Supplemental Commission Agenda Report

Planning Commission Meeting
06-21-21
Item 4.C.

To: Chair Jennings and Members of the Planning Commission

Prepared by: Tyler Eaton, Assistant Planner

Approved by: Richard Mollica, Planning Director

Date prepared: June 17, 2021 Meeting date: June 21, 2021

Subject: Wireless Communications Facility No. 20-010, Coastal Development Permit No. 20-028, Variance No. 20-017, and Site Plan Review No. 20-041 – An application for an upgraded wireless communications facility on a new replacement wooden utility pole in the public right-of-way (Continued from June 7, 2021)

Location:	31557.5 Pacific Coast Highway, not within the appealable coastal zone
Nearest APN:	4470-008-002
Geo-coordinates:	34°02'12.63"N, 118°51'43.45"W
Applicant:	Motive for Verizon Wireless
Owner:	California Department of Transportation (Caltrans) Public Right-of-Way

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RECOMMENDED ACTION: Adopt Planning Commission Resolution No. 21-48 determining the project is categorically exempt from the California Environmental Quality Act, and approving Wireless Communications Facility (WCF) No. 20-010 and Coastal Development Permit (CDP) No. 20-028 for Verizon Wireless to install two replacement wireless communications facility antennas at a height of 34 feet, 9 inches and electrical support equipment mounted on a replacement wooden utility pole, including Variance No. 20-017 to permit an upgraded wireless facility mounted over 28 feet in height and Site Plan Review No. 20-041 to install and operate a wireless communications facility within the public right-of-way (ROW) located at 31557.5 Pacific Coast Highway (PCH) (Verizon Wireless).

DISCUSSION: The purpose of this report is to respond to Scott McCollough's previously submitted letter, dated June 6, 2021. In addition, this report includes correspondence received for the June 7, 2021 Regular Planning Commission meeting.

The following is a response to Mr. McCollough's letter related to the project's conformance with the Malibu Municipal Code (MMC) and Local Coastal Program Local Implementation Plan (LIP). The City Attorney will discuss information regarding State and federal regulations at the June 21, 2021, Planning Commission meeting. Mr. McCollough summarized five points that were of major concern and then added further arguments later on in the letter. Below is a response to the five major points of concern listed in Mr. McCollough's letter:

1) *"The Planning Commission lacks jurisdiction over these applications."*

   Mr. McCollough states that pursuant to MMC Chapter 12, the Planning Commission does not have authority to act on this application and that instead, the Planning Director is the decision-making body. This application was deemed complete before the adoption of Ordinance 477U. As such, it is City practice to apply standards to projects that were applicable at the time the application was deemed complete, even if standards had changed in between the completeness determination and hearing. Additionally, pursuant to LIP Chapter 1.3.1, "If there is a conflict between a provision of the Malibu LCP and a provision of the General Plan, or any other City-adopted plan, resolution, or ordinance not included in the LCP, and it is not possible for the development to comply with both the LCP and such other plan, resolution or ordinance, the LCP shall take precedence and the development shall not be approved unless it complies with the LCP provision." The project requires a CDP and therefore, the LCP applies. As per LIP Chapter 1.3.1, the LCP standards take precedence over the MMC. Per the LCP, regular CDPs are required to be considered by the Planning Commission.

2) *"What substantive standards and requirements apply?"*

   Mr. McCollough states that staff did not refer to MMC Chapter 12, which describes the new standards for wireless permits in the ROW, but added the conditions adopted in ordinance 477U. He states that staff took a "hodge-podge approach" to these applications. As mentioned in the staff report and in staff's response above, staff applied standards contained in the ordinance in effect at the time the application was deemed complete. However, staff applied conditions of approval that were part of the new ordinance because conditions are not in the applicable ordinance, and staff determined these conditions would reduce potential adverse impacts related to the project. Staff added those conditions that were specifically related to the proposed project.

3) *"Verizon has not proven the Wireless Facilities will be used to provide any personal wireless service."*

Mr. McCollough states that Verizon did not submit evidence that this facility is for personal wireless service. MMC Chapter 17.46 does not contain a provision that the carrier must prove that facilities will support personal wireless service, nor does the LIP. Therefore, this is not an MMC or LCP requirement.

4) *"Deny the proposed and implicit waivers/exceptions/variances"*

Mr. McCollough states that Verizon is seeking a waiver on the subject application and the applicant failed to submit required documents such as the coverage maps. As stated previously, staff applied the ordinance in effect at the time the application was deemed complete. As such, staff did not apply the waiver process contained in Ordinance No. 477U. In addition, coverage maps were a requirement of the previous WCF ordinance, however, Verizon rejected staff's multiple attempts to obtain coverage maps. As discussed in the staff report, Verizon cited FCC Order 18-133, which deems coverage maps as an outdated form of displaying a need for a wireless facility as present-day needs are data driven. Staff conferred with the City's WCF consultants on the matter, and they agreed with Verizon's interpretation and accepted the applicant's justification.

Mr. McCollough stated that Verizon failed to mention if the facility is within 600 feet of other wireless facilities and, therefore, are implicitly applying for a waiver of such standard. As mentioned previously, waivers do not apply to this project because the applicable ordinance does not require a waiver. MMC Chapter 17.46.060(O) states,

> Except for facilities co-located on the same pole or tower, wireless telecommunication facilities located within any residential zone district, **except for those facilities placed on utility poles located along Pacific Coast Highway**, shall not be located within six hundred (600) feet of any other wireless telecommunications facility, unless a finding is made, based on technical evidence acceptable to the planning manager, as appropriate, showing a clear need for the facility and that no technically feasible alternative site exists. This provision shall not apply to wireless telecommunication facilities located within any commercial zone district.

WCF No. and 20-010 is along PCH and is on a utility pole, and therefore, this finding is not applicable to this project.

5) *"Verizon has not proven code compliance or safe electrical design. Staff completely failed to adequately review the proposed electrical design and ensure all fire hazards have been mitigated."*

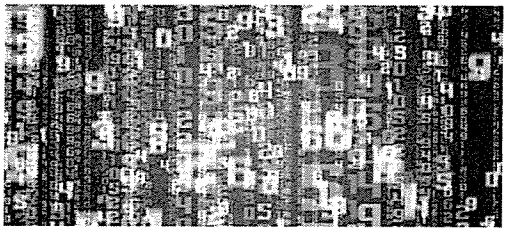
Mr. McCollough states that staff did not adequately review this application for electrical and fire safety and is not in compliance with Malibu General Plan Policy I.I.2. Staff agrees that this application needs to be built to the safety requirements of local and State law. Therefore, staff added a condition that a building plan check and permits be issued by the City Building Safety Division for all wireless projects. Those plans will be stamped and signed by the applicable engineers prior to submittal and issuance of permits. Secondly, both Planning staff and Building Safety staff will conduct a final inspection, ensuring that the project is built as permitted. Lastly, the project, for a replacement wireless facility, will comply with current California Public Utilities Commission (CPUC) separation requirements related to the safe placement of wireless facilities on utility poles. The existing facility does not meet the current CPUC safety standards.

Additional Correspondence

On June 2, 2021, staff received correspondence from Rachel Oden regarding the proximity of the WCF to nearby properties. Staff's response is included in the attachments. Staff responded to the concerns as shown in Attachment 1.

On June 7, 2021, staff received correspondence from Verizon Wireless regarding local government review of small cell WCF applications. Staff will address this correspondence at the June 21, 2021 meeting.

ATTACHMENTS: Correspondence



Internet Communications Utilities Regulation

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MEMORANDUM

Received
6/6/21
Planning Dept.

From: W. Scott McCollough
To: Malibu Planning Commission
Copy: Planning Commission Staff and City Attorney
Date: June 6, 2021
Re: Planning Commission June 7, 2021 Meeting, Items 5.H and 5.I

(5.H) Wireless Communications Facility No. 20-010, Coastal Development Permit No. 20-028, Variance No. 20-017, and Site Plan Review No. 20-041 – An application for an upgraded wireless communications facility on a new replacement wooden utility pole in the public right-of-way; Location: 31557.5 Pacific Coast Highway

(5.I) Wireless Communications Facility No. 20-011, Coastal Development Permit No. 20-029, Variance No. 20-018, and Site Plan Review No. 20-040 – An application for an upgraded wireless communications facility on a new replacement wooden utility pole in the public right-of-way; Location: 6213.5 Kanan Dume Road

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This firm represents Lonnie Gordon, a Malibu resident (Protestant). Protestant will appear in person and through her representatives at the June 7 hearing to oppose both applications and request that the Commission not approve them. Protestant requests that the undersigned and our two experts be given equivalent and equal participatory time and status to that afforded to the applicant's representatives and not a mere 3 minutes per person during public comment.

Protestant provides the discussion below and the information/evidence in Attachments 1 and 2. Please place these materials in the record.

I. SUMMARY

The Planning Commission should dismiss these applications on a procedural basis. If it does address the merits it should deny all requested permits. Verizon has failed to carry its burden of proving entitlement, eligibility for the expressly and implicitly requested waivers/exceptions, and, most important, that the proposed design is both safe and code compliant.

1. **The Planning Commission lacks jurisdiction over these applications.** Malibu Municipal Code Chapter 12 (adopted through Ordinance 477) implemented a procedure using administrative processing by the Planning Director and appeal to a hearing officer. There is no Planning Commission reviewing authority or appellate role for municipal permits in public right of way. Under the Local Implementation Plan (LIP) a separate Coastal Development Permit is supposed to be secured through a similarly

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CC: Planning Commission, PD,

Recording Secretary, File

administrative Planning Manager overseen Site Review Plan process, and the Planning Commission has only appellate, not original jurisdiction. There has been no decision and no appeal so the Coastal Development Permit application is also not properly before the Planning Commission. The only action that can be taken by the Planning Commission is dismissal or remittance back to the Planning Director/Manager for initial disposition, with any subsequent appeals taking their legislatively-ordained separate tracks.

This outcome may lead to problems, but it is mandated by the clear terms of the relevant governing laws in the MMC and LIP. Notably, Staff insisted on administrative processing and recourse to a hearing examiner under MMC Chapter 12 and convinced the City Council to adopt that process over the objection of many residents who opposed that process. Staff did not realize, or knew and did not disclose, that their approach requires different processes for each permit type. Ultimately, this is the procedure Staff insisted upon and the City Council adopted. The Planning Commission cannot circumvent the process by which it is bound despite Staff's improper placement of these applications before the Planning Commission in contravention of governing law.

2. **What substantive standards and requirements apply?** The Staff Agenda Report reveals that Staff used a hodge-podge, *ad hoc* approach to the substantive standards and requirements applicable to these permits. Although it is not entirely clear, it appears Staff mostly applied or referenced a standard or requirement from MMC Chapter 17.46 even though MMC Chapter 12 replaced Chapter 17.46 for ROW municipal permits in December 2020 and it has different rules. The Agenda Report never cites to MMC Chapter 12 or the associated Resolution 20-65, but Staff nonetheless imposed some of the MMC Chapter 12 permit conditions without so disclosing or explaining why. Staff applied the insurance coverage requirements in Resolution 20-65 Section 10.A.24, for example.

