

March 20, 2012

Sylvia Cate
Portland Bureau of Planning
1900 SW 4th Ave., Fifth Floor
Portland, OR 97201

Re: **Continuance Request and 120-Day Clock-FCC Shot Clock Extension
LU 11-125536 CU AD (Verizon Wireless)**

Dear Ms. Cate:

I am writing on behalf of Verizon Wireless in the above-mentioned case to request that the hearing on this matter be continued from **April 4, 2012 to April 26, 2012, at 3:00pm**. The purpose of this continuance is to allow the applicant additional time to prepare findings. To facilitate this continuance, the applicant hereby extends both the FCC shot clock and the statutory 120-day period under ORS 227.178 for an additional 22 days, from April 14 to and through April 26, 2012.

Sincerely,

Davis Wright Tremaine LLP



Phillip E. Grillo

cc: Mayor Sam Adams
City Commissioners
City Attorney Kathryn S. Beaumont
Council Clerk ✓
Verizon Wireless

DWT 19242732v1 0052051-014982

3/1/12

**Staff summary of proceedings to date: continued Appeal hearing:
LU 11-125536 CU AD Verizon at 6904 SE Foster**

Good afternoon, Mayor Adams and Council.

I'm Sylvia Cate, Bureau of Development Services and the assigned planner to Verizon's application for a new wireless facility at the Mt Scott Fuel site.

I am going to provide you with a brief summary of the proceedings to date. I will not rerun the PowerPoint presentation that was shown at the first hearing; however, it is available should Council like to revisit site plans or site photographs during deliberations.

The first appeal hearing was held on January 11th. At that hearing, City Council agreed to reopen the record and accept new evidence and argument from all parties followed by a rebuttal period for all parties. Verizon submitted final rebuttal argument into the record, which closed on February 15th. City Council also agreed to continue the appeal, and scheduled this continued hearing for today.

This appeal has raised several issues for City Council to resolve in order to make a final decision on Verizon's application.

1. Code interpretation: determine the intent of 'ERP' within the context of Title 33, Zoning Code
2. Determine the ERP value of Verizon's proposed facility based on the code interpretation and the engineering reports in the record.
3. The ERP value will determine which set of Conditional Use approval criteria are applicable to Verizon's application, either 33.815.225.C or 33.815.225.D
4. Determine if Verizon's proposal meets or does not meet applicable approval criteria. If all approval criteria are met, or can be met with Conditions of Approval, the proposal should be approved. Alternatively, if the proposal does not satisfy all applicable approval criteria, the application should be denied.

This concludes Staff's presentation. Are there any questions at this point for staff?

3/1/12

**DOCUMENTS ON FILE WITH THE OFFICE OF THE CITY AUDITOR
FOR LU 11-125536 CU AD Verizon at Mt. Scott Fuel Company:**

1. Copy of Type III Decision Appeal Form dated November 16, 2011
2. Copy of Decision of the Hearings Officer signed November 2, 2011
3. Notice of Public Hearing before City Council dated December 2, 2011
4. Mailing List
5. Letter from Phillip Grillo dated January 6, 2012
6. Email from Marcel Hermans with petition dated January 9, 2012
7. Email from Christian Smith dated January 10, 2012
8. Email from Marcel dated January 11, 2012
9. Staff PowerPoint presentation from Sylvia Cate
10. Letter from Matthew and Charlotte Cooper dated January 11, 2012
11. Letter from Phillip Grillo dated January 11, 2012
12. Letter from Christopher Hill dated January 11, 2012
13. Two pages of people who signed up to oppose the appeal dated January 11, 2012
14. Email from Rep. Alissa Ken-Guyer dated January 11, 2012
15. Email from City Attorney Linly Rees dated January 12, 2012
16. Email from Marcel Hermans dated January 16, 2012
17. Email from Linly Rees dated January 17, 2012
18. Email from Marcel dated January 25, 2012 at 12:44 a.m.
19. Email from Marcel dated January 25, 2012 at 9:15 a.m.
20. Email from Rich Busch dated January 25, 2012
21. Letter from Phil Grillo dated January 25, 2012 (also hand delivered)
22. Letter from Sylvia Cate dated January 25, 2012 (also hand delivered)
23. Email from Chris Hill dated January 25, 2012 (also hand delivered)
24. Email from City Attorney Ben Walters dated January 25, 2012
25. Email from Marcel Hermans - letter from Mt Scott-Arleta NA dated February 08, 2012
26. Letter from Phillip Grillo dated February 08, 2012
27. Email from Chris Hill dated February 08, 2012
28. Letter from Phillip Grillo dated February 15, 2012

