate applicable federal law.¹³

With respect to franchise fees, state law generally prohibits local franchise fees on a “telephone business” that seeks access to the ROW.¹⁴ However, cities may collect: (1) reimbursement for administrative expenses directly related to the franchise and any permits issued in connection with the franchise; (2) applicable taxes authorized by state law, such as a utility tax; and (3) compensation on a site-specific basis for certain new or enlarged facilities in the ROW or facilities installed on city-owned infrastructure (e.g., light standards, traffic signals, wayfinding signs, etc.).¹⁵

Local Law Considerations

Medina Municipal Code (“MMC”) Chapter 15.06 governs franchises for telecommunications service providers in the ROW. The MMC requires all telecommunications providers who desire to use the ROW to provide telecommunication services to first obtain a nonexclusive franchise from the City.¹⁶

The MMC reserves the City’s right to “fair and reasonable consideration” and to recover all the City’s costs in connection with the franchise.¹⁷ MMC Chapter 15.10 also imposes common terms and conditions applicable to all franchise agreements, which include, for example: (1) an express reservation by the City to exercise police powers; (2) a requirement that franchisees to obtain permits for proposed installations within the ROW; and (3) various conditions to preserve the City’s ability to manage the ROW and mitigate a franchisee’s impact on other ROW users.¹⁸ The terms and conditions in the MMC automatically apply unless expressly stated otherwise in the franchise agreement.¹⁹

MMC Section 15.06.030 sets out factors for the City Council to consider when it weighs whether to approve or deny a franchise. Those factors are listed and analyzed in the “Staff Analysis” section of this report.

Procedurally, the City must conduct at least one public hearing to consider the franchise and cannot approve or deny a franchise until the next regularly scheduled meeting after the public hearing.²⁰

Proposed Franchise Agreement:

¹¹ See WASH. REV. CODE ANN. § 35.99.030(1).

¹² See *id.* § 35.99.040(1)(d).

¹³ See *id.* § 35.99.040(2). Like the FCC’s *Moratoria Order*, state law also generally prohibits moratoria on telecommunications facilities. See *id.* § 35.99.050.

¹⁴ See *id.* § 35.21.860(1).

¹⁵ See *id.* §§ 35.21.860(1)(a)–(e).

¹⁶ See MEDINA, WASH., CODE §§ 15.06.010, 15.06.050.

¹⁷ See *id.* §§ 15.06.090, 15.06.160–15.06.170.

¹⁸ See *generally id.* §§ 15.10 *et seq.*

¹⁹ See *id.* § 15.06.010.

²⁰ See *id.* § 15.06.030.

The proposed franchise agreement between the City and ATC (**Attachment 3**) (the “Proposed Franchise”) would largely maintain the status quo and renew ATC’s franchise for another 10 years from its effectiveness. If approved, the Proposed Franchise would:

- authorize ATC to continue its existing operations (*i.e.*, the 10 existing nodes already deployed within the City as shown in Figure 1 and Attachment 2);
- not directly or indirectly authorize or entitle ATC to any future expansions or additional nodes, which would require separate permit applications submitted by ATC and approved by the City;
- require ATC to comply with all applicable requirements in the MMC, which includes any future amendments or additions to the MMC;
- maintain broad insurance, indemnification and financial security protections for the City;
- clarify that the City retains the right to terminate the Proposed Franchise if ATC fails to cure any material defaults, even if the defaults trigger liquidated damages owed to the City;
- expand the City’s right to seek attorneys’ fees for claims that include declaratory relief on which the City prevails;
- require ATC to reimburse the City for its actual costs in connection with the Proposed Franchise;
- reserve the City’s right to require revenue-generating franchise fees if permissible under applicable laws; and
- become effective upon acceptance by ATC after adoption by the City Council at a second meeting after a public hearing.

Staff Analysis:

Staff evaluated each factor in MMC Section 15.06.030. The following recounts each factor and provides Staff’s analysis in *italics* below the codified factor.