Protestant agrees that the LIP standards and requirements apply to the Coastal Development Permit. But MMC Chapter 12 standards and requirements apply to the separate municipal permit, except for those related to aesthetics. As a single example, the higher MMC Section 17.46.060.D "clear and convincing evidence" standard for waivers/exceptions/variances, rather than the lower "technical evidence acceptable to the planning manager" standard in MMC Section 17.46.N and O must be applied to Verizon's expressly and implicitly requested waivers/exceptions/variances in the context of the municipal permit. All of the conditions in Resolution 20-65, not just those Staff wants to use, must be imposed as part of the municipal permit.

The Planning Commission cannot use Staff's arbitrary approach. It must follow the municipal code process and assiduously apply the prescribed substance for the municipal permits Verizon seeks. More important, and even if it does not apply new MMC Chapter 12, it must be absolutely clear what "law" and "substance" and "standard" it is applying and state the justification for selecting those standards.

3. **Verizon has not proven the Wireless Facilities will be used to provide any "personal wireless service."** Assuming the Planning Commission considers the merits of the applications, under both federal law and the MMC (whether Chapter 12 or Section

17.46) a provider is eligible for municipal permits only if the proposed facility will, in fact, be used to support some personal wireless service. There is nothing in the record proving that Verizon will in fact use these two facilities to support any personal wireless service. It has therefore failed its burden of proving entitlement and the municipal permits must be denied.

4. **Deny the proposed and implicit waivers/exceptions/variances.** Verizon expressly sought a waiver/exception to the formerly-applicable MMC Section 17.46.100.B.9, the MMC Chapter 12 current application form Section 6.B and the LIP Section 3.16.9.9 "coverage map" requirements. The Planning Commission must deny this waiver. Verizon has not presented clear and convincing evidence that the waiver is appropriate. The coverage map is necessary. The Planning Commission cannot make the required findings related to pole replacement location or pole height without the information a coverage map would yield.

Verizon also implicitly sought other waivers from important requirements when it refused to supply other required information. For example, Verizon did not advise whether the proposed projects are within 600 feet of any other wireless facility. Staff failed to catch these omissions. The Planning Commission must reject these implicit waivers, and deny the applications because they do not satisfy at least two applicable substantive requirements.

5. **Verizon has not proven code compliance or safe electrical design. Staff completely failed to adequately review the proposed electrical design and ensure all fire hazards have been mitigated.** This is the most crucial issue the Planning Commission has before it now, and will need to contend with in all other future applications. See Attachment 2 (Susan Foster submission). The entire city relies on the permit reviewing authority to ensure that any proposed wireless facility has been rigorously designed to mitigate all known fire hazards, and will meet all applicable code requirements. Failure in this regard will threaten the life and property of every Malibu resident. If the Commission reaches the merits it is up to you to prevent another devastating fire in Malibu caused by utility/telecom infrastructure.

Malibu General Plan Policy 1.1.2 states that the "City shall minimize the risk of loss from fire." All potentially applicable laws require that express findings that the project design is both safe and fully compliant with all applicable codes. There is nothing in the record, however, to support a finding of code compliance other than bald conclusions without any analysis or support. There is no reliable evidence the Planning Commission can use to enter the required code compliance findings. Even worse, Verizon's presentation on electrical safety design is woefully deficient and contains a potential error related to power supply. No licensed engineer was willing to opine that the design is safe. Indeed, the only Verizon engineer that did supply information *expressly disclaimed any opinion on electrical and structural safety.*

Protestant, on the other hand, is providing an opinion (Attachment 1), sealed by licensed engineer Tony Simmons, that affirmatively states that "the unsigned, unsealed engineering documents submitted on behalf of Verizon do not demonstrate with engineering certainty that the five hazards associated with using electricity have been fully evaluated and mitigated for these two installations." He affirmatively states that "the

record before the Planning Commissions of the Resolutions does not support adoption of the proposed findings in Section 3 of the draft Resolutions related to code compliance and general safety and welfare, including but not limited to A.1, B.2, B.4, B.9, C.4, C.5 and E.1-4 in Resolutions 21-48 and 21-49."

Verizon has failed to prove safe design and code compliance. The Planning Commission cannot enter the required findings if it abides by General Plan Policy 1.1.2 and endeavors to "minimize the risk of fire." For this reason alone all of the permits must be denied.

As stated in the above Summary and further discussed below, the Commission must dismiss these applications for lack of jurisdiction. If it reaches the merits, however, it must deny all of these permits.

II. ARGUMENT

A. Planning Commission lacks jurisdiction over these applications

Verizon is required to obtain two separate permits for each facility First, Verizon must obtain a municipal permit under MMC Chapter 12.02. Second, and separately, Verizon must secure a Coastal Development Permit. The City is handling the Coastal Development Permit because it has assumed delegated authority from the Coastal Commission. To perform that function the City Council enacted Section 3.16 in the Local Implementation Plan. But there must still be 2 permits for each facility.[1] Each permit has its own identity, and each has specific procedures and substantive requirements. The reviewing authority must abide by each, and apply those procedures and substantive requirements to each.

The process and substance was largely the same for both when MMC Chapter 17.46 applied to ROW-related applications. So the reviewing authority could hear both permits on a "concurrent" basis. *See* LIP Section 13.3.C. It was possible to use the same processes and make the same findings, then separately approve (or deny) each permit. But that all changed in December when the Council adopted MMC Chapter 12 on an urgency and then permanent basis. The process, substance and required findings for a Chapter 12 permit are all now different from those under the LIP. And, most important, the reviewing authority is different. When the Council was debating Ordinance 477 Staff insisted that the process should be administrative in nature. Although many Malibu residents stated a clear desire for Planning Commission review, staff opposed that and convinced Council that administrative processing was the better route. They convinced the City Council, over the citizens' objection. MMC Chapter 12.02, enacted through Ordinance 477, now clearly and expressly states that the Planning Director is the Reviewing Authority and the one that "determine(s) whether to approve, approve subject to conditions, or deny and application." MMC 12.02.040.A.8. The Planning Director's determination is then subject to appeal to a Hearing Officer. MMC Section 12.02.040.B.4-.6. There is no role for Planning Commission for Chapter

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[1] Staff agrees, at least conceptually, that each permit is separate when it notes on Staff Agenda Report page 9 that "a proposal for an upgraded facility would materially result in an equivalent bundle of permits (WCF, CDP, SPR, VAR) and equivalent hearing before the approval body." (emphasis added)

12 ROW permits. Simply put, the Planning Commission now lacks jurisdiction over applications for Wireless ROW Permits. The Planning Commission must dismiss the application under Chapter 12 for lack of jurisdiction. The process envisioned by Chapter 12 must be applied.

The Planning Commission also does not have jurisdiction under the LIP. Current LIP Section 3.16.2 contemplates a "site plan review" "pursuant to Section 13.27 of the LCP" for projects in the right of way. Section 13.27 in turn names the "Planning Manager" as the reviewing authority for wireless facilities. LIP Section 13.27.1(7). The Planning Commission does not make the initial decision. Instead, it has only appellate authority. An "aggrieved person"[2] must appeal the Planning Manager's decision to the Planning Commission under LIP Section 12.20.1. There has been no Planning Manager decision and no aggrieved person has appealed. Jurisdiction has therefore not attached in the Planning Commission.

The Planning Commission lacks jurisdiction. The proper processes under MMC Chapter 12 and the LIP must be followed. The Planning Director must make a decision under MMC Chapter 12, and a separate decision under LIP 13.27. Then, if anyone is dissatisfied they must take two different appellate routes: the Chapter 12 permit goes to the hearing examiner and the LIP comes to the Planning Commission.

This is not an ideal outcome, but it is the clear consequence of the Staff's insistence before the City Council that this Commission should not be involved in Chapter 12 ROW applications. They prevailed over the community's objection and must live with the problem they created. Staff cannot now vest jurisdiction in the Planning Commission. Only the City Council can do that and they did not.

B. What substantive standards and requirements apply?

Assuming (without conceding) that the Planning Commission has jurisdiction, the Staff Agenda Report must be rejected and both projects must be denied.

Staff may contend that the LIP takes precedence over the MMC so the entire process and substance collapses into a purely LIP-based review for both permits. That is incorrect. Chapter 12 applies on its face. Each permit stands on its own and the processes and standards for each must be applied to each, separately.

An "MMC Chapter 12" permit does not suffice alone since Verizon must also obtain a Coastal Development Permit. If either permit imposes higher duties and obligations then Verizon must abide by them. The Coastal process and substance does not eliminate or make irrelevant the Chapter 12 process or substance. Both apply, and both must be followed.

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[2] AGGRIEVED PERSON - any person who, in person or through a representative, appeared at a public hearing of the City of Malibu or the California Coastal Commission in connection with the decision or action on a Coastal Development Permit application, or who, by other appropriate means prior to a hearing, informed the City of Malibu or the California Coastal Commission of the nature of his/her concerns or who for good cause was unable to do either. "Aggrieved person" includes the applicant for a Coastal Development Permit.

Staff, however, did not consistently follow or apply the proper legal and substantive standards under either Chapter 12 or LIP Section 3.16.1. Indeed, it is not clear what standards Staff contends do apply for applications deemed complete before the City Council adopted Malibu Municipal Code (MMC) Chapter 12.02 and Resolution 20-65 in December, 2020. They did not consistently apply the standards in MMC Chapter 12.02 and Resolution 20-65 or former MMC Chapter 17.46. Nor did Staff consistently apply LIP Chapter 3.16. They seem to have operated on an *ad hoc* basis.

If these applications are somehow properly before this Commission it has a separate obligation to exercise independent judgement since it will be the one that is formally acting on the applications and entering all required findings. *See* MMC Sections 2.36.080, 17.04.080. Before it takes any action the Planning Commission must expressly state just what standards, rules and procedures it is applying to these applications. And then follow them. For each of the two permits involved in Agenda Item H and each of the two permits in Agenda Item I.

While there are several aspects to the "process" and "standards" issue in the context of these applications, two predominate. The first issue, of course, is whether the old ordinance provisions in MMC Chapter 17.46 or new Chapter 12.02 (and Resolution 20-65) apply. The second is the burden of proof Verizon must carry to obtain approval.

Setting aside the jurisdictional issue, Protestant contends that the commands in Chapter 12.02 and Resolution 20-65 apply for the most part and are only preempted with regard to "aesthetics" standards.

Ordinance 484 (adopting new Chapter 12.02) Section 6 provides:

> SECTION 6. Pending Applications. All applications for wireless facilities on land other than public ROW or for modifications to existing wireless facilities in the public rights-of-way which were not subject to final action by City prior to the effective date of this Ordinance shall be subject to and comply with all provisions of this Chapter, and any design and placement standards adopted by the City Council by resolution, to the fullest extent permitted by applicable law.

Although they never disclosed this issue while the City Council was considering Ordinance 477U and 477 and the "Pending Applications" provision, Staff now asserts that the new Ordinance and Resolution 20-65 cannot be applied to applications not subject to final action, but for which the Planning Director deemed the application complete before December 2020. They do so because of certain language in the FCC's 2018 *Small Cell Order*. They are incorrect.

Staff bases its position on the "advance publication" requirement in *Small Cell Order* ¶¶86, 88 and 91.[3] Those passages are absolutely clear, however, that only ***aesthetics*** (and minimum spacing requirements imposed for aesthetics reasons, but not when imposed for other reasons) have to be published "in advance" of the time an application is deemed complete.