1/25/12

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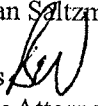
CITY OF
PORTLAND, OREGON
OFFICE OF CITY ATTORNEY

Linda Meng, City Attorney
1221 S.W. 4th Avenue, Suite 430
Portland, Oregon 97204
Telephone: (503) 823-4047
Fax No.: (503) 823-3089

January 25, 2012

INTEROFFICE MEMORANDUM

TO: Mayor Sam Adams
Commissioner Nick Fish
Commissioner Amanda Fritz
Commissioner Randy Leonard
Commissioner Dan Soltzman

FROM: Benjamin Walters 
Chief Deputy City Attorney

SUBJECT: City Code Reference to Effective Radiated Power

The Council has asked about federal standards for determining “effective radiated power” (ERP). In relation to cellular and wireless communications facilities, the Federal Communications Commission (FCC) uses ERP in at least two contexts – power and emissions. In both of these regulatory schemes, ERP is stated as a limitation. In the context of power, ERP is identified as a limitation, a restriction upon transmission levels. In the context of emissions, ERP is used as a threshold between two types of regulatory treatment. Below the threshold, the licensee is excluded from further regulatory inquiries. Above the threshold, the licensee is obligated to file with the FCC for further, detailed regulatory inquiry.

a. The FCC’s power limits upon ERP

The FCC’s administrative rules contain specific “upper” limits upon cellular tower signal power. “At a cell site, the total [radiofrequency] power that could be transmitted from each transmitting antenna at a cell site depends on the number of radio channels (transmitters) that have been authorized and the power of each transmitter.”¹ For example, “Fixed and base stations transmitting a signal in the 757-758 and 775-776 MHz bands must not exceed an effective radiated power (ERP) of 1000 watts . . .”² ERP is technically defined as “the product of the power supplied to the antenna and its gain relative to a half-wave dipole in a given direction.”³ Several factors go into establishing ERP values, including transmitter power output, transmission line losses, and antenna type and position.

¹ Federal Communications Commission, Office of Engineering and Technology, *Information On Human Exposure To Radiofrequency Fields From Cellular and PCS Radio Transmitters*, p. 1 (printed March 21, 2010) <http://www.synergy.com/images/Downloads/Reference-8.pdf>

² 47 CFR §27.50(b)(1). The information in the record, as submitted by the applicant, indicates that it will be operating within this frequency range.

³ 47 CFR §27.4

The Commission has described this power limit rule as a core technical rule intended to minimize interference between wireless systems, and providing operational flexibility.⁴ The FCC's regulatory scheme attempts to balance economic issues, (extending coverage areas, using fewer base stations, lowering infrastructure costs), with potential interference with co-channel and adjacent bandwidth users.⁵

b. The FCC's restrictions upon emissions

The Telecommunications Act of 1996 restricted state and local government authority to regulate wireless service facilities based upon RF emissions.⁶ After passage of the 1996 legislation, the FCC adopted implementing administrative regulations. In doing so, the FCC evaluated potential environmental impacts as required by the National Environmental Policy Act. One of the FCC's primary concerns in undertaking this evaluation was to set maximum permissible exposure levels for radiofrequency emissions, to protect human health and safety. After concluding a rulemaking proceeding, the FCC determined that certain transmitting facilities, including cellular and wireless facilities, could be categorically excluded from routine environmental review, if these facilities were below RF emission guidelines.

With respect to personal wireless services, a cellular facility is categorically excluded if the total effective radiated power (ERP) of all channels operated by the licensee at a site is 1000 watts or less. If the facility uses sectorized antennas, only the total effective radiated power in each direction is considered.⁷

Under the Commission's environmental administrative rules, ERP is determined as a function of "the apparent effective amount of power leaving the transmit antenna[,] . . . including

⁴ The broadband personal communications systems (PCS) and advanced wireless systems (AWS) "rule limits the peak radiated power of base stations, while the older cellular rule simply states that the radiated power must not exceed the stated value." Federal Communications Commission, In re Streamline and Harmonize Various Rules Affecting Wireless Radio Services, WT Docket No. 03-264, Order 05-144, p. 24 fn.168 (August 9, 2005) http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-144A1.pdf See, also, *New York SMSA Ltd. Partnership v. Town of Clarkstown*, 612 F3d 97, 105 (2d Cir 2010) (determining that federal law preempted regulation of radio frequency interference, where local zoning law "crossed the line between zoning and land use regulation and the regulation of technical and operational standards.)

⁵ See, e.g., Federal Communications Commission, *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies To Provide Spectrum-Based Services*, 69 FR 75144-01, 2004 WL 2866449, ¶ 85 (December 15, 2004)

⁶ "No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities 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 U.S.C. §332(c)(7)(B)(iv).

