Hand delivered Jan. 25, 2012 4:16 pm

Moore-Love, Karla

From: Moore-Love, Karla
Sent: Thursday, January 26, 2012 11:17 AM
To: Papaefthimiou, Jonna; Grumm, Matt; Crail, Tim; Schmanski, Sonia; Edwards, Kenneth; Oishi, Stuart
Cc: Cate, Sylvia; Rees, Linly
Subject: FW: LU 11-125536 CU AD; additional materials submitted for the record
Attachments: 120125.Portland City Council Q's from Council.pdf; 120125.Portland City Council Legal and Hearing memo response.pdf; 120125.Portland City Council proposed findings of fact.pdf

Testimony is attached regarding LU 11-125536 CU AD (Verizon Wireless appeal).

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

From: Chris Hill [mailto:chilltone@gmail.com]
Sent: Wednesday, January 25, 2012 4:26 PM
To: Moore-Love, Karla
Cc: Euro Guy; Neal Sutton
Subject: Re: LU 11-125536 CU AD; additional materials submitted for the record

Karla:

As you requested, here are electronic copies of the three documents I submitted this afternoon.

Please forward electronic copies of the remainder of the submissions for today's deadline, which I understand will likely be Friday because of the large land use matter you are dealing with tomorrow. Thanks!

Chris

On Wed, Jan 25, 2012 at 8:42 AM, Moore-Love, Karla <Karla.Moore-Love@portlandoregon.gov> wrote:

> Chris,
>
> I am located in the Office of the City Auditor, 1st Floor of City Hall, Room 140.
>
> Karla
>
> **Karla Moore-Love | Council Clerk**
>
> Office of the City Auditor
> 503.823.4086

From: Chris Hill [mailto:chilltone@gmail.com]
Sent: Wednesday, January 25, 2012 7:38 AM
To: Euro Guy
Cc: Moore-Love, Karla; Neal Sutton

Subject: Re: LU 11-125536 CU AD; additional materials submitted for the record

Karla:

I plan to drop mine off in person. Can you tell me where your office is?

Chris

On Wed, Jan 25, 2012 at 12:43 AM, Euro Guy <euroguy_pdx@yahoo.com> wrote:

Karla,

Could you please do the same (forward to all Council Offices and enter into the record) with the 4 attached documents, and also provide me with an e-mail confirmation to that effect?

Thanks,

Marcel

From: "Moore-Love, Karla" <Karla.Moore-Love@portlandoregon.gov>
To: 'Euro Guy' <euroguy_pdx@yahoo.com>
Sent: Wednesday, January 11, 2012 12:10 PM
Subject: RE: LU 11-125536 CU AD; council hearing January 11 (Testimony !)

Marcel,

Your testimony has been received, forwarded to all Council Offices and entered into the record.

Regards,
Karla
Karla Moore-Love | Council Clerk
City of Portland | Office of the City Auditor
1221 SW 4th Ave Rm 140
Portland OR 97204-1900
503.823.4086 | fax 503.823.4571
Clerk's Webpage: www.portlandoregon.gov/auditor/councilclerk

From: Euro Guy [mailto:euroguy_pdx@yahoo.com]
Sent: Wednesday, January 11, 2012 11:21 AM
To: Moore-Love, Karla
Subject: LU 11-125536 CU AD; council hearing January 11 (Testimony !)

Karla,

Please see my written testimony for today's City Council hearing.
Please confirm whether you received this OK. (I'll also plan to bring a hardcopy to submit at the hearing this afternoon, just in case).

Thanks,

Marcel

Christopher T. Hill

7120 SE Raymond Court
Portland, OR 97206
(503) 407-2740
Email chill@cthlaw.com

January 25, 2012

Portland City Council
City Hall
1221 SW Fourth Ave.
Portland, OR 97201

Re: Case File LU 11-125536 CU AD
PC # 10-194550

OPPONENT'S RESPONSE
TO QUESTIONS FROM CITY COUNCIL

Dear Mayor Adams and Councilmembers:

This letter addresses the questions posed by the Councilmembers at the last hearing on January 11, 2012.

Questions from the City Council

1. Is the proposed facility regulated under PCC 33.815.225.C or D, and why?

The proposed facility is regulated under PCC 33.815.225.D because the facility operates at more than 1000W ERP even if the individual antennas may operate at less than 1000W ERP. PCC 33.815.225.C uses a wattage measurement for the facility to determine if sub C applies. If the wattage of the facility is 1000W or less, then sub C applies. Otherwise, sub D applies. The statutory construction issues and opponent's outline of the state of the *PGE* and *Gaines* analysis is set forth in detail in the response to Verizon's hearing memo.

