Moore-Love, Karla

From: Moore-Love, Karla
Sent: Wednesday, February 08, 2012 2:57 PM
To: Papaefthimiou, Jonna; Grumm, Matt; Crail, Tim; Schmanski, Sonia; Edwards, Kenneth; Oishi, Stuart
Cc: Rees, Linly
Subject: FW: LU 11-125536 CU AD : Final Recap and Conclusions
Attachments: Final Recap and Conclusions for March 1 City Council Hearing.pdf

Testimony for Verizon land use case #11-125536 CU AD returning to Council on March 1st.

Karla

Karla Moore-Love | Council Clerk
Office of the City Auditor
503.823.4086

From: Euro Guy [mailto:euroguy_pdx@yahoo.com]
Sent: Wednesday, February 08, 2012 12:50 PM
To: Moore-Love, Karla
Cc: Neal Sutton; Chris Hill; Cate, Sylvia
Subject: LU 11-125536 CU AD : Final Recap and Conclusions

Karla,

Attached please find a letter from the Mt. Scott-Arleta Neighborhood Association's Land Use Chair, Neal Sutton and myself. (For the convenience of you and all other parties involved in distributing this letter, we are submitting this letter in electronic PFD format.)

Please confirm whether you received this e-mail and specifically the attached letter correctly and that the letter will be entered into the record and provided to Mayor Adams and our City Commissioners as well as any others as applicable.

Thanks,

Marcel

MT. Scott-Arleta Neighborhood!

Date: February 8, 2012

AUDITOR 02/08/12 PM 2:58

To: Portland Mayor and City Council
City Hall
1221 SW Fourth Avenue
Portland, OR 97201

Re: LU 11-125536 CU AD (HO 4110025)

Recap and Final Conclusion

Dear Mayor and City Council,

The issue at stake in this appeal is whether the Hearings Officer was correct in denying the application based on evidence in the record. Upon City Council's decision to re-open the record and allow new evidence, the question has been slightly modified to be "whether the Hearings Officer or City was correct in denying the application based on evidence currently in the record".

Either way, the underlying question is:"Do the application and the proposed development meet all of the applicable ***approval criteria in City zoning code*** as needed for this development to be approved."

The answer to that question is clearly: "No! "

The views of the citizens in our neighborhood have been documented and expressed in several documents that have been submitted into the record, in this letter, as well as several other documents. The emphasis of each of our citizens in their individual responses has been slightly different, and in order to maintain the variety and authentic character of their responses we have not attempted to condense that all in one response but instead have maintained those individual responses. We'd like to stress though that we are fully behind the responses submitted by our citizens and neighbors, most notably those from Chris Hill, Marcel Hermans and Matt Cooper.

In the January 11, City Council Meeting Commissioners defined a few questions which they considered key in order to understand and determine whether the Hearings Officer was correct.

In the new information appellant introduced, prior to, during and after the City Council hearing, appellant brought up several ***other issues that are interesting, yet not related to the issue at stake*** and not relevant to the Commissioners questions or to the ultimate decision to be made.

These issues raised by appellant that are ***irrelevant*** to the actual decision at stake are:

a) Appellant states and repeats in several instances throughout their documents that FCC regulations need to be complied with, and argues in their information that ***the proposed facility will meet FCC regulations***.
This aspect is not disputed, is not at the core of the Hearings Officer's denial or points raised by opponents, and is not relevant to the issue at stake: the question at stake is whether this proposal meets current City code!

Appellant's Exhibits 1, 2 and 3 by Hatfield and Dawson, dated January 24 and 25 are therefore ***irrelevant*** to this case.
Exhibit 1 on page 6 ends with: "In conclusion.....**for purposes of complying with FCC power limits** ....." Followed by the sentence: "In short, the relevant basis for expressing ERP, **for purposes of determining compliance with FCC power limits**, is .....".

Exhibit 2 on page 11 ends with: "Conclusions. The proposed Verizon Wireless personal wireless telecommunications facility will be **in compliance with current FCC and local rules regarding public exposure to radio frequency electromagnetic fields'**.
FCC prohibits local authorities from regulating these facilities ***based on*** public exposure to radio frequency electromagnetic fields if these facilities meet FCC regulations on that aspect. That is the reason City code just refers to FCC on that particular one aspect, and this also demonstrates again that all (other) zoning code regulations for these facilities are in fact ***not*** dealing with or relevant to these public exposure issues. It is those other zoning code requirements that this proposal does not meet or comply with!

[It is also not the City's code intent to regulate exposure aspects of this or other facilities. The fact that FCC regulations regarding to exposure already apply, shows that the City's intent is to add additional requirements in their zoning code, and is not just to mirror FCC requirements, since those are federal requirements.]