⁷ Federal Communications Commission, *A Local Government Official's Guide to Transmitting Antenna RF Emission Safety: Rules, Procedures, and Practical Guidance*, p. 7 (June 2, 2000) http://wireless.fcc.gov/siting/FCC_LSGAC_RF_Guide.pdf . See, also, 47 C.F.R. §1.1301 *et seq.*

but not limited to transmitter output power, coaxial line loss between the transmitter and the antenna, and the 'gain' (focusing effect) of the antenna."⁸

For cellular and PCS operators, the FCC doesn't generally review applications to construct facilities at individual sites. Instead, the applicant certifies whether the facility would require submission of an EA, addressing all sites within the licensed area.⁹ If a site does not qualify for categorical exclusion, the FCC's rules require a licensee to evaluate compliance with the RF exposure guidelines under the environmental assessment process.¹⁰

Under the FCC's administrative rules, if a person is concerned that a particular facility is not qualified for "categorical exclusion", they may ask the FCC for review. 47 CFR §1.1307(c).¹¹ If after considering the concerns the FCC determines that there may be a significant environmental impact, the applicant will be required to submit an environmental assessment. The FCC may also require an assessment upon making its own determination that a proposal may have a significant environmental impact. 47 CFR § 1.1307(d).

In conclusion, ERP is an engineering concept that has been incorporated by the FCC into its regulatory framework. In at least two applications of ERP within the FCC's regulations, it is applied as a limitation. ERP is applied as a cap upon signal power, an upper threshold upon transmissions. ERP is applied in the context of wireless emissions as a threshold between two levels of regulation. Below the threshold, the licensee is treated as "categorically excluded" from further regulatory examination. Above the threshold, the licensee must file for an environmental assessment by the FCC.

BW:CoP

- c. Karla Moore-Love, Council Clerk
Sylvia Cate, Bureau of Planning and Sustainability

⁸ *FCC Local Government Guide, supra*, p. 12, n. 14. "An ERP of 100 watts corresponds to an actual radiated power of 5-10 watts, depending on the type of antenna used. In urban areas, cell sites commonly emit an ERP of 10 watts per channel or less." Federal Communications Commission, *Human Exposure to Radio Frequency Fields: Guidelines For Cellular & PCS Sites*, <http://transition.fcc.gov/cgb/consumerfacts/rfexposure.pdf>

⁹ *FCC Local Government Guide, supra*, p. 11.

¹⁰ *FCC Local Government Guide, supra*, p. 8. "[I]f the facility or device has been categorically excluded from environmental processing requirements with respect to the RF exposure guidelines . . . the applicant or licensee is exempt from the requirement of performing any calculations and/or measurements to determine whether there is compliance; the Commission presumes that the operation of a categorically excluded facility or equipment is in compliance." Federal Communications Commission, *In re Requests for Relief From State and Local Regulations*, 12 F.C.C.R. 13494, 13 F.C.C.R. 7268, 1997 WL 522796, ¶ 16 (August 25, 1997), *aff'd by, Cellular Phone Taskforce v. FCC*, 205 F3d 82 (2nd Cir 2000), cert den, 531 U.S. 1070 (2001).

¹¹ See, discussion at *FCC Local Government Guide, supra*, p. 10.

Moore-Love, Karla

From: Rees, Linly
Sent: Tuesday, January 17, 2012 10:20 AM
To: 'Christopher Hill'; Moore-Love, Karla
Cc: philgrillo@dwt.com
Subject: RE: Sschedule for continuance of LU 11--125536 (Verizon Wireless)

Chris,

I've read your response and have tried to discern the differences in your rephrasing of the three time periods. I've noted two differences and will attempt to clarify those points:

1. The rebuttal due on 1/25/12 may respond to anything submitted between the Hearings Officer's decision and the end of the Council hearing on 1/11/12, not just to material submitted at the 1/11/12 hearing.
2. The rebuttal due on 2/8/12 is limited to argument only. No new evidence may be submitted.

You should submit the materials to Karla. I suggest you speak to her about her preferred method of transmittal, though I'm certain that if you are submitting it in paper, she would appreciate receiving copies. As regards service on the applicant, I suggest you coordinate with Phil Grillo.

If there is anything else that you would like me to clarify from my earlier e-mail, please let me know.

