

February 15, 2012

AUDITOR 02/15/12 PM 3:49

Honorable Mayor Sam Adams
and City Commissioners
City of Portland
1221 SW 4th Ave.
Portland, OR 97204

Re: **Appellant's Final Argument**
LU 11-125536 CU AD (Verizon Wireless)

Dear Mayor Adams and Commissioners:

I am writing on behalf of Verizon Wireless to provide you with the Appellant's final argument.

Background

For over 14 years, the City has consistently applied its ERP threshold in PCC 33.815.225(C). In nearly 1,000 cases, the City's ERP threshold has been used as a way to separate wireless technology cases from broadcast technology cases, and to apply different land use criteria to each of these respective technologies. *See* Sylvia Cate Memo to City Council dated 1/5/12 at 3.

The record shows that the City enacted this ERP threshold in 1997, in response to significant growth in wireless technology cases. *See* Cate memo to Council dated 1/25/12 at 4. Prior to that time, the City reviewed all radio frequency transmission facility cases under the same criteria. As Sylvia Cate explained: "[n]ew Conditional Use approval criteria were developed by the City in 1997, to specifically apply to the new cellular networked communication systems." *See* Cate Memo to City Council dated 1/25/12 at 4.

The 1997 code amendments that created the City's new two-track system for reviewing RF facility cases, initially established a 100 watt threshold per channel as the basis for distinguishing between wireless technology and broadcast technology. *See* Cate Memo at 4. This system worked well for a few years until the City began seeing reports from wireless carriers with power estimates exceeding 100 watts per channel and realized that FCC power

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limits had been increased to 1000 watts ERP per channel. *See* Cate Memo 1/25/12, at 4, Cate Memo 5/12/2000, Cary Pinard Memo 6/14/2000 and 2004 Code Maintenance Staff Training Packet 7/13/2004, at 180. Staff's view is confirmed in the commentary associated with the 2004 code amendments, where the City expressly stated that:

“The threshold of 100 watts effective radiated power (ERP) is outdated, particularly for cellular telephones, because of changes in radio communication technology and in the FCC standards.... These amendments proposed to increase 100 watts ERP to 1,000 watts ERP in most places in this chapter [Chapter 33.742] and in the conditional use approval criteria in 33.815.225.” *See* 2004 Code Maintenance Staff Training Packet at 180.

During the 2004 amendment process, one of the wireless carriers made the following observation, confirming how the City's ERP standard was being interpreted and applied by the City: “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 purpose of these regulations.” *See* Cate Memo to City Council 1/25/12 at 4. While the request by the carrier for Council to clarify that ERP is being evaluated on a per radio channel basis was not acted on by Council, this testimony shows that the practice of applying the City's ERP threshold per channel was known by Council, the public and by industry and was not modified or otherwise interpreted by Council when it enacted its new 1,000 watts ERP threshold in 2004, even though it had the opportunity to do so. We agree with Ms. Cate's conclusion in her recent memo to Council on this issue:

“Based on the examination of the legislative history and amendments to the zoning regulations applicable to Radio Frequency Transmission Facilities, the intent of the zoning code is to utilize the ambiguously defined ‘ERP’ as a review threshold, by specifying which set of regulations and approval criteria are applicable to facilities based on the maximum 1,000 watts ERP that the FCC has established on a per channel basis for these facilities.” *See* Cate Memo to Council 1/25/12 at 5.

In short, the City's ERP threshold has been used for over 14 years as a way to separate wireless technology cases from broadcast technology cases, and to review cases involving those technologies differently, based on review criteria that were specially enacted by the City to implement the City's different goals, policies and strategies related to each of these two technologies. For example, compare the City's recently enacted “Broadband Strategic Plan 2011-2020” 9/6/2011, pp. 13-24, with the purposes, policies and regulations in the City's Healy Heights Plan District. The interpretation proposed by the opponents in this case, and the interpretation adopted by the hearings officer in his decision, effectively eviscerates the

distinction between wireless technology cases and broadcast technology cases, and makes it much more difficult for the City to implement its goals, policies and strategies related to wireless technology and broadband policies. This is true because all or virtually all wireless technology cases, including all or most collocations, will be reviewed through a Type III process and criteria that were not intended to apply in such situations. The distinction between wireless and broadcast technologies was specifically enacted into the City's code in 1997 through the 100 watt threshold and was updated in 2004 to a 1000 watts threshold to reflect changes in the way the FCC regulated wireless power per channel. Both the hearings officer's interpretation of the 1000 watts ERP threshold and the opponents' interpretation of that phrase will have the effect of returning the City to a regulatory situation that existed prior to 1997, when all wireless technology cases were reviewed under the same criteria as broadcast technology cases. This is precisely the situation that City Council was seeking to change in 1997 and again in 2004. It would be odd for the City to interpret its code in a way that is contrary to the essential purpose of these amendments, because doing so would produce the absurd result of returning the City to the regulatory situation it was trying to amend in 1997 and again in 2004.

