CITY COUNCIL FINDINGS AND DECISION

I. GENERAL INFORMATION

File No.: **LU 11-125536 CU AD** (HO 4110025)
Verizon Wireless @ 6904 SE Foster Rd

Applicants: Galen E. and Clay E. Tyler, Listed Property Owners
Mt. Scott Fuel
6904 SE Foster Road
Portland, OR 97206-4548

Appellant: **Verizon Wireless**, Lessee
5430 NE 122nd Avenue
Portland, OR 97230

Applicants' Representative: Phil Grillo, Attorney
Davis Wright Tremaine LLP
Suite 2300
1300 SW Fifth Avenue
Portland, Oregon 97201-5630

Hearings Officer: Gregory J. Frank

Bureau of Development Services (BDS) Staff Representative: Sylvia Cate

Site Address: 6904 SE Foster Road

Legal Description: TL 12400 3.85 ACRES LAND & IMPS SEE R335883 (R992170511), SECTION 17 1S 2E

Tax Account No.: R992170510

State ID No.: 1S2E17BA 12400

Quarter Section: 3537

Neighborhood: Mt. Scott-Arleta
Business District: Foster Area

District Coalition: Southeast Uplift

Plan District: None

Zoning: CGb: General Commercial with a Buffer overlay

Land Use Review: Type III, Conditional Use and Adjustment

BDS Staff Recommendation to Hearings Officer: Approval with conditions

Hearings Officer's Decision:
Denial of:

- A Conditional Use; and
- An Adjustment to waive landscaping as required at 33.274.040.9.a.[1] & [2]

City Council Decision: Approval with Conditions

Proposal: Verizon Wireless proposes to construct a 45-foot tall monopole for a wireless telecommunications facility on real property generally described as 6904 SE Foster Road (the "Site"). The proposal includes up to a total of 12 antennas hosted on the monopole, with an initial start of nine antennas. A fenced accessory equipment compound is proposed to be located at grade adjacent to the monopole, with electrical equipment cabinets located on a concrete slab, and an emergency generator included within the equipment area (collectively the wireless associated improvements shall hereafter be referred as the "Facility").

The Applicants also request an Adjustment to waive the required landscaping buffer due to development and conditions on the Site which will partially screen the Facility from view. The Applicants note that the Site, which is used by a commercial business that stockpiles and sells crushed rock, bark dust and similar materials, already has an existing 6-foot high site-obscuring fence and concrete wall inside the fencing along the south, east and west property lines, and suggests that the existing building will screen the facility from views.

Ordinarily, the proposed monopole would be allowed by right, as it is in a commercial zone, meets the maximum height allowed in the commercial zone and is more than 50-feet away from a residential zone. However, the proposed monopole is within 2,000 feet of an existing, 45-foot tall monopole. Verizon contends that it is not able to collocate on that existing monopole, and thus proposes a new facility.

Relevant Approval Criteria:
In order to be approved, this proposal must comply with the approval criteria of Title 33, Portland Zoning Code. The applicable approval criteria are:

- 33.815.225.C.1 through 6, Conditional Use approval criteria
- 33.805.040.A through F, Adjustment
- 33.274.040.C, Mandatory Development Standards

APPEAL:

The Hearings Officer's decision of denial was appealed by Verizon Wireless.

PROCEDURAL HISTORY:

Verizon Wireless submitted an application for a Conditional Use and concurrent Adjustment on **April 1, 2011**. An incomplete letter was sent to the applicant on **April 26, 2011**.The application was deemed complete on **August 8, 2011**.

This application is subject to the ORS 227.178 '*120-day clock*'

Effective November 18, 2009, the FCC requires local governments to issue a final decision on *land use reviews for new wireless facilities* within 150 days of receiving an application, per FCC Declaratory Ruling, WT Docket No. 08-165. Because the

application proposed a new facility, the 150 day timeline applies. This accelerated review timeline is referred to as the *FCC 'shot clock.'*

The applicant extended, in writing, both the 120-day clock and the FCC 'shot clock', as documented in the evidentiary record. Both clocks expire on **April 26, 2012**.

Notice of a Public Hearing was mailed on September 9, 2011, 23 days in advance of the hearing. A re-Notice, containing a corrected phone number was mailed on September 14, 2011. Full documentation of Notifications is contained in Exhibits D-6, D-7, and H-6, pp. 3-4.

A public hearing was held before the City's Hearings Officer on **October 3, 2011**, in Room 2500A, at 9:00 AM. The record was held open until 4:30 p.m. on October 10, 2011 for new written evidence and until 4:30 p.m. on October 17, 2011 for Applicants' final argument. The record was closed on **October 17, 2011**.

The Hearings Officer issued his decision of denial on **November 3, 2011**.

The decision was appealed by Verizon Wireless on **November 16, 2011**.

A public appeal hearing before City Council was held on **January 11, 2012** at 2:00 PM. At the conclusion of the hearing, City Council determined it was appropriate to reopen the record for this application so that all interested parties could submit new information and new argument, and continue the hearing to **March 1, 2012**. City Council established the following schedule: All parties may submit new evidence and/or argument until January 25, 2011. All parties may submit rebuttal arguments but no new evidence until February 8, 2012. The applicant/appellant may submit final argument until February 15, 2012.

The continued hearing was held on **March 1, 2012**, at 2:00 PM. A tentative decision was reached by City Council, with revised findings scheduled to be adopted on **April 4, 2012**.

The applicant/appellant requested on March 20, 2012, to continue the hearing to **April 26, 2012** at 3:00 PM and extended the 120 day clock and the FCC shot clock until April 26, 2012.

ANALYSIS

Site and Vicinity: The site is a parcel of a larger ownership comprising the Mt Scott Fuel Company retail site for crushed rock and bulk landscaping materials. The site for this review comprises 167,706 square feet in area and is developed with a large industrial building surrounded by bulk piles of landscaping materials such as sand, gravel, bark dust, and similar. The site has frontage on SE Foster, as well as minor frontage areas on SE Raymond Street and SE 68th Avenue along the southerly edge of the site. The site is one of many commercial uses along SE Foster Road, which fronts the site along its northerly boundary. To the east are additional lots zoned General Commercial and developed with commercial uses. To the west and south of the site are lots and parcels zoned residential, primarily R2.5a, with an area kitty-cornered from the southwest edge of the site zoned R5a. These areas are developed with residential uses. A large Buffer overlay zone, approximately 80 feet deep is applied along the southern boundary of the site to provide additional buffering and separation from adjacent residential uses.

Zoning: The site is zoned CGb, General Commercial with a Buffer overlay.

The *General Commercial* (CG) zone is intended to allow auto-accommodating commercial development in areas already predominantly built in this manner and in most newer commercial areas. The zone allows a full range of retail and service businesses with a local or regional market. Industrial uses are allowed but are limited in size to avoid adverse effects different in kind or amount than commercial uses and to ensure that they do not dominate the character of the commercial area. Development is expected to be generally auto-accommodating, except where the site is adjacent to a transit street or in a Pedestrian District. The zone's development standards promote attractive development, an open and pleasant street appearance, and compatibility with adjacent residential areas. Development is intended to be aesthetically pleasing for motorists, transit users, pedestrians, and the businesses themselves.

The *Buffer overlay zone* requires additional buffering between nonresidential and residential zones. It is used when the base zone standards do not provide adequate separation between residential and nonresidential uses. The separation is achieved by restricting motor vehicle access, increasing setbacks, requiring additional landscaping, restricting signs, and in some cases by requiring additional information and proof of mitigation for uses that may cause off-site impacts and nuisances.

