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VIA EMAIL

Marnie Waffle
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Community Planning & Building
City of Carmel-by-the-Sea
Monte Verde Street
Carmel-by-the-Sea, California 93921

Re: Verizon Wireless Applications for Small Cells in the Right-of-Way
Commission Agenda June 12, 2019

Dear Ms. Waffle:

We write again on behalf of Verizon Wireless to encourage the City to approve five small cell wireless facilities on utility poles in the right-of-way (the “Proposed Small Cells”). Placed on existing utility infrastructure, the Proposed Small Cells will pose little visual impact while providing enhanced, reliable Verizon Wireless service to Carmel residents and visitors. We previously explained that draft findings of denial attached your May 8, 2019 Staff Report were preempted by state law granting telephone corporations the right to use any right-of-way and the recent Federal Communications Commission (“FCC”) order addressing appropriate small cell approval criteria. The City must approve the Proposed Small Cells based upon those City criteria that are consistent with state and federal law and cannot deny the facility on findings that are barred by state and federal law. In addition to violating Verizon Wireless’s state right to place telephone equipment on telephone poles, the denial would pose an unlawful prohibition of service in violation of the federal Telecommunications Act. Since this item was continued and removed from the agenda at the May 8, 2019 Commission meeting, Verizon Wireless has worked with staff to provide additional information regarding small cell technical requirements. We urge the City to adopt findings of approval for all five of the Proposed Small Cells.

The Proposed Small Cells

The Proposed Small Cells have been located and designed to pose minimal impact to the adjacent neighborhood. In fact, Verizon Wireless conducted a site walk of the neighborhood with Community Planning & Building Director Marc Wiener on April 26, 2018 to review optimal locations and designs for each new small cell within the right-of-

way. It was at this time that the shrouded design was selected. Other feedback from the site walk influenced Verizon Wireless's applications.

Verizon Wireless will mount one four-foot tall cylindrical antenna on top of each utility pole. The antenna must be elevated six feet above electric supply conductors to comply with safety requirements of Public Utilities Commission General Order 95 Rule 94.4. To meet General Order 95 requirements, several of the utility poles will be replaced with a similar pole of required additional height.

Other equipment will be placed on the side of the pole between 8 and 17 feet (or, for one node, 15 feet 8 inches). The lowest equipment will be a small wireless electric meter and a disconnect switch. Above those, a narrow six-foot tall vertical shroud will conceal the small cell associated equipment: two remote radio units ("RRUs"), two power supply units ("PSUs"), small diplexers and a fiber interconnect box, all of which will be hidden from view. Equipment will be painted brown to match the wood utility pole. As there are no moving parts, none of the pole-mounted equipment generates any noise.

Photosimulations of the Proposed Small Cells are attached as Exhibit A. Reports by Hammett & Edison, Inc., Consulting Engineers, attached as Exhibit B, confirm that each of the Proposed Small Cells will comply with FCC radio frequency exposure guidelines.

The Planning Commission Can Adopt Findings of Approval for the Proposed Small Cells.

While we explain below that certain findings and standards are preempted by state and federal law, the Planning Commission can make adequate findings to approve Verizon Wireless's small cells. For example, as described in your May 8, 2019 Staff Report, the Proposed Small Cells meet the use permit finding that a facility not make excessive demand on public services including communication facilities; in fact, the small cells will enhance communication service. Code § 17.64.010(A)(4). The Proposed Small Cells will not be injurious to public health, safety or welfare because, as staff noted, they will be installed and operated in compliance with applicable regulations including FCC radio frequency exposure guidelines. Code § 17.64.010(A)(5). Similarly, they will not affect the health, safety, or welfare of neighboring properties or uses. Code § 17.64.010(A)(7).

