STAFF REPORT

DATE: January 28, 2020

TO: City Council

FROM: Ashley Feeney, Assistant City Manager
Inder Khalsa, City Attorney
Sherri Metzker, Principal Planner

SUBJECT: **Zoning Ordinance Amendment - Wireless Ordinance**

Recommendation

Hold a public hearing and approve the following:

1. AN ORDINANCE OF THE CITY OF DAVIS REGARDING WIRELESS COMMUNICATION FACILITIES AND AMENDING AND RESTATING ARTICLE 40.29 OF THE DAVIS MUNICIPAL CODE IN ITS ENTIRETY REGARDING THE SAME

2. A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF DAVIS ADOPTING A CITY WIDE POLICY REGARDING PERMITTING REQUIREMENTS AND DEVELOPMENT STANDARDS FOR SMALL WIRELESS FACILITIES

Executive Summary

The City of Davis is proposing an amendment to the Davis Municipal Code, thereby amending and restating Article 40.29 entitled Wireless Communication Facilities to bring the City's regulation into compliance with Federal and State laws. This amendment will ensure to the greatest extent possible that wireless facilities are located, designed, installed, constructed, maintained and operated in a manner that meets the aesthetic and public health and safety requirements of the City. The proposed ordinance addresses the type of wireless facilities that are exempt, permitted, conditionally permitted, and prohibited. Further, it outlines the procedure for permit approval, design standards, and abandonment procedures.

The City of Davis is also proposing a resolution establishing permitting requirements and development standards for small cell wireless facilities. The Federal Communication Commission adopted its Declaratory Ruling and Third Report and Order relating to the placement of small wireless facilities in the public right of way. The Report and Order gives providers of wireless services certain rights to utilize public right of way and to attach small wireless facilities to public infrastructure subject to the payment of reasonable fees.

It should be noted that if there are any changes to the FCC rules as a result of any future or pending court actions, the City's implementation tools would allow for the approval of any small cell facilities to be revoked.

Public Comment
There has been public comment relative to this proposed amendment. Copies of the written comments are attached to this staff report.

Fiscal Analysis
The cost of preparation of the attached ordinance and reports is being absorbed in the community Development and Sustainability Budget. The cost of implementation of the ordinance via applications for all antennas will be paid by applicants. It should be noted that certain fees for small cell antennas have been limited to the amounts mandated by the Federal Communications Commission.

Council Goals
The update to the City's Municipal Code will make it consistent with Federal regulation. This ordinance is not directly related to a City Council goal.

Planning Commission Recommendation
On October 9, 2019, the Planning Commission held a public hearing to allow those who were present to make comments on the proposed Wireless Ordinance and then continued the matter to October 23, 2019. On October 23, 2019, the Planning Commission heard the staff report, held a public hearing and concluded by continuing the matter to December 11, 2019, to give staff an opportunity to provide more information pertaining to what other communities had done with their wireless ordinance updates and to respond to a letter presented by Verizon. On December 11, 2019, more testimony was taken and the Planning Commission deliberated the merits of the proposed update. Their recommendation is adoption of the attached ordinance and resolution with a note that the Commission has significant concerns relative to the setback distance between small cell antennas and residences (which is recommended to be 250 feet) and the city's inability to charge fair market value for the lease of the city's property (lease amounts have been mandated by the Federal Communications Commission.) The December 11, 2019, Planning Commission staff report can be found at http://documents.cityofdavis.org/Media/Default/Documents/PDF/CityCouncil/Planning-Commission/Agendas/20191211/05A-Wireless-Ordinance.pdf

Background

On September 24, 2019, an informational item on wireless telecommunications regulations was presented to City Council. The presentation was intended to help get information out to the community and provide an update to the City Council on Wireless Telecommunications regulations. The majority of the background section of this staff report is duplicative to the information that was presented to the City Council at that meeting. The following section of this staff report provides a background summary on recent FCC (Federal Communications Commission) rules and requirements related to wireless telecommunications and the restrictions imposed on state and local government's ability to regulate them. The September 24, 2019 staff report can be found at http://documents.cityofdavis.org/Media/Default/Documents/PDF/CityCouncil/CouncilMeetings/Agendas/20190924/08-Wireless-Telecommunications-Informational-Report.pdf

The September 24, 2019 meeting video can be found at
https://davis.granicus.com/player/clip/1045?view_id=6

National Environmental Policy Act

On December 24, 2019, the City of Davis ("the City") received a "cease and desist letter" demanding that the City stop enforcing its city-wide policy governing small wireless facilities ("small cells"). The Letter based its demand on a recent court case, *United Keetoowah Band of Cherokee Indians v. FCC* ("*United Keetoowah*"). That case struck down an order issued by the Federal Communications Commission ("FCC") that excused small cells from certain types of review, including federal environmental review under the National Environmental Policy Act ("NEPA").

The Letter claimed that the decision in *United Keetoowah* prohibits the City from approving permit applications for small cell development, until the FCC issues a revised order containing new rules for NEPA review. However, the *United Keetoowah* case is not applicable to the City of Davis for three reasons: **First**, *United Keetoowah* was decided by the D.C. Circuit Court of Appeals. Therefore, the decision does not apply in California, which is overseen by the Ninth Circuit Court of Appeals. **Second**, *United Keetoowah* affects small cell projects that are subject to federal environmental review under NEPA. NEPA is a federal law that only applies to significant actions that are either taken by the federal government or funded with federal money; NEPA does not apply to City rights of way and, not being a federal agency, the City does not have the authority to require NEPA compliance from cellular providers. Here, it should be noted that Telecommunications Act of 1996 specifically prohibits the City from regulating wireless facilities on the basis of the environmental effects of RF emissions, although the City can regulate other environmental impacts of facilities under CEQA (aesthetic impacts, impacts to habitat, etc.). 47 USC Section 332(c)(7)(B)(iv). **Third**, *United Keetoowah* does not affect the separate FCC order that restricts the City's ability to impose small cell regulations and delay small cell projects. The City's small cell policy was developed to comply with this separate order, which remains in full force and effect after *United Keetoowah*. As described below, the FCC order that restricts the City's regulatory authority is currently being challenged by a number of municipalities before the 9th Circuit, and the City is watching that case with interest.

SUMMARY OF FCC REPORT AND ORDER

On September 27, 2018, the Federal Communications Commission's ("FCC's") Declaratory Ruling and Third Report and Order ("Report and Order") was issued, which established a new category of "small wireless facilities" and imposed substantial restrictions on state and local governments' ability to regulate them. These restrictions include a new federal requirement that requires cities to allow small wireless facilities on city-owned infrastructure in the public right-of-way, such as streetlights. The Report and Order does allow cities to establish aesthetic and (to a limited degree) locational requirements for small cell facilities. However, the City's small wireless facility regulations are required to be "reasonable, objective, non-discriminatory, and published in advance." It further imposes tight deadlines for approving or denying small wireless facility

applications and limits the fees the city can charge for applications and for the use of City-owned infrastructure in the public right-of-way.

These requirements are in addition to existing federal requirements, which provide that "[n]o state or local statute or regulation, or other state or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide … telecommunications service."[1] Thus, any regulations that the City adopts must not "effectively prohibit" the provision of wireless service in the City. This is particularly relevant for any locational or zoning requirements the City may impose on wireless facilities; the City may not restrict the location of wireless facilities in a manner that eliminates wireless coverage in any area of the City.

Small Wireless Facilities are defined as follows:

- They are mounted on either structures 50 feet or less in height including their antennas, or no more than 10 percent taller than other adjacent structures, or do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater; and
- Each antenna is no more than three cubic feet in volume, excluding associated antenna equipment; and
- All equipment associated with the antenna and any pre-existing associated equipment is no more than 28 cubic feet in volume; and
- The facilities do not expose people to radio frequency (RF) radiation in excess of FCC standards.

Preemption of Local Aesthetic Regulations. The Report and Order requires that local regulations of small wireless facilities concerning aesthetics, undergrounding, and spacing must be:

- Reasonable, meaning technically feasible and reasonably related to the harms created by unsightly deployments;
- No more burdensome than those applied to other types of infrastructure deployments;
- Objective; and
- Published in advance.