ERP Interpretive Issue

Most of the discussion in this appeal has focused on the ERP interpretive issue. This issue is discussed in the Appellant's Hearing Memo of 1/6/12 at 1-3, in the Appellant's Expert Testimony and Rebuttal Evidence of 1/25/12 and in the Appellant's Rebuttal of 2/9/12. It is also discussed in Ms. Cate's Memo to the Hearings Officer, dated 9/23/10, and her memos to City Council dated 1/5/12 and 1/25/12. The hearings officer, the opponents, and City staff disagree on the interpretation of the phrase "facilities operating at 1,000 watts ERP or less" as that phrase is used in PCC 33.815.225(C). Verizon Wireless agrees with the analysis and conclusions of staff, and in doing so disagrees with the decision of the hearings officer and the testimony of opponents on this issue.

The disagreement with regard to the ERP interpretive issue can, in simplified terms, be described as whether or not the phrase "facilities operating at 1,000 watts ERP or less" in PCC 33.815.225(C) refers to ERP emissions from: 1) a single channel, 2) a single antenna, or 3) all channels of all antennas in all directions.

The opponents argue that the phrase "facilities operating at 1,000 watts ERP or less" can only mean that the city must add together the ERP from all of the channels, from all of the antennas, in all directions. They come to this conclusion by focusing on the word "facilities." They argue that "facility" is a term of art that has a specific meaning. They are incorrect. The code does not define the term "facility" and the dictionary definition of the term does not resolve the ambiguity. As the hearings officer noted, the dictionary definition of the term "facility" is "something that is built, installed, or established to serve a particular purpose." RF towers, RF antenna and RF transmitters are all things that are built, installed or established to serve a

particular purpose. The hearings officer specifically rejected the opponents' interpretation, even though he acknowledged that it is plausible.

The hearings officer focused instead on the definition of ERP. He stated that "PCC 33.910 defines 'Effective Radiated Power (ERP)' as 'a calculation of the amount of power emitted from a radio frequency antenna.'" He also stated that ERP is defined in 47 CFR Ch. 1 as "(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." We agree that these are the definitions of ERP. These definitions aid, but do not resolve, the meaning of the phrase "facilities operating at 1,000 watts ERP or less." The code's definition of ERP makes it clear that ERP is a "calculation" of power. What the City's code does not say is how to calculate power (ERP) for a particular purpose. In order to determine how the city intended to calculate power (ERP) for purposes of applying the phrase "facilities operating at 1,000 watts ERP or less" in PCC 33.815.225(C), legislative history must be consulted.

Prior to the enactment of ORS 174.020 and the court's decision in State v Gaines, it was common practice not to consult legislative history unless the text and context of a phrase was ambiguous. Now, as a result of the 2001 amendments to ORS 174.020 and State v Gaines, Oregon law requires the City to consult legislative history after examining the text and context of the phrase being interpreted, even if the City does not perceive an ambiguity in the text of the phrase. The extent of the City's consideration of that legislative history, and the evaluative weight the City gives it, is for the City to determine. See Gaines, at 7. As the court noted in Gaines at footnote 7, the comments of Justice W. Michael Gillette provide a common sense insight into why legislative history should be consulted. In that footnote in Gaines, Justice Gillette spoke to the House Committee on Judiciary describing the effect of the 2001 amendment to ORS 174.020 as follows:

"[T]he message that is contained in [the amendments] is: to any court, to any single trial judge, the Court of Appeals, or the Supreme Court, please guys, don't just look at the words, look at what happened when the words were put together in the statute, and if those assist you in understanding what the words mean, will you please make use of it. And if they don't, don't."