Reducing the text of sub C to it's general form, it says "if a thing measures less than a certain amount, this section applies." The thing is the facility, and the amount is 1000W. Verizon and the City take the position that the phrase "if a thing measures less than a certain amount, then this section applies" actually means "if a different thing measures less than a certain amount, then this section applies." In the words of footnote 10 from the *Gaines* opinion, you can't say black, and then all agree that black meant white.

2. What are the relevant approval criteria?

The relevant approval criteria are fairly similar whether it is a sub C or a sub D case.

Under sub D, the City has broad discretion to make findings about the significance of lessening the desired character of the area, while under sub C, the City constrained it's discretion somewhat to the factors listed in sub C.1-4. However, even the C.1-4 factors contain words which invoke discretion to reach conclusions about aesthetic judgments and feasibility of alternatives to the proposed project.

Opponent's position is that this is a sub D case because the wattage measurement applies to the facility as a whole.

3. What is a facility under the PCC and federal law?

Facility under the PCC means something conceptually distinct from an antenna and a tower, both of which are used at other places in the PCC, as discussed in detail in the response to Verizon's hearing memo. Facility has no specific definition under 47 CFR Part 22.99, Part 24.5, or Part 90.7. The closest synonym I could find was the term "station" and it's various modifiers in 47 CFR Part 22.99:

> "*Station.* A station equipped to engage in radio communication or radio transmission of energy (47 U.S.C. 153(k))."
>
> "*Airborne station.* A mobile station in the Air-Ground Radiotelephone Service authorized for use on aircraft while in flight or on the ground."
>
> "*Ground station.* In the Air-Ground Radiotelephone Service, a stationary transmitter that provides service to airborne mobile stations."
>
> "*Mobile station.* One or more transmitters that are capable of operation while in motion."
>
> "*Offshore subscriber station.* One or more fixed and/or mobile transmitters in the Offshore Radiotelephone Service that receive service from offshore central transmitters."
>
> "*Rural subscriber station.* One or more fixed transmitters in the Rural Radiotelephone Service that receive service from central office transmitters."
>
> "*Temporary fixed station.* One or more fixed transmitters that normally do not remain at any particular location for longer than 6 months."

Most of those definitions contemplate multiple transmitters as part of the station, which is consistent with the FCC's treatment of emissions requirements as the combined sum of all transmitters/antennas at a particular site.

The definitions of stations for PCS do not state one way or the other whether they include multiple transmitters. 47 CFR Part 24.5. Similarly, the definitions of stations for SMRS do not state one way or the other whether they include multiple transmitters. 47 CFR Part 90.7.

4. Under federal law, how do you calculate ERP? And what does the FCC use ERP for?

The Code of Federal Regulations defines ERP for Cellular Radiotelephone Service as:

> "*Effective radiated power (ERP).* The effective radiated power of a transmitter (with antenna, transmission line, duplexers etc.) is the power that would be necessary at the input terminals of a reference half-wave dipole antenna in order to produce the same maximum field intensity. ERP is usually calculated by multiplying the measured transmitter output power by the specified antenna system gain, relative to a half-wave dipole, in the direction of interest." 47 CFR part 22.99

For Personal Communications Service, the CFR defines ERP as:

> "*Effective Radiated Power* (e.r.p.) (*in a given direction*). The product of the power supplied to the antenna and its gain relative to a half-wave dipole in a given direction." 47 CFR Part 24.5.

For Specialized Mobile Radio Service, the definition is virtually identical to the ERP definition for PCS. 47 CFR Part 90.7.

The FCC uses ERP as a trigger for environmental assessments for public exposure, as outlined in my letter to the Council from 1/11/12, which is based on the OET Bulletin 65 and the Local Officials Guide to RF. Under the maximum public exposure standards, OET Bulletin 65 and the Local Officials Guide make it clear that the FCC considers all antennas at a facility in assessing RF exposure.

For the FCC's treatment of facilities, determination of ERP, and the allowed wattages of antennas, see the attached email from the OET's information officer.

Proposed Solutions

1. Deny the application and appeal for one of the grounds which is common to both sections

Whether the application is regulated under sub C or sub D, the application must satisfy the public-benefit-outweighs-impacts-which-cannot-be-mitigated criterion, and the compliance-with-the-FCC-maximum-public-exposure-standards-criterion. Because of the faint benefit of an increase of in-building coverage in a 20 block area for one provider among many, the significant impacts to the neighborhood, and the failure to show any mitigation, and because of the violation of the MPE standards shown in my 1/11/12 letter and testimony to the Council, this application should be denied.

Denial of this permit application is not preempted by the Telecommunications Act. Any claims of regulating RF health effects, discrimination, provision of wireless services, and lack of

substantial evidence are without merit as outlined in the response to Verizon's legal memo.