Land Use History: City records indicate no prior land use reviews. A required Pre Application Conference, PC 10-194550, was held on December 22, 2010, the summary notes from that Conference are contained in Exhibit G 3. During the conference, the applicant was encouraged to 'flip' the compound configuration in order to place the monopole toward the interior of the site and further away from adjacent homes. The plans submitted for this review reflect that recommendation.

Agency Review: A "Request for Response" was mailed **August 12, 2011**. The following Bureaus have responded with no issues or concerns. Any additional comments from agencies that are relevant to the approval criteria are included in the findings below. Additional agency comments specific to requirements at time of building permit review are found in the E Exhibits of this Report and Recommendation.

- Bureau of Environmental Services [E-1]• Bureau of Transportation Engineering [E-2]• Water Bureau [E-3]• Fire Bureau [E-4]• Site Development Section of BDS [E-5] • Bureau of Parks-Forestry Division [E-6]
- Life Safety Section of BDS [E-7]

FINDINGS AND CONCLUSIONS OF LAW
FOR
LU 11-125536 CU AD (VERIZON WIRELESS)

I. Background

This is an appeal of the hearings officer's decision denying a proposal by Verizon Wireless to construct a wireless telecommunication facility on a site located at 6904 SE Foster Rd. The site is zoned General Commercial with a Buffer Overlay (CGb). In order to construct the proposed facility, Verizon Wireless submitted a conditional use and a concurrent adjustment application. Ordinarily, the proposed 45-foot monopole and its accessory equipment would be allowed by right in the CGb zone, because it is located outside the buffer overlay zone, is within the maximum height limit allowed in the zone, and is more than 50 feet from the adjacent residential zone. However, because the proposed facility is within 2,000 feet of an existing tower, PCC 33.274.035(B) requires a conditional use permit (CUP). In this case, the applicant is also requesting an adjustment to waive the required landscaping buffer, due to development constraints and other conditions on the site.

The hearings officer denied both applications. His decision focused on the threshold issue in this case, which involves the interpretation of the phrase "facilities operating at 1,000 watts ERP or less," as that term is used in PCC 33.815.225(C). With regard to that issue, BDS staff and the applicant assert that the 1,000 watt ERP threshold is the ERP for a single channel and that the proposed facility will operate below this threshold. Opponents assert that the 1,000 watt ERP threshold is the sum of the ERP from all channels, and from all antennas, in all directions so that the facility will operate above the threshold. The hearings officer disagreed with BDS staff, the applicant, and the opponents, and decided that the 1,000 watt ERP threshold is the ERP for a single antenna. From a factual standpoint, the hearings officer concluded that "based upon the evidence in the record, that the question of which approval criterion (PCC 33. 815.225(C) or (D)) applies remains undetermined." In reaching that conclusion, the hearings officer found that the applicant did not provide substantial evidence that the criteria in either PCC 33.815.225(C) or (D) applied, and denied the application on that basis.

The applicant filed a timely appeal. In the appeal, the applicant alleged that the hearings officer's decision incorrectly interpreted the approval criteria in PCC 33.815.225 and PCC 33.274, and incorrectly determined that the application is not supported by substantial evidence in the record. The appeal also alleged that the hearings officer's decision failed to make findings concerning the applicant's compliance with PCC 33.805.040. The applicant argued that its application meets all of the relevant criteria in PCC 33.815.225, PCC 33.274 and PCC 33.805.040, and that it should have been approved.

II. Threshold Issues

A. ERP Interpretive Issue.

The ERP interpretive issue is whether 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.

Opponents argue that the phrase "facilities operating at 1,000 watts ERP of 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. Their argument focuses on the word "facilities." They argue that the term "facilities" is a term of art that has a specific meaning, which requires the City to measure the ERP from all channels, from all antennas, in all directions. Council agrees that the opponents' interpretation is plausible, but finds that it is not the most plausible of the three interpretations described above. Council finds that the term "facility" as used in PCC 33.815.225(C) is ambiguous. Council finds that the City's code does not define the term "facility" and that the dictionary definition of that 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." Council finds that RF towers, RF antennas and RF transmitters are all things that are built, installed or established to serve a particular purpose. Council therefore finds that the dictionary definition does not resolve the question of what the "facility" is for purposes of PCC 33.815.225, or how to calculate the ERP of that facility. The hearings officer specifically rejected the opponents' interpretation, even though he acknowledged that it is plausible. Council agrees with the hearings officer's conclusion that the code does not define the term "facility" and the dictionary definition of the term "facility" does not resolve the question of what the "facility" is for purposes of PCC 33. 815. 225(C), nor does it resolve how to measure the ERP for that facility.

The hearings officer's interpretation focused instead on the definition of the term" 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.'" The hearings officer 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." Council agrees that these are the definitions of ERP. Council finds, however, that these definitions aid, but do not resolve, the meaning of the phrase "facilities operating at 1,000 watts ERP or less." Council finds that the City'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.

The applicant and BDS staff have submitted legislative history into the record. This legislative history shows that when the City enacted its new ERP threshold in 2004, it intended its 1,000 watt ERP threshold to be consistent with the new FCC power limits, which calculate power per channel. Council agrees with the analysis and conclusions of BDS staff and the applicant in that regard. The expert testimony provided by Mr. Pinion and Mr. Gorton further confirms the testimony of BDS staff and the applicant that FCC power limits are calculated by channel, and that in general, FCC power limits for wireless facilities are 1,000 watts ERP or less. Council finds that Mr. Pinion and Mr. Gorton are both highly qualified RF engineers with the engineering firm of Hatfield & Dawson. Both Mr. Pinion and Mr. Gorton are licensed engineers in Oregon. Their qualifications are described in Exhibit 5 to the applicant's January 25,

2012 letter (Appellant's Expert Testimony and Rebuttal Evidence). Mr. Pinion and Mr. Gorton also testified that for purposes of calculating FCC power limits, it is standard engineering practice to calculate power by channel, not by antenna or by adding together all of the power from all of the channels, from all of the antenna, in all directions. *See* Mr. Gorton's letter of January 24, 2012 and Mr. Pinion's letter of January 25, 2012. Council finds the testimony of Mr. Pinion and Mr. Gorton to be both reasonable and credible in that regard. Council specifically finds that the City's 1,000 watt ERP threshold in PCC 33.815.225 is based on FCC power limits, which are set forth and analyzed in the January 25, 2012 letter from Mr. -Gorton, and in other documents and testimony in the record submitted by the applicant and BDS staff.

Council therefore finds that the City's 1,000 watt ERP threshold should be interpreted in a manner that is consistent with FCC power limits, which are calculated by channel, not by antenna as the hearings officer concluded, nor by adding together all of the power from all of the channels, from all of the antennas, in all directions, as argued by the opponents.

Council also notes that it is important to distinguish between the way ERP is calculated for purposes of regulating power limits, versus the way ERP is calculated for purposes of regulating RF exposure limits. This distinction is discussed in detail in the appellant's February 8, 2012 rebuttal letter and in documents referred to in that letter. As the appellant's February 8 rebuttal letter, and Mr. Walter's January 25, 2012 memo point out, there are two primary ways that ERP is used under federal law. One use of ERP is to regulate power limits and the second use is to regulate RF exposure limits. For purposes of regulating power limits, evidence in the record shows that the FCC calculates ERP by channel. On the other hand, for purposes of regulating RF exposure limits, evidence in the record shows that the FCC calculates ERP by adding together the power from all channels, on all antennas, in a given direction. This testimony is reinforced by the email of Donald Draper Campbell, Senior Engineer with the FCC. Mr. Campbell's testimony notes that the way in which ERP is calculated in a given situation depends on the context of the regulation. For RF exposure purposes, Mr. Campbell states that for sectorized antennas, "ERP is the summed for all channels and all antennas operated by a single license in a single sector in each particular frequency band." He also stated that for purposes of establishing FCC power limits under 47 CFR § 22.913, power is calculated by "transmitter" (i.e., channel).