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[3] The *Small Cell Order* is available at https://docs.fcc.gov/public/attachments/FCC-18-133A1_Rcd.pdf.

86. Given these differing perspectives and the significant impact of aesthetic requirements on the ability to deploy infrastructure and provide service, we provide guidance on whether and in what circumstances aesthetic requirements violate the Act. This will help localities develop and implement lawful rules, enable providers to comply with these requirements, and facilitate the resolution of disputes. We conclude that aesthetics requirements are not preempted if they are (1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments, and (3) objective and published in advance.

...

88. Finally, in order to establish that they are reasonable and reasonably directed to avoiding aesthetic harms, aesthetic requirements must be objective--i.e., they must incorporate clearly-defined and ascertainable standards, applied in a principled manner--and must be published in advance. [n246 omitted] "Secret" rules that require applicants to guess at what types of deployments will pass aesthetic muster substantially increase providers' costs without providing any public benefit or addressing any public harm. Providers cannot design or implement rational plans for deploying Small Wireless Facilities if they cannot predict in advance what aesthetic requirements they will be obligated to satisfy to obtain permission to deploy a facility at any given site. n247

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n247 Some local governments argue that, because different aesthetic concerns may apply to different neighborhoods, particularly those considered historic districts, it is not feasible for them to publish local aesthetic requirements in advance. See, e.g., Letter from Mark J. Schwartz, County Manager, Arlington County, VA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (Sept. 18, 2018) (Arlington County Sept. 18 Ex Parte Letter); Letter from Allison Silberberg, Mayor, City of Alexandria, VA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 2 (Sept. 18, 2018). We believe this concern is unfounded. As noted above, the fact that our approach here (including the publication requirement) is consistent with that already enacted in many state-level small cell bills supports the feasibility of our decision. Moreover, the aesthetic requirements to be published in advance need not prescribe in detail every specification to be mandated for each type of structure in each individual neighborhood. Localities need only set forth the objective standards and criteria that will be applied in a principled manner at a sufficiently clear level of detail as to enable providers to design and propose their deployments in a manner that complies with those standards.

...

91. Minimum Spacing Requirements. Some parties complain of municipal requirements regarding the spacing of wireless installations--i.e., mandating that facilities be sited at least 100, 500, or 1,000 feet, or some other minimum distance, away from other facilities, ostensibly to avoid excessive overhead "clutter" that would be visible from public areas.[n.250 omitted] We acknowledge that while some such requirements may violate 253(a), others may be

> reasonable aesthetic requirements.[n.251 omitted] For example, under the principle that any such requirements be reasonable and publicly available in advance, it is difficult to envision any circumstances in which a municipality could reasonably promulgate a new minimum spacing requirement that, in effect, prevents a provider from replacing its preexisting facilities or collocating new equipment on a structure already in use. Such a rule change with retroactive effect would almost certainly have the effect of prohibiting service under the standards we articulate here. Therefore, such requirements should be evaluated under the same standards for aesthetic requirements as those discussed above.

As is plain from each of these paragraphs, the FCC was discussing ***only*** aesthetics, and not any other topic or local requirement. That is certainly how the Ninth Circuit understood the issue. *City of Portland v. United States*, 969 F.3d 1020, 1041 (9th Cir. 2020). Thus, while any "aesthetics" requirements in Chapter 12.02 and Resolution 20-65 that materially differ from those in effect at the time the applications were submitted may be preempted, nothing in the *Small Cell Order* precludes recourse to the remainder of the process and substantive requirements in Chapter 12.02 and Resolution 20-65. Staff has essentially agreed this is so, even though they are not candid about it. For example, Staff has imposed the higher insurance requirements in Resolution 20-65, along with some other conditions.

The Planning Commission is bound by the "Pending Applications" provision in Ordinance 484 "to the fullest extent allowed by law." The law allows recourse to Chapter 12.02 and Resolution 20-65, excepting *only* requirements imposed for aesthetics reasons. Staff may think it is not bound by the City Council's direction and can do whatever it wants without any guiding principles, but Protestant hopes the Planning Commission is more inclined to honor its duties and obligations under MMU 2.36.080 and 17.04.080. In order to find that the applications are "consistent with the objectives, policies, general land uses, and goals of the Malibu general plan" (MMU 17.04.080) the Planning Commission must first articulate what standards it is applying and precisely what it is finding "consistency" with.

The second issue pertains to the burden of proof Verizon must carry to obtain approval, especially with regard to waivers. MMC Chapter 12.02.050(e) provides that a waiver request may be granted

> ...only if it is demonstrated through clear and convincing evidence that denial of an application would, within the meaning of federal law, prohibit or effectively prohibit the provision of personal wireless services, or otherwise violate applicable laws or regulations. All waivers approved pursuant to this subsection shall be (1) granted only on a case-by-case basis, and (2) narrowly-tailored so that the requirements of this Chapter are waived only to the minimum extent required to avoid the prohibition or violation.

This is not an "aesthetics" requirement; it is a legal and evidentiary rule. Therefore the new Ordinance can and does apply. Yet, even though Verizon sought exceptions or variances to install replacement poles taller than 28 feet, Staff did not apply the "clear and convincing" standard to the municipal permit request. Indeed, the Staff Agenda Report contains no discussion of the evidentiary burden Staff applied or

proposes that the Planning Commission apply. The Planning Commission must apply the proper standard when it assesses the waiver requests under the two separate regimes. Protestant contends Verizon did not meet its burden of proof.

Verizon sought, and Staff proposes to grant, a waiver from the formerly-applicable MMC Section 17.46.100.B.9, and from MMC Chapter 12 current application form Section 6.B "coverage map" requirements[4] for purposes of the municipal permits. Verizon sought, and Staff proposes to grant, a waiver from the similar LIP Section 3.16.9.9 "coverage map" requirement for purposes of the Coastal Development permits.

One of the expressly-stated reasons for mandating a coverage map is "whether alternatives exist for providing coverage." *See, e.g.*, LIP Section 3.16.9.9 and former MMC Section 17.46.100.B.9. Staff catered to "Verizon's goals and objectives" when it addressed alternatives, but neither Verizon nor Staff chose to tell the Planning Commission or the public what those "goals and objectives" are so they are not in evidence. Neither the Planning Commission nor the public can assess them to determine if those "goals and objectives" are congruent with Malibu's goals and objectives. Nor can the Planning Commission independently assess potential alternatives since there is no coverage map.[5]

Staff agreed with Verizon's contention that the FCC preempted local coverage map demands in the *Small Cell Order*. Interestingly, Verizon cited to ¶40 but Staff focused on note 87, which is actually part of ¶37. Regardless, both Verizon and Staff are incorrect and the Planning Commission must reject this position. The FCC *did not* prohibit demands for coverage maps. What ¶40 said was that "[d]ecisions that have applied solely a 'coverage gap'-based approach under Section 332(c)(7)(B)(i)(II) reflect both an unduly narrow reading of the statute and an outdated view of the marketplace." This part of the *Small Cell Order* was where the FCC was addressing the "effective prohibition" test. By "coverage gap-based approach" the FCC was referring to past decisions that required proof of a complete gap in current adequate coverage, as distinguished from the situation where a provider sought to *improve existing coverage*.[6] *See Small Cell Order* ¶¶34-42. Protestant here, and only for purposes of this case, is not contending Verizon must prove a complete gap in coverage. The issue is appropriate location for the site and the height of the pole.

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[4] New Chapter 12.02 and Resolution 20-65 do not have express application content requirements so they do not explicitly call for coverage maps. Chapter 12.02.060.D provides that the Director shall determine what is required in the application. It goes on to state that in any event the applicant shall submit "all required fee(s), documents, information, and any other materials necessary to allow the Director to make required findings and ensure that the proposed facility will comply with applicable federal and state law, the City Code, and will not endanger the public health, safety, or welfare." The Director has promulgated a PROW form, and it does expressly require coverage maps. *See* https://www.malibucity.org/DocumentCenter/View/16676/PLN-WCF-Submittal-Checklist-for-PROW?bidId=, Section 6.B. Regardless, the Planning Commission cannot make all required findings without a coverage map, as explained below.

[5] All this assumes these projects will be used to provide personal wireless service in the vicinity. If these facilities will not provide personal wireless service then Verizon is not eligible for the requested municipal permits. We will return to that subject below.

[6] Again, we will return to the question of coverage improvement, and need, below.

But nowhere does the FCC expressly say local siting authorities cannot require a coverage map to assess potential alternatives for siting after need has been shown. Nor could it given the express reservation in 47 U.S.C. §332(c)(7)(B) that local siting authorities can determine the "placement" of personal wireless facilities. "Placement" includes "location." Even if one accepts *arguendo* that Verizon has adequately demonstrated an actual need for improved coverage, Malibu has every right to decide where the best location is for that purpose. Even though this is an "upgrade" to an existing facility it may well be that the whole thing should be moved somewhere else. Part of the "best location" exercise is understanding current coverage and the proper location that will meet Malibu's general plans and policies while still fulfilling any demonstrated need for coverage enhancement/supplementation in the area.

Verizon flatly refused to provide a coverage map. Staff wants to let them get away with doing so based on a strained reading of the *Small Cell Order*. The Planning Commission must not go along with this ruse. Since there is no coverage map the Planning Commission lacks the evidence it needs to assess the pole replacement/height variance and determine the proper location. Verizon chose to not supply required information and must now live with that decision. The Planning Commission must find that Verizon has not carried its burden of providing "clear and convincing evidence" that (1) the variance is justified, (2) coverage supplementation is best accomplished at the current location, (3) the current height is inadequate so a taller pole is required, and (4) the proposed height is the best (or least-worst) solution. You cannot answer those questions without a coverage map and certainly cannot find there was clear and convincing evidence without one. The permit under MMC Chapter 12 must be denied and the permit under LIP Section 3.16 must be denied because Verizon did not provide sufficient information to make a decision on the best location and the proper height at that location.

C. Verizon has not proven the Wireless Facilities will be used to provide **any** "personal wireless service" and therefore did not show eligibility for the municipal permit[7]

All the relevant current and former Malibu ordinances apply only to "wireless facilities" that will support "personal wireless service" as defined in 47 U.S.C. §332(c)(7)(C)(i). *See* MMC Section 17.46.040 (Definitions); MMC Section 12.02.020 (Definitions).[8]

Section 332(c)(7)(C) provides relevant definitions:

(C) Definitions

For purposes of this paragraph—

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[7] The following discussion does not apply to the Coastal Development Permit application. Those permits are available to all providers of wireless communications services, including those that provide only private mobile service. *See* LIP Section 2.2 (Definitions). This is yet another situation where the municipal permit program substance differs from that in the Local Coastal Program.

[8] This is not a Spectrum Act "eligible facility" or "wireless facility modification" request. *See* MMC Section 12.02.020 (Definitions). The entitlement concepts applicable to those do not apply here.

(i) the term "personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term "personal wireless service facilities" means facilities for the provision of personal wireless services; and

(iii) the term "unlicensed wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v) of this title).

"Commercial mobile service" is defined in 47 U.S.C. §332(d)(1):

[T]he term "commercial mobile service" means any mobile service (as defined in section 153 of this title) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission.