So both conclusions of Exhibits 1 and 2 merely reiterate that the facility meets ***FCC regulations***, which is not a prime issue of dispute. Opponents have shown and Hearings Officer has confirmed that the proposed facility **does not meet *City code*. That is the issue at stake**!
That point is not addressed and not disputed or rebutted by appellant in these exhibits!
(Exhibit 3 is similarly irrelevant to the issue at stake, as it simply a Q&A of FCC regulations.)

b) Appellant makes several arguments that the current Portland's zoning code is outdated and insufficient in regards to RF Transmission Facilities.

As is clear from many materials in the record, all parties appear to agree to this point. Opponents, City staff, as well as appellant have made statements to that effect.

Although interesting, this point made by appellant is of course also not relevant to this case. The fact of the matter is that this application will need to be processed under current code, and ***the only relevant matter therefore is whether the proposed development meets the applicable criteria as stated in the current code!***

If it does, it needs to be approved, if it doesn't it cannot legally be approved. Questions whether existing code is outdated or not, code properly protects Portland's citizens, code disproportionally favors businesses or not, may be ***interesting but are not relevant*** to the particular decision in front of City Council: does this proposal meet City code, and can it be legally approved?

c) Appellant went to great lengths to argue that zoning code as currently written and in effect is not ideal from RF Industry perspective for rolling out new technologies in Portland.

Just like the other issues argued by appellant and addressed above, this point is of course also ***not relevant to this case***. This point may very well be true, and we certainly encourage City Council to review and update City policy and code on RF Infrastructure, but again, the fact of the matter is that this application will need to be processed under current code, and ***the only relevant matter therefore is whether the proposed development meets the applicable criteria as stated in the current code! (***Appellant's Exhibit 4 is therefore also irrelevant to this case.)

d) Appellant is also quite repetitive in arguing that RF Infrastructure and Cellular technology are a beneficial part of modern life, and that Portland's citizens expect and deserve to have access to those. This point is also not disputed in this case as we don't disagree with that general concept and statement. However, just like the other issues argued by appellant and addressed above, ***this point is again not relevant to this case***. This case is not about whether to have RF Infrastructure in Portland or not. This case is simply about ***this one proposed facility and whether it meets the applicable criteria as stated in the current code!***

In addition to these arguments by appellants that are irrelevant to this case, there are also several arguments that are relevant but that are misrepresented by appellant:

a) One of the most important ones in this category is undoubtedly what appears to be appellant's key issue, in which appellant claims this proposed facility will meet City code because it meets FCC limits. In both the oral testimony during the January 11, City Council hearing as well as in

the written materials submitted prior to and at that meeting, appellant claims several times that ***"FCC regulates the maximum power of wireless facilities such as this one, to 1,000 watts ERP (1,640 EIRP) or less"***. This is absolutely not true, and we have attached documentation (attachment 3) from FCC that very clearly confirms that that claim is not true!

b) In addition, appellant claims that legislative intent was something different than what ended up in the city code. This too has been clearly shown to be not true, both in submittals from Chris Hill and Marcel Hermans (dated January 25, 2012) as well in Ms. Cate's memo dated January 25, 2012 as explained in attachment 1.
c) The statement from appellant that the proposed facility will operate at less than 1,000 watt ERP is also a blatant misrepresentation of the facts, as many documents in the record show the facility will operate at more than 1,000 watts ERP.
d) More of such incorrect statements are pointed out in the January 25, 2012 letters from Chris Hill and Marcel Hermans.

We also believe it's essential for us to comment on some important points made by Ms. Cate's in her memo dated January 25, 2012 since some of that information holds relevant keys to the disputed issues in this case. Therefore, we have attached those essential comments to this letter as attachment 1.

The ***main items directly related to the actual issue at stake and to the Commissioners questions as posed at the January 11, 2012 City Council hearing*** have become very clear throughout these proceedings (and were reconfirmed and even strengthened after reopening the record) and are addressed below. These points are:

1) Applicant proposes a ***facility with a ERP well over 1,000 watts***, even though that is the maximum limit the City zoning code allows under the code article applicant applied under.
2) Both FCC and City code define ***the ERP of a Facility as the total ERP of all channels and all antennas***.
3) The proposed development ***does not meet City code*** (and should therefore be denied).
4) ***City code is outdated*** and insufficient to be used to properly regulate these facilities, and should therefore not be used anymore to permit these facilities.
5) ***Applicant has a*** long and steadily growing ***record of*** making false and incorrect statements, and ***misrepresenting information*** and the facts in this case.