As discussed above, the legislative history in the record shows that the reason the City enacted its 1,000 watt ERP threshold in PCC 33.815.225(C) was to make the City's zoning code consistent with the new FCC power limits for wireless facilities in CFR Chapter 47, which calculates ERP by channel, not by facility or by antenna. On the other hand, as explained by the appellant in its February 8th rebuttal letter, there is no legislative history or other testimony in the record showing that the purpose of the City's 1,000 watt ERP threshold was to make the City's ERP threshold consistent with FCC RF exposure limits. Council finds that the purpose of the City's 1,000 watt ERP threshold is not related to FCC RF exposure limits. The City's 1,000 watt ERP threshold in PCC 33.815.225 is intended to be consistent with the FCC's power limits for wireless facilities, which calculates power by channel.

In short, while there are three plausible interpretations of the phrase "facilities operating at 1,000 watts ERP or less" in PCC 33.815.225, the interpretation proposed by BDS staff and the applicant is the most plausible. It is the most plausible interpretation because computing ERP by channel, for purposes of determining compliance with FCC power limits, is consistent with standard engineering practices, it is consistent with the federal law and it is consistent with the legislative history of the City's 1,000 watt ERP threshold.

B. ERP Factual Issue

The ERP factual issue related to PCC 33.815.225 is whether the proposed facility will operate at 1,000 watts ERP or less. If so, the CUP criteria in PCC 33.815.225(C) apply. If not, the CUP criteria in PCC 33.815.225(D) apply. According to the testimony of Mr. Jeff Cully, Mr. David Pinion PE, and Mr. Thomas Gorton PE, the maximum ERP of any single channel from any of the Verizon Wireless antennas located on the proposed facility will be less than 759 watts. As explained above, when the City enacted its new 1,000 watt ERP threshold in 2004, it intended its 1,000 watt ERP threshold to be consistent with the FCC power limits for wireless facilities, which calculate power on a per channel basis. Council finds that there is substantial evidence in the record that the per channel ERP for this facility will be less than 759 watts. Council therefore finds that the CUP criteria in PCC 33.815.225(C) apply.

In the proceedings before the hearings officer, and again on appeal to Council, opponents assert that in order for Mr. Culley to submit a document to the City (Exhibit H.7) that he signed using his Verizon Wireless title "RF Engineer," he must be licensed with the Oregon State Board of Examiners for Engineering & Land Surveying. (OSBEELS). Because Mr. Culley is not a licensed RF engineer in Oregon, opponents contended that the data and conclusions offered by Mr. Culley are not credible and that the hearings officer could not rely on such information. The hearings officer agreed with the opponents and found that Mr. Culley's testimony was not credible because he is not a licensed engineer in Oregon. The hearings officer also found that any statements made by any third party (i.e. Mr. Pinion) that relied on Mr. Culley's statements, were also not credible. Based on this reasoning, the hearings officer found that the ERP conclusions of Mr. Culley and Mr. Pinion were not credible.

Council disagrees with the arguments of the opponents and conclusions of the hearings officer regarding the credibility of Mr. Culley and Mr. Pinion. Council finds that the statements of Mr. Culley and Mr. Pinion are credible. Council also finds that the statements of Mr. Gorton are credible and that his testimony further confirms the credibility of Mr. Culley and Mr. Gordon.

With regard to the testimony of Mr. Culley, Council finds that none of the relevant criteria require Mr. Culley to be a registered professional engineer in order for him to submit his letter of 9/26/11 (Exhibit H.7) into the public record in this case. Opponents asserted and the hearings officer found that Mr. Culley's 9/26/11 letter discussing coverage issues constitutes the unlawful practice of engineering under ORS 672.007(1)(C), because Mr. Culley signed that document using his Verizon Wireless title "RF Engineer" even though he is not a licensed engineer in Oregon. In that regard, Council finds that ORS 672.007(1)(C) is not a relevant approval criterion in this case. Council finds that pursuant to ORS 672.200-325, the Oregon State Board of Examiners for Engineering and Land Surveying (OSBEELS) has jurisdiction to determine whether such action constitutes the unlawful practice of engineering. Conversely, Council finds that the City does not have jurisdiction to make such a determination. Council finds that there has been no finding from OSBEELS that the submission of Mr. Culley's 9/26/11 letter into the public record in this case constitutes the unlawful practice of engineering. In the T-Mobile case cited by opponents and relied upon by the hearings officer in his decision, OSBELLS determined that a similar coverage letter provided by a non-licensed professional did not constitute the unlawful practice of engineering. That finding was made even though the Board found that it was improper for the non-licensed professional to use the title RF Engineer, without being registered as a professional engineer in Oregon.

Even if OSBEELS were to determine that Mr. Culley's 9/26/11 letter constitutes the unlawful practice of engineering in this case, Council finds that there is other credible evidence in the record demonstrating that the information and conclusions provided by Mr. Culley are credible and consistent with standard industry practice, even though he is not a licensed engineer. That evidence was provided by Mr. Gorton. Mr. Gorton is a licensed engineer in Oregon. Evidence in the record shows that Mr. Gorton reviewed the information and conclusions in Mr. Culley's 9/26/11 letter and concluded that the information and conclusions in that letter are professionally credible and consistent with standard industry practice. Therefore, even if OSBEELS finds that Mr. Culley violated ORS 672.007(1)(C) by submitting a letter into the record that he signed as an "RF Engineer," Mr. Gorton's testimony demonstrates that the information and conclusions in Mr. Culley's letter are professionally credible and consistent with standard industry practice and that the City can therefore rely on the information and conclusions in Mr. Culley's letter. Council therefore finds that Mr. Culley's letter of 9/26/11 is professionally credible and consistent with standard industry practice and that Mr. Culley's testimony is credible.

With regard to the ERP information provided by Mr. Culley to Mr. Pinion, Council finds that there is no evidence in the record that any federal, state or local law prevents Mr. Culley from providing ERP information to Mr. Pinion, nor is there any known legal requirement preventing Mr. Pinion from using that information in an engineering report prepared by Mr. Pinion that was submitted into the record in this case. ORS 672.007(1)(C) does not prevent a licensed engineer from using information provided by a non-licensed professional in a report submitted by the licensed engineer to the City.

Council finds that based on the evidence in the record, Mr. Pinion is a qualified licensed engineer in Oregon. As the applicant stated in the record, many licensed professionals use information provided by non-licensed professionals as a basis for reaching professional conclusions in reports submitted to public agencies. Council is not aware of any regulation preventing a licensed engineer from providing the City with his or her expert opinion, if that expert opinion includes information provided to the licensed engineer by a non-licensed professional.

Council also finds that the requirement in PCC 33.274.070 referred to in the hearings officer's decision does not create such a requirement. As explained by the appellant in its hearing memo of 1/6/12, PCC 33.274.070 pertains to "measurements" required in PCC Chapter 274. Council finds that the information provided by Mr. Culley to Mr. Pinion does not pertain to measurements required in PCC Chapter 274. The information provided by Mr. Culley to Mr. Pinion relates to the ERP information required in PCC 33.815.225(C); it does not relate to any measurements required in PCC Chapter 33.274.

