

**Before the Planning Commission**

**Planning Department File No. 2021-01-003**

**CONDITIONAL USE APPLICATION  
FOR  
Wireless Telecommunication Facility  
And  
Sage-Grouse Rule Permit**

**Planning Commission Meeting Date: January 28, 2021**

- 1. OWNER OF RECORD:** **Oregon Department of State Lands**  
775 Summer St NE, Ste 100  
Salem, OR 97301
- 2. APPLICANT:** **Smartlink on B/O New Cingular Wireless  
PCS, LLC**  
11232 120th Ave NE #204  
Kirkland, WA 98033
- 3. PROPOSED ACTION:** CUP approval of an unmanned wireless telecommunication facility consisting of a 449' guyed tower with anchor tenant's tower. Applicants request a sage-grouse rule permit pursuant to OAR 660-023-0115.
- 4. PROPERTY IDENTIFICATION:** Tax Lot 100, T28, R37E, Sec. 31, Map 28S37E, Malheur County Reference Number 15740.
- 5. PROPERTY LOCATION AND DIRECTIONS:** From Burns Junction, head north on the Steens Highway after approximately 29 miles, turn right (east) on private access road. The proposed site is on the left in approximately 0.3 miles.
- 6. ZONING:** Exclusive Range Use (C-A2).
- 7. PARCEL SIZE:** 5301.04 acres.
- 8. PARCEL USE:** The parcel is exclusively used as rangeland.
- 9. SURROUNDING USE:** The surrounding area is exclusively used as rangeland.
- 10. ACCESS:** Access is a private access drive originating off of Hwy 78.
- 11. SANITATION REQUIREMENTS:** No sanitation is required.

**12. FIRE PROTECTION:** The proposed Wireless Telecommunication Facility is not within a fire district.

**13. NATURAL HAZARDS:** None known.

**14. WATER RIGHTS:** N/A.

**15. ZONING HISTORY:** No relevant zoning history is noted.

## **I. GENERAL CONDITIONAL USE CRITERIA**

**Malheur County Code (MCC) 6-6-7, OAR 660-033-0130 – GENERAL CRITERIA TO EVALUATE SUITABILITY:** In considering the suitability of proposed conditional uses, the Planning Commission shall base its decision upon the following criteria:

A. Comprehensive Plan goals and policies, as applicable.

**Finding of Fact: The county comprehensive plan and county zoning regulations provide the conditional use process for a wireless telecommunication facility. Additionally, the proposed Facility satisfies several of the applicable goals and policies of the Malheur County Comprehensive Plan including, but not limited to, Goal 3 “Agricultural Lands”, Goal 5 “Open Space, Scenic and Historic Areas, and Natural Resource” and Goal 11 “Public Facilities and Services”.**

- **The proposed Facility forwards the intent of Goal 3 - Agricultural Lands: “To preserve and maintain the agricultural land in the county for agricultural purposes”. The proposed Facility will encompass 2500 sq. ft. on a 5,301.04-acre parcel of vacant land. The Facility will not impact the remainder of the parcel to be used for agricultural purposes.**

- **The proposed Facility forwards the intent of Goal 5 - Open Space, Scenic and Historic Areas, and Natural Resource, specifically “Fish and Wildlife Habitat”. AT&T’s representative, Smartlink, has been working closely with ODFW, Malheur County and Trileaf to discuss the mitigation process that is required due to the proposed Facility being located within the Low-Density Sage Grouse Habitat. AT&T is proposing to employ engineering methods for deterring corvid and raptor nest establishment and perching opportunities for foraging (hunting). Nest excluding devices on appropriate surfaces as well as polyethylene twine netting is proposed to be installed on the support structure. The products are specifically designed to deter the use of structures by avian species.**

- **The proposed Facility forwards the intent of Goal 11 - Public Facilities and Services: “To plan and develop a timely, orderly, and efficient arrangement of public facilities and services to serve as a framework for urban and rural development”. The proposed new Facility will provide sufficient continuous and**

**uninterrupted wireless service within the Targeted Service Area, resulting in fewer dropped calls, improved call quality, and improved access to additional wireless services the public now demands (this includes emergency 911 calls). The proposed WTF will also best support the FirstNet Network. FirstNet is a separate communications platform operating on a physically separate, dedicated core that is purpose-built for public safety based on first responder specifications and requirements.**

B. Specific plan recommendations.

**Finding of Fact: MCC 6-6-8-8 regulates the conditional use process for a wireless telecommunication facility.**

C. Existing development and viewpoints of property owners in the surrounding area.

**Finding of Fact: Letter notice was sent to adjoining landowners and published in the Argus Observer on January 8, 2021. No comments were received. A public hearing was held on January 28, 2021.**