The FCC rules are consistent. For example, 47 C.F.R. §1.6002(i) defines a "Facility or personal wireless service facility" as "an antenna facility or a structure that is used for the provision of personal wireless service, whether such service is provided on a stand-alone basis or commingled with other wireless communications services." (emphasis added)

These definitions collectively demonstrate that a mobile service provider must plan to use the "wireless facilities" sought to be installed in Malibu to provide "personal wireless service." The FCC has made clear that carriers that do and will provide personal wireless service may *also* use permitted wireless facilities to support other services like Internet or data services that are not personal wireless services[9] on a "commingled" basis. But as a matter of law applicants for Malibu municipal permits **must** demonstrate that they are eligible for a permit, and to do that the applicant **must, at minimum**, plead and prove it will use the planned wireless facility to provide personal wireless service.

Protestant asks each Planning Commission member to do a word search in the Verizon-supplied materials included in the Agenda Report. Look for "personal wireless service," "commercial mobile service," "telecommunications service" and "common carrier." The Staff-generated materials use "personal wireless service" once, when quoting §332 of the Act. None of the other relevant terms appear at all.

Verizon did not plead, and Staff (properly) does not propose to find, that Verizon will use the proposed wireless facilities to provide "personal wireless service." Protestant does not understand why Staff has nonetheless proposed that the

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[9] Wireless Broadband Internet Access is NOT "personal wireless service" so it is not a "covered service" for purposes of §332(c). That is so because the FCC has ruled it is not offered on a "common carrier" basis and is therefore not a "telecommunications service." It is instead a "private mobile service." A provider that will offer only private mobile service through a proposed facility is not "covered" by 47 U.S.C. §332(c) and is ineligible for a permit under all current and former MMC provisions.

application be approved, but the Planning Commission cannot approve a municipal permit unless the applicant proves entitlement. Verizon has not done so. The Planning Commission must deny the municipal permit because Verizon failed to show it is eligible for, and entitled to, a WRP or any other kind of permit to use the public right of way, under the current ordinance (MMC Chapter 12) or even the prior ordinance (MMC Chapter 17.46).

Protestant contends that Verizon has not carried its burden of proof, the permit application should be denied and Verizon should not be allowed to supplement its application information at this late date. Verizon and their Staff helpers are likely to try and salvage the application despite this gaping failure of proof, and they will probably now offer additional evidence. We predict they will first attempt to baffle the Planning Commission members using impenetrable but ultimately deceptive jargon. For example, one of Verizon's favorite gambits is to observe that "Voice over LTE" (VoLTE) is "data" and then imply without actually affirming that any voice services will actually be supported along with all other "data" services provisioned by the wireless facilities in issue.

It is true that VoLTE is digital and packet-switched. But that does not mean the specific facilities proposed here will ever handle any voice traffic. To begin with, we do not know if Verizon will, in fact, be supporting VoLTE *over these facilities*. It is entirely possible voice will be handled through "Circuit Switched Fallback," which means voice goes over the 2G/3G network.[10] That is analog, not digital packet-switched, and it is not routed over "data" channels. But even if Verizon does intend to support VoLTE in this area that still does not mean these facilities will be used for it. Both locations employ RRUs, without an on-site BBU. The BBU is elsewhere. We do not know what BBU equipment will be used, or where it will be.

It is important to understand that, just like traditional SS7-based analog voice, LTE uses "out of band" signaling. There is a "control" channel that manages all sessions, e.g., setup and teardown and bearer channel assignment. There is a separate channel that handles the "bearer" – here the voice content.

VoLTE only works when the wireless facility supporting the control channel for the user equipment (UE) can connect to, and interoperate with, the LTE "Evolved Packet Core" (EPC) IP Multimedia Subsystem (IMS), which is always distant. IMS is what contains the Session Initiation Protocol (SIP) telephony functionality and in turn has the gateway to the rest of the public switched network. IMS is also critical for ensuring the traffic channel supporting the voice packets receive adequate Quality of Service priority.

The UE has to obtain its IP address from a Public Data Network (PDN) Gateway node and communicate with a Policy and Charging Rule Function (PCRF) node. The PCRF must then tell Verizon's network to assign a logical "bearer" or "traffic" channel[11]

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[10] *See* https://ieeexplore.ieee.org/document/9004596. Staff Agenda Report p. 21 notes that the "replacement antennas at this location" will be "for [Verizon's] 4G LTE network." There is no indication they will also handle 2G/3G.

[11] The "channel" is not a singular dedicated physical path. It is "logical" and defined through timeslot

with appropriate QoS from some wireless facility for voice traffic use. This bearer channel is usually separate from the other logical bearer/traffic channels supporting different data flows, such as for email or web-browsing because they have lower QoS requirements. The conversation can then ensue, with the packetized voice content going over the assigned logical bearer channel.

Verizon has not provided any information indicating that these facilities will be supporting either the LTE-based "control channel" or the logical "bearer" channel for any voice traffic, or indeed for any personal wireless service. It is entirely possible that all voice and any other personal wireless services consumed within range of these facilities will in fact be completely supported over channels delivered by the nearest macro-tower. This is quite common in the small cell environment: voice goes through the macro and the small cell handles only bearer used entirely for other "data" – like Internet access. The reason is simple: small cells cover a fairly limited area so there must be frequent hand-offs to other cells, and this creates delay and unacceptable call quality. Further, voice traffic, unlike other data, is quite latency-sensitive, and small cells sometimes cannot provide acceptable call quality. So many carriers routinely "send" VoLTE over macro-cell delivered channels and use the small cell only for data services with lower Quality of Service (QOS) requirements – like e-mail, web browsing and even video. Other times a carrier will have the macro cell supply the control channel for all applications and use the small cell for only bearer, and only assign certain types of data.

If that is the case here, then Verizon is not eligible for a permit, since these facilities will not in any manner support any personal wireless service.

Let us be clear. It is technically possible for a small cell arrangement to handle voice bearer and some even handle the control channel. The problem here is we just do not know, since Verizon chose to not provide any of the relevant information. But if Verizon now tries to backfill, here are the precise questions to ask:

- Is this wireless facility able to communicate with Verizon's core IMS server and receive sufficient instructions to set up and tear down voice sessions over assigned bearer channels?
- Where is the BBU that will be driving the RRUs.
- Describe the RRU equipment and its capabilities.
- Will this arrangement employ Cloud or Centralized Radio Access Networking (C-RAN)?
- Will this wireless facility actually handle any VoLTE bearer traffic over wireless logical channels delivered through the physical path between this facility and the user's equipment?

Unless Verizon affirmatively states that voice traffic associated with UEs in the vicinity will actually be handled by these facilities, and not some other facility, then the

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assignment within the physical channel.

municipal permit applications must be denied because Verizon will not be providing **any** "personal wireless service" over them.

D. Deny the proposed and implicit waivers/exceptions/variances

The Staff Agenda Report proposes to waive several requirements, but the Planning Commission should not agree. All waivers/exceptions/variances should be denied. In particular, as explained above, the Planning Commission must deny the request for waiver of the coverage map requirement.

Staff has also implicitly granted other waivers.

First, Resolution 20-65 provides that "Placements shall not be in front of dwelling units or schools" but based on the picture it appears that the Kanan Dume Road pole (Item 5.H) will be almost directly in front of the adjacent residential home. Neither Verizon nor Staff addressed this issue. To the extent the standards in Resolution 20-65 apply then a waiver was required. Verizon did not seek a waiver, so one cannot be granted.

Second, the Kanan Dume project is not on PCH. Resolution 20-65 and former MMU Section 17.46.060 prohibit projects within 600 feet of any other telecommunications facility.[12] Neither Verizon nor Staff addressed whether this condition has been met.[13] To the extent there is another wireless facility within 600 feet a waiver is required. Verizon did not request a waiver, so one cannot be granted. Since Verizon did not produce any evidence there were no facilities within 600 feet it has failed its burden of proof, and the application must be denied.

E. Verizon has not proven code compliance or safe electrical design

This is the last topic in our Opposition, but it is actually the most important thing for the Planning Commission to consider. Lives are at stake. Please now turn to Attachment 1, the signed and sealed presentation by Tony Simmons, PE and Attachment 2, the letter from Susan Foster. When done please pick back up at this point and read what follows.

These two experts – one of whom is putting his professional license on the line – are telling you that Verizon's electrical design has not been proven safe and that all potential fire hazards have been mitigated. If this Commission is the proper reviewing authority then it must render affirmative findings of both safety and code compliance. The proposed Resolutions before you have such findings. But the record is entirely inadequate and this Commission cannot responsibly adopt them.

Verizon's drawings are not "final" and are incomplete. There is at least one potential error relating to the power supply. The Staff claims both safety and code compliance but the Agenda Report contains absolutely no demonstration that Staff gave

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[12] Since the 600 foot separation requirement was in MMC Chapter 17.46 when Verizon filed its applications the *Small Cell* "advance publication" requirement has been met.

[13] Staff found there are no schools, playgrounds or parks within 500 feet for purposes of LIP Section 3.15.5.N, but it did not consider whether the 600 foot wireless facility separation requirement in the MMC was met.

more than passing concern to this vital subject even though the entire community in Malibu has – for good reason – been extraordinarily vocal about fire/electrical safety concerns in the wireless context for the last eight months. Nowhere in the record is there a positive demonstration or anything more than unsubstantiated claims that the design complies with applicable requirements of the Uniform Building Code, National Electrical Code, and Uniform Fire Code. No engineer vouched for the design. Indeed, Verizon's engineer *expressly disclaimed* any opinion on electrical safety or code compliance.

On the other hand, Tony Simmons, PE has provided his professional opinion that "the record before the Planning Commissions does not support adoption of the proposed findings in Section 3 of the draft Resolutions related to code compliance and general safety and welfare, including but not limited to A.1, B.2, B.4, B.9, C.4, C.5 and E.1-4 in Resolutions 21-48 and 21-49" because he cannot confirm with "engineering certainty that the five recognized hazards associated with the use of electricity have been properly mitigated by the design professional in responsible charge."

If the Planning Commission is the reviewing authority then it must demand far better evidence and a much more rigorous demonstration and proof that these projects will not cause another fire in Malibu. Verizon failed. Staff failed. We respectfully request that this Commission, consistent with Malibu General Plan Policy 1.1.2, "minimize the risk of loss from fire" and deny these permits.

All of Malibu depends on the permitting authority to ensure that every fire/electrical safety precaution has been taken before a project is approved. That did not happen here. For this reason alone, and in addition to all the other reasons given above, both applications and all permits must be denied on the merits if the Planning Commission finds it has jurisdiction and reaches the merits (which it should not).

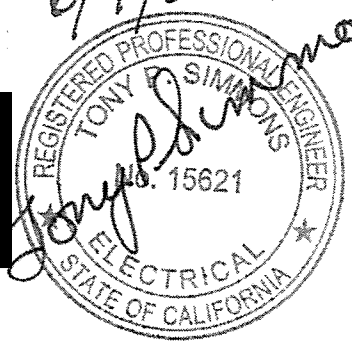
ATTACHMENT 1 TO GORDON OPPOSITION

ATTACHMENT 1

6/4/2021

Tony P Simmons, PE

[redacted]



To Chairman Jennings and Members of the Planning Commission

Recommendation to DENY Planning Resolutions 21-48 and 21-49 based on inadequate proof of mitigation of recognized electrical safety hazards.