Though most of the City's telecommunication facility and design review standards are preempted, the Planning Commission can nonetheless find that the Proposed Small Cells are screened from view to the maximum extent feasible, as the associated equipment on the side of each pole is concealed behind a narrow vertical shroud. Code § 17.46.040(D). With respect to design review, the Code encourages—but does not require—equipment to be placed in a building or underground, which is

infeasible. However, the small cell equipment shroud is an alternate screening technique that is feasible for right-of-way facilities on utility poles. Code § 17.46.050(C).

In sum, despite numerous preempted provisions, the Code affords the opportunity for the Planning Commission to make findings of approval for all five small cells.

Draft Findings of Denial Were Preempted by State and Federal Law.

As we explained in our prior letter of May 8, 2019, the various findings of denial drafted by staff were based on City requirements that contradict state law or FCC regulations. As they are preempted, those findings cannot be the basis of denial.

State Law Preempts The Prohibition of Facilities in The R-1 Zone and The Discouragement of Right-of-Way Siting.

Several findings of denial were based on the Code's prohibition of wireless facilities within the R-1 residential zone and the discouragement of facilities in the right-of-way. Code §§ 17.46.020(A), 17.46.040(C). However, those Code provisions contradict California Public Utilities Code Section 7901, which grants telephone corporations such as Verizon Wireless a statewide right to place their equipment along any right-of-way. Section 7901 does not favor certain streets (such as those in non-residential zones) over others. Further, the City cannot deny a right-of-way facility based on a preference for private property sites, as that would violate the rights of telephone corporations under Section 7901. Both Code provisions are preempted by state law, and they cannot be the basis for denial of the Proposed Small Cells.

FCC Regulations Preempt Any Subjective Standards Applied to Small Cells.

Several findings of denial were based on Code zoning standards that are entirely subjective. Those include the telecommunication facility standards that reference "visual clutter" and protection of public and private views. Code § 17.46.040(C). One conditional use permit finding requires development to be "compatible with surrounding land uses" while not contradicting the purpose of the zoning district, which is to "maintain the residential village character." Code §§ 17.08.010, 17.64.010(A)(6). These indefinite, subjective standards are matters of opinion that invite discretion.

In contrast, the FCC requires that small cells be evaluated under objective standards that are published in advance. See *In Re: Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, FCC 18-133, ¶¶ 86 (September 27, 2018) (the "Small Cells Order"). Under objective standards, either a facility complies, or it does not. Vague, subjective standards do not provide clear guidance for approval, and instead leave applicants guessing at the outcome of their proposals which the FCC discourages. *Id.*, ¶

88. The FCC also requires small cell approval criteria to be “reasonable,” that is, “technically feasible” and meant to avoid “out-of-character deployments.” *Id.*, ¶¶ 86-87.

With respect to the subjective “compatibility with the community” standard, the denial findings focused on purported height limits, equipment orientation and the new bollards proposed for three of the small cells. The referenced height limits apply to residential buildings and regulate the number of stories, plates and roofs, which are inapplicable to public utility structures. Code § 17.10.030(B). Existing utility poles already exceed the purported 24-foot height limit, and because General Order 95 requires antennas to be elevated six feet above pole-top electric conductors, standards forbidding required additional height would be technically infeasible and unreasonable. Further, each of the Proposed Small Cells falls under the height allowances in the FCC’s definition of small cell, which are no less than 50 feet. 47 C.F.R. § 1.6002(l)(1).

The findings of denial reference only one standard for equipment orientation, compatibility with “village character,” which, again, is subjective and preempted. Where a new bollard is necessary per PG&E requirements for service worker safety, the City’s prohibition of bollards is also technically infeasible.

The subjective findings and standards are preempted by the FCC’s Small Cells Order and cannot be the basis for denial. We note that, to date, the City has not provided Verizon Wireless with updated standards that apply specifically to small cells.

Requiring Associated Equipment Underground Is Unreasonable in Contradiction of The FCC’s Direction.