Both the hearings officer's interpretation and the opponents' interpretation of the phrase "facilities operating at 1,000 watts ERP or less" do not take into consideration the legislative history that is now part of the record in this case. Both of those interpretations are, in fact, inconsistent with the legislative history supporting the City's ERP threshold in PCC 33.815.225(C). In Justice Gillette's words, this legislative history shows "what happened when the words were put together." That legislative history shows that the City intended its 1,000 watts ERP threshold to be consistent with the new FCC power limits, which calculate power per channel. All of the expert testimony in the record shows that FCC power limits are calculated by

channel, and that in urban settings like this one, FCC power limits are 1,000 watts ERP or less. This is the standard on which the City's 1,000 watts ERP threshold is based. The City's 1,000 watts ERP threshold should therefore be interpreted in a manner that is consistent with FCC power limits, which are calculated by channel, not by antenna or by adding together all of the power from all of the channels, from all of the antennas, in all directions.

The opponents have made a number of other arguments regarding how to calculate power in this case. For the benefit of City Council, the following ERP Issue Matrix has been prepared to assist you in making your determination on the ERP interpretive issue. As shown below, while there are three plausible interpretations of the phrase "facilities operating at 1,000 watts ERP or less," staff's interpretation is the most plausible, because it is 1) consistent with federal law, 2) consistent with standard engineering practices, 3) consistent with legislative history, and 4) consistent with longstanding City practice, both before and after the City's ERP threshold was amended in 2004 from 100 to 1,000 watts ERP.

**ERP
Issue Matrix**

	Opponents' Interpretation	Hearings Officer's Interpretation	Staff's Interpretation
Interpretation	The 1000 watts ERP threshold for a facility is the sum of the ERP from all channels, from all antennas, in all directions.	The 1000 watts ERP threshold for a facility is the ERP for a single antenna.	The 1000 watts ERP threshold is the ERP for a single channel.
Consistent with standard engineering practices?	No	No	Yes
Consistent with federal law?	No	No	Yes
Consistent with legislative history?	No	No	Yes
Consistent with prior City practice?	No	No	Yes
ERP based on evidence in the record	20,172 watts ERP	2,346 watts ERP	759 watts ERP
Plausibility of Interpretation	Less Plausible	Less Plausible	Most Plausible

ERP Factual Issue

The factual record in this appeal is clear. Mr. Gorton, who is a registered professional engineer in Oregon, has confirmed that the relevant ERP in this case is 759 watts ERP. He stated in his 1/24/12 letter at p. 6, that:

“To be clear, the maximum ERP of any channel at the facility proposed by Verizon Wireless is listed in Mr. Pinion’s October report (Record Exhibit H28a) is 759 watts. ERP per channel is the standard method of expressing ERP for purposes of determining compliance with FCC power limits, as described above.”

Mr. Gorton also stated what the ERP would be if the City adopted the hearings officer’s interpretation of the phrase “facilities operating at 1,000 watts ERP or less.” In that regard, he stated in his 1/24/12 letter at p. 6, that:

“If for some reason the city chooses to express ERP per antenna, then according to Mr. Pinion’s October report, the highest total ERP per frequency band under that scenario would be 2,346 watts. This is the sum total of the ERP from all of the channels associated with the two groups of PCS transmitters proposed (1,173 watts for each group of PCS transmitters, times two equals 2,346). As it is impractical to combine different frequency bands into a single transmitting antenna, it is common practice to utilize separate antennas for each frequency band. Therefore the total power in the PCS band, 2,346 watts, will be the highest per antenna ERP at this facility. I would stress that this ERP value is calculated from data that is already in the record. We did not express ERP in this way in our previous filings because an expression of ERP per antenna is not relevant to any ERP standard. Furthermore, we are expressing ERP in this way at this time only as an accommodation to the City, so that City Council can see what the ERP would be, if ERP per antenna was relevant to any known standard, which it is not.”

Mr. Gorton also stated what the ERP would be if the City adopted the opponents interpretation of the phrase “facilities operating at 1,000 watts ERP or less. In that regard he stated in his 1/24/12 letter at page 6, that:

“If for some reason the city chooses to express ERP for all of the proposed channels, in all directions, then according to Mr. Pinion’s October report, the total ERP under that scenario would be 20,172 watts ERP (6,724 watts ERP per sector, times three, equals 20,172). Again, I would stress that this ERP value is based on data already in the record. We have not expressed ERP in this way in previous submissions, because an expression of ERP that is based on adding together the

power from all of the channels, in all directions, is not relevant to any known ERP standard. We are expressing ERP in this fashion at this time only as an accommodation to the City.”