Second, even if the information provided by Mr. Culley to Mr. Pinion did relate to PCC Chapter 274, Council agrees with the applicant that Mr. Culley did not "measure" anything. As explained by the applicant, evidence in the record shows that Mr. Culley used the manufacturer's specifications for each antenna to calculate the expected ERP for the proposed facility based on the maximum number of transmitters expected to be installed on the site. Mr. Culley's calculations did not require measurements to be taken. Because the facility does not yet exist, there is nothing to measure. The requirement in PCC 33.274.070 that "Measurements required in Chapter 33.274 be made by a qualified licensed engineer with an FCC First Class or General Radio-Telephone License or under the supervision of a registered professional electrical engineer," therefore does not apply.

Finally, even if the requirement in PCC 33.274.070 did apply to the reports prepared by Mr. Pinion, evidence in the record shows that Mr. Pinion is a qualified licensed engineer and holds an FCC General Radio-Telephone Operator License. He therefore meets the qualifications contained in that section. Evidence in the record also shows that Mr. Pinion prepared, submitted and signed all of the relevant engineering reports predicting ERP levels from the proposed facility. Because Mr. Pinion meets the qualifications in PCC 33.274.070, and because he prepared, submitted and signed all of the relevant engineering reports predicting ERP levels for the proposed facility, Council finds that even if the requirements of PCC 33.274.070 apply, Mr. Pinion's reports predicting ERP for the proposed facility, comply with those requirements.

With regard to the credibility of Mr. Culley, Council finds that all of the information and conclusions provided by Mr. Culley have been reviewed by Mr. Gorton, who is a qualified licensed engineer. Mr. Gorton concluded that all of the information and conclusions provided by Mr. Culley are professionally credible and consistent with standard industry practice concerning wireless network design and compliance with current FCC ERP, RF and EMF regulations. He specifically found that the "Per channel ERP values and number of channels specified by Verizon Wireless for use at the proposed POR FOSTER site to be consistent with those provided by Verizon Wireless and other providers for use at similar sites reviewed by Hatfield & Dawson." In that regard, Council finds that there is no contrary expert testimony in the record. Council also finds that none of the testimony provided by the opponents undermines the credibility of Mr. Culley, or the information and conclusions he provided in the record. Overall, based upon all of the evidence in the record, Council finds that all of Mr. Culley's information and conclusions, including the ERP information he provided to Mr. Pinion, is professionally credible and consistent with standard industry practices. Council is persuaded by the testimony of Mr. Gorton, who confirmed that the information and conclusions provided by Mr. Culley are professionally credible and consistent with standard industry practice.

With regard to the testimony of Mr. Pinion, Council agrees with all of his testimony and finds that his analysis and conclusions are professionally credible, internally consistent, and consistent with standard industry practice. In his January 25, 2012 letter, Mr. Pinion provided a detailed explanation about the relevant values he used to described ERP values and RF exposure conditions in each of his three reports. In that letter, Mr. Pinion explained why there are no inconsistencies or errors in any of his reports. Council agrees with Mr. Pinion's testimony in that regard. The analysis and conclusion of Mr. Pinion are further supported by the testimony of Mr. Gorton, who reviewed Mr. Pinion's testimony and found it to be professionally credible and consistent with standard industry practice. In particular, Council agrees with Mr. Pinion's analysis and conclusions that "The maximum ERP for any single channel from any of the Verizon Wireless antennas will be less than 759 watts. Therefore, the facility will operate at less than 1,000 watts **based on one channel of one antenna**." (emphasis in original). This testimony by Mr. Pinion demonstrates that the proposed facility will operate at 1,000 watts ERP or less, and that the criteria in PCC 33.815.255(C) therefore apply. Council also specifically agrees with Mr. Pinion's October 2011 report and his January 25, 2012 letter in response to the testimony of Mr. Hill.

With regard to the testimony of Mr. Gorton, Council finds that there is no evidence in the record questioning the credibility of Mr. Gorton. Council agrees with all of Mr. Gorton's testimony and finds that it is professionally credible. Council further finds that Mr. Gorton's testimony verifies and clarifies the technical information previously submitted into the record by applicant.

III. Conditional Use Standards

33.815.225 Radio Frequency Transmission Facilities

(C) Approval criteria for facilities operating at 1,000 watts ERP or less, proposing to locate on a tower in a C or EX zone more than 50 feet from an R zone:

33.815.225(C)(1)

(1) The applicant must prove that a tower that is taller than the base zone height standard allows or is within 2,000 feet of another tower is the only feasible way to provide the service, including documentation as to why the proposed facility cannot feasibly be located in a right-of-way.

Findings: There is substantial evidence in the record that the proposed tower is within 2,000 feet of another tower, but that the proposed tower is the only feasible way to provide the service, including documentation as to why the proposed facility cannot feasibly be located in the right-of-way.

There is substantial evidence in the record that the applicant has documented a gap in service capacity and coverage. (*See* Exhibits A-1, H-7 and 28). As part of the applicant's analysis, the applicant identified three options within its search ring for providing the needed service. These options include potential colocation on an existing tower, potential colocation on an existing rooftop facility, and potential colocation within the right-of-way on SE Foster Road.

Colocation on an Existing Tower. This option was discussed in detail in the applicant's materials and in the staff report. Evidence in the record shows that colocation on a nearby tower is not feasible because Verizon Wireless' coverage objectives cannot be met due to inadequate tower height. In addition, space constraints on the site prevent the applicant from locating its ground equipment within the leased area or in other available areas on the site. This option is therefore not feasible.

Colocation on an Existing Rooftop Facility. This option was also discussed in detail in the applicant's materials and in the staff report. Evidence in the record shows that colocation on a nearby rooftop facility is not feasible because the structural integrity of the rooftop is not capable of supporting the applicant's antenna. In addition, evidence in the record shows that it is not feasible for the applicant to locate needed ground equipment on the site. This option is therefore not feasible.

Colocation within the ROW. This option was discussed in detail in the applicant's materials and in the staff report. The Bureau of Transportation also commented on this option. Evidence in the record shows that colocation within the public ROW on SE Foster Road is not feasible because there is insufficient area within the ROW to locate needed equipment and cabinets. Based upon city GIS information, the Bureau of Transportation indicated that there are multiple underground service laterals that would make it problematic to locate needed equipment and cabinets underground within the search ring. PDOT has determined that above grade or below grade installation of needed equipment and cabinets would not be feasible in the ROW on SE Foster Road within the

search ring. For all of these reasons, colocation within the ROW along SE Foster Road is not feasible.

Overall, there is substantial evidence in the record that the proposed tower is the only feasible way to provide the needed service. This criterion is therefore met.

33.815.225(C)(2)

(2) The tower, including mounting technique, must be sleek, clean and uncluttered.

Findings: Evidence in the record shows that the tower design, including the mounting design, will be sleek, clean and uncluttered. The 45-foot monopole will be sleek and clean in appearance as shown by the photos and plans in the record. The photos also show that the mounting design and antennas will be attached to the pole in an uncluttered way. The submitted plans show davit arms approximately 2 feet in length supporting a lateral mounting bar that the antennas are mounted on. No "top hat" style antenna mounts are proposed, and there will be no grating around the mounting device. This mounting configuration and overall design is as sleek, clean and uncluttered as possible. This criterion is therefore met.

33.815.225(C)(3)

(3) Accessory equipment associated with the facility must be adequately screened. If a new structure will be built to store the accessory equipment, the new structure must be designed to be compatible with the desired character of the surrounding area.