Several findings of denial targeted the small cell associated equipment placed on the side of each pole, claiming that it does not comply with the General Plan which prefers utilities underground where feasible, with minimal impact to tree roots. *Carmel General Plan Land Use and Community Character Element*, Policy P1-53. The FCC determined that undergrounding requirements, similar to aesthetic requirements, must be reasonable, non-discriminatory and objective. Small Cells Order, ¶¶ 86, 90. The City’s direction to place associated equipment underground is unreasonable in two ways.

First, undergrounding is generally technically infeasible due to numerous constraints on large vaults in the roadway. A vault must accommodate the required RRUs, other network gear in addition to space for workers to service the equipment. To reduce the risk of water intrusion, two sump pumps must be placed below a vault along with a drywell that can release water into the City’s stormwater system. A vault 8 feet 2 inches long and 5 feet 8 inches wide is required to accommodate Verizon Wireless’s equipment. Exhaust vents measuring 24 inches square must be placed beyond both ends of a vault for ventilation equipment that produces noise. The total required excavation area is 18 feet long, 10 feet wide and 8 feet 1 inch deep. A photograph of a problematic vault installed by consultant Crown Castle in the Santa Cruz right-of-way is attached as

Exhibit C. The example illustrates how vaults placed on the edge of the public right-of-way intrude into front yard landscaping, which will be the case in Carmel.

To make room for the bend radius of required conduit for Verizon Wireless antennas running between a vault and pole risers, vault placement cannot be closer than 6 to 10 feet of the utility pole supporting the antennas depending upon utility pole class and other factors. At the same time to avoid signal loss due to excessive cable lengths between the antenna and RRU, any vaulted RRU would have to be no more than 30 feet from the utility pole. Within this area extending between six and 30 feet outward from a pole, various factors impede excavation and placement of a permanent underground vault in the right-of-way. These factors include trees, tree roots, driveways and underground utilities such as water, stormwater, sewer and gas lines, as well as any underground electric and/or communication lines serving individual homes. Vault surfaces must be flat, requiring substantial grading of any sloped curbs which may eliminate certain driveway access. Cars cannot be parked above vaults as that impedes service access; bollards may be required to prevent parking. Unlike pole-mounted equipment, vaulted equipment requires an electric meter placed on a ground-mounted pedestal that may also require bollards for protection from traffic. Vaults must be kept clear of landscaping and will intrude on neighboring yards that occupy portions of the right-of-way. Pedestals require a landscape clear perimeter to allow PG&E access and conflict with City's *Right-of-Way Vision Statement*. This and other rules are contained in PG&E's Installation Details for Service to Pole-Mounted Communication Equipment attached as Exhibit D. The analysis attached as Exhibit E reviews the feasibility of underground vaults for each of the Proposed Small Cells.

Wet northern California coastal weather has caused undo flooding of vaults, particularly when storms lead to power outages that prevent sump pumps from operating. Unlike sealed transformers and cables typically placed in vaults, RRUs and similar sensitive electronic transceivers are ruined if at all submerged, and warranties do not cover this situation. Similarly, the RRUs have been designed for passive cooling without fans. Vaulting the RRUs requires active cooling with fans and exhaust vents creating unnecessary noise. Like sump pumps, fans do not operate during power outages and radio failure due to lack of ventilation unnecessarily reduces reliability. Verizon Wireless is not vaulting small cell equipment in Northern California because it unnecessarily introduces the mechanical unreliability of fans and pumps to the provision of wireless service.

Feasibility aside, blanket undergrounding requirements are also unreasonable because small cells are not "out-of-character" among other utility infrastructure along the right-of-way such as poles, wires, transformers and other utility apparatus. Utility poles offer ideal sites for small cells by consolidating new equipment onto existing utility infrastructure. A reasonable standard is to allow small cell equipment up to a certain volume before undergrounding is considered. For each of the Proposed Small Cells, the associated equipment—RRUs, PSUs, diplexers, and fiber box—total less than four cubic feet in volume, well under the 28 cubic feet of associated equipment allowed under the

FCC's definition of small cell. 47 C.F.R. § 1.6002(l)(3). Further, Verizon Wireless has chosen to conceal this associated equipment within a narrow vertical shroud painted to match the pole (the meter and disconnect switch cannot be placed underground or shrouded). Requiring undergrounding of small, concealed equipment components is unnecessary and unreasonable in contradiction of the FCC's direction.