Each of these points in more detail:

1) **Applicant proposes a facility with a ERP well over 1,000 watts, even though that is the maximum limit the City zoning code allows under the City code article applicant applied under.**

   On page 6 of its Exhibit 1, appellant confirms that the total ERP of the facility is 20,172 watts (based on all channels of the facility). Appellant even states there "Again, I would stress that this ERP value is based on data already in the record".

On that same page appellant explains that this can be broken up in either 2,346 watts per frequency band or also in 2,346 watts per antenna, neither of which numbers of course are below the 1,000 watts threshold applicable to the zoning code section the application was filed under.

So where the record prior to the January 11, 2012 City Council hearing already had multiple documents showing the proposed facility operating at an ERP greater than 1,000 watts, appellant in its additional new evidence confirms that the facility will operate at more than 1,000 watts ERP.

2) Both FCC and City code define the ERP of a Facility as the total ERP of all channels and all antennas.

The record contains many pieces of evidence that clearly prove that where City code speaks to a "Facility operating at 1,000 watts ERP or less" the meaning of that is just that: the total ERP of that facility.

To summarize the main sources of evidence:

a) The "White Paper by Marcel Hermans, December 2011", titled "***Meaning of 'ERP' in Portland City Code***" explains from many different perspectives and ***with many separate lines of evidence*** that the ERP is to be counted as the total ERP of the facility: all channels of all antennas! This white paper was submitted into the record on January 25, 2012 by e-mail from Marcel Hermans.

b) In addition, FCC was asked the question and the confirmation e-mail was received from FCC and is included in the record. It states:

> *In contrast, for radiofrequency (RF) exposure purposes, we generally do not specify the total ERP for a facility. However,* ***to determine exclusion from further radiofrequency (RF) exposure evaluations we consider the total ERP for multiple antennas and frequencies that are collocated as specified in Section 1.1307(b)(1). For the wireless services using sector antennas, the ERP is summed for all channels and all antennas*** *operated by a single licensee in a single sector in each particular service or frequency band. (emphasis added)*

c) To show that this is not just an opinion or interpretation of an FCC employee in charge of replying to e-mails, one can look this up in the FCC regulations as well.

47 CFR Ch. I (10–1–04 Edition), section 1.1307 (page 326) specifically states (see link below):
http://www.gpo.gov/fdsys/pkg/CFR-2004-title47-vol1/pdf/CFR-2004-title47-vol1-chapI-subchapA.pdf

"The term power in column 2 of table 1 refers to ***total operating power of the transmitting operation in question in terms of effective radiated power (ERP),***

equivalent isotropically radiated power (EIRP), or peak envelope power (PEP), as defined in § 2.1 of this chapter.

a. For the case of the Cellular Radiotelephone Service, subpart H of part 22 of this chapter; the Personal Communications Service, part 24 of this chapter and the Specialized Mobile Radio Service, part 90 of this chapter, ***the phrase total power of all channels in column 2 of table 1 means the sum of the ERP or EIRP of all co-located simultaneously operating transmitters owned and operated by a single licensee****." (emphasis added)*

d) Chris Hill's letter dated January 25, 2012 titled "Opponent's Response to Verizon's Legal Memo and Hearings Memo".

On page 4, 5 and 6, under points 2 and 3, Mr. Hill also and again clearly explains that there is really no reason or any legal ground to suggest any other meaning of "Facility operating at 1,000 watts ERP or less" than just what it says: a facility operating at 1,000 watts ERP or less.

3) The proposed development does not meet City code (and should therefore be denied).

As has been shown in many of the submitted pieces of evidence in the record, the proposed development does not meet City code. Just one example of a more than 30-page explanation of all the points in which this facility does not meet City code is the 10/2/2011 letter submitted by the Mount Scott-Arleta Neighborhood Association, in the record coded as H-15.a.

Appellant has done nothing in their additional submittals to dispel any of the substantive points made, but rather tried to distract from those points by arguing about the relevance of the non-licensed status of their RF Engineer, and by trying to prove that the facility would meet FCC regulations (although this is of course clearly not an appeal to FCC or an FCC-ruling, but an appeal to City of Portland, based on non-compliance with Portland's City zoning code.

The list is too long to repeat here, but some of the ones worth mentioning are (more backgrounds on all of it in the referenced documents, H-15.a. and others):

a) ***Negative impacts*** have been shown to be in the order of $ 900,000 to $ 1 million, even if conservative numbers from scientific methods and studies are being used! ***No mention was made by applicant of negative impacts***, even though code speaks to mitigating those and weighing those against possible benefits...
b) This facility is not allowed since applicant failed to prove there are no ***other feasible ways to provide the service***. On the contrary, several feasible alternatives were identified by applicant and others, and many other alternatives are available as well but were never investigated or reported on.
c) Again: there are many more items of non-compliance shown in the referenced documents in the record!