Planning Resolution 20-48 is Agenda Item 5.H of the Commission Agenda Report prepared for the June 7, 2021, Commission Meeting. This resolution is for:

Wireless Communications Facility No. 20-010, Coastal Development Permit No. 20-028, Variance No. 20-017, and Site Plan Review No. 20- 041 – An application for an upgraded wireless communications facility on a new replacement wooden utility pole in the public right-of-way. This WCF is located at 31557.5 Pacific Coast Highway.

Planning Resolution 21-49 is item 5.I of the Commission Agenda Report prepared for the June 7, 2021, Commission Meeting. This resolution is for:

Wireless Communications Facility No. 20-011, Coastal Development Permit No. 20-029, -Variance No. 20-018, and Site Plan Review No. 20-040 – An application for an upgraded wireless communications facility on a new replacement wooden utility pole in the public right-of-way. This WCF is located at 6213.5 Kanan Dume Road.,

Issue 1: The Agenda Reports prepared for both installations do not contain the consultant's report.

The first sentence under the Discussion heading on the first page of both Commission Agenda Reports states:

"This application was reviewed by City staff and the City's ***wireless communications facility consultant*** for compliance with all applicable codes and regulations in effect at the time the application was deemed complete. This agenda report provides site and project analyses of the proposed wireless communications facility project, including attached project plans, visual demonstration exhibits, alternative site."

The record submitted by the Planning Department does not include the report prepared by the City's wireless communication facility consultant and therefore is incomplete. Consequently, I cannot confirm that the five recognized hazards associated with the use of electricity have been properly mitigated by the design professional in responsible charge.

The Five Hazards Associated with Using Electricity

INTRODUCTION.

The National Electric Code NEC recognizes five hazards associated with using electricity that must be mitigated. Article 90.1(A)of the NEC states: The purpose of this *code* is the practical safeguarding of persons and property from hazards arising from use of electricity. This Code is not intended to be a design specification or a construction manual for untrained persons.

Article 90.1(C) of the NEC specifies five hazards associated with using electricity that must be mitigated, (1) shock, also known as electrical contact, (2) thermal effects, (3) overcurrent, (4), fault current , and (5) overvoltage. Each hazard is based on different principles of physics. No one consideration, other than not using electricity, mitigates all hazards associated with electricity.

(1) Shock.

Electrical contact may stop the heart or cause a reaction that imperils the life or health of the shocked person or other nearby individuals.

This hazard is mitigated by ensuring conductors (wires) are insulated or isolated from casual or inadvertent contact by people and that step potential hazards are mitigated. The design professional must select electrical components that are properly insulated for the site-specific environment, that are properly protected from site specific risks to the insulation, and that are appropriate for site specific for environmental conditions.

(2) Thermal Effects.

There at least three independent thermal effects to be mitigated. (1). Electrical equipment is rated for a specific ambient temperature and altitude and must be derated for higher elevations and higher ambient temperatures. (2) Electric equipment and conductors produce heat when conducting electricity and need adequate air flow to ensure proper cooling. (3) A fault current may produce an arc flash that can instantly cause third degree burns.

(3) Overcurrent.

Overcurrent is the condition when actual current exceed the design current. As an example, a circuit is designed to safely carry 20 Amps. The circuit breaker protecting the circuit is faulty and allows 40 amps to flow. The wires will create more heat than can be dissipated. The temperature of the wire and insulation will increase and eventually cause the insulation to fail, which in turns leads to a fault current, which can create an arc, which can cause a fire.

(4) Fault Current.

Fault current occurs when the insulation system has failed and allows the current to travel along an unintended path. Fault current can lead to an electric arc which can start fires, vaporize metal, and cause third degree burns. The fire report on the collapse of an WCF at Otay High School in Chula Vista, California stated that an electric arc was the heat source responsible for the collapse.

(5) Overvoltage

All electrical equipment is designed to operate within a specified voltage range. Overvoltage describes a condition when the actual voltage exceeds the voltage range specified for a component in an electrical system. In 2015, 5,800 electric meters and an unknown number of customer-owned electrical appliances in Stockton, California, catastrophically failed when the voltage exceeded the specified voltage range. 80 fires resulted from the overvoltage condition. This incident started when a vehicle struck a power pole carrying transmission and distribution conductors. The transmission and distribution conductors made contact. PG&E lost control of the voltage.

SCE power poles near Malibu Canyon Road and Harbor Vista Drive carry transmission and distribution circuits. The pole 250 feet west of Harbor Vista Drive along Malibu Canyon Drive is not protected against being struck by a vehicle. A vehicle striking this pole may cause the proposed WCF to catastrophically fail.

The City of Malibu retained an outside expert to ensure that electrical, structural and other hazards are mitigated prior to approval by the City. The report analyzing each hazard is missing. These omissions alone are grounds to DENY both resolutions until the missing report is provided.

Issue 2: 14 of 15 engineering documents are marked "PRELIMINARY NOT FOR CONSTRUCTION".

Fourteen of the fifteen engineering documents in each application are marked "PRELIMARY NOT FOR CONSTRUCTION:"

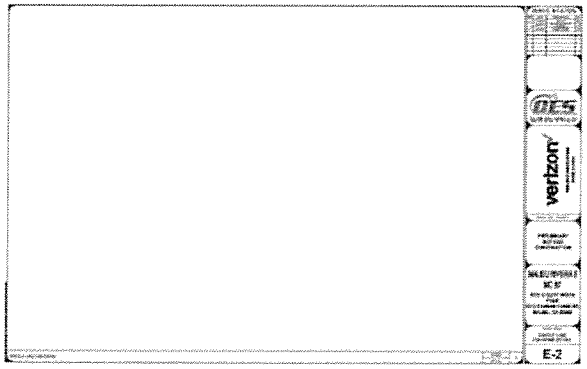
Thirteen of the documents were not certified by the responsible design professional. The design professionals responsible for these engineering documents told the world the documents were not finished.

There is no requirement that preliminary engineering documents be sealed by a design professional. Nonetheless, the Planning Commission must require that all engineering documents be certified as "ready for construction" by the design professional in responsible charge. "PRELIMINARY NOT READY FOR CONSTRUCTION" engineering documents alone are grounds to DENY both resolutions.

Issue 3: The engineering documents do not include evidence that the overvoltage hazard has been analyzed.

The overvoltage event in Stockton, California exposed the reality of a hazard recognized in the NEC. The applications provide no evidence that this hazard has been analyzed and mitigated. This alone is grounds to DENY both resolutions until the missing report is provided.

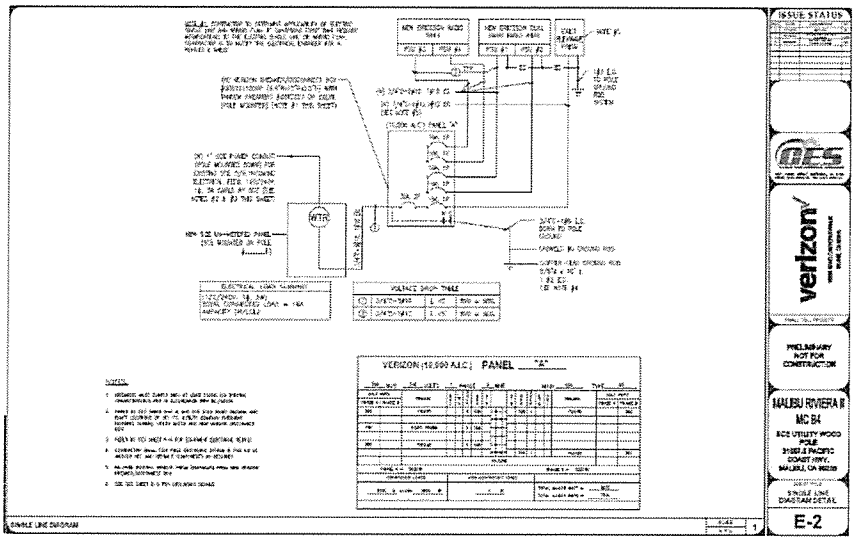
Issue 4: Sheet E-3 SINGLE LINE DIAGRAM is blank in the application for the Kanan Dume installation.



The one-line diagram is the industry standard method to demonstrate that the fault current and overload protective devices are in the correct position in the electric circuit. Without the information provided in the one-line diagram, it is not possible to determine that the overcurrent and fault current hazards have been mitigated.

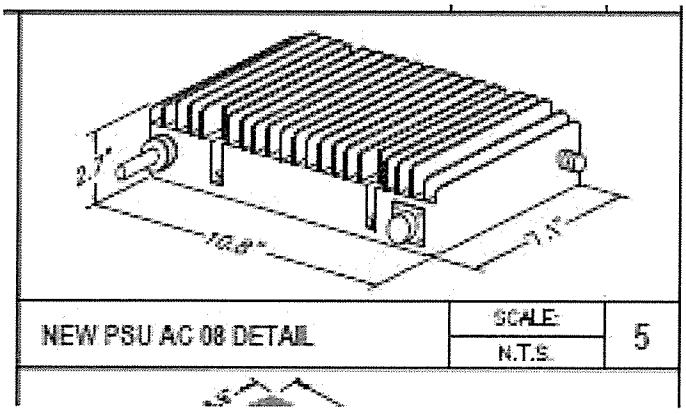
A more complete but imperfect example of a one lined diagram is shown on the next page. It was taken from the application for the WCF at 31557.5 Pacific Coast Highway (PCH). This one line shows that the WTR device protects the breaker box and the 10 Amp circuit breakers in the breaker box protect each power supply.

It is possible to analyze the one-line for PCH for errors and omissions. It is not possible analyze the one line for Kana Dume for errors and omissions. The missing one-line alone is grounds to DENY resolution 21-49 until the missing report is provided.



Issue 5: The wrong power supply may have been specified at Kanan Dume.

Block 5 on Sheet A-6 for the Kanan Dume WCF shows a PSU AC 08 power supply. The same detail is used in the application for the WCF at 31557.5 Pacific Coast Highway. The WCF at Kanan Dume has a battery backup while the WCF at PCH does not. The detail does not include the electrical specifications.



Fortunately, the application for the WCF at 3956.5 Cross Creek Road also specifies PSU AC 08 and includes the electrical specifications for the power supply.

NONE

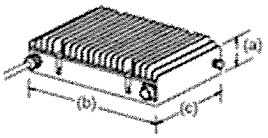
ERICSSON PSU AC 08:

TECHNICAL DATA:
Max Pwr Dissipation: 80w
Temperature Range: -40°C to + 55°C
Limited Performance: -40°C to + 33°C
(cold start-up)
Limited Performance: N/A
(power derating)

INPUT CHARACTERISTICS:
Nominal Input Voltage: 100-250V AC
Rated Operating Voltage Range:
85-275V AC
External Input Fuse: For 1000W
OUTPUT POWER: 16A @ 100V AC, 8A
@ 200V AC
Input Current Rating: 13A @ 100V AC,
6.5A @ 200V AC

OUTPUT CHARACTERISTICS:
Default Output Voltage: 54.5V DC
Voltage Range: -54.0V to -58.5V DC
Output Power: 1000W

DIMENSIONS:
(a) Height: 69mm (2.25")
(b) Width: 274mm (9.0")
(c) Depth: 180mm (6.0")
Weight: <5.2kg



PSU AC 08

PSU AC 08 DETAIL	SCALE NONE	6

PSU AC 08 requires input energy from a 100-250 VAC system.