2. Deny the application for the reasons the Hearings Officer specified

The Hearings Officer essentially found that Verizon did not put any evidence in the record about the wattage of all channels of one antenna, and that their reliance on Mr. Culley's unlicensed practice of engineering rendered all evidence based upon Mr. Culley's engineering un-credible. The City could leave those findings undisturbed.

To the extent Verizon claims the City misled Verizon about the applicable standards, the Council can find that Verizon believed that the facility wattage required consideration of all antennas based upon the initial RF form at exhibit A4, and Verizon's consultant's reports, the later of which resume discussion of the wattage of all antennas in a given sector/direction.

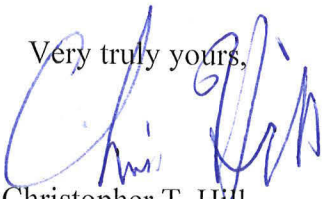
3. Make the code language track the legislative policy

While it goes beyond the scope of this application, drafting language to make the Code provisions track the Council's intent—whatever that may be—would benefit applicants, neighbors, and BDS staff. If the Council intends to regulate cell towers under a certain Code provision, I would suggest making the legislative category track the FCC category(-ies) which the Council would like to regulate rather than specifying a power measurement of a facility and assuming that all cell towers fall within that power measurement (sensitivity of the measure) and that things other than cell towers do not fall within that power measurement (specificity of the measure).

Given the problem with MPE compliance in this case, it also appears prudent to increase the distance between cell towers and residential zones.

Finally, one of the most difficult parts of the process from an opponent's perspective is shooting at a moving target. It is difficult to state objections to something which keeps changing as time goes along, and the process inherently favors the applicant because the applicant gets multiple opportunities to respond to objections. I would suggest some kind of correction of that procedural imbalance in future code revisions..

Very truly yours,



Christopher T. Hill

Enclosures

Gmail by Google

Chris Hill <chilltone@gmail.com>

Fw: Questions regarding wireless telecommunications facilities

Euro Guy <euroguy_pdx@yahoo.com> **Wed, Jan 25, 2012 at 8:47 AM**
Reply-To: Euro Guy <euroguy_pdx@yahoo.com>
To: Chris Hill <chilltone@gmail.com>

----- Forwarded Message -----
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

Donald Draper Campbell
Senior Engineer
Federal Communications Commission
Office of Engineering and Technology
Washington, DC 20554
+1 202-418-2405

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

Christopher T. Hill

7120 SE Raymond Court
Portland, OR 97206
(503) 407-2740
Email chill@cthlaw.com

January 25, 2012

Portland City Council
City Hall
1221 SW Fourth Ave.
Portland, OR 97201

Re: Case File LU 11-125536 CU AD
PC # 10-194550

OPPONENT'S RESPONSE
TO VERIZON LEGAL MEMO AND HEARING MEMO

Dear Mayor Adams and Councilmembers:

This letter is responsive to the materials submitted to the City Council by the applicant/appellant by letter from Mr. Grillo.

Response to Verizon Legal Memo

Verizon's written submissions, Verizon's consultant's reports, and Verizon's argument before the City Council all suggest that Verizon will use the Federal Telecommunications Act's preemption of state and local law as a weapon to force the City to approve Verizon's permit application. To date, Verizon has not mentioned 47 USC § 332(c)(7)(A), which is the subsection immediately preceding the sections it cites:

> "(7) Preservation of local zoning authority
> "(A) General authority
> "Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities."

The City is allowed to decide the placement, construction and modification of cell towers unless one of the sections in 47 USC § 332(c)(7)(B) pre-empts the decision.

1. Local regulation of RF impacts is allowed when consistent with FCC regulations

Federal law preempts local regulation of cell towers "on the basis of the environmental

effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions." 47 USC § 332(c)(7)(B)(iv). The City Code provision regulating RF impacts incorporates the FCC's maximum public exposure (MPE) limits. PCC 33.274.040.C.5. Because the City Code and FCC MPE limits are the same, Verizon must show compliance with them in order to have it's application approved.

As a factual matter, Verizon failed to show compliance with the MPE limits by submitting a consultant's report which showed exposure over the MPE limit when accounting for the time in that standard, as outlined in my 1/13/12 letter to the City Council, and by submitting the Radio Frequency Transmission Facility form which listed the power density as 0.59 mW/cm^2 which is over the MPE limit listed in the consultant's report as 0.459 mW/cm^2. A4; H28-a, p. 7.

2. Applying the same rules to all applications in the same time period is not discriminatory

The City is allowed to discriminate among providers so long as the discrimination is reasonable, which allows the City to treat one provider's application differently from another provider's application based on traditional bases of zoning regulation—including visual, aesthetic, and safety concerns. *Voice Stream PCS I, LLC v. City of Hillsboro*, 301 F.Supp.2d 1251, 1262-63 (D.Or. 2004)(finding no discrimination based on a permit denial for lack of significant public benefit and negative affect on the aesthetic character of the neighborhood).