These requirements went into effect on April 15, 2019. Local agencies were not required to adopt new standards by that date, but any standards in effect that do not meet the requirements after that date are unenforceable. In an effort to maintain local control allowed under the law, City of Davis staff did develop and implement design criteria prior to the April 15, 2019 thereby preserving local control over design aesthetics to the extent permissible under the FCC Report and Order.

New Shot Clock Deadlines. Local agencies must act on all small wireless facility applications before the following "shot clock" deadlines: 60 days for a collocation on an existing structure; and 90 days for new small wireless facilities on a new structure. These extremely tight deadlines apply to all applications, regardless of whether they are submitted in large batches, and all permits and approvals required by the local agency, including but not limited to building permits, planning permits, encroachment permits, license agreements, etc. If the City fails to act within the required

[1] Federal Telecommunications Act of 1996, 47 U.S.C. § 253.

deadline, the City is presumptively in violation of the Federal Telecommunications Act, entitling the applicant to seek injunctive relief from the court.

New Limits on Local Fees. The Report and Order further limits the extent to which local agencies may impose fees on small wireless facility deployments. Local fees must now be shown to be a reasonable approximation of the state or local government's costs, and no higher than the fees charged to similarly situated competitors in similar situations. These limits apply to fees imposed for:

- Processing applications;
- The use of the public right-of-way; and
- The privilege of attaching to or using fixtures and structures in the public right-of-way that are owned or controlled by the government.

The Report and Order's impact on fees is most severe with respect to this last category because it intrudes on any leases, licenses, or other agreements with a wireless provider. Local agencies were previously under no obligation to allow wireless providers access to their physical property in the public-right-of-way, such as streetlights, traffic lights, and signs, and could therefore negotiate with providers for compensation. Under the Report and Order, however, local agencies can no longer refuse to allow facilities on their property or even leverage their properties in the right-of-way for additional revenue, but can only recover fees that are reasonably related to their actual costs. Whether existing agreements violate the fee limits in the Report and Order will depend upon all the facts and circumstances of the specific case.

The Report and Order also established presumptively reasonable "safe harbor" fees as follows:

- Either $500 for non-recurring fees, including application fees for up to five small wireless facilities, with an additional $100 for each application beyond five; or $1,000 for non-recurring fees for a new pole (i.e., not a collocation) intended to support one or more Small Wireless Facilities; and
- $270 per Small Wireless Facility per year for all recurring fees, including any possible public right-of-way access fee or fee for attachment to municipally-owned structures in the public right-of-way.

Local agencies may still charge higher fees, but they must establish such fees are reasonable and non-discriminatory and constitute a reasonable approximation of costs.

PENDING LEGAL CHALLENGE TO THE REPORT AND ORDER

Numerous municipalities have filed legal challenges to the Report and Order in federal court, arguing on various grounds that the Federal Communications Commission (the "FCC") exceeded its statutory authority and abused its discretion by acting in an arbitrary and capricious manner. Several wireless providers have also filed challenges on the grounds that the FCC should have adopted a "deemed approved" remedy for small wireless facility shot clock violations.

These cases have been consolidated as *City of San Jose v. FCC* and transferred to the Ninth Circuit Court of Appeals. Briefing was scheduled to conclude in December, but staff is unaware of any date scheduled for oral arguments. Unfortunately, the municipalities' motion to stay the effect of

the Report and Order pending their legal challenge was denied. The Report and Order therefore remains in effect for the time being.

CONSEQUENCES OF NON-COMPLIANCE

Under the current provisions of Article 40.29 of the Davis Municipal Code ("Municipal Code" or "DMC"), all wireless telecommunication facilities are subject to a thorough permitting process and must comply with detailed design requirements and standards. (*See* DMC § 40.29.010 *et seq*.) Under the Report and Order, however, many of these provisions are now unenforceable with respect to small wireless facilities because they are too subjective. Moreover, the City's current regulations are not sufficiently streamlined to allow expedient, ministerial approval of small wireless facility applications within the strict confines of the new shot clock. For this reason, City staff has prepared the recommended amendments to Article 40.29 to comply with other developments in telecommunications law. Those changes are discussed further below.

THE MASTER LICENSE AGREEMENT

All cities are facing the challenge of complying with the Report and Order, and there is no one-size-fits all solution. Staff, together with legal counsel has developed a Master License Agreement (MLA) as a mechanism to respond to requests from wireless providers to attach to City-owned facilities in the public right-of-way as required by the new FCC rules until the City can amend its telecommunications ordinance. That said, the MLA will continue in effect and will become subject to any future ordinance or design standards adopted by the City. The MLA does not lock in design standards or City fees at the time of approval, so any future applications the company might submit would be subject the City's regulations in place at that time. This is advisable because: (1) the City cannot readily predict how wireless technology might change in the future; (2) cost-based fees will certainly increase in the future; and (3) the entire Report and Order – including the cap on annual license fees – could be overturned if the lawsuit against the FCC is successful.

Thus, the MLA provides that the annual license fees would automatically increase the annual license fee to $1,250 per installation in the event the relevant provisions of the Report and Order are no longer legally effective. The MLA does not involve the expenditure of City funds. As explained above, the fees that can be collected for small wireless facilities on City property have been essentially capped at a low "safe harbor" amount. Finally, the approval of the small wireless facilities themselves is non-discretionary, subject to compliance with limited objective standards. For these reasons, we believe that the MLA is an appropriate tool for the City to use in effort to condition and memorialize City discretion to the greatest extent allowed under the law.

PROPOSED CHANGES TO THE CITY'S WIRELESS REGULATIONS

With regard to the wireless telecommunications ordinance, staff recommends that amendments to Article 40.29 of the Municipal Code ("Wireless Telecommunication Facilities") include a provision that: (1) exempts small wireless facilities that meet the FCC's definition from Article 40.29; and (2) make such small wireless facilities subject to a separate Small Wireless Facility Policy ("Policy") that the City Council would adopt by resolution. The Policy would apply to small wireless facilities in both the right-of-way and on private property.

The purpose of adopting the Policy by resolution rather than by an ordinance amending the Municipal Code is to maintain the City's ability to update its regulations quickly to respond to changes in technology and federal law.

LIMITS ON CONSIDERATION OR RADIO FREQUENCY (RF) EMISSIONS

Concerns about the possible negative health effects of radio frequency (RF) emissions generated by wireless facilities are often raised whenever cities consider approving new wireless regulations or approve new wireless facility applications. However, federal law has preempted the City's ability to consider such matters to the extent wireless facilities comply with RF standards promulgated by the FCC. The Federal Telecommunications Act of 1996 states in part:

> *"No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [FCC's] regulations concerning such emissions."*

(47 U.S.C. § 332(c)(7)(B)(iv) (emphasis added).) This rule predates the Report and Order, and therefore applies to all wireless telecommunication facilities, including small wireless facilities.

The City may not regulate wireless facilities, including small wireless facilities, based on concerns regarding RF emissions, including health concerns. All that the City can do is to require that such facilities meet the FCC requirements for RF emissions. Therefore, staff recommends that the City's Policy for small wireless facilities include the following provisions:

- Applications should be required to include an RF exposure compliance report that certifies that the proposed small wireless facility, as well as any collocated wireless facilities, will comply with applicable federal RF exposure standards and exposure limits. That report would be required to be prepared and certified by an RF engineer acceptable to the City.

- No small wireless facility would be approved unless the City finds that the applicant has demonstrated that the proposed project will be in compliance with all applicable FCC regulations and guidelines for human exposure to RF emissions.

- Any approved project would be subject to a standard condition of approval that requires all small wireless facilities to be maintained in compliance at all times with all federal, state and local statutes, regulations, orders or other rules applicable to human exposure to RF emissions.

- All small wireless facilities would be required to be designed, constructed, operated and maintained in compliance with all generally applicable health and safety regulations, which includes without limitation all applicable regulations for human exposure to RF emissions.