In short, the opponents’ interpretation and the hearings officer’s interpretation of ERP are not based on any known ERP standard. As Mr. Hermans stated in his White Paper at p. 6: “ERP is clearly an engineering term describing a technical concept, and is therefore in its definition based on engineering. Therefore, to get an accurate handle on its meaning, value should be given to how engineers (or specifically RF Engineers) would interpret the term and its meaning.” We agree. It would make little sense for City Council to adopt an interpretation of its ERP threshold that as Mr. Gorton puts it “is not relevant to any known ERP standard.” Mr. Hermans makes another important point in his White Paper at p. 12 that bears repeating. He stated that: “The threshold of 1,000 watts ERP used in PCC is not an invention or a randomly selected number by City of Portland staff, but rather finds its origin in FCC code.” Again, we agree.

Legislative history shows that the origin of the City’s 1,000 watts ERP threshold is the FCC power limit described in Mr. Gorton’s 1/24/12 letter at pp. 3-4. These power limits are referred to in Mr. Walters’ memo to Council dated 1/25/12 and are referred to in the legislative history related to the drafting and enactment of the 1,000 watt ERP threshold in PCC 33.815.225(C). There is no doubt that this was the origin of the City’s 1,000 watt ERP threshold. The FCC’s power limit calculates ERP by channel, not by antenna (as decided by the hearings officer) or by adding together all of the power from all of the channels of all of the antennas in all directions (as asserted by the opponents). Those interpretations are plausible but incorrect. Staff’s interpretation is plausible and correct.

With that said, it may be helpful for City Council to understand what the downward ERP is from this facility toward the adjacent uses. As noted in the testimony, antennas used by Verizon Wireless and other wireless carriers focus RF energy and power from the transmitters toward the horizon and away from neighboring uses. For example, in this case, Mr. Pinion stated that “the ERP from the highest-powered sector will be 6,724 watts ERP **towards the horizon.**” See 1/25/12 Pinion letter at 9. However, as Mr. Pinion explained: “downward ERP will be substantially less than the horizontal ERP due to the nature of Verizon Wireless antennas. The proposed antennas are highly directional and suppress downward ERP. Energy directed downward from an antenna is wasted because it does not enhance coverage.” Pinion letter at 10. With regard to downward ERP, Mr. Pinion specifically stated that: “I estimate that the downward ERP from the Verizon Wireless 700 MHz and cellular operations will be 39.28 watts (Exhibit A-3, p. 5). This is based on the maximum ERP towards the horizon of 3,928 watts ERP, divided by the antenna suppression factor of 100.” Pinion letter at 10. For the PCS band, Mr. Pinion stated that: “The downward ERP from the Verizon Wireless PCS operations is predicted to be 46.92 watts (Exhibit A-3, p. 5). This is based on the maximum ERP towards the horizon for those bands, 2,346 watts ERP, divided by a suppression factor of 50. This is the same ERP

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value given in my October report for the sum of two PCS bands, two times 1,173 watts (Exhibit H28(a), p. 3).” *See* Pinion letter at 10. In other words, the total downward ERP for this facility is $39.28 + 46.92 = 86.20$ watts ERP. The directional nature of the antennas used make the downward power very low. Other relevant exposure data is provided by Mr. Pinion in his reports. All of the data and conclusions contained in these reports meet or exceed relevant federal standards, and therefore meet or exceed any relevant local standards. If any of the opponents wish to challenge the applicant’s compliance with federal emission standards, they are free to make those challenges through the relevant federal process. In the end, this facility will not be licensed by the FCC if it does not meet or exceed relevant federal standards, including but not limited to federal emission and power standards.

In short this wireless facility will operate at 1,000 watts or less ERP. FCC power standards are the basis for the City’s 1,000 watts ERP standard. FCC power standards calculate ERP by channel, not by antenna or by adding together ERP from all channels, from all antennas, in all directions. Public health and safety concerns are protected through federal emission and separation standards, which are and will be met in this case. The City does not have authority to regulate or deny wireless land use applications based on perceived health impacts. Health impacts from wireless facilities are exclusively regulated at the federal level. Also, the City does not have the authority to regulate based on the technology employed by a wireless carrier. *See New York SMSA Limited Partnership v. Town of Clarkstown*, 612 F3d 97 (2nd Cir. 2010). In this case, the downward ERP will be very low, because of the highly directional nature of the antenna used by Verizon Wireless. Because this facility is projected to operate at a maximum ERP of 759 watts, it is subject to the approval criteria in PCC 33.815,225(C) and other relevant criteria in PCC 33.274 that apply to RF facilities operating at 1,000 watts ERP or less.