A changed interpretation of the Code in this case would not discriminate against Verizon because all providers would be treated the same under the changed interpretation, just as they were treated the same under the prior interpretation. Verizon's discrimination claim proves too much because it would also apply to the City's attempt to revise the City Code because that would result in a first permit denial, and the first applicant denied could claim discrimination using Verizon's argument in this case. The City should not be concerned about Verizon's discrimination allegation because Federal District Court would rule against Verizon.

3. Denial of this permit would not prevent provision of personal wireless services

Verizon also claims denying this permit would result in an effective prohibition of personal wireless services. Judge Mosman noted in the *Voice Stream PCS I* case that the carrier bears a heavy burden to prove an effective prohibition claim. *Id*, at 1261. In rejecting the claim there, Judge Mosman noted that

> "A significant gap does not exist simply because an area with coverage also has "dead spots"...It is undisputed [the] tower would simply improve existing indoor coverage, not fill a complete void in coverage...Similarly [the applicant] does not attempt to show that the proposed tower was the "only feasible plan" or that "there are no other potential solutions to the purported problem"."

Id, at 1261. Similarly here, the project's purpose is to improve indoor coverage rather than to provide coverage where it is currently absent, and the applicant has not shown that the proposed project is the only feasible plan to provide service. See, e.g. exhibit H18-a, p 1-2. Denial of this permit would not prevent provision of wireless services under the TCA.

4. The hearings officer found that Verizon did not produce substantial evidence on all elements

Verizon complains that the hearings officer failed to determine what criteria apply to the application. However, Verizon ignores the fact that the hearings officer concluded he could not determine which Code section applied because of Verizon's submissions:

> "The Hearings Officer agrees with BDS staff that the PCC 33.815.225 C language is properly interpreted to read ERP based upon one antenna...[but] the Hearings Officer disagrees with BDS staff's interpretation that ERP limits are based upon "one channel.""
>
> "The Applicants' ERP wattage estimates based upon "one channel of one antenna" are not consistent with the Hearings Officer's interpretation of PCC 33.815.225...The Hearings Officer interpretation of PCC 33.815.225 phrase "facilities operating at 1,000 watts ERP or less" refers to a single antenna and a channel of one antenna...The Hearings Officer finds that the combination of the Applicants' conflicting representations...the lack of credibility of the Applicants' "RF engineer," and the lack of responsiveness in Exhibit H.28a to PCC 33.815.225...result in the Applicants' failure to demonstrate that PCC 33.815.225 C is the applicable approval criteria."

Decision of the Hearings Officer, p. 11, 13-14. The hearings officer did conclude he could not determine which Code section applied, but he reasoned his way through his decision, made code interpretation and factual findings along the way, and concluded that Verizon did not submit enough evidence to sustain it's burden on all elements of the application.

The record is devoid of any evidence of the wattage of all channels of one antenna. Verizon knew that was the Hearings Officer's finding once it received notice of the opinion. Verizon did not fix that fatal flaw in its submissions to the City Council.

The Federal Telecommunications Act requires findings based upon substantial evidence. *Voice Stream PCS I*, at 1256. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, is not a large or considerable amount of evidence, and may allow for two different conclusions. *Id.* If the City were to uphold the Hearings Officer's denial of the application, it would be based upon substantial evidence because it "grounded its decision to deny [the] application in the specifics of the case, not on merely unsupported and vague objections about cell-phone towers in general." *Id*, at 1260 (internal quotations and citations omitted).

Response to Verizon Hearing Memo

1. Text and context are given primary weight in statutory construction

The Hearings Officer identified the Oregon Supreme Court's restatement of longstanding rules of statutory construction in *PGE v. BOLI*, 317 Or 606 (1993). The Oregon Legislature

recently made slight modifications to ORS 174.020 to allow courts to consider legislative history and give it the weight to which the courts deemed appropriate. *State v. Gaines*, 346 Or 160 (2009) was the Oregon Supreme Court's recent announcement about the effect of the slight modifications to the rules of statutory construction. The primary upshot of the decision was that courts would no longer refuse to consider legislative history when the text and context were unambiguous.

However, the Oregon Supreme Court also noted "there is no more persuasive evidence of the intent of the legislature than the words by which the legislature undertook to give expression to its wishes...Only the text of a statute receives the consideration and approval of a majority of the members of the legislature, as required to have the effect of law." *Gaines*, at 171 (internal quotation and cites omitted). This led the Court to the conclusion that "text and context remain primary, and must be given primary weight in the analysis. Nothing in the 2001 amendments to ORS 174.020 purports to require the courts to retreat from that long-standing recognition." *Id.*

The Court also pointed out the comments of the key sponsor, who said "We still have to mean what we say when we say it. We can't say, black, and then * * * all agree that black meant white. That's not going to work." *Id.*, fn 10 at 173.