4) **City code is outdated and insufficient to be used to properly regulate these facilities, and can therefore not be used to permit these facilities.**

Both appellant and opponents have shown that City code has several deficiencies for dealing with the current-day types of RF facilities within Portland City's neighborhoods. City staff has testified in several documents in the record that developments in the RF industry and technology over the last 10 years have been dramatic, hence City code not properly outfitted to regulate facilities of the current kind.

Even the PCIA – Wireless Infrastructure Association and the Northwest Wireless Association state in their joint January 25, 2012 letter to City Council agreed with us that "***the City should revise its zoning regulations***", urge "the City of Portland to ***seriously consider the effect the City's zoning regulations have*** ....to provide wireless telecommunication services" and that "City of Portland's ***Zoning Regulation currently stifles*** the ability to deploy the infrastructure necessary to provide the wireless services...." !

Similarly, appellant's main argument at the January 11, 2012 City Council hearing and in its submittals thereto was that *there must have been a different intent* by the City as compared to what is actually stated and written in City Zoning Code. Obviously, the point appellant is trying to make is that **although this particular proposed development does not meet City code**, that was actually never the intent of the code.....

Similarly, City staff has provided multiple documents that show that there are serious issues and challenges with applying current City code to applications such as this one. (As a reminder to other documents in the record (e.g. G-4), ***City Staff had to*** specifically "coach" and ***redirect applicant*** to revise their initial application because as initially submitted it could not be approved ***because of its failure to meet the applicable code***!

Given that even applicant and their regional and national trade organizations argued in their official letters in to the record that ***City Zoning Code is not proper to regulate these facilities***, it would be an extremely bad and dangerous public policy decision to attempt to use this current zoning code to rule in such a contentious case like this one (and especially since the Hearings Officer had already ruled that the application and proposed development do not meet City code!).

There is only one proper way to deal with zoning code that has been proven to be outdated and insufficient: it needs to be revised and updated! Any urgent decisions needed in the mean time should err to the side of caution: a temporary stay until things have been sorted out and an application can be approved is 100 times better than approving something that should not be approved based on current code and that may or may not be approved in the revised code, depending on the outcome of that code revision! Irreparable harm should be avoided even if that due diligence may require a temporary delay of some applications!

5) **Applicant has a long and steadily growing record of making false and incorrect statements, and misrepresenting information and the facts in this case.**

Besides the previously noted point that applicant violated ORS by illegally using the term "RF Engineer" in the public realm for an individual not properly licensed to do so (for which the first steps for an official law enforcement investigation have been initiated!), and making false statements in to the official record on that (Hopfer to Hearings Officer, 10/3/2011), there are several other relevant statements made by applicant in to the record that are incorrect and that are misrepresenting the facts. Below are just some of those examples, with many more throughout the documents submitted by applicant/appellant:

In its January 11, 2012 "Appellant's Legal Memo" addressed to City Council, appellant misrepresents the facts as to ***opponents view*** (claiming it being directed against ***harmful RF emission impacts***), as to a "***substantial risk***.....from unreasonably discriminating" while there is not a trace of such aspect in this case, and by appellants incorrect claim that the Hearings Officer "failed to determine ***whether*** there is substantial evidence in the record...." while he in fact did determine ***that there was a lack of reliable substantial evidence*** in the record!

In its January 6, 2012 "***Appellant's Hearing Memo***" addressed to City Council, one of appellant's main points throughout the memo is the claim that "***the FCC regulates the maximum power of wireless facilities such as this one, to 1,000 watts ERP (1,640 EIRP) or less***". This is listed on page 2, twice under section B); is repeated on page 3 under II.A), on page 5 near the bottom, as well as on page 6 under D)! This claim appears to be one of the main pillars of appellants appeal, yet it ***is simply not true***!

Anyone can read for themselves in FCC regulations that ***there is no such thing*** as "*FCC regulating the maximum power of wireless facilities such as this one, to 1,000 watts ERP (1,640 EIRP) or less*"!!

Appellant's statement is simply not true, which we did confirm with the FCC in a phone conversation, and which we had subsequently re-confirmed by FCC in writing in an e-mail that was then submitted into the record on January 25, 2012 at 9:15 am (coded as number 19).

Unlike what appellant incorrectly claims, FCC regulations *DO NOT* place a 1,000 watts ERP limit on wireless communication facilities!!!