Linly Rees

Deputy City Attorney
Portland City Attorney's Office
(503) 823-4047
linly.rees@portlandoregon.gov
(Note: New e-mail address)

From: Christopher Hill [mailto:chill@cthlaw.com]
Sent: Thursday, January 12, 2012 3:20 PM
To: Rees, Linly; Moore-Love, Karla
Cc: philgrillo@dwt.com
Subject: RE: Sschedule for continuance of LU 11--125536 (Verizon Wireless)

Linly:

Just want to make sure we (I) am on the same page:

- 1/25/12 is submission of responses to the new evidence and argument submitted at the hearing yesterday
- 2/8/12 is submission of rebuttal to the 1/25/12 submissions
- 2/15/12 is applicant's final argument

Is that correct?

And for submission of evidence and argument, do we submit that to Karla with 7 copies plus serve on

1/19/2012

the adverse party?

Chris

Christopher T. Hill, PC
520 SW Sixth Avenue, Suite 1250
Portland, OR 97204
(503) 227-4330
chill@cthlaw.com
<http://www.portlandinjurylaw.com>

From: Rees, Linly [mailto:Linly.Rees@portlandoregon.gov]
Sent: Thursday, January 12, 2012 9:46 AM
To: Moore-Love, Karla
Cc: 'philgrillo@dwt.com'; 'chill@cthlaw.com'
Subject: Sschedule for continuance of LU 11--125536 (Verizon Wireless)

Karla:

At the conclusion of yesterday's hearing on the Verizon Wireless application, City Council established the following schedule for the continuance:

January 25, 2012 (submit to Council Clerk by 5 pm) - All parties may respond to new evidence and/or argument that was accepted by the Council subsequent to the Hearings Officer's decision by submission of rebuttal evidence and/or argument. In addition, all parties may submit arguments that respond to the questions raised by Council.

February 8, 2012 (submit to Council Clerk by 5 pm) - All parties may submit rebuttal arguments. No new evidence may be submitted during this period.

February 15, 2012 (submit to Council Clerk by 5 pm) - The applicant may submit final argument. No new evidence may be submitted.

March 1, 2012, 2 pm - Council will hold the continued hearing.
The applicant agreed to extend the 150 day shot clock and 120 day clock to April 4, 2012.

Please include this email in the record of the proceeding.

Linly Rees
Deputy City Attorney
Portland City Attorney's Office
(503) 823-4047
linly.rees@portlandoregon.gov
(Note: New e-mail address)

Moore-Love, Karla

From: Euro Guy [euroguy_pdx@yahoo.com]
Sent: Monday, January 16, 2012 1:54 PM
To: Cate, Sylvia; Rees, Linly; Moore-Love, Karla
Subject: Following up with you regarding appeal hearing LU_11_125536_CU

Linly, Sylvia, Karla,

I have several questions regarding this case, and the recent direction, and would appreciate your reply and information to that. I have grouped my questions in multiple categories for your convenience. I realize some questions are process-related, others are legally focused, etc. Unless I hear otherwise, I will assume that you can coordinate internally to get me solid and official answers, and work with others within the City's organization as needed. If that is incorrect, and you require me to direct certain questions to specific others myself, please let me know. *(Please note, at this time I'm just trying to get some needed information and clarification, and at this point my e-mail is not intended as "testimony" or to be otherwise included in the official record.)*

1) Commissioner Saltzman "disclosed that he had had ex parte contact" by stating that he had seen or received an e-mail from "Marcel". Although there are of course others with that first name, from context I assume he refers to an e-mail from me (?). I've been very careful not to directly communicate with Commissioners, so I was surprised about his statement and me being called out at the meeting.

There are of course multiple e-mails from me in the record, so if he was referring to those I can only compliment him on reading those and acknowledging that. However, in that case it begs the question whether the other commissioners did *not* read the materials in the record, since they didn't make similar disclosure statements...? I did specifically submit additional written testimony on Wednesday morning prior to the meeting through an e-mail directed to Karla, who said it would be added to the record. If that is what Mr. Saltzman referred to, was he the only Commissioner who received and/or read that testimony?

I did also send a recent e-mail to the *staff contacts* of the Council members, asking them to convey the sentiments, feeling and thoughts in the community about this case to their respective Commissioner/Mayor. It was my understanding that that is the prescribed proper process for conveying information to Council members, in order to specifically avoid running afoul in regards to "ex parte contacts". On that one too, the e-mail was to staff of each commissioner, not just Saltzman's staff, so I'm still in the dark as to what the "ex part contact" was referring too.....

If I did make a mistake in the process I would like to know what that was, so I can avoid that for future cases. If the e-mail Mr. Saltzman referred to was by another person named Marcel, I would like to know that too as that may become a quite confusing but relevant fact in the furtherance of this case.

Therefore, I would appreciate if you could please clarify that whole situation and provide me answers to the questions above.