An important rule of construction which was announced in *PGE* and which was not changed in *Gaines* is,

> "In trying to ascertain the meaning of a statutory provision, and thereby to inform the court's inquiry into legislative intent, the court considers rules of construction of the statutory text that bear directly on how to read the text. Some of those rules are mandated by statute, including, for example, the statutory enjoinder "not to insert what has been omitted, or to omit what has been inserted." ORS 174.010. Others are found in the case law, including, for example, the rule that words of common usage typically should be given their plain, natural, and ordinary meaning."
>
> *PGE*, at 611.

The City Code contains its own rules for interpreting the land use regulations Code at PCC 33.700.070. Legislative history is not among the things which are used to interpret Title 33 of the Code.

2. Facility does not mean a single antenna

Meaning is ascribed.

The meaning that we ascribe to the words can be shown by how they are used. In this case, the word "facility" has been used by Verizon, Verizon's consultants, and the City, to mean the aggregation of all antennas at the location.

Verizon's consultant report distinguishes between the facility and the antennas: "the

proposed wireless facility will have a new 45' monopole, with nine panel antennas..."

The BDS report to the Hearings Officer makes similar distinctions between the facility and the antennas in the Staff Report conclusion: "The applicant requests...a wireless telecommunications facility that...will include up to a total of 12 antennas..."

The proposed findings of fact submitted by Verizon to the City Council contain several references to the facility in the singular and or distinguish between antennas and the facility as the aggregate of antennas at the project site:

- p. 3: "The facility itself is 53 feet away from the adjacent residential zone."
- p. 4: "[T]he proposed facility will meet emission standards..."
- p. 7: "[T]he proposed antennas will be approximately 45 feet above grade, and will operate below 1,000 watts ERP"
- p. 9: "[T]he proposed 45-foot monopole is not a radio frequency transmission facility of 100,000 watts or more...[T]he proposed facility will accommodate at least three two-way antennas for every 40 feet of tower, or at least one two-way antenna for every 20 feet of tower...because 9 two-way antenna are proposed on the proposed 45-foot monopole."

The City Code uses both the words "facility" and "antenna" and uses them to mean different things. PCC 33.274.040 sets out the development standards for radio frequency transmission facilities. There are specific antenna requirements in PCC 33.274.040.C.6 That clearly shows that the City Code uses the word "antenna" when it means "antenna." Perhaps more illuminating is the discussion of tower design at PCC 33.274.040.C.10:

> "10. Tower design.
> "a. For a **tower** accommodating a Radio Frequency Transmission **Facility** of 100,000 watts or more, the **tower** must be designed to support at least two additional **transmitter/antenna systems** of equal or greater power to that proposed by the applicant and one microwave **facility**, and at least three two-way **antennas** for every 40 feet of tower over 200 feet of height above ground.
> "b. For any other **tower**, the design must accommodate at least three two-way **antennas** for every 40 feet of **tower**, or at least one two-way **antenna** for every 20 feet of **tower** and one microwave **facility**.
> "c. The requirements of Subparagraphs a. and b. above may be modified by the City to provide the maximum number of compatible users within the radio frequency emission levels." (emphasis added)

The City Code uses the words "facility," "antenna," and "tower" to mean different things. The Code uses the word "antenna" when it means "antenna" and "facility" when it means "facility."

The term "radio frequency transmission facility" is not defined in the Code, but it is a use category which is described at PCC 33.920.540 as,

"33.920.540 Radio Frequency Transmission Facilities
A. Characteristics. Radio Frequency Transmission Facilities includes **all devices**, equipment, machinery, structures or supporting elements necessary to produce nonionizing electromagnetic radiation within the range of frequencies from 100 KHz to 300 GHz and operating as a discrete unit to produce a signal or message. Towers may be self supporting, guyed, or mounted on poles or buildings.
B. Accessory Uses. Accessory use may include transmitter facility buildings.
C. Examples. **Examples include broadcast towers, communication towers, and point to point microwave towers.**
D. Exceptions.
1. Receive-only antenna are not included in this category.
2. Radio and television studios are classified in the Office category.
3. Radio Frequency Transmission Facilities that are public safety facilities are classified as Basic Utilities." (emphasis added)

A "facility" included all devices necessary to produce RF emissions operating as a discrete unit, and examples include towers, some of which are required to have multiple antennas in addition to facilities.

Under *Gaines*, the text and context of the statute are given primary consideration. If the words "facility" and "antenna" had the same meaning, then Verizon, Verizon's consultant, the City staff, and the City Code would not have made the distinction between the two concepts. The text of the Code refers to the aggregation of all antennas as the thing which is measured.