Further research found the table to the right. The table lists five AC power supplies and two DC power supplies. The table was not taken from the manufacturer's website. It is indicative and not authoritative. It is possible that an AC power supply has been selected for use on a DC battery backup system. The missing report should resolve this question. This alone is grounds to DENY Resolution 21-49 until the missing report is provided.

Table 1 lists the technical data of the PSU variants.

Table 1 PSU Technical Data

Technical Data		PSU AC 01	PSU AC 02	PSU AC 03	PSU AC 08	PSU AC 09	PSU 24 01	PSU 48 02
Maximum power dissipation (W)		200	70	175	80	50	200	55
Temperature range (°C)	Range	−40 to +70	−40 to +55	−40 to +70	−40 to +55	−40 to +55	−40 to +70	−40 to +55
	Limited performance (cold start-up)	−40 to −10	−40 to −33	−40 to −10	−40 to −33	"	−40 to -10	−40 to -33
	Limited performance (power derating)	+55 to +70	N/A	+55 to +70	N/A	"	+55 to +70	N/A
Input Characteristics	Nominal input voltage	100–250 V AC	100–250 V AC	100–250 V AC	100–250 V AC	100–250 V AC	27.2 V DC	−54.5 V DC
	Rated operating voltage range	85–275 V AC	90–275 V AC	85–275 V AC	85–275 V AC	85–275 V AC	19.5 to +30.0 V DC	−36.0 to −58.5 V DC
	External input fuse	10 A/phase at 1,200 W[1] 16 A/phase at 1800 W[1]	For 700 W output power:[1] 12 A at 100 V AC 6 A at 200 V AC	• 10 A/phase at 8 A input current[1]; • 12.5 A (25 A/3xPS U)/phase at 10 A input current[1]; • 15 or 16 A/phase at 12.5 A input current[1]; • 20 A/phase or 16 A Hydraulic magnetic circuit breaker at 15 A input current[1]	For 1000 W output power:[1] 16 A at 100 V AC 8 A at 200 V AC	For 1000 W output power[1] 16 A at 100 V AC	80 A for 1200 W[1]; 125 A for 1,800 W[1]	For 700 W output power:[1] Min 25 A Max 80 A
	Input current rating	9 A at 1,200 W 14 A at 1,800 W	9 A at 100 V AC 4.5 A at 200 V AC	8, 10, 12.5, and 15 A[1]	13 A at 100 V AC 6.5 A at 200 V AC	11 A at 100 V AC	80 A at 1,200 W 100 A at 1,800 W	≤ 20 A

Conclusion

- The absence of the consultant's reports, the unfinished engineering documents, and absence of the overvoltage studies each provide grounds to DENY both resolutions until the missing reports are received.

- The missing one-line and the uncertainty of the power supply provide two additional grounds to DENY Resolution 21-49.

Based on the information provided in the materials before the Planning Commission, I cannot confirm with engineering certainty that the five recognized hazards associated with the use of electricity have been properly mitigated by the design professional in responsible charge.

The unsigned, unsealed engineering documents submitted on behalf of Verizon do not demonstrate with engineering certainty that the five hazards associated with using electricity have been fully evaluated and mitigated for these two installations.

The record before the Planning Commission does not support adoption of the proposed findings in Section 3 of the draft Resolutions related to code compliance and general safety and welfare, including but not limited to A.1, B.2, B.4, B.9, C.4, C.5 and E.1-4 in Resolutions 21-48 and 21-49.

Tony P. Simmons

ATTACHMENT 2 TO GORDON OPPOSITION

ATTACHMENT 2

Susan Foster

[redacted]

June 7, 2021

Malibu Planning Commission
23825 Stuart Ranch Road
Malibu, California 90265-4861

RE Planning Commission June 7, 2021 Meeting, Items 5.H and 5.I

(5.H) Wireless Communications Facility No. 20-010, Coastal Development Permit No. 20-028, Variance No. 20-017, and Site Plan Review No. 20-041 – An application for an upgraded wireless communications facility on a new replacement wooden utility pole in the public right-of-way; Location: 31557.5 Pacific Coast Highway

(5.I) Wireless Communications Facility No. 20-011, Coastal Development Permit No. 20-029, Variance No. 20-018, and Site Plan Review No. 20-040 – An application for an upgraded wireless communications facility on a new replacement wooden utility pole in the public right-of-way; Location: 6213.5 Kanan Dume Road

Dear Chairman Jennings & Members of the Commission:

I write this letter in an attempt to prevent another telecommunications-related fire. The city has yet to recover from the Woolsey Fire of 2018. Our review of applications strongly indicate little is being done at the most essential level – the application level where you get your first look at cell tower designs – to ensure that preventable telecom-related fires like the three I reference below do not happen again.

The two applications on their face demonstrate that Verizon and its experts did not apply proper engineering rigor with regard to fire hazard prevention. The electrical diagrams are preliminary and incomplete. No engineer vouched for them. There is no way to independently assess for whether, and then find that, the projects comply with the Uniform Building Code, National Electric Code, Uniform Plumbing Code, Uniform Mechanical Code, and Uniform Fire Code (*see* LIP Section 3.16.5.A.) There is not sufficient evidence for any finding that these facilities will not pose a threat to public health. (*see* LIP 3.15.4.A.) Indeed, the evidence to date indicates that Verizon may be using the wrong power supply.

Even worse, the record implies that Staff did not spend much, if any, time analyzing electrical safety. Staff asserts that the design is safe and code compliant but it does not include any reports or analyses explaining how it came to that conclusion. For all we know they did not really even look at the issue. If they had they would have noticed the missing one-line diagram in the Kanan Dume application and the potential power supply issue in the same application.

At this point you have no choice. You must reject these applications until Verizon proves, with competent and complete evidence, that the design is fully code-compliant and was designed so as to mitigate all fire risks.

For the record, I will remind the Planning Commission of three telecom-connected fires, two of which occurred in Malibu. This is precisely what we aim to avoid.

MALIBU CANYON FIRE, October 2007:

Santa Ana winds swept through Malibu Canyon, knocking over three utility poles. Those poles sparked a fire that burned nearly 4,000 square acres. It destroyed three dozen cars and 14 structures including Castle Kashan and the Malibu Presbyterian Church. It also damaged 19 other structures and injured three firefighters. Five years later three telecommunications carriers, AT&T, Verizon and Sprint (now T-Mobile), settled with California utility regulators for a joint fine of $12 million in equal shares, $7 million designated for California's general fund and the remainder going to new utility pole inspection funding. As part of the 2012 settlement AT&T, Verizon and Sprint did not admit to culpability for overloading the utility poles. The power lines on the poles that fell were owned and operated by Southern California Edison (SCE) and the poles were jointly owned by Edison, AT&T, Sprint, Verizon and NextG.

NextG, now owned by infrastructure builder Crown Castle International, Inc., and Edison initially fought the CPUC but ultimately settled and admitted culpability in overloading the utility poles and misleading investigators which all five parties were accused of doing.

Under the 2013 settlement, Edison and NextG admitted that one of the failed power poles was overloaded with NextG telecommunications equipment when the fire started, in violation of CPUC rules, and that Edison did not act to prevent the overloading. NextG admitted that a consultant who testified on behalf of Edison gave "incorrect" information by stating that all items attached to the failed poles had been saved as evidence. Investigators later found that five pieces of equipment related to the investigation, including two NextG cables, had been discarded.

Edison reached a $37 million settlement with the CPUC for its admitted role. NextG was charged with $14.5 million in penalties.

Of the $37 million Southern California Edison agreed to pay, $20 million was directed as a penalty paid to California's general fund and $17 million directed to assessing pole loads and working to improve Malibu Canyon.

Under the terms, Edison admitted it violated the law by not taking action to prevent the overloading of its pole by third-party telecommunications equipment.

SCE also acknowledged that one of its employees had concluded that a replacement pole for the overloaded pole that started the fire in the first place didn't comply with the

CPUC's safety regulations for new construction. Edison should have worked to remedy the situation back in November 2007. They did not.

Under the agreement with the CPUC, Southern California Edison admitted that it violated the law by not taking prompt action to prevent a telecommunications company from attaching fiber-optic cable to jointly owned poles in Malibu Canyon. Edison also acknowledged that a letter it sent to the CPUC after the fire did not identify pole overloading and termite damage as possible contributing factors in the pole failures.

Damages paid by all five companies involved with the fire exceeded $60 million. A significant portion of the penalties imposed by the CPUC on the five parties was directed to pole inspections. The need to spend millions on pole inspections to look for overloading and faulty equipment frustrated one of the Malibu City Councilmembers who until recently was an active member of the Malibu City Council.

On February 27, 2013, the Malibu Times quoted Malibu City Councilmember Skylar Peak, an electrician by trade, speaking just after the NextG settlement: "[NextG] should have installed equipment that was safe in the first place," Peak said. "It's frustrating that we have to go back to check now."

He called the agreement a "step in the right direction" but not enough to fully address power pole safety in the city. "There's a lot of old equipment in Malibu that needs to be looked at," Peak said. "Not just NextG [equipment]."

WOOLSEY FIRE, November 2018:

A 2018 wildfire that killed three people, destroyed 1,600 homes – over 400 of them in Malibu – burned more than 96,000 acres and cost over $6 billion. The Woolsey fire raged for two weeks.

A redacted version of the Woolsey fire investigation report obtained by the Ventura County Star concludes Southern California Edison equipment associated with an electrical circuit was the cause of the blaze, though a communication line may have played a significant role.

"The Investigation Team (IT) determined electrical equipment associated with the Big Rock 16kV circuit, owned and operated by Southern California Edison (SCE), was the cause of the Woolsey Fire," the report stated. Under strong winds, a guy wire on a steel pole connected with an energized conductor caused "heated material" to fall on vegetation "thereby causing the Woolsey Fire," the fire report states.

A "communication line" that was hooked up to the steel pole also became energized by the incident; a lashing wire is a technique that can be used by wireless communications carriers to secure lines to utility poles. If the lashing wire is secured improperly, or the equipment is flawed or outdated, electricity can escape, and arcing can take place. Arcing can reach temperatures up to 4000° in less than 1/10 of a second.

A second fire was reported about a quarter of a mile away underneath the communication line. The two fires merged to become the Woolsey fire, the report says.

However, five full pages and notably, several sentences in the concluding remarks, remain redacted. The 70-page report includes the redacted pages under a section called "Violations."

The release of the full investigation report into the Woolsey Fire has been delayed by a criminal investigation by the California Attorney General's Office.

Absent any additional evidence, Southern California Edison claims it is likely that its equipment was "associated" with the start of the blaze. In January 2021 SCE agreed to pay $2.2 billion to settle insurance claims for the Woolsey Fire.

SCE representative stated the cause or causes of the Woolsey Fire cannot be determined until its investigators can look at the evidence collected by officials. That evidence is in the possession of the California Department of Forestry and Fire Protection. Investigators collected metal shavings, melted plastic, guy wire and other items, according to the fire report.

Without admitting wrongdoing or liability, Edison has settled with the public agencies that sued the utility, agreeing to pay $210 million to the public agencies.

