

**Comment Letter A-1 - Air Products Manufacturing Corporation (letter dated December 11, 2018)**



Air Products Manufacturing Corporation  
3100 West Ray Road, Suite 310  
Chandler, AZ 85226  
Telephone (480) 752-6008

December 11, 2018

City of Santa Clara  
Department of Public Works  
Attn: Ms. Falguni Amin, Principal Engineer-Design  
1500 Warburton Avenue  
Santa Clara, CA 95050

Dear Ms. Amin,

We are writing to formally submit our comments regarding Santa Clara's proposed Pavement Preservation Ordinance that is scheduled to be considered by City Council at its February 5, 2019 meeting.

As you know, Santa Clara and Silicon Valley are home to many hi-tech businesses. In fact, the tech industry is a primary driver of the region's economy, particularly jobs and commerce.

Many of those companies, particularly high-tech manufacturers, require industrial gases such as nitrogen to produce their products and conduct R&D for next generation technology.

One of the primary means of industrial gas delivery to dozens of businesses is a pipeline system that resides in many of the streets across the region, including in Santa Clara. Air Products operates a nitrogen pipeline originating at our industrial gas plant at 1515 Norman Avenue.

While the industrial gas pipeline is not a public utility, it functions in very much the same manner, delivering a product or service to many buildings, plants and facilities throughout the region.

Because the economy is fluid, there are business creations, closures, and emergency service requirements and interruptions happening frequently. For instance, if a business that requires nitrogen for its processes starts-up or moves into Santa Clara, it would immediately require nitrogen service. That would require street cuts to install or modify the lateral from the main pipeline into the building or plant. Curtailing that excavation for 3-5 years because of a newly constructed, reconstructed, resurfaced or sealed street would be an undue hardship on both Air Products and its customers. It certainly has the potential to make Santa Clara less competitive in attracting and retaining tech companies

We recognize that the ordinance contains provisions that grant the Director of Public Works discretionary authority to authorize exemptions. Sections (c), (3), (4) & (5) are the applicable provisions.

We are seeking favorable interpretation of the proposed ordinance under those subsections, that Air Products' business interests and those of our high-tech customers and prospective customers would be included in the Director of Public Works' discretion to authorize street cuts/opening as required to meet customer demand. If the City's interpretations aren't favorable to our position, the ordinance will have a significant negative effect on our business and the regional economy.

**A1.1**

**A1.2**

Will the City Staff formally respond to our comments so that we know the status of our concerns before the City Council meeting on February 5? Also, is the February 5 Council meeting open to the public? We would certainly be happy to discuss this matter with Public Works staff. I can be reached at [sullivanw@airproducts.com](mailto:sullivanw@airproducts.com) or (480) 752-6008.

**A1.3**

Thank you for your kind attention to our comments and for your consideration of our concerns.

Sincerely,



W. John Sullivan  
Atmospheric Gases Business Manager, West Region

**Response to Comment Letter A-1 - Air Products Manufacturing Corporation (letter dated December 11, 2018)**

A1.1 Comment noted.

A1.2 Per the Ordinance, the Director of Public Works and City Engineer are granted discretionary authority to authorize exemptions. Each request for an exemption submitted under the requirements of the Ordinance will be evaluated by the Director of Public Works or City Engineer based upon the information submitted. At this time, without information submitted for a specific request, it would not be possible to determine if the business interests of Air Products or those of its high-tech customers and prospective customers warrant an exemption.






A1.3 The Ordinance will be considered for adoption by the Santa Clara City Council at a public hearing that will be open to the public. All comments received will be included for consideration by the Council.

**Comment Letter A-2 - Comcast (e-mail received December 17, 2018)**

CITY OF SANTA CLARA

PROPOSED PAVEMENT PRESERVATION ORDINANCE

COMCAST COMMENTS

- 1. Regarding the time frame set forth in 12.25.230, this effectively provides more than a 3 (or 5 as the case may be) year moratorium on cuts/openings, as the clock starts at the end of the year in which the resealing or reconstructing occurs. Additional questions/observations:
    - a. How will companies be notified of completion of work? 
    - b. Time frame should begin upon completion of work 
  - 2. Exemptions
    - a. No definition of utility service – we would assume that Comcast would be covered by this provision but need clarification 
    - b. Standard of “no reasonable means of providing service exists” – if there is no service lateral going to residence/building, we assume that would be sufficient standard, but please clarify if not 
    - c. Exemption Request: what is the time frame for Director to act upon exemption request? Additionally, need to understand what “appropriate conditions” would be imposed as this may substantially add to the costs of construction and may imperil work to be done 
- A2.1**