What Verizon asks the City Council to do in this case is to "insert what has been omitted." ORS 174.010; *PGE*, at 611. Verizon wants PCC 33.815.225.C to read, "facilities **with individual antennas** operating at 1,000 watts ERP or less." Particularly in light of the City Code's distinction between facilities and antennas, Verizon's interpretation must be rejected.

3. The legislative history offered by Verizon supports the view that a facility means all antennas

The legislative history offered by Verizon, Sylvia Cate 5/12/00 report, at p. 2-3, states,

> "[T]he FCC…established ERP standards for the three primary services of wireless telecommunications (officially: Cellular Radiotelephone Service, Personal Communications Service, and Specialized Mobile Radio Service). Each of these classifications are regulated by limits of power, defined as effective radiated power (ERP)…In general, it appears that these types of facilities are authorized by the FCC to routinely operate at or below 1000 watts ERP (1640 watts EIRP). Any facility exceeding these FCC thresholds requires a 'routine environmental evaluation' as further defined by the FCC."

The legislative history shows that an antenna cannot operate above 1000W ERP, the threshold established by the FCC. However, the last sentence quoted above states that a facility

can exceed that threshold, which means that a "facility" may include more than one antenna.

4. Reliance on an unlicensed engineer's practice of engineering

Verizon relies upon Jeff Culley's practice of engineering in two critical points in the application: (1) his determination that the project will meet the project purpose, and (2) in the information relied upon by Verizon's consultant to estimate the RF emissions.

Mr. Culley's 9/26/10 letter, exhibit H7, at page 2, he notes that he used a Radio Frequency prediction tool to predict the signal strength and analyze the network design currently and with the proposed project in place. There is no evidence in the record about what that tool is, about how accurate it is, about whether it was calibrated or applied properly, or about whether it was reasonable to use the tool for the planning and design Mr. Culley used it for. As noted by the Hearings Officer, Mr. Culley's letter is signed "RF Engineer."

The signature and title he lists are violations of ORS 672.007(1)(a) and (b) because his use of the title of engineer implies that he is an engineer. The analysis he went through in the letter is the practice of engineering in violation of ORS 672.007(1)(c) and 672.005(1)(a) and (b) because it is a service requiring engineering education, training, or experience, and because it applies special knowledge of the mathematical, engineering, and physical sciences to evaluation, planning, and design for the project, and in connection with public or private utilities, structures, works, or projects.

Verizon's consultant's reliance upon Mr. Culley's statements about the wattage of the antennas taints any calculations made based upon Mr. Culley's statements with his lack of an engineering license. Mr. Culley's statements to the consultant required Mr. Culley to apply engineering knowledge to this project because the wattage that cell tower antennas run at is not known by laypeople. The antenna datasheets only specify a power gain in decibels and do not specify the amount of power going into the antennas. See the attachments to my letter at exhibit H18.

Verizon attempted to shore up the problem with Mr. Culley's practice of engineering in calculating the antenna wattage by stating that he simply used the manufacturers' specifications for each antenna. Verizon provides no explanation about why Mr. Culley rather than their consultant made the antenna wattage estimate. If it is as simple as consulting a manufacturer's datasheet, then there was no need to have Mr. Culley perform the task. If the calculation is more complex than consulting a manufacturer's datasheet, then it strengthens the conclusion that Mr. Culley used RF engineering expertise for design of the network, which the consultant then relied upon.

5. Similarity of approval criteria under PCC 33.815.225.C and 33.815.225.D

The approval criteria in PCC 33.815.225.C and 33.815.225.D are not all that dissimilar. The primary difference is the City has significantly more discretion to approve or deny permits under 33.815.225.D. Here are the criteria and their analogues in the other section:

33.815.225.C	33.815.225.D
1. Tower over base zone height or within 2,000 feet of another tower is only feasible way to provide the service, including documentation about ROW feasibility.	1. Based on the number and proximity of other facilities in the area, the proposal will not significantly lessen the desired character and appearance of the area.
2. The tower must be sleek clean and uncluttered.	
3. Accessory equipment must be adequately screened	
4. Visual impact of the tower must be minimized	
5. Public benefits of the use outweigh any impacts which cannot be mitigated.	2. Public benefits of the use outweigh any impacts which cannot be mitigated.
6. The regulations of Chapter 33.274 are met.	3. The regulations of Chapter 33.274 are met.

PCC 33.815.225.C provides more bright line rules than 33.815.225.D, however C.1-4 deal with zoning interests similar to D.1. PCC 33.815.225.C.5 has language identical to 33.815.225.D.2. PCC 33.815.225.C.6 has language identical to 33.815.225.D.3.