CONCLUSION

In conclusion, the FCC's Report and Order places substantial new limitations on the City's ability to regulate small wireless facilities, one of which is that local aesthetic regulations must be objective and published in advance. The City continues to be prohibited from regulating small wireless facilities (or any wireless facilities) based on RF emissions or health impacts. The MLA is strongly recommended as an appropriate means of complying with the Report and Order with regard to the pending and future applications while maximizing the ability to condition and memorialize City discretion to the greatest extent allowed under the law. The proposed amendments and the MLA process, would protect the City's interests and preserve the maximum authority allowed under the new law

Project Analysis

The last time the City of Davis did a major update to the Wireless Telecommunications Ordinance was in 2012. At that time, the city was able to maintain much of its local authority with regard to regulations in the wireless industry. However, since that time, the Federal Government has adopted new regulation removing much of the local discretionary authority and replacing it with simple ministerial authority. In particular, as described above, this applies to small cell facilities. It is staff's expectation that these antennas will be located in various places around the City in the public right of way and will make use of City light poles for their structural mechanism. Staff has worked with legal counsel to include provisions in the ordinance that allow for locational preferences and other aesthetic measures to the extent allowed under the law. The following is a brief explanation of each new section of Article 40.29.

40.29.010 – 030 Purpose, Authority and Definitions

These three sections are simply updated to reflect the current code format. The definitions have been updated to reflect current provisions. In particular, those terms that are subject to change by the Federal Communications Commission (FCC), have been redefined to refer to the appropriate Federal code. This will prevent the need to redefine the term every time the FCC modifies the definition.

40.29.040 – Applicability; Exemptions

This section outlines the applicability of the Article and lists those types of antennas that are exempt from permitting by the City. These types of antenna include satellite dishes, amateur radio

operators, public safety repeaters, and temporary emergency antennas, just to name a few. These antenna may need a building permit, but are not subject to discretionary approval.

40.29.050 – Conditionally Permitted Wireless Facilities

This section makes approval of a conditional use permit a requirement for all wireless facilities except those listed in 40.29.060, 40.29.070, or 40.29.080.

40.29.060 – Permitted Wireless Facilities

Eligible Facility Requests, as defined by the FCC, are permitted uses. Therefore, there is no discretionary approval permitted if the application meets this definition. Currently, an eligible facility request must meet the following requirements;

1. A modification substantially changes a wireless tower on private property if it increases the height of the tower as it existed on February 22, 2012 by more than 10% or 20 feet (whichever is greater). 47 C.F.R. § 1.40001(b)(7)(i).
2. A modification substantially changes a wireless tower on private property if it adds an appurtenance that protrudes from the tower by more than 20 feet or by the width of the tower at the level of the appurtenance (whichever is greater). 47 C.F.R. § 1.40001(b)(7)(ii).
3. A modification substantially changes a wireless tower on private property if it involves more than four (4) new equipment cabinets. 47 C.F.R. § 1.40001(b)(7)(ii).
4. A modification substantially changes a wireless tower on private property if it entails any excavation or deployment outside the current boundaries of the leased or owned property surrounding the tower and any access or utility easements related to the site. 47 C.F.R. §§ 1.40001(b)(6), 1.40001(7)(iv).
5. A modification substantially changes a wireless tower on private property if it would defeat the concealment elements of the tower. 47 C.F.R. § 1.40001(b)(7)(v).
6. A modification substantially changes a wireless tower on private property if it does not comply with conditions associated with the siting approval for the original construction or subsequent modification(s) of the tower. Noncompliance with prior permit conditions related to height, width, equipment cabinets and excavation would not cause a substantial change to the extent the condition is more restrictive than the applicable FCC thresholds. 47 C.F.R. § 1.40001(b)(7)(vi).

40.29.070 – Prohibited Wireless Facilities

This section contains the types of wireless facilities that are prohibited in the City. Those that exeed the radio frequency emissions standards adopted by the FCC, those in areas zoned for residential uses, zoned for schools, sensitive habitat areas or historical resources. It should be noted that this section applies to those antenna that would otherwise require a conditional use permit. They do not apply to small wireless facilities as they have their own locational preferences.

40.29.080 – Small Wireless Facilities

Small Wireless Facilities are defined by the FCC as follows:

(1) The facilities—
(i) are mounted on structures 50 feet or less in height including their antennas as defined in section 1.1320(d), or
(ii) are mounted on structures no more than 10 percent taller than other adjacent structures, or
(iii) do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater;

(2) Each antenna associated with the deployment, excluding associated antenna equipment (as defined in the definition of antenna in section 1.1320(d)), is no more than three cubic feet in volume;

(3) All other wireless equipment associated with the structure, including the wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than 28 cubic feet in volume;

(4) The facilities do not require antenna structure registration under part 17 of this chapter;

(5) The facilities are not located on Tribal lands, as defined under 36 CFR 800.16(x); and

(6) The facilities do not result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified in section 1.1307(b).

The Federal regulations permit the local jurisdictions to establish certain aesthetic design standards. In light of that provision, staff is recommending adoption of the attached resolution entitled, "Citywide Policy Regarding Permitting Requirements and Development Standards for Small Wireless Facilities." Adopting the standards by resolution, as opposed to ordinance will allow the City to react more quickly to the changing provisions for small wireless facilities.

40.29.090 – Applications

The provisions for a conditional use permit for a wireless facility are very similar to those in effect today. This section explains the requirements for obtaining a conditional use permit, including recommending pre submittal conference and a submittal appointment.

40.29.100 – General Requirements and Design Standards

This section describes the requirements and standards that apply to all permitted and conditionally permitted wireless facilities.

40.29.110 – Public Hearing; Noticing
40.29.120 - Findings
40.29.130 - Regulatory Compliance

These three sections describe procedures and findings for approving a conditional use permit. The regulatory compliance section requires the permittee to ensure compliance with the current regulations.

40.29.140 – Existing Conforming and Legal Nonconforming Wireless Facilities
40.29.150 – Periodic Review

These sections provide provisions for dealing with changes to non conforming wireless facilities and the periodic review of facilities to determine if the facility is conforming.

40.29.160 – Transfer of Operation
40.29.170 – Abandonment or Discontinuation of Use

These sections deal with the transfer of ownership of a permit and the abandonment of discontinuation of a wireless facility.

40.29.180 – Violations; Public Nuisance
40.29.190 – Revocation of Permit
40.29.200 – Mandatory Removal and Relocation
40.29.210 – Appeals
40.29.220 – Effect of State or Federal Law

These five sections describe procedural provisions for violations and revocations of permits.

Resolution of the City Council of the City of Davis Adopting a City Wide Policy Regarding Permitting Requirements and Development Standards for Small Wireless Facilities

As mentioned earlier, the purpose of adopting development standards via a resolution is to facilitate prompt updates to the City's standards. The resolution outlines application requirements. It also describes submittal and completeness review requirements. The approval or denial provisions are followed by a list of standard conditions of approval.

One area of particular public concern is the locational preference requirements. Staff is recommending three levels of preference, starting with,

1 non residential zones,
2 any location in a residential zone 250 feet or more from any structure approved for a residential or school use,
3 if located in a residential area, a location that is as far as possible from any structure approved for a residential use.

Applications for less preferred locations or structures may be approved so long as the applicant demonstrates that either,

1) no more preferred locations or structures exist within 500 feet from the proposed site, or
2) any more preferred locations or structures within 500 feet from the proposed site would be technically infeasible as supported by clear and convincing written evidence.

Prohibited support structures would also be denied a permit.

The resolution also includes design standards for a variety of factors. Issues such as noise, lighting, landscaping, signage, concealment, installation preferences, and accessory equipment provisions. These design provisions address both steel and wooden poles.

Environmental Determination

The City of Davis (City) has determined that the adoption of the resolution is exempt from review under the California Environmental Quality Act.(CEQA) (California Public Resources Code Section 21000, et seq.), pursuant to State CEQA Regulation Section 15061 (B)(3) (14 Cal. Code Regs. Section 15061 (B)(3)) covering activities with no possibility of having a significant effect on the environment. In addition, the City of Davis has determined that the ordinance is categorically exempt pursuant to Section 15301 of the CEQA regulations applicable to minor alterations of existing governmental and/or utility owned structures.