Findings: Evidence in the record shows that accessory equipment associated with the facility will be adequately screened and that the small structures that will be built to store accessory equipment and screen the proposed generator will be designed to be compatible with the desired character of the surrounding area. Evidence in the record shows that the perimeter of the property along the west, south and east property lines is surrounded by a concrete wall that screens the site from adjacent uses. In addition, evidence in the record shows that there is an existing building directly north of the proposed facility that screens the accessory equipment associated with the facility from adjacent uses.

With regard to the desired character of the area, there is substantial evidence in the record that the small equipment shelter that will be built to screen the accessory equipment associated with the facility and the matching wall that will be built to screen the emergency generator will be compatible with the desired character of the surrounding area. These structures will provide complete visual screening of the equipment and will be more compatible with the surrounding area and the desired character of the commercial area along SE Foster Road. The staff report at pp. 10-11 provides detailed findings concerning the desired character of the area that adequately explain why these small structures will be compatible with the desired character of the area and the purpose of the CG zone. As those findings explain, "An equipment shelter/building will provide complete visual screening of the equipment and [will] be more compatible with the desired character of the surrounding area." Council finds that by requiring

the accessory equipment associated with the facility to be completely screened, it will be consistent with the desired character of the surrounding area which is to improve the physical image and character of the Mt. Scott Arleta Neighborhood. By placing this equipment within a structure, the physical image and character of the neighborhood will be improved. It should also be noted that by placing this accessory equipment in an equipment shelter/building, the site will become more conforming, because this equipment will not be used as an external work activity area or an area for exterior display, as much of the site is now. Condition C, which requires that the applicant install street trees and ground cover along the SE Foster Road frontage, will also make the site more conforming, further improving the desired character of the area. For all of these reasons, there is substantial evidence in the record that this criterion can and will be met.

33.815.225(C)(4)

(4) The visual impact of the tower on the surrounding area must be minimized.

Findings: Based upon the evidence in the record, and the conditions of approval required below, Council finds that the visual impact of the tower on the surrounding area will be minimized. As noted in the staff report, PCC 33.815.225(B)(3)(a)-(e) lists several ways that visual impacts can be minimized. Evidence in the record shows that the applicant has utilized three of these methods to minimize visual impacts on the surrounding area. First, the applicant has limited the height of the tower as much as possible given the technical requirement for providing service, to a height of 45 feet, which is a permitted height in the base zone. Second, the applicant proposes to locate the tower away from adjacent residential land uses that are more sensitive to the visual impacts of the tower. The facility is proposed to be located at least 53 feet away from the nearest adjacent residential zone, and is proposed to be located at least 110 feet away from the nearest residential structure. Pursuant to condition of approval D, Council has required the applicant to relocate the facility from the originally proposed area behind the adjacent commercial building, to around the corner and alongside the southeast façade of that building. Alternatively, any location on the site that is closer to SE Foster Road, farther away from residences, and east of the southeast façade of the adjacent building, will satisfy this condition. The intent of this condition is to require the applicant to locate the tower farther away from adjacent residences. By requiring the applicant to locate the tower farther from adjacent residences, the visual impacts of the tower will be minimized as much as possible.

In addition, evidence in the record shows that the visual context of the surrounding area includes a significant amount of overhead infrastructure, including numerous 45-foot tall utility poles. These 45-foot tall poles are located along most of the streets in the surrounding area. In addition to the 45-foot utility poles, there is a set of 65-foot tall utility poles located along SE 70th Street and SE 65th Street, near the site. As a result, this neighborhood, like many others in Portland, contains a significant amount of overhead infrastructure that provides electrical power, land-line phones, cable and street light service to homes and business in the area. The height of the proposed 45-foot wireless monopole is similar to the existing overhead infrastructure in the area. On the other hand, the overall design of the proposed 45 foot wireless monopole is more sleek and uncluttered than other overhead infrastructure in the surrounding area, because most of the existing overhead infrastructure has multiple davit arms of varying lengths that often support multiple attachments, including

various wires, transformers and mounting devices. Therefore, the sleek, clean and uncluttered look of the proposed facility will also minimize its visual impact. For all of these reasons, and for the reasons discussed in the staff report and applicant's narrative, there is substantial evidence in the record that the visual impact of the tower on the surrounding area will be minimized. This criterion will therefore be met.

33.815.225(C)(5)

(5) Public benefits of the use outweigh any impacts which cannot be mitigated.

Findings: There is substantial evidence in the record that the public benefits of the use outweigh any impacts that cannot be mitigated.

The record shows that public benefits of the use involve enhanced wireless telecommunication services in the area. Evidence in the record shows that the public benefits of the use include improved in-building coverage, better handoffs between this site and other sites, improved signal strength in weaker areas, enhanced 911 connections to government and emergency responders, and enhanced connections to existing and future consumers and businesses in the neighborhood, and within the network generally.

The record shows that the impacts that cannot be fully mitigated from the proposed use include limited visual impacts on some adjacent residential properties and RF concerns expressed by the neighborhood.

With regard to visual impacts, evidence in the record shows that the height of the proposed monopole will not exceed the 45-foot height limit in the zone. Evidence in the record also shows that the facility has been designed to be as sleek, clean and uncluttered as possible to minimize the visual impact of the facility as much as possible. In order to further reduce any visual impact on adjacent residential properties, Council has imposed a condition of approval requiring the facility will be moved either around the corner from the adjacent commercial building and along the southeast façade of that building, or closer to SE Foster Road, farther away from residences, and east of the southeast façade of the adjacent commercial building. Evidence in the record shows that by relocating the proposed facility in this way, visual impacts from the facility on adjacent residential uses can be mitigated as much as possible, because by relocating the facility farther away from adjacent residentially zoned land, the facility will be less visible to adjacent residences. For these reasons, the public benefits of the use outweigh the limited visual impacts that cannot be fully mitigated.

With regard to RF impacts, evidence in the record shows that the proposed facility will meet emission standards established by both the City and FCC. As a matter of federal law, the facility cannot exceed federal RF emission limits. Evidence in the record also shows that the FCC will not license the facility, unless it meets federal RF emission standards. Under the Federal Telecommunication Act of 1996, local governments cannot deny a request to construct a wireless facility based on radio frequency emissions, so long as the facility meets the standards set by the FCC. Evidence in the record shows that these standards can and will be met, and that RF emissions from the facility will be within City and FCC limits. Because the facility can and will meet both City and FCC emission limits, RF impacts have been mitigated to the extent possible.

Overall, because the visual impacts and the RF impacts of the facility will be mitigated as much as possible, and because the public benefits of the use outweigh any impacts that cannot be fully mitigated, this criteria will be met.

33.815.225(C)(6)

(6) The regulations of Chapter 33.274, Radio Frequency Transmission Facilities, be met.

Findings: The relevant regulations of Chapter 33.274 are the development standards in 33.274.040(C), discussed below. All of the applicable development standards in 33.274.040(C) are met, except the landscaping requirement in subsection (C)(9). The applicant has requested an Adjustment from that standard and the record shows that the approval criteria for the adjustment can and will be met. This criterion is therefore met.

IV. Development Standards

33.274.040 Development Standards Radio Frequency Transmission Facilities

(C) **General requirements**

(C)(1) Tower sharing. Where technically feasible, new facilities must co-locate on existing towers or other structures to avoid construction of new towers. Requests for a new tower must be accompanied by evidence that application was made to locate on existing towers or other structures, with no success; or that location on an existing tower or other structure is infeasible.

Findings: As discussed above under criterion 33.815.225(C)(1), there is substantial evidence in the record that colocation on existing facilities within the search ring is not feasible. This criterion is therefore met.

(C)(2) Grouping of towers. The grouping of towers that support facilities operating at 1,000 watts ERP or 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.