Substantive Approval Criteria Are Met

In the applicant’s proposed findings, all of the relevant approval criteria are analyzed in relation to relevant evidence in the record. *See* Appellant’s Hearing Memo dated 1/6/12, Exhibit C, pp. 1-13. These proposed findings shows that there is substantial evidence in the record that all of the relevant approval criteria can and will be met, subject to two conditions of approval proposed by staff, and an additional condition proposed by the applicant regarding the installation of street trees and ground cover in the public ROW along the frontage of the site on SE Foster Road. *See* Appellant’s Hearing Memo dated 1/6/12, Exhibit C, p. 13.

During the hearing and the open record period, several issues were raised that deserve further discussion here:

Mr. Culley's Substantive Testimony is credible and does not violate ORS 672.007(1)(C).

Opponents continue to assert that Mr. Culley's 9/26/11 letter discussing coverage issues and the information he provided to Mr. Pinion concerning ERP predictions constitute the unlawful practice of engineering under ORS 672.007(1)(C). We disagree and note that the statute is not a relevant approval criterion in this case. In the T-Mobile case cited by opponents and discussed by the hearings officer, OSBEELS determined that a similar coverage letter provided by a non-licensed professional like Mr. Culley did not constitute the unlawful practice of engineering. This finding was made even though the Board in that case found that it was improper for the non-licensed professional to use the title RF Engineer, without registration. There has been no finding from OSBEELS that the substantive aspects of Mr. Culley's 9/26/11 letter constitute the unlawful practice of engineering and we do not expect any such finding to be made, given the outcome in the T-Mobile case relative to that issue. Furthermore, as we pointed out previously, we are not aware of any federal, state or local law that prevents Mr. Culley from providing ERP predictions to Mr. Pinion, who is a licensed engineer, and for Mr. Pinion to use those estimates in an engineering report prepared and submitted by Mr. Pinion into the public record in this case. Many licensed professionals use information provided to them by non-licensed professionals. To the best of our knowledge, there is no federal, state or local regulation that prevents a licensed engineer from providing the City with his expert opinion, even if that opinion includes calculations performed by a non-engineer.

In any event, the question of whether any of these actions by Mr. Culley constitute the unlawful practice of engineering is an issue for the Oregon State Board of Examiners for Engineering and Land Surveying to resolve. The statute cited by opponents is not a relevant approval criterion in this case and the City does not have jurisdiction to make findings under that statute, especially not without providing Mr. Culley with notice and an opportunity for a hearing.

We also note that in this case, all of the information provided by Mr. Culley has been substantively reviewed by Mr. Gorton, who has concluded that:

“Based upon my professional experience, the information and conclusions contained in the above-mentioned exhibits are professionally credible and are consistent with standard industry practice concerning wireless network design and compliance with current FCC ERP, RF and EMF regulations. I find that per channel ERP values and number of channels specified by Verizon for use at the proposed POR FOSTER site to be consistent with those provided by Verizon and other providers for use at similar sites reviewed by Hatfield & Dawson. Mr. Pinion's reports are based on the calculation methodology specified in OET Bulletin 65 *Evaluating Compliance with FCC Guidelines for Human Exposure to*

Radiofrequency Electromagnetic Fields, published by the Office of Engineering & Technology of the Federal Communications Commission.”

In short, both Mr. Culley and Mr. Pinion have provided credible testimony in this case. Mr. Culley is not required to be a registered professional engineer in order to submit his letter dated 9/26/11 into the public record, nor is he required to be a registered professional engineer in order to provide information to Mr. Pinion, who in turn used that information to prepare both his August and October engineering reports that were later submitted into the public record. If testimony concerning ERP estimates cannot be submitted into the public record by a non-licensed individual, without constituting the unauthorized practice of engineering under ORS 672.007(1)(c), then everyone who submitted such testimony into the public record in this case who is not a licensed engineer would likewise be in violation of the statute. The statute is not nearly as broad as the opponents have asserted. Mr. Culley’s substantive testimony and the information he provided to Mr. Pinion do not constitute the unlawful practice of engineering under ORS 672.007(1)(c) as alleged by the opponents. We are not aware of any federal, state or local law that requires Mr. Culley to be a registered professional engineer in order to provide the testimony he submitted into the public record in this case. The T-Mobile OSBEELS case cited by the opponents supports this conclusion. Likewise, we are not aware of any federal, state or local law that prevents Mr. Culley from providing information to Mr. Pinion that Mr. Pinion later used in an engineering report provided to the City. OSBEELS has jurisdiction to determine whether such testimony constitutes the unlawful practice of engineering. OSBEELS has not made such a finding with regard to Mr. Culley’s substantive testimony in this case, nor is it likely to.

Only Feasible Way to Provide the Service. PCC 33.815.225(C)(1).