Attachments

1. Proposed Ordinance regarding Wireless Communication
2. Proposed Resolution Adopting Permitting Requirements
3. Public Comments Received by City
4. City Attorney Memo

ORDINANCE NO.

AN ORDINANCE OF THE CITY OF DAVIS REGARDING WIRELESS COMMUNICATION FACILITIES AND AMENDING AND RESTATING ARTICLE 40.29 OF THE DAVIS MUNICIPAL CODE IN ITS ENTIRETY REGARDING THE SAME

WHEREAS, there have been significant changes in the types of wireless communication facilities used to provide communications services within the City; and

WHEREAS, both federal and state law has been modified regarding the regulation of wireless communication facilities both in the public rights or way and on private property outside of the public rights of way; and

WHEREAS, the City desires ensure to the greatest extent allowed under federal state law that wireless communication facilities are located, designed, installed, constructed, maintained, and operated in a manner that meets the aesthetic and public health and safety requirements of the City; and

WHEREAS, the City deems it necessary and appropriate to adopt standards and regulations relating to the location, design, installation, construction, maintenance, and operation of wireless communication facilities, including towers, antennas, and other structures both in the public rights or way and on private property outside of the public rights of way and to provide for the enforcement of these standards and regulations consistent with federal and state legal requirements;

NOW, THEREFORE, the City Council of the City of Davis does hereby ordain as follows:

Section 1. **Code Amendment**. Article 40.29 of the Davis Municipal Code is hereby amended and restated in its entirety and replaced and reenacted as set forth in **Exhibit A** attached hereto and incorporated herein. The provisions of Article 40.29, insofar as they are substantially the same as provisions of ordinances previously adopted by the City relating to the same matter, shall be construed as restatements and continuations of the earlier enactment, and not as new enactments. The adoption of this Ordinance shall not affect any actions and proceedings that began before the effective date of this Ordinance; prosecution for ordinance violations committed before the effective date of this Ordinance; licenses and penalties due and unpaid at the effective date of this Ordinance.

Section 2. **Severability**. If any provision of this Ordinance, or its application to any person or circumstance, is determined by a court of competent jurisdiction to be unlawful, unenforceable or otherwise void, that determination shall have no effect on any other provision of this Ordinance or the application of this Ordinance to any other person or circumstance and, to that end, the provisions of this Ordinance are severable.

Section 3. **Effective Date and Notice**. The City Clerk shall certify to the adoption of this Ordinance, and the City Clerk shall, at least five (5) days prior to meeting at which this Ordinance is to be adopted and within fifteen (15) days of its adoption, cause a summary of this Ordinance to published in a newspaper of general circulation published and circulated in the City of Davis and

a certified copy of the full text of the Ordinance to be posted in the office of the City Clerk. This Ordinance shall take effect thirty (30) days following its adoption.

INTRODUCED on the ____ day of, _____, and PASSED AND ADOPTED by the City Council of the City of Davis on the ____ day of, _____, by the following vote:

AYES:

NOES:

ABSTAIN:

ATTEST:

_____
Zoe S. Mirabile, CMC
City Clerk

EXHIBIT A

Article 40.29 WIRELESS COMMUNICATION FACILITIES

40.29.010. Purpose.

The purpose of this Article is to provide uniform standards for the establishment and modification of wireless communications facilities (WFs) in the City and to provide for the desired location, design, installation, construction, maintenance, and operation of WFs consistent with applicable federal and state requirements. These standards are intended to address and balance the potentially adverse visual and aesthetic impacts of WFs while providing for the communication needs of residents, local businesses, and government agencies; manage the public rights-of-way and ensure the public is not incommoded by the placement of WFs in the public rights-of-way.

40.29.020. Authority.

This Article is enacted pursuant to the City's police power to regulate for the public health, safety and welfare subject to the limitations of that power under federal and state law, including but not necessarily limited to the Federal Telecommunications Act of 1996, Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, state laws regulating the processing and procedures associated with local WF approvals. This Article shall be interpreted in conjunction with the federal and state laws and regulations regarding the processing and placement of telecommunications facilities within the City.

40.29.030. Definitions.

For the purposes of this Article, the following terms shall have the meanings set forth below:

(a) **Antenna**. Any system of wires, poles, rods, discs, reflecting discs, panels, flat panels, dishes, whip antennae, or other similar devices used for the transmission or reception of wireless signals. Antennae includes devices having active elements extending in any direction, and directional beam-type arrays having elements carried by and disposed from a generally horizontal boom that may be mounted upon and rotated through a vertical mast or tower interconnecting the boom and antenna support, all of which elements are deemed to be a part of the antenna. The height of the antenna shall include all array structures.

(1) **Antenna—Amateur radio**. A ground, building, or tower mounted antenna, or similar antenna structure, operated by a federally licensed amateur radio operator as part of the Amateur Radio Service, and as designated by the Federal Communications Commission (FCC).

(2) **Antenna array**. A group of antennas located on the same structure.

(3) **Antenna—Building mounted**. An antenna, other than an antenna with its supports resting on the ground, directly attached, façade-mounted or affixed to a building, tank, or structure other than a tower.

(4) **Antenna—Roof mounted**. Any antenna which is mounted to the roof of a building, tank, or similar structure.

(5) **Antenna—Flush mounted**. An antenna mounted to the wall of a structure that does not project above the façade to which it is mounted

(6) **Antenna—Direct broadcast satellite service (DBS)**. An antenna, usually a small home receiving satellite dish.

(7) **Antenna—Directional**. A device used to transmit and/or receive radio frequency signals in a directional pattern of less than three hundred sixty degrees. Also known as panel antenna.

(8) **Antenna—Ground mounted**. Any antenna with its base, single or multiple posts, placed directly on the ground.

(9) **Antenna—Satellite earth station (SES)**. An antenna designed to receive and/or transmit radio frequency signals directly to and/or from a satellite.

(10) **Antenna—Television broadcast service (TVBS)**. An antenna designed to receive only television broadcast signals.

(11) **Antenna—Radio antennas**. An antenna designed to receive AM/FM radio broadcast signals, or similar signals used for commercial purposes.

(12) **Antenna—Distributed Antenna System (DAS)**. Network of spatially separated antenna sites connected to a common source that provides wireless communication service within a geographic area or structure.

(13) **Antenna—All other antennas**. All other antenna(s) not previously covered in this section.

(b) **Base Station**. The same as defined by the FCC in 47 C.F.R. § 1.60001(b)(1), as may be amended or superseded.

(c) **CPCN**. A Certificate of Public Convenience and Necessity granted by the California Public Utility Commission, or its duly appointed successor agency, pursuant to California Public Utilities Code Sections 1001 *et seq.*, as may be amended or superseded.

(d) **Collocation**. The mounting of one or more WFs, including antennas, on an existing or proposed WF or utility pole.

(e) **Director**. The Director of the City's Community Development and Sustainability Department or his or her designee.

(f) **Equipment building, shelter, or cabinet**. A cabinet or building used by telecommunications providers to house equipment at a site or facility.

(g) **Eligible Facilities Request**. An eligible facility request within the meaning of 47 C.F.R.§ 1.6100(b)(3) as may be amended or superseded.

(h) **FCC**. The Federal Communications Commission or its lawful successor.

(i) **Lattice tower**. A tower constructed of metal crossed strips or bars to support WF antennas and related equipment.

(j) **Monopole**. A tower that consists of a single pole structure (non-lattice), designed and erected on the ground or on top of a structure, to support WF antennas and related equipment.

(k) **Permittee**. The recipient, or its heirs, successors, or assigns of a permit issued pursuant to this Article or any predecessors to this Article, or any operator, user, or lessee of any permitted WF issued a permit pursuant to this or any predecessors to this Article.

(l) **Personal Wireless Services**. Commercial mobile services , unlicensed wireless services and common carrier wireless exchange access services as defined in 47 U.S.C. Section 332(c)(7)(C)(i), as may be amended or superseded.

(m) **Public Right-of-Way (PROW)**. Any public road, highway, or waterway subject to Public Utilities Code section 7901 (as it may be amended from time to time).