In the January 11, 2012 City Council hearing, appellant can again be heard several times claiming the opposite and trying to convince City Council that FCC does impose such limit!

Therefore, considering all these points described above, and with all the evidence in the record, there is absolutely no way we can see how this proposed facility could possibly be approved under the current City code.

We'd be more than happy to assist the City in its efforts to revise the applicable zoning code sections in an expedited manner, and are ready to share more of our insights as to City code regarding RF facilities whenever the City would be interested in that information. However, at any time the City code should be applied as it is effect, and the City should never engage in attempting to process applications based on what future code revisions may or may not entail!

Respectfully submitted,

Neal Sutton,

Land Use Chair, Mt. Scott-Arleta Neighborhood Association

& Marcel Hermans

Attachment 1:

Comments to staff memo, Sylvia Cate to Mayor Adams and City Council, January 25, 2012

In her memo, Ms. Cate covers several issues that need some clarification beyond the information provided by Ms. Cate.

1. As to ERP and FCC's use of ERP, the main facts that already have been established in the record are that in one field of application ***FCC does use ERP*** in the exact same way as the ***Portland zoning code*** does, namely ***as a threshold*** to determine the need for further review. In that particular case, the FCC specifically uses ERP as being the ***total ERP of all channels of all antennas of the facility***.
   There is remarkable similarity in FCC's use of ERP as a review-threshold for certain RF-facilities, and City zoning's code in use of ERP as a review-threshold for certain RF-facilities. The attached e-mail from FCC dated November 2, 2011 (Attachment 2) very clearly shows that for use as a review-threshold, all channels of all antennas are to be taken into account for establishing ERP.

2. Ms. Cate's account of legislative history on page 4 of the memo describes how the issue of whether and how to re-define ERP came up in 1997. Ms. Cate's memo describes:

   > "The legislative history of this major amendment included the following request to the City by the wireless telecommunications industry:
   >
   > Define ERP: Currently, the term "effective radiated power' (ERP) is not completely defined in the text of the chapter. According to BOP current planning staff, ERP is interpreted and enforced by radio channel for the purposes of these regulations.
   >
   > Requested action: Modify Section 33.274 to include/define ERP is evaluated on a per channel basis."

   This paragraph in the memo is extremely important and illustrative to the key points of legislative intent, since it shows that:

   a.) The request to change to a definition of "per channel basis" was indeed brought up and known during the major amendments, but ***specifically not included or enacted***! The only conclusion can be that ***legislative intent was not to define ERP that way***, since the request was specifically made and rejected!!!
   b.) Also, ***from the request in itself*** as well as from the specific language of the request it is very clear that the ***industry at that time also did not buy into staff's interpretation of the code***

as it was in effect (just as it is clear from several other documents in the record that they currently don't buy into such interpretation). Industry comment uses language as "*According to* BOP current planning staff..." and "...BOP *current* planning staff..." and "...is *interpreted and enforced*...." (emphasis added) all to clearly distinguish that ***interpretation*** from a situation in which there is a description which is clear, commonly understood and agreed to by all.

If the industry would have had the same interpretation as BOP staff, they would never have raised the issue as it would have been completely clear and undisputed what it means! (The fact that in addition to all of this, Ms. Cate may actually have been one of the principal individuals of BOP staff they referred to may be interesting, but isn't even relevant for the actual point.)

Separately, on page 5 under that same point 2 in her memo, Ms. Cate reiterates that "4G technologies are not recognized by the current zoning code regulations" and that "regulatory language become obsolete seemingly overnight" which also underlines the fact that there are no grounds to argue or reasons to believe that legislative intent was for facilities like the currently proposed one to be allowed under section 33.815.C, as appellant attempts to argue.

3. As to the issue of the FCC shot clock, it is important to remember that all that such shot clock does is require local governments ***to act on*** applications "within a reasonable period of time". Obviously, there is no requirement to *approve* facilities that don't meet City code (and by other laws that would of course actually be ***illegal***). Verizon's application has been reviewed and acted upon by the City in a timely manner: the Hearings Officer denied the application within the set timeline.

   Similarly, the City can and should process all future applications within reasonable timelines. If those are allowed by current city code they should be approved, if they are not, they should be denied.

   Applicants can decide for themselves whether to file any application for new a facility, and they can do that currently as well as after nay zoning code revisions have been made.

   The City has no obligation at all (on the contrary: they have the obligation not to) process any applications based on presumed future changes to the code which are not yet in effect at the time of the application.