Findings: There is substantial evidence in the record that the proposed facility does not operate at 1,000 watts ERP or more. This criterion therefore does not apply.

(C)(3) Tower finish. For towers not regulated by the Oregon Aeronautics Division or Federal Aviation Administration, a finish (paint/surface) must be provided that reduces the visibility of the structure.

Findings: There is substantial evidence in the record that the proposed tower does not require aviation warning paint or lighting and is not regulated in that way by the OAD or FAA. Evidence in the record also shows that the monopole will have a typical, utilitarian grey matte finish that will help reduce the visibility of the structure. Therefore, there is substantial evidence in the record that this criterion will be met.

(C)(4) Tower illumination. Towers must not be illuminated except as required for the Oregon State Aeronautics Division or the Federal Aviation Administration.

Findings: The tower is not required by the Oregon State Aeronautics Division or Federal Aviation Administration to be illuminated and evidence in the record shows that it will not be illuminated. This criterion is therefore met.

(C)(5) Radio frequency emission levels. All existing and proposed Radio Frequency Transmission Facilities are prohibited from exceeding or causing other facilities to exceed the radio frequency emission standards specified in Table 2743-1, except as superseded by Part 1, Practice and Procedure, Title 47 of the Code of Federal Regulations, Section 1.1310, Radio Frequency Radiation Exposure Limits.

Findings: There is substantial evidence in the record that the proposed wireless facility will not exceed or cause other facilities to exceed the RF emission standards specified above.

Evidence in the record shows that the applicant submitted three RF engineering reports for the proposed facility prepared by Mr. David Pinion at Hatfield & Dawson Consulting Electrical Engineers, showing that the facility will not exceed applicable RF standards and that it will not cause other facilities to exceed applicable RF standards. These reports are dated March 2011 (Rec. Ex. A-2), August 2011 (Rec. Ex. A-3), and October 2011 (Rec. Ex. (H)(28)(a)). These reports show that the proposed Verizon Wireless facility will be in compliance with current FCC and City of Portland regulations regarding radio frequency emission levels.

For example, Mr. Pinion's October 2011 report calculated the predicted "maximum worst-case" power densities and unattenuated exposure levels that are predicted for this facility and has concluded that:

> "The proposed Verizon Wireless facility will be in compliance with current FCC and city rules regarding minimum siting distances and public exposure to radio frequency electromagnetic fields. This conclusion is based on information supplied by Verizon representatives, and estimates at future RF exposure conditions, due to the proposed Verizon facility, and ambient conditions." (Rec. Ex. (H)(28)(a), p. 15)

Mr. Pinion's report also surveyed RF exposure conditions near the project site and in the vicinity of the SBA monopole at 6514 SE Foster Road, which is the other wireless facility in the area. Mr. Pinion's report concludes that "RF emissions from the two facilities will be low enough to ensure that the cumulative RF exposure conditions due to those facilities will not exceed FCC

limits in any publicly accessible location." (*See* Rec. Ex. (H)(28)(a)). Overall, there is substantial evidence in the record that this facility will not exceed applicable City and FCC RF emission standards and that this criterion will therefore be met.

(C)(6) Antenna requirements. The antenna on any tower or support structure must meet the minimum siting distances to habitable areas of structures shown in Table 274.2. Measurements are made from points A and B on the antenna to the nearest habitable area of a structure normally occupied on a regular basis by someone other than the immediate family or employees of the owner/operator of the antenna. Point A is measured from the highest point of the antenna (not the tower) to the structure, and Point B is measured from the closest point of the antenna to the structure.

Findings: There is substantial evidence in the record that the proposed antenna will meet the minimum siting distance requirements as shown in Table 274-2.

The engineering reports provided by Mr. Pinion show that the new Verizon Wireless antennas will be 17 feet horizontally from the nearest property line and that they will be 19 feet above the roof line of the adjacent building. (Rec. Ex. A-3) Evidence in the record therefore shows that all of the Verizon Wireless antennas will be 25 feet slant distance from the nearest habitable space. Evidence in the record also shows that the proposed antennas will be approximately 45 feet above grade, and will operate below 1,000 watts ERP. (*See* staff report and Rec. Ex. 28(a)). According to Table 274-2, antennas associated with this facility are required to be at least 15 feet from Point A, and at least 6 feet from Point B. Point A is the minimum distance from the highest point of the antenna to the habitable area of a structure. Point B is the minimum distance from the closest portion of an antenna to the habitable area of a structure.

In this case, the record shows that the highest point from the antenna to the nearest habitable structure will be 25 feet slant distance from the nearest habitable structure, which exceeds the minimum required distance of 15 feet from Point A. The record shows that the closest point from the proposed antenna location to the nearest habitable structure will be 17 feet horizontally from Point B, which exceeds the minimum required distance of 6 feet. Because condition D requires the facility to be located farther from adjacent residential structures, the minimum siting distance requirements in Table 274-2 will continue to be met. Overall, there is substantial evidence in the record that this facility will meet the minimum siting distance standards to habitable areas of structures in Table 274.2, and that this criterion will therefore be met.

(C)(7) Setbacks. All towers must be set back at least a distance equal to 20 percent of the height of the tower or 15 feet, whichever is greater, from all abutting R and OS zoned property and public streets. Accessory equipment or structures must meet the base zone setback standards.

Findings: Evidence in the record shows that the fenced area where the proposed monopole and accessory equipment will be located is approximately 53 feet from the nearest residential property line. This criterion requires the proposed monopole to be set back at least 15 feet from the nearest residential property line. (Since 20 percent of the 45-foot monopole height is 9 feet, the 15-foot setback in subsection (C)(7) applies.) The accessory equipment will also be

located at least 53 feet from the closest residential property line and will significantly exceed the required setback. The base zone setback standard for the CG zone allows a 0-foot setback, unless the property line abuts an R zoned lot. In that case, the rear lot setback is 0 feet and the side yard setback is 5 feet, as described in Table 130-4. Evidence in the record shows that the proposed facility will meet the required setback of 15 feet from the nearest residential property line, because the facility will be located at least 53 feet from the nearest residential property line. For all of these reasons, and because condition D requires the facility to be located even farther from adjacent residences, the proposed facility will meet or exceed the required setbacks. This criterion is therefore met.

(C)(8) Guy anchor setback. Tower guy anchors must meet the main building setback requirements of the base zone.

Findings: Evidence in the record shows that the applicant is not proposing any guy anchors. This standard therefore does not apply.

(C)(9) Landscaping and screening. The base of a tower and all accessory equipment or structures located at grade must be fully screened from the street and any abutting sites as follows:

(a) In C, E or I zones more than 50 feet from an R zone. A tower and all accessory equipment or structures located in the C, E, or I zones more than 50 feet from an R zone must meet the following landscape standard:

(1) Generally. Except as provided in (2), below, a landscaped area that is at least 5 feet deep and meets the L3 standard must be provided around the base of a tower and all accessory equipment or structures.

(2) Exception. If the base of the tower and any accessory equipment or structures are screened by an existing building or fence, then some or all of the required landscaping may be relocated subject to all of the following standards.

- *The building or fence must be on the site;*
- *The fence must be at least six feet in height and be totally sight-obscuring;*
- *The relocated landscaping must meet the 1L2 standards. The relocated landscaping cannot substitute for any other landscaping required by this Title; and*
- *If any part of the base of the tower or accessory equipment is not screened by a building or fence, 5 feet of L3 landscaping must be provided.*

Findings: There is substantial evidence in the record that the base of the tower and all accessory equipment located at grade will be fully screened from the street and from any abutting sites, because the base of the tower and the proposed accessory equipment and structures will be screened by a 6 foot high, site-obscuring concrete barrier and by existing buildings. The base of the tower

and the proposed accessory equipment will also be screened by a site-obscuring fence, an equipment shelter, and by a matching wall around the proposed emergency generator. The screening requirement in this criterion will therefore be met.