D. Availability of services and utilities.

**Finding of Fact: There is no burden to any of the services and utilities anticipated.**

**ROADS: During construction, the burden on Hwy 78 will be limited to material transport and light truck traffic. A technician may visit the site one time per month for maintenance/ inspections.**

**POLICE & FIRE: There is no anticipated increase in protection requirements. The fenced lease area will be covered in gravel.**

**SEWER & WATER: A WTF does not require sewer or water, therefore, no burden is anticipated.**

**ELECTRICAL & TELEPHONE: As necessary, improvements to the electrical service may be required for operational needs and will be the responsibility of the applicant and its future co-locators.**

**SOLID WASTE: A WTF does not produce solid waste, therefore, no burden is anticipated.**

E. The effect of the proposed use on the stability of the community's social and economic characteristics.

**Finding of Fact: The proposed tower will have no effect on the farming/ranching practices that would interfere with the stability of the community's social and economic characteristics.**

**The proposed WTF will provide a social benefit to the community by providing new AT&T coverage to an area that does not currently have any. The WTF will accommodate future co-location opportunities, which will support the economy by**

**providing a choice of wireless carriers in the area.**

- F. It does not interfere with traditional fish and wildlife use of habitats determined critical or sensitive in the Fish and Wildlife Habitat Protection Plan for Malheur County.

**Finding of Fact: The proposed site falls within the Low-Density Sage Grouse Habitat. AT&T's representative, Smartlink, has been working closely with the Oregon Department of Fish and Wildlife and Malheur County to discuss the project and its impacts on the Sage Grouse Low-Density Habitat. Please see Applicant's Attachment 5 - Sage Grouse Mitigation Plan for detailed information. The mitigation plan has been approved by ODFW. As a condition to approval, the Applicant must satisfy all areas of the mitigation plan.**

G. General Criteria

1. Increasing setbacks of structures to reduce possibilities of overshadowing adjoining property, noise, odor or night lighting nuisances.

**Finding of Fact: The proposed WTF will be located more than 110% the height of the tower from all property lines. Please see Applicant's Attachment 10 - Zoning Drawings for demonstration of AT&T's compliance. WTF's are a passive use and will not produce noise or odor. The generator will run approximately one time per month during business hours. Tower lighting will comply with FAA requirements.**

2. Landscaping improvements for the visual benefits of the subject site and for the improved appearance of the neighborhood and County.

**Finding of Fact: The proposed WTF will be installed on a vacant parcel, over 1400ft East of Hwy 78. The WTF will be surrounded by a 6ft high chain-link fence without landscape screening. Please see Applicant's Attachment 10 - Zoning Drawings for further details on the proposed location and design.**

3. Location and size of driveway access points and right-of-way widening and improvement for present and future traffic circulation and safety.

**Finding of Fact: Access to the lease area will be via an existing private access drive that will be improved and extended approximately 4950ft. A 12ft access gate will be installed just south of the existing cattle grate at the beginning of the access drive off of Hwy 78 to allow for construction access. The access drive will not be accessible to vehicular pedestrians. Please see Applicant's Attachment 10 - Zoning Drawings for further details.**

4. Visual screening of outdoor waste and storage areas.

**Finding of Fact: This criterion is not applicable. The proposed WTF will not**

**produce outdoor waste or contain storage areas. The tower and ground equipment will be located within a 50ft x 50ft fenced compound.**

5. Control and focusing of outdoor lighting to avoid glare being directed beyond property limits.

**Finding of Fact: The only lighting proposed is a light on top of the tower that will comply with FAA regulations. In addition, a security light will be located on the outside of the walk-in-cabinet. No lighting will provide glare onto adjacent properties. Please see Applicant's Attachment 10 – Zoning Drawings.**

6. Special criteria listed below, as applicable.
- H. Allowance of Certain Uses: A use allowed under Section 6-3A-3 of this Title shall be approved only where it is found that the use will not:
1. Force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; or
  2. Significantly increase cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use.

**Finding of Fact: No agricultural efforts are currently evident within 0.25 miles of the proposed WTF. The proposed WTF will not significantly increase the cost of, or force a significant change to, accepted farm or forest practices on surrounding lands, as the WTF will only encompass 2500 sq ft on a 5,301.04 acre parcel. The remainder of the parcel may be developed however the Oregon Department of State Lands chooses.**

## **II. SPECIFIC CONDITIONAL USE CRITERIA:**

### **MCC 6-6-8-8 – Wireless Telecommunication Facilities**

#### A. Siting Prioritization:

1. All wireless telecommunication facilities shall be sited in accordance with the following priorities, in order of preference:
  - a. Collocation by placement of antenna or other transmission and reception devices on an existing tower, building or other structure such as a utility pole or tower, water tank or similar facility.