2) I, and many others with me, are quite confused about the "on the record" aspect of this appeal. Even the Hearings Officer at his hearing was very specific and very clear and firm, in stating and repeating several times, that any evidence would need to be submitted by his records-closing-date, and that that also applied to anything that would be allowed in any further follow-up in appeal to City Council. Apparently, the applicants who didn't see the case go in the direction they liked were allowed (?) to re-open that case and submit new evidence contrary to earlier direction and statements from Hearings Officer. Since they are allowed to submit new evidence, which in effect changes the record and therefore the information about the application and the proposed development, it seems that in order for there to be any valid public input process, a new public notice would need to be published to inform anyone in the general public and specifically the neighborhood that this case is now re-opened and has been changed. Many people have been informed or heard from others that the Hearings Officer has rejected this application and don't even know any better that that the case is closed. (Especially since timely or correct notification about the appeal was not send out, many people will have moved on, knowing that the case is indeed closed and over.)

Therefore:

Will a new notice be send out to neighboring property owners and the citizens of Portland to notify them that (and how) the process and application has changed?

What will be the new timelines for the public notices, and any follow-up comment periods in order to assure citizens have opportunity to get informed and gather and provide relevant feedback and input as sought by Commissioners?

And:

If anyone else will not like the direction and/or likely outcome the case may take after the next go-around, will they also be allowed to re-open the record again and have their chance of trying for a more favorable outcome that way?

If applicant will also not like the direction and/or likely outcome the case may take after the next go-around, will they be allowed to re-open the record again and have yet another new chance of trying for a more favorable outcome?

3) Since applicant raised several issues at the Council hearing that were not relevant or specific to this case and thereby tried to expand the scope of the discussion to something far beyond the issue at stake (was the Hearings Officer correct in his decision?), venturing out into issues regarding City policy, other historic application cases, general interpretation of City Code, Code adherence to federal mandates, etc. and it appeared that City Council indeed engaged in that discussion at the meeting and plans to do from here forward, it seems appropriate to have any further steps and audiences in this process also be expanded to match that new scope. I believe that if City Council indeed expands the scope of their review and their possible ruling/decision, and plans to engage in those broader subjects brought up by applicant beyond the actual Land-Use review application of this case, the process for that needs to reflect that new broader scope and be set up accordingly to facilitate input from all Portland citizens, and not just the few that were notified of this specific development proposal.

Could you please confirm that Commissioners will either only be ruling on the decision in this specific case (Hearings Officer was correct or not), or otherwise will follow the proper process for public input and discussion?

4) At the hearing the Commissioners appeared to have some questions they were still struggling with. I believe the answers to all those questions are available in the record, and certainly to the degree those questions would be relevant to the decision at stake as to either confirming or rejecting the Hearings Officer's decision in this case. Therefore, it appears the Commissioners may not (yet) have read the whole record in the case.

Do we need to re-submit anything to the record to assure the Commissioners read it, or how would we be assured that Commissioners will read our submittals into the record before they will make their decision?

Also, in case the Commissioners would not plan to read the whole record, what is the validity or justification of even adding any new evidence to the record...?

Furthermore, at the Council meeting the Commissioners for the very most part directed their questions to the applicant, even on many aspects and issues that several others present at the meeting had actually already provided testimony and comments in the record on, and who would therefore be a much more logical audience to answer those questions. Pretty much all of the general discussion was also solely between Commissioners and the applicant, while others present were not able or allowed to participate in that discussion or provide their views, insight or input.

Will there be a chance for real dialogue with Commissioners from citizens and stakeholders in this case in the upcoming process steps?

Could Commissioners in the next step of their process -if they have any questions- solicit an answer from anyone who commented on that specific issue in the record and not just one-sidedly only from the applicant?

Will the specific questions that the Commissioners have and would like to see answered and/or commented on be written up somewhere and provided to people interested in this matter, so that further testimony/information can be as much as possible to the point (benefitting both Commissioners and the public process)?

[I think this is EXTREMELY important since it could avoid similar situations as at the meeting, where applicant is the one who can bring up any issues they would like to talk about instead of City Council defining the issues as to specifically the ones relevant for the decision at stake: did the Hearings Officer rightly deny the application.]

I would appreciate your answers to my questions,

Thanks,

1/19/2012

Marcel Hermans

Moore-Love, Karla

From: Rees, Linly
Sent: Thursday, January 12, 2012 9:46 AM
To: Moore-Love, Karla
Cc: 'philgrillo@dwt.com'; 'chill@cthlaw.com'
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Linly Rees

Deputy City Attorney
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(503) 823-4047

linly.rees@portlandoregon.gov

(Note: New e-mail address)