**A2.2**

**A2.3**

**A2.4**

**A2.5**

**Response to Comment Letter A-2 - Comcast (e-mail received December 17, 2018)**

- A2.1 The Ordinance grants the Director of Public Works and City Engineer discretionary authority to implement practices and procedures to ensure street pavements are preserved. Upon adoption of the Ordinance, under the authority so granted, the City intends to implement a coordination program to notify excavators of planned and completed work.
- A2.2. Due to the volume of encroachment permit applications and work completed within City streets in any given year, it is impractical for the City to enforce the beginning timeframe for restriction based on an overabundance of specific dates for specific streets. For uniformity and simplicity for both the City and permittees, the timeframes for restriction are consolidated as beginning on December 31 of the year in which the work occurred.
- A2.3 For the purposes of this Ordinance, the City would consider Comcast in the same regard as a utility and therefore Comcast would be covered by this provision by reason of its franchise right to use the public rights-of-way as granted under the Digital Infrastructure and Video Competition Act of 2006 (DIVCA).
- A2.4 Per the Ordinance, the Director of Public Works and City Engineer are granted discretionary authority to authorize exemptions. Each request for an exemption submitted under the requirements of the Ordinance will be evaluated by the Director of Public Works or City Engineer based upon the information submitted. At this time, without information submitted for a specific request, it would not be possible to determine if service lateral going to residence/building warrants an exemption.
- A2.5 The proposed Ordinance is a section under Chapter 12.25, Excavation and Use of City Rights-of-Way, of the City of Santa Clara City Code. Under the Code, there are no mandatory timeframes specified for the City to approve or deny a permit. The Ordinance grants the Director of Public Works and City Engineer discretionary authority in granting an exemption to determine appropriate conditions to ensure the rapid and complete restoration of the street and the pavement. Any such conditions would be determined at the time of application based upon the information submitted.

**Comment Letter A-3 – Zayo Group, LLC (letter received December 18, 2018)**

December 18, 2018

City of Santa Clara  
 Department of Public Works  
 Attn: Ms. Falguni Amin, Principal Engineer – Design  
 1500 Warburton Avenue  
 Santa Clara, CA 95050  
 Via: Electronic Mail

RE: City of Santa Clara Proposed Pavement Preservation Ordinance

Dear Ms. Amin:

Thank you for your letter dated November 28, 2018, regarding the City of Santa Clara's proposed pavement preservation ordinance (the "Proposed Ordinance"), and for the opportunity to comment on the Proposed Ordinance prior to it being considered by the Santa Clara City Council. Zayo Group, LLC ("Zayo") and its predecessor companies have a long history of infrastructure development in the City of Santa Clara, and the Proposed Ordinance is of great interest to us.

As you know, the Federal Communications Commission (FCC) recently adopted its declaratory ruling in the "Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment" matter (the "FCC Declaratory Ruling"), which clarified the types of state and local moratoria that violate Section 253(a) of the Telecommunications Act of 1934 (as amended) (the "Act").<sup>1</sup> Section 152 of the Declaratory Ruling specifically addresses "street cut" requirements, similar to the Proposed Ordinance. It provides as follows:

**There may be situations in which states or localities impose limitations on deployment, but allow for alternative means of deployment in a manner that is reasonably comparable in cost and ease. Providers sometimes inaccurately characterize these limitations as moratoria, but we find that characterization to be inapt where the limitations do not foreclose deployments and carriers' ability to build the facilities they need to provide service. For example, some "street-cut" requirements, which providers sometimes refer to as moratoria, are not designed to thwart construction, but to promote "dig once" policies "in order to preserve the roadway and incentivize interested providers to deploy telecommunications conduit," and would not qualify as unlawful moratoria if the state or locality imposing such street-cut requirements does not bar alternative means of deployment such as aerial lines or sublicensing existing underground conduits.<sup>ii</sup>**

With the Declaratory Ruling in mind, Zayo's concern with the Proposed Ordinance is that it does not, on its face, provide for, or even reference, "alternative means of deployment". Zayo urges the City to take the Declaratory Ruling into account during its review of the Proposed Ordinance and welcomes the opportunity to discuss the Proposed Ordinance with City Staff at their convenience. Please contact Randy Whitehead, Zayo's Senior Director of Underlying Rights for the Western Region, at Randy.Whitehead@zayo.com if you have any questions in the meantime.

Sincerely,

A handwritten signature in black ink, appearing to read "Preston Johnson".

Preston Johnson,  
 Regional Counsel  
 Zayo Group, LLC  
 720.639.8143  
 preston.johnson@zayo.com

**A3.1**

Cc: Dan Stoll, Zayo Senior Vice President  
Jeff Jarvis, Zayo Vice President of Network Development & OSP Operations  
Randy Whitehead, Zayo Senior Director of Underlying Rights

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<sup>1</sup> Section 140 of the Declaratory Ruling provides as follows:

Section 253(a) of the Act specifies that “[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” Notwithstanding that clear admonition, some states and localities have adopted moratoria on the deployment of telecommunications services or telecommunications facilities, including explicit refusals to authorize deployment and dilatory tactics that amount to de facto refusals to allow deployment. To provide regulatory certainty and further deployment, we issue this Declaratory Ruling making clear that such state and local moratoria violate section 253(a) and strike at the heart of the ban on barriers to entry that Congress enacted in that provision.

<sup>2</sup> The footnote to Section 152 also provides:

To promote deployment, we encourage state and local governments that enact a street-cut requirement that allows for alternative means of deployment to still provide advance notice to enable providers to deploy in the right-of-way in the least disruptive manner possible.

**Response to Comment Letter A-3 – Zayo Group, LLC (letter received December 18, 2018)**

- A3.1 City has reviewed and considered the information referenced in the comment letter. Because the regulations contained in the Ordinance are to preserve roadway pavements and because neither the Ordinance nor other provisions in the Code of the City of Santa Clara bar alternative means of deployment, the Ordinance would not be considered an unlawful barrier to deployment consistent with the conclusions referenced in the comment letter.