The applicant has requested an adjustment from the landscape requirement in this criterion. Because the adjustment criteria can and will be met, the landscape requirement in this criterion either does not apply or will be met through approval of the proposed adjustment. This criterion will therefore be met.

(C)(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.

Findings: Evidence in the record shows that the proposed 45-foot monopole is not a radio frequency transmission facility of 100,000 watts or more, so subsection (b), rather than subsection (a), applies. Evidence in the record shows that the 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 and one microwave facility, because 9 two-way antenna are proposed on the proposed 45-foot monopole. This criterion is therefore met.

(C)(11) Mounting device. The device or structure used to mount facilities operating at 1,000 watts ERP or less to an existing building or other non-broadcast structure may not project more than 10 feet above the roof of the building or other non-broadcast structure.

Findings: Evidence in the record shows that the proposed antennas will be mounted on a monopole and will not be mounted on any existing building or other non-broadcast structure. This criterion therefore does not apply.

(C)(12) Abandoned facilities. A tower erected to support one or more Federal Communication Commission licensed Radio Frequency Transmission Facilities must be removed from a site if no facility on the tower has been in use for more than six months.

Findings: Evidence in the record shows that the applicant has agreed to remove the tower and accessory equipment within six months of non-use. Evidence in the record indicates that the lease between Verizon Wireless and the property

owner addresses abandonment and removal of the facility. This criterion will therefore be met.

(D) **Additional requirements in OS, R, C, and EX zones and EG and I zones within 50 feet of an R zone.**

(D)(1) Purpose. These additional regulations are intended to ensure that facilities operating at 1,000 watts ERP or less have few visual impacts. The requirements encourage facilities that look clean and uncluttered.

(D)(2) Standards. In addition to the regulations in Subsection C., above, facilities operating at 1,000 watts ERP or less located in OS, R, C, or EX zones or EG or I zones within 50 feet of an R zone must meet all of the following standards:

(a) Antennas mounted on towers. Triangular "top hat" style antenna mounts are prohibited. Antennas must be mounted to a tower either on davit arms that are no longer than 5 feet, flush with the tower, within a unicell style top cylinder, or other similar mounting technique that minimizes visual impact.

(b) Antennas mounted on existing buildings or other non-broadcast structures. This standard only applies to facilities located in OS or R zones or within 50 feet of an R zone. The visual impact of antennas that are mounted to existing buildings or other non-broadcast structures must be minimized. For instance, on a pitched roof, an antenna may be hidden behind a false dormer, mounted flush to the façade of the building and painted to match; mounted on a structure designed with minimal bulk and painted to fade into the background; or mounted by other technique that equally minimizes the visual impact of the antenna. The specific technique will be determined by the conditional use review.

(c) Lattice. Lattice towers are not allowed.

Findings: Evidence in the record shows that the proposed facility will be located on C zoned property more than 50 feet from an R zone. The criteria in subsection (D)(2) therefore do not apply. Opponents assert that this subsection should be interpreted to mean that any project located in an OS, R, or C zone, regardless of whether or not it is located within 50 feet of an R zone, must meet the standards in subsection (D)(2). Based on the text and context of the standard and the facts in the record, Council agrees with the interpretation and conclusion of BDS staff that this criterion does not apply. Even if the opponents' interpretation is correct, however, there is substantial evidence in the record that the criterion in subsection (D)(2) will be met, because, as required in subsection (D)(2)(a), no top hat style antenna mounts are proposed. Evidence in the record shows that davit arms will be approximately 2 feet in length and flush with the tower, within a unicell style top cylinder or other similar mounting device that minimizes visual impact. The evidence also shows that subsections (D)(2)(b) and (c) do not apply because the antennas will not be mounted on an existing building or other non-broadcast structure, nor will they be mounted on a lattice tower. For all of the above reasons, Council finds that the criteria in subsection (D)(2) do not apply. Even if the criteria in subsection (D)(2) apply, those criteria can and will be met.

V. Adjustment Standards

33.805.010 Approval Criteria

Adjustment requests will be approved if the review body finds that the applicant has shown that approval criteria A. through F. below have been met.

(A) Granting the adjustment will equally or better meet the purpose of the regulation to be modified; and

Findings: The applicant is requesting an adjustment from the landscaping standard in PCC 33.274.040(9)(a)(1) and (2).
The purpose of the regulation to be modified is found at 33.274.040.A. *Purpose*, which states:

The development standards:

- *Ensure that Radio Frequency Transmission Facilities will be compatible with adjacent uses;*
- *Reduce the visual impact of towers and accessory equipment in residential and open space zones whenever possible;*
- *Protect adjacent populated areas from excessive radio frequency emission levels; and*
- *Protect adjacent property from tower failure, falling ice, and other safety hazards.*

The regulation itself [33.274.040.9.] states [emphasis added]:

Landscaping and screening. The base of a tower and all accessory equipment or structures located at grade must be fully screened from the street and any abutting sites...:

As noted above, the buffering standard in that code section will be met. Evidence in the record shows that it is not practical for the applicant to provide landscaping around the base of the tower under PCC 33.274.040(9)(a)(1), nor is it practical to provide landscaping elsewhere on the site under PCC 33.274.040(9)(a)(2). The applicant is therefore seeking an adjustment from the landscaping standard in those subsections.

In order to ensure that granting the adjustment will equally or better meet the purpose of the regulation to be modified, the applicant has agreed to place its equipment in an equipment shelter and to fully screen the emergency generator behind a matching wall, so that this equipment will be more visually compatible with adjacent uses. This agreement is reflected in Condition B below, as proposed by BDS staff.

As discussed in the BDS staff report, the purpose of the landscaping standard in PCC 33.274.040(9)(a)(1) and (2) is to fully screen the base of the tower and all accessory equipment or structures from the street and any abutting sites.

The proposed adjustment, along with Condition B, will equally or better meet the purpose of the regulation to be modified, because the additional screening fully screens the base of the tower and the accessory equipment from the street and any abutting sites. In this case, given the fact that a 6 foot tall concrete, site-obscuring barrier exists around the perimeter of the facility on the west, south

and east sides of the site, and that a building abuts the site long the north side of the site, planting landscape material around the base of the tower, inside the perimeter wall, serves no practical purpose related to the purpose of the regulation to be modified. On the other hand, placing the equipment within a shelter and the generator behind a solid wall equally or better satisfies the purpose of the screening and landscaping requirement in PCC 33.274.040(9), because it ensures that the facility will be completely screened from view. At best, landscaping will only partially screen the equipment from view. It should also be noted that the landscaping and screening standards in PCC 33.274.040(9) are intended to screen: "The base of the tower and all relevant accessory equipment or structures located at grade." This standard is not intended to screen the entire tower from view.

As previously discussed, Council has required the applicant to relocate the facility on-site, as specified in condition D. The purpose of condition D is to make the facility less visible from adjacent residential uses. Council finds that relocating the facility, pursuant to condition D further ensures that granting the adjustment will equally or better meet the purpose of the regulation to be modified because relocating the facility as requested in condition D will better meet the purpose of the regulation to be modified. For all of these reasons, this criterion will be met.