**Finding of Fact: AT&T generally considers all siting possibilities within, and adjacent to, a search ring to determine the best location for a new facility to meet the targeted service objectives. AT&T will first attempt to utilize an existing tower or structure for collocation at the desired antenna height. If an existing tower or structure is not available or determined to be infeasible, AT&T will then propose a new tower. For this proposed WTF, AT&T's construction and real estate group, with the assistance of outside consultants, thoroughly analyzed all siting**

**options and found that the proposed location is the only available property within the search ring that will meet AT&T's services objectives in the Targeted Service Area.**

**There are no pre-existing towers, buildings or other structures within or directly adjacent to the search ring available for collocation. The closest existing utility pole is approximately 30-40 ft tall and is located roughly 5 miles south at Folly Farm Road and Hwy 78, extending southeast. Pursuant to AT&T's RF engineers, a 449ft antenna tip height is the minimum height needed for a site within the search ring to best meet AT&T's service objectives within the Targeted Service Area.**

- b. Use of alternate technology whereby transmission and reception devices are placed on new or existing structures which are consistent in height with and sited similarly to types normally found in the surrounding area, such as telephone, electrical, or light poles.

**Finding of Fact: As noted above, the closest existing utility pole is located approximately 5 miles south and is approximately 30-40 ft tall. Pursuant to AT&T's RF engineers, a 449ft antenna tip height is the minimum height needed for a site within the search ring to best meet AT&T's service objectives within the Targeted Service Area.**

- c. Siting of a new tower in a visually subordinate manner. As used in this subsection "visually subordinate" means the relative visibility of a wireless telecommunication facility where that facility does not noticeably contrast with the surrounding landscape. Visually subordinate facilities may be partially visible, but not visually dominant in relation to their surroundings as viewed from residences, highways and other vantage points.

**Finding of Fact: The subject parcel and the large parcel properties surrounding it are open range land characterized by low vegetation and variations in elevation. There are no residences in the area and the tower will be located approximately 1400 ft east of Hwy 78.**

- d. Siting of a new tower in a visually dominant location, but employing concealment technology. As used in this subsection a "concealment technology" means technology through which a wireless telecommunication facility is designed to resemble an object present in the natural environment or to resemble a building of a type typically and customarily found in the area.

**Finding of Fact: The relatively narrow profile of a guyed tower and its distance from Hwy 78 and other property lines will effectively subdue its visible impact. Concealment technologies typically explored for WTF's are not consistent with or effective for the type of installation which is**

**being proposed.**

- e. Siting of a new tower in a visually dominant manner without employing concealment technology.

**Finding of Fact: Applicant has determined that the location of the proposed site provides the best opportunity for the proposed WTF due to the existing private access road extending off Hwy 78, the ground elevation and surrounding terrain. The proposed WTF is located on vacant high desert open range land that will encompass 2500 sq. ft on a 5,301-acre parcel. The Facility is proposed to be setback over 1400 ft East of Hwy 78, and even further from the North, South and East property lines. Please see Applicant's Attachment 6—Photo Simulation and Attachment 10—Zoning Drawings for demonstration of AT&T's proposed design and location.**

**As noted above, the relatively narrow profile of a guyed tower and its distance from Hwy 78 and other property lines will effectively subdue its visible impact. Concealment technologies typically explored for WCF's are not consistent with or effective for the type of installation which is being proposed.**

B. Height, Setback and Access Requirements:

- 1. Wireless telecommunication facilities shall be limited to the height necessary to provide the service.

**Finding of Fact: Applicant's technical analysis supports a tower of 450' would target 90.33 percent of the identified area of influence. This is ten times greater than current coverage. Please see Applicant's Attachment 3—RF Justification for demonstration that the WTF is the minimum necessary height to reasonably serve the operational requirements of the WTF.**

- 2. Notwithstanding the setback requirements in the zone in which the facility is to be located, the following setbacks apply. Telecommunication towers shall be:
  - a. Set back from the property line at least the height of the tower plus ten percent (10%). A "tract" (contiguous property under the same ownership) shall be considered a single parcel for the purposes of setbacks.