The City has broad discretion under PCC 33.815.225.D.1, D.2, and C.5. LUBA has noted the "undefined and subjective nature" of 33.815.225.D.2. *Belluschi v. Portland/King*, LUBA No. 2006-204, p. 20, 21. In *Belluschi*, the hearings officer noted that BDS staff viewed the public benefit under 33.815.225.D.2 to be the public benefit from the project purpose, rather than the public benefit from the general kind of use, as BDS has done in this case. *Id.*, at 19. In the *Voice Stream PCS* case, Judge Mosman noted that "[i]n determining whether the tower would be in the "public interest," the city was within its authority to weigh the benefit of merely improving the existing coverage against the negative aesthetic impact the tower would cause." *Id*, at 1259.

While there is less discretion to be exercised under PCC 33.815.225.C.1-4 than under D.1, the criteria under C.1-4 still invite the City to exercise discretion. Findings of feasibility of providing the service, feasibility of siting the facility outside of the public right-of-way, the aesthetics of the tower and it's relation to the area surrounding the site, and the adequacy of screening the equipment all require the exercise of discretion.

In the exercise of discretion, the City must consider whether the proposed project "equally or better meet[s] the purpose of the regulation to be modified." PCC 33.805.040.A. In the exercise of discretion, the City should consider whether the proposed project meets the policy goals of PCC 33.274.010, which states the City's purpose for regulating Radio Frequency Transmission Facilities:

- Protect the health and safety of citizens from the adverse impacts of radio frequency emissions;
- Reduce the number of towers that are built in or near residential and open space Zones;
- Ensure that towers in or near residential or open space zones are only sited when alternative locations or building mounts are not feasible;

- Preserve the quality of living in residential areas which are in close proximity to Radio Frequency Transmission Facilities; and
- Preserve the opportunity for continued and growing service from the radio frequency transmission industries.

6. Verizon's failure to meet approval criteria under either Code section

The proposed project fails to meet the approval criteria whether the application is analyzed under 33.815.225.C or 33.815.225.D. Opponents submit proposed findings of fact in a separate document, and provide the summary of the failures of proof in this letter. The 10/2/11 MSANA letter submitted by Neal Sutton, the MSANA land use chair at exhibit H15a also details objections under both a sub C and a sub D analysis.

Under 33.815.225.C.1, Verizon failed to show that the project is the only feasible way to meet the project purpose of improving in-building coverage between SE 52nd and SE 72nd on Foster. Verizon made no attempt to find a site between SE 52nd and about SE 63rd, despite the presence of several potential sites. H18, p. 1-2.

Under 33.815.225.C.5, the public benefits of the improved in-building coverage rely upon Mr. Culley's unlicensed practice of engineering. Even if he were a licensed engineer, the public benefit of marginally improved coverage in buildings in a 20 block area does not outweigh the many impacts outlined by the opponents. Those include the impact on property values which will cause a loss of 2-25% of aggregate property value based upon the testimony and reports submitted by Eric Joy at exhibit H20. That loss of property value easily reaches into the 6 and potentially the 7 figures. The proposed project will affect the neighborhood's aesthetics because the tower is likely to remain after Mt. Scott Fuels leaves the site due to property value increases. The proposed project also imposes restrictions on future uses of the site because the cell tower is unlikely to be removed. The applicant also has a burden to show that all of the impacts outlined by opponents cannot be mitigated. There is no evidence in the record about mitigation of the impacts.

Under 33.815.225.C.6, Verizon failed to show that the proposed project will comply with 33.274 because it relied on Mr. Culley's unlicensed practice of engineering, and even if Mr. Culley were licensed, Verizon submitted two documents showing that the proposed project would violate the maximum public exposure standards. A4, H28a.

Under 33.815.225.D.1, Verizon failed to show that, based on the number and proximity of other facilities in the area, this project will not lessen the desired character and appearance of the area. There are two facilities within 2000 feet of each other at 6514 SE Foster and 4521 SE 63rd. This facility would be the third within 2000 feet of another. This facility would dominate the skyline over a single story building just like the one at 6514 SE Foster.

Under 33.815.225.D.2, Verizon has the same proof failures as under 33.815.225.C.5, above.

Under 33.815.225.D.3, Verizon has the same proof failures as under 33.815.225.C.6, above.

Conclusion

Because of the failures of proof under either Code analysis of this project, the City Council should deny the permit application request and make the findings of fact proposed by the opponents.

Very truly yours,

Christopher T. Hill

Enclosures

Christopher T. Hill

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January 25, 2012

Portland City Council
City Hall
1221 SW Fourth Ave.
Portland, OR 97201

Re: Case File LU 11-125536 CU AD
PC # 10-194550

OPPONENT'S PROPOSED FINDINGS OF FACT

Dear Mayor Adams and Councilmembers:

This letter is a rebuttal to Verizon's proposed findings of fact, and is intended as a cut and paste style of factual findings depending on how a majority of the Council votes on particular issues. For Verizon's other proposed findings of fact, opponents may not necessarily agree with the proposals, but opponents believe any of the findings below are fatal to Verizon's permit application.