SILVERADO FIRE, October 2020

The Silverado Fire broke out in hills near Irvine and forced, together with the Blue Ridge Fire just to the north, the evacuation of over 130,000 people in Orange County. Two firefighters suffered serious burns and at least 17 buildings were damaged or destroyed. According to Southern California Edison's report to utility regulators, a "lashing wire" that ties a telecommunications line to a supporting cable may have come into contact with a separate 12,000-volt conductor line above it.

The wire may have belonged to T-Mobile, not Edison, the utility said in a recent filing with state utility regulators.

A report filed Oct. 26, 2020 by Southern California Edison to the California Public Utilities Commission opened an investigation regarding the potential role of a "lashing wire" as a cause of the Silverado Fire in Irvine.

The report, obtained by *Irvine Weekly*, indicates that a component of a telecommunications line, a lashing wire, may have contacted a SEC power line and ignited the fire.

Here is the report in full:

> "SCE submits this report as it may involve an event that meets the subject of significant public attention or media coverage reporting requirement. Preliminary information reflects SCE overhead electrical facilities are located in the origin area of the Silverado Fire. We have no indication of any circuit activity prior to the report time of the fire, nor downed overhead primary conductors in the origin area. However, it appears that a lashing wire that was attached to an underbuilt telecommunication line may have contact[ed] SCE's overhead primary conductor which may have resulted in the ignition of the fire. The investigation is ongoing."

A lashing wire, which does not carry an electrical current, is one-third of a telecommunications line, according to Southern California Edison Spokesperson Chris Abel.

"Telecommunication wires have three components, there's the cable itself, the support wire and the lashing wire winds around and hold them together," Abel said. "Telecommunication lines are third party owned, and they are below our power lines."

THE "LASHING WIRE" WARNING

What the lashing wire involvement in both Woolsey and Silverado tells us is that a lashing wire was not properly wrapped and/or secured, with disastrous consequences. In the Woolsey Fire, a telecommunications company whose identity we do not know because of the ongoing criminal investigation by the California Attorney General's office, may be primarily or secondarily at fault. And in the case of the Silverado Fire in 2020, SCE is pointing to T-Mobile.

We don't know what is happening with the securing of the lashing wires, but we know something is going wrong because when designed and installed properly, lashing wires are not supposed to come loose. It could be an engineering failure, or it could be a technical implementation failure, but something is not being done correctly.

As Tony Simmons, P.E. pointed out to me, it could be that Brand X lashing wire is being used and the technicians may be using Brand Y installing tools. Metal lashing is a recognized hazard if it is not done right. As Mr. Simmons stated to me, if he were the owner of a utility pole, such as SCE or poles jointly owned by multiple carriers, he would want to know what people are doing. It is the responsibility of the telecommunications company to secure their lashing wires properly at both ends, and it is the responsibility of the pole owner to make sure that whichever company is renting out space on their poles is securing the telecommunications wires according to appropriate engineering protocol. If one end is coming unwrapped and getting into a distribution line, you have two responsible parties – the telecommunications carrier that owns the lashing wire and the owner of the pole which is, in most cases in Malibu, SCE and possibly SCE along with other partners. Somebody is not mitigating a known hazard.

I do not mean to suggest there is a lashing line problem in these proposed projects. The fiber here appears to be underground. But the lashing example serves to show that electrical safety has to be a priority in all areas, and it is clear that the utility and telecommunications companies have simply dropped the ball. I have offered three examples and there are countless more throughout

the state of California confirming the role of utilities in starting wildfires – and telecommunications is a utility. When safety is not made a top priority on electrical equipment, it leads in one catastrophic direction, and that direction is fire.

The foregoing also demonstrates that the burden of ensuring rigorous safety design and code compliance falls on permitting authorities. At the front end, before any project is approved. The Municipal Code and Local Implementation Plan standards expressly require code compliance and an affirmative finding of safety. So now, since neither Verizon nor Staff performed their duties, you must do yours. Deny these applications and require a far more rigorous demonstration. Malibu's safety and security rests in your hands. If you do not do your job and insist on proper proof of safety before you approve them then you will bear some of the responsibility if there is a defect and it starts another devastating fire.

PLANNING COMMISSION MUST DENY THE TWO INCOMPLETE APPLICATIONS:

The Planning Commission has before you two applications:

1) 31557.5 Pacific Coast Highway with applicant Motive for Verizon Wireless
2) 6213.5 Kanan Dume Road with applicant Motive for Verizon Wireless

You have two applications from Verizon that say exactly the same thing on page 1: "This application was reviewed by City staff and the City's wireless communications facility consultant for compliance with all applicable codes and regulations in effect at the time the application was deemed complete." There is, however, no documentation provided regarding the City staff and consultant's supposed review.

Please focus on the phrase "deemed complete". Within these two applications you have diagrams and documents crucial to evaluating the safety of the proposed cell towers with the wording "PRELIMINARY NOT FOR CONSTRUCTION". This means the document has been distributed for review and discussion. This does not mean the documents are worthy of being used for approvals and affirmative safety/compliance findings. The Kanan Dume Rd. application is incomplete since the space for the crucial One Line Diagram is blank.

In the white paper Tony Simmons and I submitted to this Planning Commission in early March of this year, we explained why we required each document in our Electric Fire Safety Protocol. It's true that protocol does not apply specifically to these two small cell applications. Yet fundamental engineering requirements apply to ALL of these applications, and a One Line Diagram is an integral part of the engineering documents.

We explained in our paper submitted to you three months ago that a One Line Diagram is important for the following reasons:

- A One Line Diagram of the electrical system is important because it provides a map of the electrical installation and serves as the primary reference for all the other documents.

- This document allows less experienced electrical workers to quickly troubleshoot electrical malfunctions and failures and to identify a de-energization point.

In both the applications before you, professional engineers were willing to sign their names and stamp their seals for purposes of RF radiation modeling. They were willing to put their license on the line for the proposition that the modeling is in compliance with the FCC. That's easy modeling to do because the FCC sets the allowable regulatory level so high that virtually every cell tower comes in under that regulatory ceiling. So that is not a high-risk venture for a professional engineer. But look immediately under the stamp on pdf page 65 of 79 in the PCH application and pdf page 66 of 78 in the Kanan Dume application. The electrical engineer *expressly disclaimed responsibility for everything other than RF compliance*.

You therefore do not have any electrical engineers vouching for electrical design safety or code compliance. Apparently, no professional engineer was willing to put his/her name and seal on the electrical engineering designs of the cell towers on these applications. That should set off an alarm for those reviewing these applications. Staff should have asked questions and required better and complete diagrams. Staff could not have performed any meaningful independent assessment given the lack of reliable information. They were not willing to produce their own report that addresses this topic, and that should set off a second loud alarm.

You now have Tony Simmons, P.E. signing his name and stamping his seal on his evaluation and professional analysis of these two applications. When a professional engineer signs and seals a document, it is submitted with the highest level of accountability possible. Tony Simmons has found both these applications severely deficient. He affirmatively states that "the unsigned, unsealed engineering documents submitted on behalf of Verizon do not demonstrate with engineering certainty that the five hazards associated with using electricity have been fully evaluated and mitigated for these two installations." He affirmatively states that "the record before the Planning Commissions of the Resolutions does not support adoption of the proposed findings in Section 3 of the draft Resolutions related to code compliance and general safety and welfare, including but not limited to A.1, B.2, B.4, B.9, C.4, C.5 and E.1-4 in Resolutions 21-48 and 21-49." You now have a shrieking third alarm.

Why is this important? When a doctor makes a mistake, a single patient can die. When a criminal attorney is derelict in his/her duty and fails to adequately represent a client, that client – even though he/she may be innocent – may lose their freedom or even their life. When an engineer makes a mistake, hundreds if not thousands of people can die.

That's why "signed and sealed" is so profoundly important in the world of engineering. There is not a single electrical document or diagram that is signed and sealed by a professional engineer in the two applications you have before you. Yet Tony Simmons is willing to defend his recommendations to the Planning Commission in any proceeding before the PE Board in his professional analysis of these applications. Like all professional engineers Tony Simmons is prepared to defend all his work product in any proceeding before the PE Board. That is why the lack of sealed diagrams is important. The work is so shoddy no PE would attest to it. And we suspect that the Staff is not willing to show their work because they did not, in fact, perform any meaningful review.

ATTACHMENT 2

DEMAND COMPETENCE AND PROOF OF WORK

Good governance requires a documented trail of the decision-making process. With electrical devices such as cell towers, you have an engineering subject matter expert who is paid for his/her expertise on ensuring compliance with the applicable electric codes. Yet without a report you don't know that the proper steps have been taken to determine whether or not the applicant – in this case Verizon – is in compliance from an electrical engineering perspective. The available evidence suggests that, like Verizon, the Staff experts have simply not done their job.

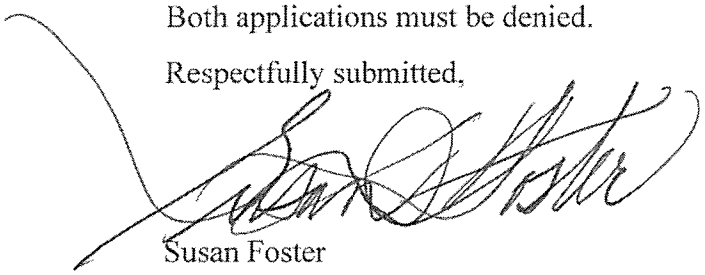
Malibu deserves better. Malibu deserves the best of your subject matter expert when it comes to permitting. Malibu deserves the best when it comes to the electric engineering documents that are supposed to be provided by Verizon, or whomever the carrier may be. These documents should be signed and sealed by professional engineers willing to professionally defend their approval of these designs, diagrams, and documents. Malibu deserves a Staff that is willing to show its work as well and be able to document the basis for its conclusions and recommendations.

We respectfully request that the Planning Commission police the wireless companies' efforts and work by denying these two applications until we can see adequate proof that due diligence has been exercised, how it has been exercised, and enough information to confirm code compliance. We need to see the City's wireless consultant and Staff analyses.

The wireless companies need to be given a clear message that Malibu insists that their facilities be proven safe and they will be required to show their work and present adequate information for you to make the required safety and code compliance findings. Only then can Malibu residents be assured that every possible step has been taken to minimize the risk of yet another wildfire caused or made worse by equipment breakdown in a WCF.

Both applications must be denied.

Respectfully submitted,



Susan Foster

Cc: Kathleen Stekko

Received
6/2/2021
Planning Dept.

Aaron Gribben

Subject: FW: Wireless application

From: Tyler Eaton
Sent: Wednesday, June 2, 2021 8:24 AM
To: RACHEL ODEN [redacted]
Subject: RE: Wireless application

Hello Rachel,

Thank you for your inquiry. Below are some answers to your questions:

- The proposed replacement Verizon wireless communications facility (WCF 20-010) is located along PCH near the southern property boundaries of 31577 and 31555 PCH.
- It will be approximately 300 feet from 31527 PCH, 450 feet from 31501 PCH, and 550 feet from 31509 PCH.
- It is to the west of all three of your properties.
- This is not a 5G Network upgrade, but it will improve Verizon's 4G Network.
- See photosimulation below for a demonstration of the site before and after.
- Verizon provided a radio frequency, electromagnetic energy report showing the proposed emissions from the site conducted by a third-party electrical engineer. It was reviewed by City staff and the City's wireless consultant and was deemed to meet the Federal Communications Commission's safety requirements. Additionally, there will be construction safety reviews from the City's Building Safety staff, Southern California Edison, and the California Department of Transportation along with a final inspection from City staff to ensure the site was constructed as approved, if approved.
- The utility wires for the replacement pole will be above ground, how they are now. All of the equipment for the replacement wireless facility will also be above ground attached to the side of the replacement utility pole.
- The site is not anticipated to obstruct scenic views.