**Finding of Facts: The setback to the proposed WTF is 1,436' from the west property line, 15,260' from the east property line, 9,528' from the north property line, and 4,973' from the south property line. The towers height is 449' and the required setback would need to be 494'. The proposed WTF meets this criterion.**

- b. Except as provided in subsection B(2)(b)(1) of this section, the plot leased by

the licensed carrier for the wireless telecommunication facility shall be at least six hundred feet (600') from residences and schools not on the applicant's tract, or as far away from nearby residences and schools as it is sited from the closest dwelling on the applicant's tract.

**Finding of Fact: There are no residences or schools within 600 ft of the proposed Facility.**

1. A facility may be sited closer to a school when the school district makes a request and demonstrates the facility is necessary for educational purposes.

C. Construction Standards:

1. The following construction standards shall apply to all new or replacement telecommunication facilities:
  - a. No lighting of wireless telecommunication facilities is allowed, except as required by the Federal Aviation Administration, Oregon Department of Aviation or as a condition of approval by the Malheur County Planning Commission.

**Finding of Fact: A light will be located on top of the tower due to the height and will comply with FAA regulations. Please see Applicant's Attachment 7—ODA Determination, which recommends marking and lighting for the Facility. Please see Applicant's Attachment 8—FAA TOWAIR Report which demonstrates FAA registration is required.**

- b. Based on the existing conditions and vegetation at the proposed site, the wireless telecommunication facility shall be constructed or surfaced with materials to reduce visibility of the facility by the use of nonreflective materials that minimize glare and blend the structure into the surrounding environment.

**Finding of Fact: Pursuant to the ODA, marking is required for the proposed WCF. The proposed Facility will be painted per FAA / ODA specifications utilizing nonreflective paint. Please See Applicant's Attachment 7—ODA Determination and Attachment 10—Zoning Drawings.**

- c. Antenna(s) and associated equipment located on the same structure as the antenna shall be surfaced in a nonreflective material color to match the structure on which it is located.

**Finding of Fact: The antennas and associated equipment located on the structure will be painted per FAA/ ODA specifications utilizing nonreflective paint. Please See Applicant's Attachment 6—Photo**



### **Simulations, and Attachment 10—Zoning Drawings.**

- d. Warning and safety signs, up to three (3) square feet in area, are allowed. All other signs are prohibited.

**Finding of Fact: AT&T is not proposing any signage other than that required above and by certain state and federal laws.**

- e. Equipment areas must be enclosed by a chainlink fence or equivalent with or without slats for screening.

**Finding of Fact: AT&T is proposing to install a 6ft chain-link fence around the 50 ft x 50 ft Lease Area. In addition, there will be three guy wire anchor points that will be located within a 15ft x 20ft fenced Lease Area. Please see Applicant's Attachment 10—Zoning Drawings, Sheets A2.0 and A2.1.**

- f. Nothing in this subsection preempts the coloring requirements of the Federal Aviation Administration or the Oregon Department of Aviation.

**Finding of Fact: Pursuant to the ODA, marking is required for the proposed WTF. The proposed Facility will be painted per FAA / ODA specifications utilizing nonreflective paint. Please See Applicant's Attachment 7—ODA Determination and Attachment 10—Zoning Drawings.**

### **III. SAGE-GROUSE RULE PERMIT CRITERIA (OAR 660-023-0115)**

- 7. Conflicting uses. For purposes of protecting significant sage-grouse habitat, conflicting uses are:
  - a) Large-scale development; and
  - b) Other activities, which require review by county decision makers pursuant to OAR 660-033-0120 (Uses Authorized on Agricultural Lands) table and are proposed:
    - A) In a core area within 4.0 miles of an occupied or occupied-pending lek;
    - B) In a low-density area within 3.1 miles of an occupied or occupied-pending lek; or
    - C) In general habitat within 3.1 miles of an occupied or occupied-pending lek.

**Finding of Fact: AT&T's proposed WTF is considered a large-scale development, as the guyed tower is more than 50ft in height. The tower is also located within low density sage grouse habitat.**

- 8. Pre-Application Conference. A county should convene a pre-application conference prior to accepting an application for a conflicting use in significant sage-grouse

habitat. The pre-application conference should include, at a minimum, the applicant, county planning staff and local ODFW staff.