**Concern of Setting a Precedent for Future Additional Small Cells
Cannot be The Basis of Denial.**

One finding of denial is based on a concern that approval of Verizon Wireless's small cells will lead to additional facilities in the right-of-way. However, if other wireless carriers file additional applications in the area, those are beyond the scope of Verizon Wireless's present proposal. Approval of Verizon Wireless's small cells does not mandate approval of additional facilities. While the Telecommunications Act does not allow cities to "unreasonably discriminate" against certain wireless carriers, the City could decline future small cells if there is substantial evidence of cumulative impacts under reasonable, objective criteria. 47 U.S.C. § 332(c)(7)(B)(i)(I). Speculating on future deployments is contrary to the objectivity the FCC requires for review of small cells; each small cell must be evaluated on its own merits. Concerns over setting precedent cannot be the basis for denial.

Denial Would Constitute an Unlawful Prohibition of Service.

The federal Telecommunications Act provides that local government regulation of wireless facilities "shall not prohibit or have the effect of prohibiting" the provision of personal wireless service. 47 U.S.C. § 332(c)(7)(B)(i)(II). Under Ninth Circuit case law, a local government violates this clause if a wireless provider can show two things: (1) that it has a "significant gap" in service; and (2) that the proposed facility is the "least intrusive means," in relation to the land use values embodied in local regulations, to address the gap. *See T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987 (9th Cir. 2009).

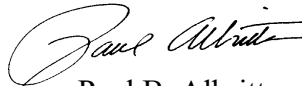
In the Small Cells Order, the FCC determined that the Ninth Circuit's two-part test is too narrow, and that a wireless carrier need not show an insurmountable barrier, or even a significant gap, to prove a prohibition of service. Small Cell Order, ¶¶ 35, 38. Instead, "a state or local legal requirement constitutes an effective prohibition if it 'materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.'" *Id.*, ¶ 35. Thus, local regulations of small cells are preempted if they materially inhibit "densifying a wireless network, introducing new services, or otherwise improving service capabilities." *Id.*, ¶ 37.

These are exactly Verizon Wireless's objectives for the Proposed Small Cells in the south Carmel area. As demand for service increases, denial would defeat these objectives, leaving the area underserved or unserved, compromising network access for

all customers. In particular, denial based on prohibitive factors, such as the ban on facilities in the R-1 zone, would materially inhibit Verizon Wireless's ability to improve service on its network and therefore effectively prohibit service in violation of the Telecommunications Act.

Verizon Wireless has proposed five small cells in the right-of-way to improve service for south Carmel residents and visitors. Placed on existing utility infrastructure, with associated equipment screened from view, the small cells pose minimal visual impact and satisfy those City regulations that are reasonable and objective in accordance with the FCC's Small Cells Order. Findings of denial attached to the May 8, 2019 Staff Report are preempted by state law or the Small Cells Order, and denial would also constitute a prohibition of service in violation of the Telecommunications Act. We urge the City to adopt findings of approval for Verizon Wireless's small cells.

Very truly yours,



Paul B. Albritton

cc: Jon Giffen, Esq.
Glen Mozingo, Esq.
Gerard Rose, Esq.
Mark Wiener

Schedule of Exhibits

- Exhibit A:** Photosimulations
- Exhibit B:** Radio Frequency Exposure Reports
- Exhibit C:** Problematic Vault in Santa Cruz
- Exhibit D:** PG&E Installation Details for Service to Pole-Mounted Communication Equipment
- Exhibit E:** Vaulting Feasibility Analysis