Opponents assert that several sites “a few hundred feet outside of Verizon’s search area” should have been considered as feasible sites. See Hill letter of 1/25/12, p. 9 and Exhibit H18, pp. 1-2. All of these sites are outside the search area identified by Verizon Wireless and were rejected for that reason. The fact that these sites are located with the coverage area designated by Verizon Wireless is irrelevant. The coverage area is the area where identified coverage objectives can be met. The search area is the area where transmitters may be located to meet identified coverage objectives. The two areas are not interchangeable or synonymous. Other options such as collocation on the two existing facilities within the search area and within 2,000 feet of this proposed facility are not feasible for the reasons previously discussed. Similarly, it is not feasible to locate the facility in the public ROW for the reasons previously discussed. The evidence shows that there are no other feasible ways to provide the needed service.

It should also be noted that other opportunities for locating this facility in alternative locations on the site were explored by Verizon Wireless and staff. *See* for example Ms. Cate's 9/23/11 staff report at 4-8. Alternative locations on the site were rejected by the property owner because they would interfere "with the existing commercial operations or the safe vehicle movements of customers and employees." *See* for example, Cate at 4-8.

Public Benefits of the use outweigh any impacts which cannot be mitigated.
PCC 33.815.225(C)(5).

Opponents assert that the only public benefit of the use is "marginally improved coverage in a building in a 20 block area." *See* Hill letter 1/25/12 at 9. Opponents assert that the impacts of the use are: 1) concerns that a 45 ft. monopole support structure for wireless facilities will result in a "loss of 2-25% of aggregate property value based upon the testimony and reports submitted by Eric Joy at Exhibit H20," 2) concerns that the project will affect "the neighborhood's aesthetics," 3) concerns that the project "imposes restriction on future uses of the site because the cell tower is unlikely to be removed, and 4) concerns that the proposed project would "violate maximum public exposure standards." *See* Hill letter 1/25/12 at 9.

1. Loss of Property Value. The opponents' position that the proposed 45 ft. monopole support structure for wireless facilities will result in a loss of property value is not supported by the evidence in the record and is untrue. Property values and changes in property values are determined by appraisals from professionally certified property appraisers. No appraisal has been submitted in this case showing that this project has or will affect the value of any property in the area. The proposed use is a permitted use in this commercial zone. The height of the structure is within the height limits of this commercial zone. The only reason this particular structure and use is being reviewed under the City's conditional uses standards is because it is within 2,000 feet of an existing monopole. Without an appraisal, the opponents cannot prove that the proposed structure and use will result in any loss of property value to any specific property in the area. The testimony and reports in the record from the opponents do not prove that this proposed use and structure will result in any loss of value for any property in the area. For these reasons, there is no loss of property value in the neighborhood as a result of the proposed use.

2. Neighborhood Aesthetics. The opponents' position is that because "the tower would stick up above the adjacent one story buildings" that it would "dominate the skyline on the proposed site and adjoining commercial and residential sites." *See* Hill letter 1/25/12, p. 2. They argue that 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 or because of the location on sites away from the areas residents expect to see other tall structure like utility poles, i.e. because they are away from the edge of the site." *See* Hill letter 1/25/12 at 2. We note that any structure that is taller than adjacent structures will

be visually noticed. Nonetheless, in this commercial zone, city regulations allow structures and buildings of this height. If redevelopment plans for this area are successful, taller structures will gradually take the place of shorter ones. The real issue here is not height, per se, or even height in relation to nearby one- and two-story residential buildings, but rather neighborhood aesthetics generally. In this case, the pole and its antenna will be sleek, clean and uncluttered. The davit arms will only be approximately 2 feet in length. No "top hat" style antenna mounts are proposed. The tower finish will be light grey. The height of the structure is allowed by right in the base zone. The pole and its support facilities will be located as far away from adjacent residential uses as possible. It will be located 53 feet from the nearest residential zone and 110 feet from the nearest residential structure, well beyond the required setback. The neighborhood and the immediate area contain many utility poles of heights ranging from 35 feet to 65 feet in height. Most of these poles have wires and other items mounted on them that extend much further than the 2 foot davit arm extensions proposed here. The skyline in the immediate area surrounding this site is already dominated by utility poles ranging in height from 35 feet to 65 feet. For these reasons and for all of the other reasons discussed in the application, the applicant's proposed findings, and the staff report, visual and aesthetic impacts from the proposed structure will not significantly affect the neighborhood compared to existing and allowed uses, height limits and setback requirements in the underlying zone. For these reasons, there are no significant neighborhood aesthetics that are not mitigated.