(n) **RF**. Radio frequency or electromagnetic waves generally between 30 kHz and 300 GHz in the electromagnetic spectrum.

(o) **Section 6409**. Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156, codified as 47 U.S.C. Section 1455 (a), as may be amended.

(p) **Shot Clock**. The presumptively reasonable time under federal law in which a local government must act on an application or request for authorization to place, construct, or modify WF facilities.

(q) **Small Wireless Facilities (SWF)**. A small wireless facility within the meaning of 47 C.F.R. § 1.6002(*l*) or any successor provision.

(r) **Stealth technology/techniques**. Methods of camouflaging or otherwise rendering minimally visible to the casual observer the visual appearance of WF towers, antenna, cabinets, and/or other related equipment. Stealth techniques render WF more visually appealing or blend WF into an existing structure and may utilize, but does not require, concealment of all components of the WF.

(s) **Tower**. A freestanding mast, pole, monopole, guyed tower, lattice tower, free standing tower or other structure designed and primarily used to support WF antennae.

(t) **Temporary Wireless Facilities**. A portable wireless facility intended or used to provide personal wireless services on a temporary or emergency basis, such as a large scale special event in which more users than usually gather in a confined location or when a disaster disables permanent wireless facilities. Temporary wireless facilities include, without limitation, cells on wheels (COWS), sites on wheels (SOWs), cells on light trucks (COLTs) or other similarly portable wireless facilities not permanently affixed to the site on which it is located.

(u) **Wireless communication Facility (WF)**. The transmitters, antenna structures and other types of installations used for the provision of personal wireless services at a fixed location, including but not limited to associated towers, support structures , base stations, poles, pipes, mains, conduits, ducts, pedestals, and electronic equipment, and antennas.

(v) **Wireless**. Transmissions through the airwaves including, but not limited to, infrared line of sight, cellular, PCS, microwave, satellite, radio, or television.

40.29.040. Applicability; Exemptions.

(a) **Applicability**. No person shall construct, install, attach, operate, collocate, modify, reconstruct, relocate, or otherwise deploy any WF within the City's jurisdictional and territorial boundaries, on private property and within the public right of way except in compliance with this Article.

(b) **Other Permits and Regulatory Approvals**. In addition to any permit or approval required under this Article, the applicant, owner or operator, who owns or controls an WF, must obtain all other permits and regulatory approvals (such as compliance with the California Environmental Quality Act) required by the City, any federal, state or local government agencies; and the applicant, owner or operator must comply with all applicable federal state and local government agency laws and regulations applicable to the WFs including without limitation, any applicable laws and regulations governing RF emissions.

(c) **Exemptions**. Notwithstanding Section 40.29.040(a), this Article shall not apply to any of the following:

(1) Television antennae, satellite dishes, and amateur radio facilities, whether interior or exterior, as follows:

(A) Direct broadcast satellite (DBS) antennae and television broadcast service (TBS) antennae or other similarly scaled telecommunication device that neither exceeds one meter in diameter nor extends above the roof peak or parapet.

(B) Ground mounted antennas and support structures: (i) located entirely on-site and not overhanging or extending beyond any property line; (ii) not located within any required front or side yard setback; and (iii) screened from public view to the extent practical.

(C) Antenna height shall not exceed the maximum allowable building height for the zoning district in which it is located by more than ten feet. The antenna support structure shall not exceed a width or diameter of twenty four inches.

(2) WFs used only for public safety purposes, including transmitters, repeaters, and remote cameras so long as the facilities are designed to match the supporting structure.

(3) WFs that are accessory to other publicly owned or operated equipment used for data acquisition such as irrigation controls, well monitoring, and traffic signal controls.

(4) WFs erected and operated for emergency situations, as designated by the police chief, fire chief, or City manager so long as the facility is removed at the conclusion of the emergency.

(5) Multipoint distribution service (MDS) antennas and other temporary mobile wireless service including mobile WFs and services providing public information coverage of news events (less than two-weeks duration).

(6) Mobile WFs when placed on a site for less than seven consecutive days, provided any necessary building permit is obtained.

(7) SES in a commercial or industrial zone that meet the following standards:

(A) The antennas do not exceed two meters in either diameter or diagonal measurement.

(B) The antennas are located as far away as possible from the edges of rooftops or are otherwise adequately screened to eliminate visibility from adjacent properties. The method of screening shall be approved by the director.

(8) Commercial television (TVBS) and AM/FM radio antennas not extending more than twelve feet beyond the maximum allowed building height for the zone.

(9) Personal wireless internet equipment, such as a wireless router, provided that the equipment is included entirely within a building or residence.

(10) Any WF that is specifically and expressly exempt from local regulation pursuant to federal or state law, but only to the extent of any such exemption and provided that the applicant must provide the documentation necessary to prove the exemption to the satisfaction of the Director.

40.29.050. Conditionally Permitted WFs.

All WFs subject to this Article shall be conditionally permitted unless permitted under Section 40.29.060, prohibited under Section 40.29.070, or subject to Section 40.29.080 regarding small wireless facilities.

40.29.060. Permitted WFs.

The following types of WFs are permitted in any zone.

(a) Eligible facility requests.

(b) Collocation facilities that meets the requirements of California Government Code § 65850.6, as may be amended or superseded.

40.29.070. Prohibited WFs.

The following types of WFs are prohibited.

(a) WFs that exceed current standards for RF emissions standards adopted by the FCC.

(b) WFs in areas zoned or designated on the general plan land use map for residential uses; or within five hundred feet of areas so designated or zoned. Mixed use zones are subject to this prohibition.

(c) WFs on sites containing existing or planned public or private school facilities; or within five hundred feet of said areas so designated or zoned.

(d) WFs in designated sensitive habitat areas, such as habitat restoration areas, as designated by the City. The community development and sustainability department shall maintain a map identifying such areas.

(e) WFs on a property that has been designated an historical resource in accordance with Article 40.23.

40.29.080. Small Wireless Facilities.

Notwithstanding any other provision of the Davis Municipal Code to the contrary, all small wireless facilities shall be subject only to and must comply with the "Citywide Policy Regarding Permitting Requirements and Development Standards for Small Wireless Facilities" adopted by City Council resolution. No person shall construct, install, attach, operate, collocate, modify, reconstruct, relocate, remove, or otherwise deploy any small wireless facility in violation of such policy.

40.29.090. Applications.

(a) **Application required**. All conditional use permit applications for WFs shall be submitted under the conditional use permit procedures set forth in Article 40.30 and must include the following:

(1) All application materials generally required for a conditional use permit under Article 40.30

(2) Any other information or materials the Director may require in order to properly assess a particular application. The Director shall determine the required number, size, and contents of any required plans.

(3) A vicinity map, including topographic areas, one-thousand-foot radius from proposed site/facility, residential and school zones and major roads/highways. The distance of the existing or proposed WF from existing residentially designated/zoned areas, existing residences, schools, major roads and highways, and all other telecommunication sites and facilities (including other providers locations) within a one-thousand-foot radius shall be delineated on the vicinity map.

(4) A site plan that includes and identifies:

(A) All facility related support and protection equipment;

(B) A description of general project information, including the type of facility, number of antennas, height to top of antenna(s), radio frequency range, wattage output of equipment, and a statement of compliance with current FCC requirements.

(C) Elevations of all proposed telecommunication structures and appurtenances, and composite elevations from the street(s) showing the proposed project and all buildings on the site.

(5) Photo simulations, photo-montage, story poles, elevations and/or other visual or graphic illustrations necessary to determine potential visual impact of the proposed project. Visual impact demonstrations shall include accurate scale and coloration of the proposed facility. The visual simulation shall show the proposed structure as it would be seen from surrounding properties from perspective points to be determined in consultation with the community development and sustainability department prior to preparation. The City may also require the simulation analyzing stealth designs, and/or on-site demonstration mock-ups before the public hearing.

(6) Landscape plan that shows existing vegetation, vegetation to be removed, and proposed plantings by type, size, and location. If deemed necessary, the community development and sustainability director may require a report by a licensed landscape architect to verify project impacts on existing vegetation. This report may recommend protective measures to be implemented during and after construction. Where deemed appropriate by the community development and sustainability department, a landscape plan may be required for the entire parcel and leased area.