- A. Whether the applicant has received all requisite licenses, certificates, and authorizations from the Federal Communications Commission, the Washington Utilities and Transportation Commission, and any other federal or state agency with jurisdiction over the activities proposed by the applicant;

ATC Outdoor DAS LLC is registered with the Washington Utilities and Transportation Commission as a Telecommunications Provider.²¹ Although ATC Outdoor DAS LLC does not provide services that require FCC spectrum licenses, its customers do and

²¹ <https://www.utc.wa.gov/company/42475>

will be required to maintain those licenses (and any other approvals).

- B. The capacity of the rights-of-way to accommodate the applicant's proposed facilities;

Each individual facility and the ROW's capacity to accommodate the proposed improvements would be evaluated on a case-by-case basis.

- C. The capacity of the rights-of-way to accommodate additional utility and telecommunications facilities if the franchise is granted;

Each individual facility and the ROW's capacity to accommodate the proposed improvements would be evaluated on a case-by-case basis.

- D. The damage or disruption, if any, of public or private facilities, improvements, service, travel or landscaping if the franchise is granted;

The Proposed Franchise requires the franchisee to take precautions to avoid damage or disruption to the ROW, and to repair any damage that nevertheless occurs. Work within the ROW would require construction, traffic control and any other applicable health and safety approvals that would be evaluated on a case-by-case basis.

- E. The public interest in minimizing the cost and disruption of construction within the rights-of-way;

The Proposed Franchise requires the franchisee to take precautions to avoid damage or disruption to the ROW, and to repair any damage that nevertheless occurs. Work with the potential to disrupt the ROW would require traffic control and any other applicable health and safety approvals that would be evaluated on a case-by-case basis.

- F. Applicant's proposed compliance with all applicable development guidelines;

The Proposed Franchise does not exempt the franchisee from all applicable development guidelines or other regulations or ordinances by the City.

- G. The effect, if any, on public health, safety and welfare if the franchise requested is granted;

No adverse impacts are a foreseeable result from approval of the Proposed Franchise. If an application for any future facility or other work created a foreseeable adverse impact on public health,

safety or welfare, the City would have the opportunity to impose mitigation conditions or deny such applications.

- H. The availability of alternate routes and/or locations for the proposed facilities;

Staff sees no comparable alternative to the ROW.

- I. Such other factors as may demonstrate that the grant to use the rights-of-way will or will not serve the community interest.

The Proposed Franchise will maintain the status quo under the Original Ordinance with additional liability protections and enforcement mechanisms for the City's benefit. If any future additions or expansions to the existing facilities created cause for concern, those proposals would be evaluated and any concerns would be mitigated on a case-by-case basis. Staff perceives no other factors to suggest that the Proposed Franchise would be counter to the community interest.

Recommendation:

Staff recommends that the City Council hold two public hearings (9/23/24 and 10/14/24), take public testimony, and direct staff to add a second public hearing to the October 14 City Council meeting for adoption of Ordinance No. 1032, approving the Proposed Franchise.

Attachments:

1. **DRAFT Ordinance No. 1032** – An Ordinance of the City of Medina, Washington, Granting a Nonexclusive Telecommunications Franchise to Construct and Operate a Distributed Antenna System; Providing for Severability; and Establishing an Effective Date, including **Exhibit A** – Proposed Franchise Agreement.
2. **Ordinance No. 863** – An Ordinance of the City of Medina, Washington, Granting a Nonexclusive Telecommunications Franchise to Construct and Operate a Distributed Antenna System; Providing for Severability; and Establishing an Effective Date.

Budget/Fiscal Impact: Various.

Recommendation: Hold public hearing, take public testimony, and add to October 14 City Council meeting for a second public hearing and action.

City Manager Approval: 

Proposed Council Motion: N/A

Time Estimate: 45 minutes