3. Restrictions on Future Uses. Opponents argue that the existence of the monopole will restrict future use of the property and will prevent it from redeveloping. Opponents' premise and conclusion are both incorrect. First, approval of the monopole will not restrict future use of the property any more than approval of any other permitted or conditional use will restrict future use of the property. Uses can and do change over time and there is nothing unique about a 45 foot monopole wireless facility that will restrict future use of the site. In fact, evidence in the record shows that a 45 foot monopole similar to the one proposed here is located within 2,000 feet of the site, and is surrounded by existing commercial buildings. Nearby, a rooftop installation exists, further showing how wireless facilities can be integrated into existing and proposed buildings and structures. There is nothing inherent about locating a proposed wireless facility on this site that will prevent it from redeveloping in the future. For these reasons, there are no restrictions on future uses of the site as a result of the proposed use.

4. Public Exposure Standards. In various documents in the record, opponents argue that the proposed facility will violate FCC Maximum Public Exposure (MPE) standards. Opponents are incorrect. The extensive written testimony provided by both Mr. Pinion and Mr. Gorton, who are both registered professional engineers in Oregon, demonstrate that all of the relevant FCC MPE and other federal and local emission and exposure standards can and will be met. See Pinion letter 1/25/12, p. 11 and Pinion October report, p. 15. It should also be noted that all of the relevant federal emission and exposure standards, which control and preempt any

local emission and exposure standards, will be met as an ongoing condition of federal licensing. In other words, the facility cannot and will not be licensed by the FCC unless it meets all of the relevant federal standards. All of the City's emission and exposure standards defer to federal law in that regard. *See* PCC 33.274.040(C)(5) and (6). All of the expert testimony in the record demonstrates that all of the relevant federal and local public exposure and emission standards can and will be met. For these reasons, there are no emission or exposure impacts that exceed City or state standards that cannot be mitigated.

5. Public Benefits. Opponents argue that the only public benefit of the proposed use is "marginally improved coverage in buildings in a 20 block area." Opponents are incorrect. There is extensive evidence in the record showing that there is a significant gap in in-building coverage along Foster Road between 52nd and 72nd. Evidence shows that the proposed use "will also allow for good handoffs between the sites and improve the signal levels in the weaker areas." Culley letter 9/26/12, p. 1. The evidence also shows that "The proposed POR Foster site is an essential communication facility for public service as part of Verizon Wireless' communication network providing enhanced 911 services as well as serving many governmental agencies and emergency responders." Culley letter 9/26/12, p. 3. This testimony is confirmed and enhanced by the extensive public benefits discussed in the City of Portland's Broadband Strategic Plan dated 9/6/11. *See* Appellant's Expert Testimony and Rebuttal Evidence 1/25/12, Exhibit 4.

Overall, the public benefits of the use include improved in-building coverage, better handoffs between site, improved signal strength in weaker areas, enhanced 911 connections to government and emergency responders, and enhanced connections to existing and future consumer and businesses in the area and within the network generally. The impacts that cannot be fully mitigated from the proposed use include limited visual impacts on some adjacent residential properties that will be able to see the 45 foot monopole from their property. These visual impacts are mitigated to the greatest possible extent. The pole has been moved as far into the site as possible, to be further from adjacent residences without impacting business operations and safety on-site. Other on-site, off-site and public ROW locations within the search ring are not feasible. For these reasons and for all of the other reasons discussed in the record, the public benefits of the proposed use outweigh any impacts that cannot be fully mitigated.

Alternative Approval Criteria and Findings

Because the proposed facility will operate at an ERP of 1000 watts or less, the approval criteria in PCC 33.815.225(C) and related criteria in PCC 33.274.040 and 33.805 apply in this case. For the reasons set forth above and in other material submitted by the applicant into the record, all of the relevant approval criteria can and will be met. Proposed findings have been submitted by the Appellant with regard to each of those criteria. *See* Appellant's Hearing Memo, 1/6/12, Applicant's Proposed Findings, Exhibit C.

If Council determines that the proposed facility will operate at more than 1,000 watts ERP, then this application will be subject to a different set of standards in PCC 33.815.225(D) and 33.274.040.

The only new approval criteria that would apply in PCC 33.815.225(D) is criteria (D)(1) which requires that:

(D)(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.”