(7) A written statement and supporting information, as requested by staff and/or the planning commission, regarding alternative site selection and co-location opportunities in the service area. The application shall describe the preferred location sites within the geographic service area, a statement why each alternative site was rejected, and a contact list used in the site selection process. Provide a statement and evidence of refusal regarding lack of co-location opportunities.

(8) Noise and acoustical information for the base transceiver station(s), equipment buildings, and associated equipment such as air conditioning units and back-up generators. Such information shall be provided by a qualified firm or individual, approved by the City, and paid for by the project applicant.

(9) An RF analysis conducted and certified by a state-licensed/registered RF engineer or qualified consultant to determine the maximum potential RF power density of the proposed WF at full build-out, along with a comparison of the maximum RF exposure calculations at ground level with the FCC's RF safety standards. The engineer shall use accepted industry standards for evaluating compliance with FCC-guidelines for human exposure to RF, such as OET 65, or any superseding reports/standards. The RF analysis

shall be provided by a qualified firm or individual, approved by the City, and paid for by the project applicant.

(10) A cumulative impact analysis for the proposed facility and other WFs on the project site or within one thousand three hundred feet of the proposed WF site. The analysis shall include all existing and proposed (application submitted to the community development and sustainability department) WFs on or near the site, dimensions of all antennas and support equipment on or near the site, power rating for all existing and proposed back-up equipment, and a report estimating the ambient RF fields and maximum potential cumulative electromagnetic radiation at, and surrounding, the proposed site that would result if the proposed WF were operating at full buildout.

(11) Statement by the applicant of willingness to allow other carriers to co-locate on their facilities wherever technically and economically feasible and aesthetically desirable.

(12) A signed copy of the proposed property lease agreement, exclusive of the financial terms of the lease, including provisions for removal of the WF and appurtenant equipment within ninety days of its abandonment and provisions for City access to the WF for removal where the provider fails to remove the WF and appurtenant equipment within ninety days of its abandonment pursuant to Section 40.29.025(b). The final agreement shall be submitted at the building permit stage.

(13) An evidence of needs report detailing operational and capacity needs of the provider's system within the City of Davis and the immediate area adjacent to the City. The report shall detail how the proposed WF is technically necessary to address current demand and technical limitations of the current system, including technical evidence regarding significant gaps in the provider's coverage, if applicable, and that there are no less intrusive means to close that significant gap. Such report shall be evaluated by a qualified firm or individual, chosen by the City, and paid for by the project applicant. The qualified firm or individual chosen by the City may request additional information from the applicant to sufficiently evaluate the proposed project.

(14) A security plan which includes emergency contact information, main breaker switch, emergency procedures to follow, and any other information as required by Section 40.29.180 and/or the community development and sustainability director.

(15) A description of the anticipated maintenance program and back-up generator power testing schedule.

(16) Any other documents, information, and other materials the Director deems necessary to make the findings required for approval and ensure that the WF will comply with applicable federal and state law, the City Code.

(17) The name of the applicant, its telephone number and contact information, and if the applicant is a wireless infrastructure provider, the name and contact information for the wireless service provider that will be using the personal wireless services facility;

(18) A complete description of the proposed WF and the work that will be required to install or modify it, including, but not limited to, detail regarding proposed excavations, if any; detailed site plans showing the location of the WF, and specifications for each element of the WF, clearly describing the site and all structures and facilities at the site before and after installation or modification; and describing the distance to the nearest residential dwelling unit and any historical structure within 500 feet of the facility. Before and after 360 degree photosimulations must be provided.

(19) Documentation sufficient to show that the proposed facility will comply with generally-applicable health and safety provisions of the City Code and the FCC's radio frequency emissions standards.

(20) A copy of the lease or other agreement between the applicant and the owner of the property to which the proposed facility will be attached.

(21) If the application is for an eligible facilities request, the application shall state as such and must contain information sufficient to show that the application qualifies as an eligible facilities request, which information must show that there is an existing WF that was approved by the City. Before and after 360 degree photosimulations must be provided, as well as documentation sufficient to show that the proposed facility will comply with generally-applicable health and safety provisions of the City Code and the FCC's radio frequency emissions standards.

(22) Proof that notice has been mailed to owners of all property owners, and the resident manager for any multi-family dwelling unit that includes ten (10) or more units, within 300 feet of the proposed personal wireless services facility.

(23) If applicant contends that denial of the application would prohibit or effectively prohibit the provision of service in violation of federal law, or otherwise violate applicable law, the application must provide all information on which the applicant relies on in support of that claim. Applicants are not permitted to supplement this showing if doing so would prevent City from complying with any deadline for action on an application.

(24) The electronic version of an application must be in a standard format that can be easily uploaded on a web page for review by the public.

(25) Any required fees.

(26) If the proposed WF is to be located in the public right of way, sufficient evidence of the permittee's regulatory status as a telephone corporation under the California Public Utilities Code (such as a valid CPCN).

(b) The Director may develop, publish, and from time to time update or amend any forms, checklists, guidelines, informational handouts, or other related materials that the Director finds necessary, appropriate, or useful for processing any application governed under this Article.

(c) The Director may establish any other reasonable rules and regulations as the Director deems necessary or appropriate to organize, document and manage the application intake process,

which may include without limitation regular hours for appointments with applicants. All such rules and regulations must be in written form and publicly stated to provide applicants with prior notice.

(d) If deemed necessary by the Director, the City may hire a third party independent RF engineer to evaluate any technical aspect or siting issues proposed in the application. The applicant will be responsible to pay for all charges of this analysis.

(e) **Pre-submittal Conference**.

(1) The pre-submittal conference is intended to streamline the review process through informal discussion that includes, without limitation, the appropriate project classification and review process, any latent issues in connection with the proposed or existing wireless tower or base station, including compliance with generally applicable rules for public health and safety, potential concealment issues or concerns, if applicable; coordination with other departments responsible for application review; and application completeness issues. To mitigate unnecessary delays due to application incompleteness, applicants are encouraged, but not required to, bring any draft applications or other materials so that staff may provide informal feedback and guidance about whether such applications or other materials may be incomplete or unacceptable. The City shall use reasonable efforts to provide the applicant within an appointment within five working days after receiving a request and any applicable fee or deposit to reimburse the City for its reasonable costs to provide the services rendered in the pre-submittal conference.

(2) A pre-submittal conference is required for all permitted and conditionally permitted WFs. Pre-submittal conferences are allowed and encouraged, but not required, for small wireless facilities.

(b) **Submittal Appointment**. All applications must be submitted to the City at a pre-scheduled meeting with the director. The director shall use reasonable efforts to provide the applicant with an appointment within five working days after receipt of a request and if applicable, confirms that the applicant complied with the pre-submittal conference requirement. Any application received without an appointment, whether delivered in person, by mail or through any other means, will not be considered duly filed unless the applicant received a written exemption from the City of Davis at a pre-submittal conference.

40.29.100. General Requirements and Design Standards.

The following general requirements and development standards are applicable to all permitted and conditionally permitted WFs.

(a) **Upgrades**. If technological improvements or developments occur that allow the use of materially smaller or less visually obtrusive equipment, the service provider may be required to replace or upgrade an approved WF upon application for a new permit in order to minimize the WF's adverse impacts on land use compatibility and aesthetics. This provision would only apply to the specific site where the application for modification is requested.

(b) **Business License**. Each service provider with a WF in the City shall obtain a City business license prior to initiation of service.

(c) **Mixed Use Projects**. New mixed-use planned developments over fifty acres in size shall be encouraged to identify a preferred site or sites for WFs under the terms of the planned development. Such sites may be developed with WFs, even if subsequent land use development occurs.

(d) **Code Compliance**. All WFs shall be installed and maintained in compliance with the requirements of the Uniform Building Code, National Electrical Code, the Americans with Disabilities Act, as well as other restrictions specified in this Article and other applicable provisions of the Davis Municipal Code.