(B) If in a residential zone, the proposal will not significantly detract from the livability or appearance of the residential area, or if in an OS, C, E, or I zone, the proposal will be consistent with the classifications of the adjacent streets and the desired character of the area; and

Findings: Evidence in the records shows that the proposed adjustment is not in a residential zone. The proposed facility is located in a commercial zone. There is substantial evidence in the record that the proposed adjustment will be consistent with the classification of the adjacent streets and the desired character of the area.

The site has frontage on SE Foster, as well as minor frontage areas on SE Raymond Street and SE 68th Avenue along the southerly edge of the site. *SE Foster is classified for higher levels of transportation services within the Transportation System Plan.* (It is classified as a Major City Traffic Street, a Major Transit Street and a local service Bikeway. Both SE Raymond and SE 68th are classified as Local Service Streets for all modes.) Portland Bureau of Transportation responded to the proposal and responded that *"Based on...the proposed project on the submitted site plan, all work is well within the property boundaries and out of the ROW. PBOT anticipates no impact to the public transportation system."*

Evidence in the record shows that the adjustment will have no significant impact on the street system. The record shows that the wireless facility itself will generate only one or two trips per month for technical servicing. The adjustment itself will not generate any new trips. The adjustment will therefore be consistent with the classification of adjacent streets.

The proposed adjustment will also be consistent with the desired character of the area, because the enhanced screening, including placing the accessory equipment in an equipment shed and screening the generator with a matching wall, will provide full screening and will be more consistent with the overall appearance and character of nearby commercial and residential uses in the

area. Overall, the additional screening required by Condition B will be more visually compatible with the desired character of the area than the required landscaping would have been.

The desired character of the area is defined in PCC 33.910, as follows:

> **"Desired Character."** The preferred and envisioned character (usually of an area) based on the purpose statement or character of the base zone, overly zone, or plan district. It also includes the preferred and envisioned character based on any adopted area plans or design guidelines for an area.

The staff report analyzed the purpose and character of the base zone and the adopted Mt. Scott-Arleta Neighborhood Plan, as follows:

The site is zoned CG, General Commercial, and the purpose statement of commercial zones is found at 33.130.010 which reads:

> *The commercial zones implement the commercial policies and plan map designations of the Comprehensive Plan. The zones are for areas of the City designated by the Comprehensive Plan for commercial uses. The differences in the zones reflect the diversity of commercial areas in the City. The zones are distinguished by the uses allowed and the intensity of development allowed. Some of the zones encourage commercial areas that are supportive of surrounding residential areas, while other zones allow commercial areas which have a community or regional market. The regulations promote uses and development which will enhance the economic viability of the specific commercial district and the city as a whole. In general, a wide range of uses is allowed in each zone. Limits on the intensity of uses and the development standards promote the desired character for the commercial area. The development standards are designed to allow a large degree of development flexibility within parameters which support the intent of the specific zone. In addition, the regulations provide certainty to property owners, developers, and neighbors about the limits of what is allowed.*

The character statement for the CG zone is found at 33.130.030.G, Characteristics of the Zones, which states:

> ***General Commercial zone.*** *The General Commercial (CG) zone is intended to allow auto-accommodating commercial development in areas already predominantly built in this manner and in most newer commercial areas. The zone allows a full range of retail and service businesses with a local or regional market. Industrial uses are allowed but are limited in size to avoid adverse effects different in kind or amount than commercial uses and to ensure that they do not dominate the character of the commercial area. Development is expected to be generally auto-accommodating, except where the site is adjacent to a transit street or in a Pedestrian District. The zone's development standards promote attractive development, an open and pleasant street appearance, and compatibility with adjacent residential areas. Development is intended to be aesthetically pleasing for motorists, transit users, pedestrians, and the businesses themselves.*

The Mt. Scott-Arleta Neighborhood Plan, was adopted by City Council in March 1996 as part of the Outer Southeast Community Plan. The vision statement for Mt. Scott-Arleta's Future speaks to livability and community pride as well as schools providing a high standard of learning, housing bounded by compatible commercial services along SE Foster Road, local businesses flourishing along Foster Road, along with safe roads, excellent transit services and community policing efforts to help ensure the neighborhood remains a pleasant place to live, operate a business, and to raise a family.

Policy 1, *Urban Design*, states "improve the physical image and character of the Mt Scott-Arleta Neighborhood through emphasizing its historic heritage and diverse culture. Objective 1 under this policy states 'Encourage physical changes which reinforce the vision for Mt Scott-Arleta's future.' [The vision statement for the Neighborhood does not speak to the provision of digital services or ensuring that there is not a 'digital divide' within the neighborhood, where more affluent residents have wireless services and less economically fortunate residents do not. However, the Neighborhood Plan was adopted in the first quarter of 1996; the Telecommunications Act of 1996, which spawned the explosive growth of wireless services, was not passed by Congress until later in the year]. The placement of the proposed monopole on a business site that has been in the neighborhood for over 70's years appears to be neutral in relation to this policy. However, Policy 4, *Economic Development*, states: 'Improve commercial viability for business districts in the neighborhood, to provide a full range of goods and convenient neighborhood services. Given the importance of fast, reliable wireless broadband services as part of the economy, the proposal is consistent with this Policy.

By fully enclosing all of the accessory equipment within a building, and by screening the emergency generator behind a matching wall, the accessory equipment will be fully screened, and the structure will be more consistent with the desired character of the CG zone, as well as be more compatible with adjacent residential areas.

Council agrees with the analysis and conclusions of BDS staff in that regard. Council finds that with the addition of conditions A-D, and because the accessory equipment and the proposed generator will be fully screened, that the proposed adjustment will be consistent with the desired character of the area. This criterion will therefore be met.

(C) If more than one adjustment is being requested, the cumulative effect of the adjustments results in a project which is still consistent with the overall purpose of the zone; and

Findings: Only one adjustment is required. This criterion therefore does not apply.

(D) City-designated scenic resources and historic resources are preserved; and

Findings: There is substantial evidence in the record that there are no city designated scenic or historic resources on the site. This criterion therefore does not apply.

(E) Any impacts resulting from the adjustment are mitigated to the extent practical; and

Findings: There is substantial evidence in the record that any impacts resulting from the proposed adjustment will be mitigated to the extent practicable. As the staff report indicates, existing concrete barriers, existing buildings and a proposed site-obscuring fence around the accessory equipment and base of the tower will completely screen the base of the tower and all accessory equipment from the street and from abutting sites. Condition B ensures that the accessory equipment will be fully screened from view, by requiring that accessory equipment will be placed in an equipment shelter and by requiring that the emergency generator be completely screened by a matching wall. For these reasons, it is unlikely that any impacts will result from the adjustment. Condition D also mitigates impacts by locating the facility farther from adjacent residential uses. For all of the above reasons, this criterion will be met.

(F) If in an environmental zone, the proposal has few significant detrimental impacts on the resource and resource values as is practicable.

Findings: The site is not located in an environmental zone. This criterion therefore does not apply.

VI. Conclusions

For the reasons set forth above, there is substantial evidence in the record that all of the relevant approval criteria can and will be met. Council therefore overturns the hearings officer's decision and grants the appeal of Verizon Wireless.

VII. Decision and Conditions of Approval

Approval of:

- A Conditional Use; and
- An Adjustment to waive landscaping as required at 33.274.040.9.a.[1] & [2]

for a wireless telecommunications facility consisting of a 45-foot tall monopole and accessory equipment located at grade near the base of the monopole, subject to the following conditions:

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.

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.

D) The applicant shall relocate the facility from the originally proposed area behind the adjacent building, to around the corner and alongside the southeast façade of that building. Alternatively, any location on the site that is closer to SE Foster Road, farther away from residences, and east of the southeast façade of the adjacent building, will satisfy this condition.