   Therefore, the City should always process applications based on then current code. Given feedback from citizens, City staff and the RF industry, the City should also work on revising its policies and zoning code as it applies to RF facilities. Verizon and any other company can file applications under current code, or wait to file until code has been revised. The City may want to request that mobile communication companies voluntarily hold off on any new applications

until code has been properly revised. Alternatively, the City could consider an official temporary moratorium during which no new applications will be processed by City staff pending the zoning code revision process. Even that safer and more rigorous step does not appear to be in conflict with FCC shot clock rules as long as the City revises the code "***within a reasonable period of time***". If zoning code revisions typically take 18 months, then that is by definition a "*reasonable time*" so the City can obviously take 18 months to revise the code. This seems especially the recommended approach, since citizens, as well as City staff and RF industry have provided testimony that current zoning code is no longer suitable to process applications for these kinds of facilities.

4. As to the issue of the requirement for a licensed engineer, City staff and appellant seem to be *mixing up and/or confusing* this issue with the ***legal requirements of ORS***. State law in ORS defines who is allowed to use the ***protected title of "Engineer"*** in the public realm, just like doctors, attorneys, law enforcement officials and many other professionals are protected through licensure. ***Verizon violated that State law*** by submitting official documents to the City which they pretended to be by an "RF Engineer".

5. On page 7 of her memo Ms. Cate states that "*the opposition argues that Verizon's proposal actually consists of 9 distinct facilities*". We don't believe that that is what any of this proposal's opponents have argued. This may (?) stem from initial confusion caused by the City attempting to regulate the proposal under the category for facilities operating at less than 1,000 watts ERP, while the application showed the facility would be operating at much higher ERP levels, then leading to the assumption that perhaps the City considered antennas as separate facilities.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance	)	WT Docket No. 08-165

DECLARATORY RULING

Adopted: November 18, 2009 **Released:** November 18, 2009

By the Commission: Chairman Genachowski and Commissioners Copps, McDowell, Clyburn, and Baker issuing separate statements.

TABLE OF CONTENTS

I. INTRODUCTION

1. This Declaratory Ruling by the Commission promotes the deployment of broadband and other wireless services by reducing delays in the construction and improvement of wireless networks. Wireless operators must generally obtain State and local zoning approvals before building wireless towers or attaching equipment to pre-existing structures. To encourage the expansion of wireless networks, Congress has required these entities to act "within a reasonable period of time" on such requests.[1] In many cases, delays in the zoning process have hindered the deployment of new wireless infrastructure.[2]

[1] 47 U.S.C. § 332(c)(7)(B)(ii).

[2] *See* para. 33, *infra.*

Accordingly, today we define timeframes for State and local action on wireless facilities siting requests, while also preserving the authority of States and localities to make the ultimate determination on local zoning and land use policies.

2. On July 11, 2008, CTIA – The Wireless Association® (CTIA) filed a petition requesting that the Commission issue a Declaratory Ruling clarifying provisions in Sections 253 and 332(c)(7) of the Communications Act of 1934, as amended (Communications Act), regarding State and local review of wireless facility siting applications (Petition).[3] The Petition raises three issues: the timeframes in which zoning authorities must act on siting requests for wireless towers or antenna sites, their power to restrict competitive entry by multiple providers in a given area, and their ability to impose certain procedural requirements on wireless service providers. In this Declaratory Ruling, we grant the Petition in part and deny it in part to ensure that both localities and service providers may have an opportunity to make their case in court, as contemplated by Section 332(c)(7) of the Act.[4]

3. Wireless services are central to the economic, civic, and social lives of over 270 million Americans.[5] Americans are now in the transition toward increasing reliance on their mobile devices for broadband services, in addition to voice services.[6] Without access to mobile wireless networks, however, consumers cannot receive voice and broadband services from providers. Providers continue to build out their networks to provide such services, and a crucial requirement for providing those services is obtaining State and local governmental approvals for constructing towers or attaching transmitting equipment to pre-existing structures. While Section 332(c)(7) of the Communications Act preserves the authority of State and local governments with respect to such approvals, Section 332(c)(7) also limits such State and local authority, thereby protecting core local and State government zoning functions while fostering infrastructure build out.

4. The first part of this Declaratory Ruling concludes that we should define what is a presumptively "reasonable time" beyond which inaction on a siting application constitutes a "failure to act." In defining this timeframe, we have taken several measures to ensure that the reasonableness of the time for action "tak[es] into account the nature and scope" of the siting request."[7] In the event a State or local government fails to act within the appropriate time period, the applicant is entitled to bring an action in court under Section 332(c)(7)(B)(v) of the Communications Act, and the court will determine whether the delay was in fact unreasonable under all the circumstances of the case. We conclude that the record supports setting the following timeframes: (1) 90 days for the review of collocation applications; and (2) 150 days for the review of siting applications other than collocations.