Existing Site

Date Received 6/2/2021 Time 8:24AM
Planning Commission meeting of 6/7/21
Agenda Item No. 5H
Total No. of Pages 4

CC: Planning Commission, PD,

Recording Secretary, File



Proposed Site



Let me know if you have further questions.

Thank you.
Tyler

Tyler Eaton | Assistant Planner | City of Malibu
23825 Stuart Ranch Road, Malibu CA, 90265
Office: 310-456-2489 Ext. 273
Cell: 424-422-8365
Email:teaton@malibucity.org

From: RACHEL ODEN [redacted]
Sent: Tuesday, June 1, 2021 5:11 PM
To: Tyler Eaton <teaton@malibucity.org>; arome@motive-energy.com
Subject: Wireless application

Hello,

We received notification of a wireless communication facility application.What's the exact location of this? We are located at 31501, 31509 and 31527 PCH. How close exactly is this to our property? Is this east or west of our property? What is this exactly? Is this 5g? Is there a photo of what it will look like? Are there any dangers to the device? Are the wires above ground or below? Will it obscure any views if this is to pass? Please advise.

Aaron Gribben

Subject: Memo re State and Federal Law: Small Cells in the Right-of-Way
Attachments: Memo to Malibu re Federal and State Law Governing Small Cells in the ROW 20210516.pdf

From: Rogers, Ethan JOSEPH [redacted]
Sent: Monday, June 7, 2021 3:37 PM
To: Planning Commission <planningcommission@malibucity.org>; Kathleen Stecko <kstecko@malibucity.org>
Cc: Daisy Mae Gonzales Uy Kimpang [redacted]
Subject: Re: Memo re State and Federal Law: Small Cells in the Right-of-Way

Dear Chair Jennings, Vice Chair Weil and Commissioners:

I am resending the attached memo, the substance of which applies to your review tonight of Verizon's small cell applications.

Received
6/7/21
Planning Dept.

Thank you for your time and consideration.

Best,

Ethan

Ethan J. Rogers
[redacted]

On Sun, May 16, 2021 at 2:10 PM Rogers, Ethan JOSEPH [redacted] wrote:

> Dear Chair Jennings, Vice Chair Weil and Commissioners:
>
> For your review prior to deciding on Verizon's small cell applications tomorrow, please find the attached memo explaining the limitations imposed by law on local governments relative to such decision(s).
>
> Thank you for your time and consideration.
>
> Best,
>
> Ethan
>
> **Ethan J. Rogers**
> [redacted]

Date Received 6/7/21 Time 3:37PM
Planning Commission meeting of 6/7/21
Agenda Item No. 5H5I
Total No. of Pages 5

CC: Planning Commission, PD,

Recording Secretary, File

verizon

MEMORANDUM

TO: The City of Malibu, California

FROM: Ethan J. Rogers, Verizon Wireless Network Counsel

DATE: May 16, 2021

RE: Federal and State Law Requirements for Local Government Review of Small Cell Wireless Facility Applications

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I. Executive Summary

Verizon Wireless provides this memo in anticipation of decisions that your jurisdiction will make on applications for small cell facilities in the right-of-way. This memo summarizes certain federal and California state laws that govern wireless facility applications. Below, we review requirements of the federal Telecommunications Act and applicable regulations of the Federal Communications Commission (the "FCC"). We also address California Public Utilities Code Section 7901 regulating the right-of-way, and California Government Code Section 65964 addressing wireless facilities.

II. Federal Law Constrains Local Government Review of Small Cells.

The Telecommunications Act imposes five principal limitations on local authority over the placement and construction of wireless facilities. Local governments shall not discriminate among wireless providers, nor prohibit or effectively prohibit the provision of personal wireless services. Local governments must act on applications within a reasonable period of time, and provide substantial evidence for a denial. Additionally, local governments may not regulate based on the environmental effects of radio frequency emissions if a facility complies with the FCC's exposure guidelines. 47 U.S.C. § 332(c)(7)(B). The FCC has adopted regulations interpreting these statutory requirements with respect to small cells.

A. A Denial Cannot Constitute a Prohibition of Service.

Local government regulations "shall not prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II). For small cells, the FCC determined that a wireless carrier need not show an insurmountable barrier, or even a "significant gap," to prove a prohibition of service. *See In Re: Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment,* Declaratory Ruling and Third Report and Order, 33 FCC Rcd. 9088, ¶¶ 35, 38 (September 27, 2018) (the "Infrastructure Order").[1] Instead, "a state or local legal requirement constitutes an effective prohibition if it 'materially limits or inhibits the

[1] The Ninth Circuit Court of Appeals upheld these FCC requirements. *See City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020), petition for cert. pending, No. 20-1354 (filed March 22, 2021).

ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.'" *Id.*, ¶ 35. Thus, state or local regulations are preempted if they materially inhibit "densifying a wireless network, introducing new services, or otherwise improving service capabilities." *Id.*, ¶ 37.

B. Small Cells Must Be Evaluated under Reasonable Aesthetic Criteria.

In adopting the "materially inhibit standard," the FCC also confirmed that a local government's aesthetic criteria for small cells must be "reasonable," that is, "technically feasible" and meant to avoid "out-of-character" deployments, and also "published in advance." Infrastructure Order, ¶¶ 86-87. A denial based on infeasible or otherwise unreasonable standards would "materially inhibit" deployment of small cells and service improvements, constituting an effective prohibition of service.

C. A Denial Must Be Supported by Substantial Evidence.

Under the federal Telecommunications Act, a local government's denial of a wireless facility application must be based on "substantial evidence." *See* 47 U.S.C. § 332(c)(7)(B)(iii). This means that a denial must be based on requirements set forth in local regulations and supported by evidence in the record. *See Metro PCS, Inc. v. City and County of San Francisco,* 400 F.3d 715, 725 (9th Cir. 2005). Further, generalized aesthetic objections do not amount to substantial evidence upon which a local government can deny a wireless facility permit. *See City of Rancho Palos Verdes v. Abrams,* 101 Cal. App. 4th 367, 381 (2002).

D. Radio Frequency Emissions and Proxy Concerns Such as Property Values Cannot Be a Decision Factor.

A local government cannot consider the environmental effects of radio frequency emissions if a proposed wireless facility complies with the FCC's exposure limits. 47 U.S.C. § 332(c)(7)(B)(iv). Moreover, federal law bars efforts to circumvent preemption of health concerns through proxy concerns such as property values. *See, e.g., AT&T Wireless Servs. of Cal. LLC v. City of Carlsbad,* 308 F. Supp. 2d 1148, 1159 (S.D. Cal. 2003) ("Thus, direct or indirect concerns over the health effects of RF emissions may not serve as substantial evidence to support the denial of an application"); *Calif. RSA No. 4, d/b/a Verizon Wireless v. Madera County,* 332 F. Supp. 2d 1291, 1311 (E.D. Cal. 2003).

E. A Local Government Must Take Final Action on a Small Cell Application within the 60- or 90-day "Shot Clock" Time Period.

The Telecommunications Act requires local governments to act on wireless facility applications within a "reasonable period of time." 47 U.S.C. § 332(c)(7)(B)(ii). According to FCC rules, the presumptively reasonable period of time is 60 days for small cells on existing structures, and 90 days for small cells on new structures. 47 C.F.R. § 1.6003(c). The time period may be tolled if a local government issues a timely request for information, or by mutual agreement. 47 C.F.R. § 1.6003(d). If a local government does not take final action within the Shot Clock period, an applicant may file claims of

unreasonable delay and a prohibition of service in federal court. 47 U.S.C. § 332(c)(7)(B)(v); Infrastructure Order ¶¶ 117-18.

III. State Law Constrains Local Government Review of Right-of-Way Facilities.

State law provides a separate remedy if a local government does not act within the FCC's Shot Clock periods. State Assembly Bill 537 has been introduced this legislative session in order to clarify the applicable FCC time periods for review of small cell applications.

A. Verizon Wireless Has a Statewide Right to Use the Right-of-Way.

California Public Utilities Code Section 7901 grants telephone corporations such as Verizon Wireless a statewide right to place their equipment along any public right-of-way, including new poles. The California Supreme Court has confirmed this right. *See T-Mobile West LLC v. City and County of San Francisco* (2019) 6 Cal.5th 1107, 1122 ("Any wireless provider may construct telephone lines on the City's public roads. . .").

B. Local Governments Cannot Limit Right-of-Way Facilities to Poles of a Particular Owner.

California Government Code Section 65964(c) bars local governments from limiting wireless facilities to sites owned by particular parties. Because of this, a local government cannot deny right-of-way facilities based on a preference for different poles owned by the local government itself or a local utility.

IV. Both Federal and State Law Preempt Requirements To Show the Need for Small Cells in the Right-of-Way, and Limit Review of Alternatives.

A. Local Governments Cannot Require Coverage Maps or Similar Information for Small Cells in the Right-of-Way.

Because Public Utilities Code Section 7901 grants telephone corporations a statewide right to place their equipment along any public right-of-way, wireless facility applicants need not prove the need for their right-of-way facilities. Further, as explained above, the FCC disfavored dated standards for a prohibition of service based on "coverage gaps" and the like, instead adopting the "materially inhibit" standard for small cells. Infrastructure Order, ¶¶ 38, 40. Because of these state and federal laws, a local government cannot require wireless carriers to prove the need for their small cells in the right-of-way, and so cannot request irrelevant information such as coverage maps, drive test results, or network capacity data.

B. Review of Alternatives Should Be Based on Reasonable Aesthetic Criteria, Not a "Least Intrusive" Standard, and Is Limited to the Right-of-Way.

When the FCC rejected the "coverage gap" approach to establishing a prohibition of service, it also rejected the requirement that a proposed small cell must be the "least intrusive means" to fill a gap. Infrastructure Order, ¶ 40, n. 94. As discussed above, the Telecommunications Act requires that denial of a wireless facility be supported by "substantial evidence" based on the local government's published codes or standards. Therefore, when reviewing alternatives, a local government cannot apply the vague "least intrusive means" criterion if it is not specified in local wireless regulations that are consistent with federal requirements. Instead, any comparison of alternatives must be based on "reasonable" aesthetic criteria, as required by the FCC.

Because Section 7901 grants telephone corporations the right to use the right-of-way, a local government cannot request review of alternatives outside the right-of-way, nor can it deny a right-of-way facility based on preference for private property.

Conclusion

Federal and state law impose several limitations on review of wireless facility applications that local governments must observe to avoid legal challenges. This area of law is complicated and continues to evolve. For example, new FCC rules regarding radio frequency exposure are effective this month, and currently, two bills have been introduced in the California State Legislature this session that may affect small cell siting. Counsel to Verizon Wireless is available at any time to provide details about the above summary and current updates.