CONDITIONAL USE APPROVAL CRITERIA

33.815.225.C.1 and/or 33.815.225.D.1

Proposed Findings: There is substantial evidence in the record that the proposed tower is within 2,000 feet of another tower, but that there are other feasible ways to provide the service at addresses to the west of Verizon's search ring and which are within the area which Verizon proposes to improve in-building coverage.

The applicant has not documented any gap in coverage, but merely documents areas of existing coverage which might be improved.

Applicant relies upon Jeff Culley's unlicensed practice of engineering as it's proof of existing and improved coverage, and we decline to rely upon his engineering work in making this decision. Applicant submitted no other proof to support it's assertions about the existing and proposed improvements to applicant's coverage areas.

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33.815.225.C.4 and/or 33.815.225.D.1

Proposed Findings: There is substantial evidence in the record that the tower would stick up above the adjacent one story buildings and dominate the skyline on the proposed site and adjoining commercial and residential sites.

Cell towers with multiple panel arrays of antennas in the middle of a site do not have the same visual impact as utility poles in the public right of way because of the increased bulk and appearance and because of the location on sites away from the areas residents expect to see other tall structures like utility poles, i.e. because they are away from the edge of the site. There is substantial evidence in the record that this criterion is not met.

33.815.225.D.1

Proposed Findings: There is substantial evidence in the record that because of the number and proximity of other RF transmission facilities in the area, applicant's project would significantly lessen the desired character and appearance of the area. The aesthetic impacts on the area would be significant for the reasons stated above. [cut and paste findings under the 33.815.225.C.1/D.1 and 33.815.225.C.4/D.1, above]

33.815.225.C.5 and/or 33.815.225.D.2

Proposed Findings: There is substantial evidence in the record that the public benefits are minimal, that the impacts are significant, and that applicant makes no mention of mitigation of any impacts.

The public benefit is merely an increase in in-building coverage between SE 52nd and SE 72nd on SE Foster. Applicant submitted no evidence about increased benefit to emergency service providers or 911 calls. If we were to weigh the public benefit of all use of cell phone and wireless communications technologies rather than the particular project purpose in this case, we would essentially read the public benefit criterion out of the Code because no impacts of cell towers would exceed the combined public benefit of all cell phone and wireless communications technologies.

The impacts to the neighborhood include aesthetics, long-term restrictions on development of the site and adjoining sites (e.g. limitation of construction of multi-story buildings in the future), a decrease in property values, and RF emissions which are likely to exceed the FCC's MPE limits unless the residents curtail their use of their property.

33.815.225.C.6 and/or 33.815.225.D.3

Proposed Findings: The project fails to meet the development standards of Chapter 33.274 because the applicant submitted documents to the City showing violation of the FCC MPE requirements in two places, exhibits A4 and H28a. We find the applicant's power estimates to be unreliable because they have changed significantly over time.

Applicant relies upon Jeff Culley's unlicensed practice of engineering as it's proof of the power each antenna in the proposed project will emit, and we decline to rely upon his engineering work in making this decision. Applicant submitted only proof which relies upon Mr. Culley's engineering work (the Hatfield & Dawson consultant reports) and we decline to rely upon that proof for the same reason.

DEVELOPMENT STANDARDS

33.274.040.C.2

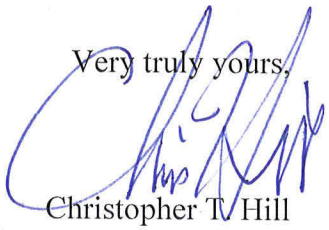
Proposed Findings: The proposed facility operates at more than 1000 watts ERP. Because of the nature of cellular radiotelephone networks systems, which operate on dispersed networks of towers, grouping of towers is not always technically feasible. In this case, it is not feasible to group towers.

33.274.040.C.5

Proposed Findings: There is substantial evidence in the record that the proposed facility will exceed the FCC's maximum public exposure (MPE) limits, based upon the documents submitted by the applicant, the OET Technical Bulletin 65, and the Local Official's Guide to RF. Because of the time component of the MPE limit, a resident at the adjoining residential property would be exposed to RF emissions above the MPE limit if the resident was outside for 6.5 hours or longer. We find the residential use category contemplates a resident's ability to be outside for 6.5 hours or longer without excessive exposure to RF emissions from a nearby cell tower.

Emissions above the MPE limit triggers the need for an environmental assessment under NEPA which is approved by the FCC. Applicant has not submitted any evidence of an EA or of FCC's approval of the same.

Very truly yours,



Christopher T. Hill