5. In the second part of this decision, we find, as the Petitioner urges, that it is a violation of Section 332(c)(7)(B)(i)(II) of the Communications Act for a State or local government to deny a personal

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[3] In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, WT Docket No. 08-165, *Petition for Declaratory Ruling*, filed July 11, 2008 ("Petition").

[4] 47 U.S.C. § 332(c)(7).

[5] Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless including Commercial Mobile Services, WT Docket No. 09-66, *Notice of Inquiry*, 24 FCC Rcd 11357, 11358 ¶ 2 (2009) ("*Mobile Wireless Competition NOI*"); *see also* Fostering Innovation and Investment in the Wireless Communications Market, GN Docket No. 09-157, A National Broadband Plan For Our Future, GN Docket No. 09-51, *Notice of Inquiry*, 24 FCC Rcd 11322 ¶ 1 (2009) ("Wireless communications is one of the most important sectors of our economy and one that touches the lives of nearly all Americans.").

[6] *Mobile Wireless Competition NOI*, 24 FCC Rcd at 11358 ¶ 2.

[7] 47 U.S.C. § 332(c)(7)(B)(ii).

wireless service facility siting application because service is available from another provider. Finally, because we have not been presented with any evidence of a specific controversy, we deny the last part of the Petitioner's request, that we find that a State or local regulation that requires a variance or waiver for every wireless facility siting violates Section 253(a) of the Communications Act.

II. BACKGROUND

6. *The Statute.* Section 332(c)(7) of the Act is titled "Preservation of Local Zoning Authority," and it addresses "the authority of a State or local government . . . over decisions regarding the placement, construction, and modification of personal wireless service facilities."[8] Personal wireless service facilities are defined in Section 332(c)(7)(C)(ii) as "facilities for the provision of personal wireless services,"[9] and personal wireless services are defined in Section 332(c)(7)(C)(i) as "commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services."[10]

7. Subsection (A) states that nothing in the Act limits such authority except as provided in Section 332(c)(7).[11] Subsection (B) identifies those limitations. Among other limitations, Clause (B)(i) states that "[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services."[12] Clause (B)(ii) requires the State or local government to act on any request to place, construct, or modify personal wireless service facilities "within a reasonable period of time . . . taking into account the nature and scope of such request."[13] Clause (B)(v) permits a person adversely affected by any final action or failure to act by the State or local government to commence an action in court within 30 days after such final action or failure to act.[14]

8. Section 253 of the Communications Act contains provisions removing barriers to entry in the provision of telecommunications services.[15] Specifically, Section 253(a) states: "No 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."[16] Section 253(d) directs the Commission to preempt any State or local statute, regulation, or legal requirement that it determines, after notice and an opportunity for public comment, violates Section 253(a).[17]

9. *The Petition.* The Petition contends that the ability to deploy wireless systems depends upon the availability of sites for the construction of towers and transmitters. Before a wireless service provider can use a site for a tower or add an antenna to a tower or other structure, zoning approval is generally required at the local level, and the local zoning approval process "can be extremely time-

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[8] 47 U.S.C. § 332(c)(7)(A). Section 332(c)(7) appears in Appendix B in its entirety.

[9] 47 U.S.C. § 332(c)(7)(C)(ii).

[10] 47 U.S.C. § 332(c)(7)(C)(i). "Unlicensed wireless service" is defined as "the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v))." 47 U.S.C. § 332(c)(7)(C)(iii).

[11] 47 U.S.C. § 332(c)(7)(A).

[12] 47 U.S.C. § 332(c)(7)(B)(i).

[13] 47 U.S.C. § 332(c)(7)(B)(ii).

[14] 47 U.S.C. § 332(c)(7)(B)(v). In the case of an action or failure to act that is impermissibly based on the environmental effects of radio frequency emissions pursuant to Section 332(c)(7)(B)(iv), a person adversely affected may also petition the Commission for relief. *Id.*

[15] 47 U.S.C. § 253.

[16] 47 U.S.C. § 253(a).

[17] 47 U.S.C. § 253(d).

Attachment 2:

FCC e-mail confirming ERP is summed for all channels of all channels

From: OETInfo <OETInfo@fcc.gov>
To: 'Euro Guy' <euroguy_pdx@yahoo.com>
Cc: Donald Campbell <Donald.Campbell@fcc.gov>
Sent: Wednesday, November 2, 2011 8:34 AM
Subject: RE: Questions regarding ERP of facilities (wireless telecommunications)

Hello Marcel,

The answer to your question depends on the context. For example, Section 22.913 of FCC rules limits the ERP of cellular base station transmitters generally to 500 watts. That limitation is per frequency.