(e) **Permit Term**. The City may impose a condition limiting the duration of any conditional use permit for a WF located on any property, but in no event shall such duration be less than 10 years. Prior to expiration, the permittee may apply for an extension of its conditional use permit. An extension of the conditional use permit would be for a period of time determined by the City, and would be subject to the then existing requirements of this Article. The City may approve, modify, or deny the application for extension subject to the then existing requirements of this Article and applicable law.

(f) **Height**. All WFs shall be designed to the minimum functional height required.

(1) The height of the WF shall be measured from the natural, undisturbed ground surface below the center of the base of the structure to either the top of the structure or the highest antenna or related equipment attached thereto, whichever is higher.

(2) If the WF is not attached to a building, the height of the facility shall be reviewed for the visual impact on the surrounding land uses and the community.

(g) **Setbacks.**

(1) All WFs shall comply with the building setbacks applicable to the zoning district in which it is located, provided that in no instance, shall the WF (including antennae and equipment) be located closer than five feet to any property line unless a reduced setback is approved pursuant to a conditional use permit based on a finding that aesthetic impacts would be reduced and/or open space improved.

(2) No WF shall be located within any required front or side yard unless approved by pursuant to a conditional use permit based on a finding that aesthetic impacts would be reduced and/or open space improved.

(h) **Landscaping.** Landscaping shall be used for screening as appropriate to reduce visual impacts of WFs.

(1) Existing landscaping in the vicinity of a proposed WF shall be protected from damage during and after construction. Submission of a tree protection plan may be required to ensure compliance with this requirement.

(2) Offsite landscaping may be required to mitigate off site impacts, subject to willing property owners. Additional landscaping may also be required in the public right of way to obscure visibility of a WF from passing motorists, bicyclists, and pedestrians.

(i) **Towers**. Towers, where utilized, must be monopoles. Lattice towers are prohibited. Monopoles shall not exceed 4 feet in diameter unless technical evidence is provided showing that a larger diameter is necessary to attain the proposed tower height and the proposed tower height is necessary.

(j) **Stealth Design**. All WFs shall employ state of the art stealth technology and techniques shall be used, as appropriate to the site and the facility, to minimize visual impacts and provide appropriate screening to make the WF as visually inconspicuous as possible and to hide the WF from the predominant views from surrounding properties. In the case of WF mounted on existing structures, the WF shall also be located in a manner so as to minimize visual impacts from surrounding properties and PROW. Where no stealth technology is proposed for the site, a detailed analysis as to why stealth technology is physically and technically infeasible for the project shall be submitted with the application.

(k) **Building Mounted Antenna**. All flush mounted antenna and support structures mounted on a building shall be painted to be architecturally compatible with the building on which it is located or painted to minimize the visual impacts where the structures extend above the roof line and minimize visual impacts from surrounding properties. The specific color is subject to City review based on a visual analysis of the particular site.

(l) **Accessory Equipment**. All accessory equipment shall be designed and screened from public view. The specific design is subject to City review based on a visual analysis of the particular site.

(m) **Collocation**. Support structures and site area for WFs shall be designed and of adequate size to allow at least one additional service provider to potentially collocate on the structure, subject to any specific design standards and aesthetic considerations required as a condition of approval.

(n) **Fencing**. All proposed fencing shall be decorative and compatible with the adjacent buildings and properties within the surrounding area and shall be designed to limit and/or allow for removal of graffiti.

(o) **Noise**. WFs and all related equipment must comply with all noise regulations and shall not exceed such regulations, either individually or cumulatively. The City may require the applicant to incorporate appropriate noise baffling materials and/or strategies to avoid any ambient noise from equipment reasonably likely to exceed the applicable noise regulations. Back-up generators shall only be operated during power outages and/or for testing and maintenance purposes on weekdays between the hours of 9:00 a.m. and 4:00 p.m.

(p) **Security**. WFs may incorporate reasonable and appropriate site security measures, such as locks and anti-climbing devices to prevent unauthorized access, theft or vandalism. All WFs shall be constructed of graffiti resistant materials. Barbed wire, razor wire, electrified fences or any similar security measures are prohibited.

(q) **Power Sources**. Permanent backup power sources that emit noise or exhaust fumes are prohibited.

(r) **Lighting**. WFs may not include exterior lights other than as may be required by an applicable governmental regulation or applicable pole owner policies related to public or worker safety. All exterior lights permitted or required to be installed must comply with the City's Dark Sky Ordinance, No. 1966, if applicable, and shall be installed in locations and within enclosures that mitigate illumination impacts on other properties to the maximum extent feasible. The provisions of this subsection shall not be interpreted to prohibit installations on street lights or the installation of luminaires on new poles when required.

(s) **Signage**. All WFs must include signage that accurately identifies the equipment owner/operator, the owner/operator's site name or identification number and a toll free number to the owner/operator's network operations center. WFs shall not bear any other signage or advertisements unless expressly approved by the City, required by law or recommended under governmental agencies for compliance with RF emissions regulations.

(t) **Utilities**. All cables and connectors for telephone, primary electric and other similar utilities must be routed underground to the extent feasible in conduits large enough to accommodate future collocated WFs. To the extent feasible, undergrounded cables and wires must transition directly into the pole base without any external cabinet, doghouse, or similar equipment housing. Meters, panels, disconnect switches and other associated improvements must be placed in inconspicuous locations to the extent feasible. The City shall not approve new overhead utility lines or service drops merely because compliance with the undergrounding requirements would increase the project cost. Microwave or other wireless backhaul is discouraged when it would involve a separate and unconcealed antenna.

(u) **Public Safety**.

(1) No WF shall interfere with access to any fire hydrant, fire station, fire escape, water valve, underground vault, valve housing structure, or any other public health or safety facility. No person shall install, use, or maintain any WF, which in whole or in part rest upon, in or over any public right of way, when such installation , use or maintenance endangers or is reasonably likely to endanger the safety of persons or property, or when such site or location is used for public utility, public transportation purposes, or other governmental purpose, or when such facility unreasonable interferes with or unreasonably impedes the flow of pedestrian or vehicular traffic including any legally parked or stopped vehicle, the ingress into to egress from any residence or place of business, the use of poles, posts, traffic signs or signals, hydrants, mailboxes, permitted sidewalk dining, permitted street furniture or other objects permitted at or near the location where the WFs are located.

(2) For the protection of emergency response personnel, each WF shall have a main breaker switch to disconnect electrical power at the site. For co-location WF sites, a single main switch shall be installed to disconnect electrical power for all carriers at the site in the event of an emergency.

(3) WFs shall not be operated in any manner that would cause interference with the City's existing and/or future emergency telecommunication system. If such interference occurs, it is the service provider's responsibility to remedy the issue to the satisfaction of the City.

(v) **Security Plan.** A security plan, subject to the Director's approval, must be kept on file with the City. Permittee must comply with the security plan at all times.

(w) **Indemnification; Liability**. The following requirements shall be conditions of approval of all permits approved by the City for any WF.

(1) The permittee shall defend, indemnify, and hold harmless the City of Davis, its officers, employees, or agents from or against any action or challenge to attack, set aside, void, or annul any approval or condition of approval of the City of Davis concerning this approval, including but not limited to any approval or condition of approval of the City council, planning commission, or Director.

(2) The permittee shall further defend, indemnify and hold harmless the City of Davis, its officers, agents, and employees from any damages, liabilities, claims, suits, or causes of action of any kind or form, whether for personal injury, death or property damage, arising out of or in connection with the activities or performance of the permittee, its agents, employees, licensees, contractors, subcontractors, or independent contractors, pursuant to the approval issued by the City.

(3) WF operators and permittees shall be strictly liable for interference their WF causes with City communications systems and they shall be responsible for the all costs associated with determining the source of the interference, eliminating the interference (including but not limited to filtering, installing cavities, installing directional antennas, powering down systems, and engineering analysis), and arising from third party claims against the City attributable to the interference.

(4) The City shall promptly notify the permittee of any claim, action, or proceeding concerning the project and the City shall cooperate fully in the defense of the matter. The City reserves the right, at its own option, to choose its own attorney to represent the City, its officers, employees and agents in the defense of the matter.