Proposed Findings. There are two existing wireless facilities in the area, other than the proposed facility. The first existing facility is a rooftop installation located at 4521 SE 63rd. The second existing facility is a 45 foot monopole located at 6514 SE Foster Rd. The proposed facility will not significantly lessen the desired character and appearance of the area, based on the number and proximity of these two existing facilities. The first existing facility has very little impact on the character or appearance of the area because it is a rooftop installation and does not significantly affect any of the adjacent commercial or residential uses or the area as a whole. The second existing facility is a 45 foot monopole that creates some visual impacts in the area, but due to its height and location in the commercial zone, it is both a permitted use zone and it is within both the height limits and setbacks in the underlying zone. Because these two existing facilities are consistent with the City’s comprehensive plan and zoning code, they are therefore consistent with the desired character and appearance of the area. The question then becomes whether adding one 45 foot monopole within 2,000 feet of an existing 45 foot tower and within 2,000 feet of an existing roof-mounted facility, will significantly lessen the desired character and appearance of the area. The answer is no, as explained below.

The opponents have argued that adding one more monopole in this neighborhood will create a “tower farm” and that it will prevent the neighborhood from redeveloping. Both claims are overstated and untrue. While this particular 45 foot monopole will create limited visual impacts on several adjacent residential properties and will be noticeable in the immediate area generally, it will not significantly lessen the desired character or appearance of the area. The immediate area surrounding the site contains many existing 35 foot utility poles and several 65 foot utility poles. One additional 45 foot monopole in the area will not create or significantly lessen the visual appearance of the area, nor will it create a tower farm. Similarly, one 45 foot monopole located on this site will not prevent the neighborhood from redeveloping, nor will it significantly lessen the ability of the neighborhood or the site to redevelop. Wireless facilities are part of the City’s “critical infrastructure.” *See* Portland’s Broadband Strategic Plan 2011-2020, p. 4. As that plan points out, such facilities are “an essential critical infrastructure in the planning fabric, along with transportation, telecommunications, parks, power, and water/sewer infrastructure. A robust broadband ecosystem of infrastructure, competitive providers, services

and devices is necessary for economic growth, job creation, education, livability, sustainability, public safety and civic engagement.” See Portland’s Broadband Strategic Plan at 4. In short, this facility will not prevent the neighborhood from redeveloping. On the contrary, it improves the neighborhood’s critical infrastructure by creating a better broadband system in the area. A better broadband system with upgraded coverage will encourage, rather than prevent, neighborhood redevelopment. For all of these reasons, this criteria can and will be met.

As far as we know, the only new approval criteria that would apply in PCC 33.274.040(C) is criteria (C)(2) which requires that:

(C)(2) “Grouping of towers. The grouping of towers that support facilities operating at 1,000 watts ERP of more on a site is encouraged where technically feasible. However, tower grouping may not result in radio frequency emission levels exceeding the standards of this chapter.”

Proposed Findings. The grouping of towers criterion does not apply in this case, because only one tower is proposed. If a second tower is proposed, grouping would be encouraged under this criterion only if it is technically feasible. Even then, tower grouping cannot result in RF emission levels exceeding the standards of this chapter, which in the case of wireless facilities, defer to and are preempted by FCC standards. This criterion therefore does not apply because only one tower is proposed.

Conclusion

For all of the reasons set forth above, and based upon all of the evidence and testimony in the record, the decision of the hearings officer should be reversed and the appeal of Verizon Wireless should be granted, subject to the following conditions of approval:

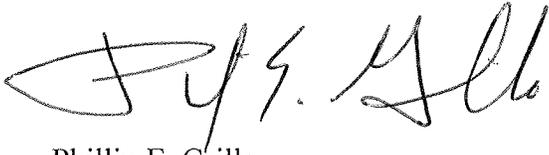
- A) As part of the building permit application submittal, the following development-related condition (B) must be noted on each of the four required site plans or included as a sheet in the numbered set of plans. The sheet on which this information appears must be labeled “ZONING COMPLIANCE PAGE – Case File LU 11-125536 CU AD.” All requirements must be graphically represented on the site plan, landscape, or other required plan and must be labeled “REQUIRED.”
- B) The applicant must place all of the accessory equipment, except for the electrical service meter within an equipment building and the emergency generator screened by a matching wall.

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C) The applicant shall install street trees and ground cover in the public ROW along the frontage of the site on SE Foster Road, subject to the review and approval of the Portland Bureau of Transportation Engineering.

Respectfully submitted,

Davis Wright Tremaine LLP

A handwritten signature in black ink, appearing to read "P. E. Grillo". The signature is stylized with a large, sweeping initial "P" and a long horizontal stroke.

Phillip E. Grillo

PEG/lkt

cc: Client