In contrast, for radiofrequency (RF) exposure purposes, we generally do not specify the total ERP for a facility. However, to determine exclusion from further radiofrequency (RF) exposure evaluations we consider the total ERP for multiple antennas and frequencies that are collocated as specified in Section 1.1307(b)(1). For the wireless services using sector antennas, the ERP is summed for all channels and all antennas operated by a single licensee in a single sector in each particular service or frequency band.

Since the spatial regions where our RF exposure limits may be exceeded are typically small, and different licensees and frequency bands were assumed (at the time the RFR rules were written) to not use the same antenna, the intent was to sum the ERP for all the antennas that are practically collocated. For example, consider a tower hosting 5 different licensees, with each licensee operating in a single frequency band and at a different height on the tower. In that case each licensee could independently use the applicable exclusion without consideration of the facilities operated by other licensees.

As you may know, we have proposed changes to our categorical exclusion criteria to deal with the now-common deployments involving multiple licensees and frequency bands (possibly operating from the same antennas), and we may act on these proposals in the future. We emphasize that compliance with our exposure limits is required regardless of categorical exclusion, so it may be prudent to sum exposure from all sources in the area

I hope that this is responsive to your questions. Please contact me if you require further guidance.

Regards,
Donald

Donald Draper Campbell
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Washington, DC 20554
+1 202-418-2405

From: Euro Guy [mailto:euroguy_pdx@yahoo.com]
Sent: Sunday, October 30, 2011 10:34 PM
To: OETInfo
Subject: Questions regarding ERP of facilities (wireless telecommunications)

As it pertains to wireless communication facilities (cell towers, etc.) there is some recent confusion in our community about the proper interpretation and application of Effective Radiated Power (ERP) as it relates to facilities with multiple antennas. It appears that the most common and accepted interpretation of ERP of facilities is similar to how power of facilities is defined and determined in general: The (total) ERP of a facility is the sum of the ERP's of its individual transmitters. (Just like the total power of a "power plant facility" consisting of 4 turbines or generators with output of 500 kW each would be characterized as a "2 MW facility" or a "2 MW power plant.")

1)
Is it indeed the interpretation of the FCC that a facility consisting of 10 antennas that each has an ERP of 100 watts should be characterized as a 1,000 watt facility?
2)
Similarly, an antenna that transmits on two channels with an ERP of 50 watts each per channel should be characterized as an antenna with an ERP of 100 watt, and not as an antenna with an ERP of 50 watts, correct?
3)
And also as a very specific example, a facility consisting of a tower with 10 antennas that are each rated as having an ERP of 50 watts, should***not*** be characterized as "a facility operating at 100 watts or less"; correct?

It seems very clear from the many FCC regulations, rules, publications and communications that those are indeed the proper and correct interpretations, however due to the confusion in our community I would highly appreciate it if you could confirm those interpretations are correct.

(P.S. I realize that not all channels and all antennas of a facility may necessarily transmit all at the same time, and certainly not do so at their maximum ERP levels, and I also realize that antennas transmitting in different directions not necessarily have overlapping fields of their radiation, but the questions above just pertain to the definition and interpretation of ERP for multi-channel, multi-antenna facilities.)

Thanks,

Marcel

Attachment 3:

FCC e-mail confirming there is no 1,000 watt ERP limit for cellular facilities, as claimed by appellant

<<Note: Highlighting added >>

From: OETInfo <OETInfo@fcc.gov>
To: 'Euro Guy' <euroguy_pdx@yahoo.com>
Sent: Wednesday, January 25, 2012 4:25 AM
Subject: RE: Questions regarding wireless telecommunications facilities

yes

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From: Euro Guy [mailto:euroguy_pdx@yahoo.com]
Sent: Wednesday, January 25, 2012 1:31 AM
To: OETInfo
Subject: Re: Questions regarding wireless telecommunications facilities

Mr. Cambell,

Just to confirm some of the items of our telephone conversation earlier today, amongst other things I understood from you that :

(1) FCC regulations do not place a 1,000 watt ERP limit on wireless communication facilities, but rather define certain thresholds of ERP levels per transmitter.

(2) An antenna at a certain wireless communication facility could easily have a total combined ERP of 5,000 watts and also fall within FCC approved criteria, if for example several carrier and several channels all operate on such antenna.

(3) In order to determine the total maximum ERP of a facility, one would add up the ERP of all channels and all antennas that are part of that facility.

Did I get all of that correct?

Thanks,

Marcel