**Finding of Fact: Applicant Response: AT&T’s representative, Smartlink and the environmental consulting firm, Trileaf, have held multiple meetings with Mr. Evans, Malheur County Planning Director and Mr. Seidel, Sage Grouse Mitigation Coordinator with ODFW to discuss the proposed WCF and Sage Grouse Mitigation Plan.**

10. Program to achieve the goal of protecting significant sage-grouse habitat in low density area.
  - a) A county may approve a large-scale development in low density area upon applying the mitigation hierarchy as follows:
    - A) Avoidance. Before proceeding with large-scale development activity that impacts a low-density area, the proponent must demonstrate that reasonable alternatives have been considered and that the activity or other action cannot avoid impacts within a low-density area. If the proposed large-scale development can occur in another location that avoids both direct and indirect impacts within a low-density area, then the proposal must not be allowed unless it can satisfy the following criteria:
      - (i) It is not technically or financially feasible to locate the proposed largescale development outside of a low-density area based on accepted engineering practices, regulatory standards, proximity to necessary infrastructure or some combination thereof; or
      - (ii) The proposed large-scale development is dependent on geographic or other physical features(s) found in low density habitat areas that are less common at other locations, or it is a linear use that must cross significant sage-grouse habitat in order to achieve a reasonably direct route.

**Finding of Fact: AT&T’s proposed Facility is a large-scale development within the low-density sage grouse habitat. AT&T acknowledges, understands and intends to comply with the above provision. Please see Applicant’s Attachment 5—Sage Grouse Mitigation Plan.**

- B) Minimization. If the proposed use cannot be sited by avoiding a low density area altogether, including direct and indirect impacts, it shall be located to minimize the amount of such habitat directly or indirectly disturbed, and to minimize fragmentation of the low density area(s) in question by locating the development adjacent to existing development and at the edge of the low density area when impossible. Uses should minimize impacts through micro-siting, limitations on the timing of construction or use, or both, and methods of construction.

**Finding of Fact: The Applicant acknowledges, understands and intends to comply with the above provision. Please see Applicant’s Attachment**

## **5—Sage Grouse Mitigation Plan.**

- C) Compensatory Mitigation. Required consistent with the provisions of paragraph (9)(a)(D) above.

**Finding of Fact: The Applicant acknowledges, understands and intends to comply with the above provision. Please see Applicant’s Attachment 5—Draft Sage Grouse Mitigation Plan which demonstrates compliance with the provisions of paragraph (9)(a)(D) above.**

## **V. APPLICANT’S PROPOSED FINDINGS OF FACT**

The Applicant has submitted additional proposed findings of fact in the conditional use application.

## **VII. CONDITIONS OF APPROVAL**

1. All required road access permits must be obtained from the Oregon Department of Transportation. If necessary, all easements must be obtained along with a road maintenance agreement between all parties.
2. The current mitigation plan shall be finalized by the applicant in consultation with and approved by the Department prior to project construction.
3. The applicant shall provide mitigation as agreed to in the mitigation plan.
4. Minimization measures outlined in the mitigation plan shall be utilized and maintained through the construction, operation, and decommissioning phases of the project.
5. The project shall be removed upon decommissioning and any disturbed area shall be reclaimed to standards identified in the mitigation plan.
6. A ten (10) foot buffer must be maintained within the lease area and beyond the fence to decrease the chances of a wildfire.
7. After the county makes a determination of discontinued or nonuse, the property owner shall, within six (6) months, complete removal operations.
8. This approval is valid for two years from the date of this order. Substantial action must be taken within this time period or the approval will lapse.

## **IX. EXHIBITS**

1. Applicant’s conditional use application with attachments.
2. Email from John Eden, Oregon Department of Transportation

3. Letter from Nigel Sidel, Oregon Department of Fish & Wildlife.

**CONCLUSION**

Based upon the foregoing findings of fact, the Malheur County Planning Commission makes the following conclusion and decision:

Substantial evidence exists in the record to support the conclusion that the application meets the general and specific criteria established in the Malheur County code and Oregon Revised Statutes for a wireless telecommunication facility in an exclusive range use zone.

**ORDER**

This application for a conditional use permit is approved.

**APPEALS**

The appellate body for appeals from the final decision of the Planning Commission is the County Court. To file an appeal an appellant must file a completed notice of appeal on a form prescribed by the Planning Department with a \$200.00 appeal fee with the Planning Department not later than 5:00pm on the tenth day following the mailing of written notice of the decision. Notice of appeals may not be received by fax or email. The notice must include a statement raising any issue relied upon for the appeal with sufficient specificity to afford the County Court an adequate opportunity to respond to and resolve each issue. All appeals from the Planning Commission's final decision shall be based on the record of the hearing made before the Commission. Therefore, no additional information or testimony not included in the record of the hearing before the Planning Commission may be brought before the appellate body. The appellant must pay for the transcription of the hearing appealed from and submit the transcript to the Planning Department within ten (10) days after the date of notice of appeal is filed or ten days after the hearing tape is mailed or given to the appellant, whichever is later.



\_\_\_\_\_  
Planning Commission Chair  
Kathy Clarich



\_\_\_\_\_  
Date