(5) Failure to comply with any of these conditions shall constitute grounds for revoking a WF permit.

40.29.110. Public Hearing; Noticing.

Public hearings on proposed conditionally permitted WFs shall be conducted and noticed in accordance with Sections 40.30.070 of the Davis Municipal Code. The noticing radius for proposed WFs shall be five hundred feet. The noticing radius shall be measured from the outer boundary of the subject parcel, or, for those facilities in the PROW, from the outer boundary of the closest parcel adjacent to the subject PROW site.

40.29.120. Findings.

In addition to the required findings for a conditional use permit, and other standards set forth in this Article, the following findings shall be met prior to approval of any WF requiring a conditional use permit:

(a) The proposed WF has been designed to minimize its visual and environmental impacts, including the utilization of stealth technology, when applicable.

(b) The proposed site has the appropriate zoning, dimensions, slope, design, and configuration for the development of a WF.

(c) That proposed site will be appropriately landscaped as required by this Article.

(d) Based on information submitted, the proposed WF is in compliance with all FCC and California Public Utilities Commission (PUC) requirements.

40.29.130. Regulatory Compliance and Monitoring.

(a) Permittees shall ensure that its WF complies at all times with all current regulatory and operational requirements, including but not limited to RF emission standards adopted by the FCC, antenna height standards adopted by the Federal Aviation Administration, and any other regulatory or operational standard established by any other government agency with regulatory authority over the WF.

(b) No WF, either by itself or in combination with other such facilities, shall generate at any time, electromagnetic or RF emissions in excess of the FCC-adopted standards for human exposure, as they may be amended over time.

(c) The permittee shall, at its own expense, obtain and maintain the most current information from the FCC regarding allowable RF emissions and all other applicable regulations and standards, and shall file a monitoring report documenting its WFs' current emissions (including field measurements). The field measurements shall be conducted in accordance with accepted industry standards. The report shall include findings from a qualified engineer or consultant as to whether the monitoring results are in compliance with FCC standards.

(1) The monitoring report shall be filed with the Director as follows:

(A) For WFs approved after June 1, 2012, within five days of the WF's first day of operation (i.e., within 5 days of when the WF "goes live"), or as set forth in the permit issued under this Article;

(B) For WFs approved after June 1, 2012, annually on the anniversary of the initial compliance report submittal date, and for existing WFs, upon request by the Director and annually thereafter;

(C) Within six months of the effective date of any amendment or revision of applicable regulatory and operational standards, unless the controlling agency

mandates a more stringent compliance schedule, in which case the report shall be filed consistent with the more stringent compliance schedule

(D) Upon any change or alteration in the WF's equipment or operation, including but not limited to addition of new antennas, change in frequency use, increase in effective radiated power, or addition of a new wireless provider to an existing WF (e.g., addition of a new tenant to a DAS WF).

(2) At the Director's sole discretion, a qualified independent RF engineer or consultant, selected by and under contract to the City, may be retained to review and verify monitoring reports for compliance with FCC regulations. All costs associated with the City's review of these monitoring reports shall be the responsibility of the permittee, which shall reimburse the City for the review costs within 30 days of the City's demand for reimbursement.

(3) If a new WF is not in compliance with applicable FCC standards and conditions of approval, a final building permit shall not be issued, any operation of the WF shall cease immediately, and the permittee will be subject to the revocation procedures under this Article if compliance is not achieved within a reasonable period as specified by the Director following written notice and an opportunity to cure.

40.29.140. Existing Conforming and Legal Nonconforming WFs.

(a) Except as may otherwise be required by state or federal law (as in the case of an eligible facility request), modification of an existing legal nonconforming WF shall be subject to same permitting requirements as a new WF.

(b) Without otherwise limiting the applicability of any other provision of the Davis Municipal Code, all existing conforming and legal nonconforming WFs are subject to, Sections 40.29.130, 40.29.150, 40.29.160, and 40.29.170 of this Article.

40.29.150. Periodic Review.

The City may conduct a periodic review of any WF to consider whether or not the facility is conforming with the conditions of its entitlements and permits.

40.29.160. Transfer of Operation.

Permittee shall not assign or transfer any interest in its permits for WFs without advance written notice to the Director. The notice shall specify the identity of the assignee or transferee of the permit, as well as the assignee or transferee's address, telephone number, name of primary contact person(s), and other applicable contact information, such as an e-mail address or facsimile number. The new assignee or transferee shall comply with all of the WF's conditions of approval.

40.29.170. Abandonment or Discontinuation of Use.

(a) All permittees who intend to abandon or discontinue the use of any WF shall notify the City of such intentions no less than sixty (60) days prior to the final day of use. Said notification

shall be in writing, shall specify the date of termination, the date the WF will be removed, and the method of removal.

(b) Non-operation, disuse (including, but not limited to, cessation of wireless services) or disrepair for ninety (90) days or more shall constitute abandonment by the permittee under this Article or any predecessors to this Article. The Director shall send a written notice of abandonment to the permittee.

(c) Upon abandonment, the conditional use permit shall become null and void. Absent a timely request for a hearing pursuant to subdivision (e) of this section, the WF shall be physically removed at the permittee's expense no more than ninety (90) days from the date of the abandonment notice. The WF shall be removed in accordance with applicable health and safety requirements and the site upon which the WF was located shall be restored to the condition that existed prior to the installation of the WF, or as required by the Director. The permittee shall be responsible for obtaining all necessary permits for the removal of the WF and site restoration.

(d) At any time after ninety (90) days following abandonment, the Director may have the WF removed and restore the premises as he/she deems appropriate. The City may, but shall not be required to, store the removed WF (or any part thereof). The WF permittee shall be liable for the entire cost of such removal, repair, restoration, and storage. The City may, in lieu of storing the removed WF, convert it to the City's use, sell it, or dispose of it in any manner deemed appropriate by the City.

(e) The permittee may request a hearing before a hearing officer appointed by the City manager regarding the notice of abandonment, provided a written hearing request is received by the Director within 10 days of the date of the notice of abandonment. The appeal hearing shall be conducted pursuant to Section 23.04.060(d). The hearing officer shall issue a written decision. The decision of the hearing officer regarding abandonment of the WF shall constitute the final administrative decision of the City and shall not be appealable to the City council or any committee or commission of the City. Failure to file a timely hearing request means the notice of abandonment is final and the WF shall be removed within 90 days from the date of the abandonment notice.

(f) Prior to commencing operations of a WF, the permittee shall file with the City, and shall maintain in good standing throughout the term of its approval, a bond or other sufficient security in an amount equal to the cost of physically removing the WF and all related facilities and equipment on the site, as determined by the Director. However, the City may not require the owner or operator to post a cash deposit or establish a cash escrow account as security under this subsection. In setting the amount of the bond or security, the Director shall take into consideration the permittee's estimate of removal costs.

40.29.180. Violations; Public Nuisance.

Any violation of this Article is deemed a public nuisance subject to abatement and shall, in addition to any other available legal penalty or remedy, constitute grounds for revocation of any permits and/or approvals granted under this Article or any predecessors to this Article.

40.29.190. Revocation of Permit.

(a) Permittees shall fully comply with all conditions related to any permit or approval granted under this Article or any predecessors to this Article. Failure to comply with any condition of approval or maintenance of the WF in a matter that creates a public nuisance or otherwise causes jeopardy to the public health, welfare or safety shall constitute grounds for revocation. If such a violation is not remedied within a reasonable period, following written notice and an opportunity to cure, the Director may schedule a public hearing before the planning commission to consider revocation of the permit. The planning commission revocation action may be appealed to the City council pursuant to Article 40.35.

(b) If the permit is revoked pursuant to this section, the permittee shall remove its WF at its own expense and shall repair and restore the site to the condition that existed prior to the WF's installation or as required by the Director within ninety (90) days of revocation in accordance with applicable health and safety requirements. The permittee shall be responsible for obtaining all necessary permits for the WF's removal and site restoration.

(c) At any time after ninety (90) days following permit revocation, the Director may have the WF removed and restore the premises as he/she deems appropriate. The City may, but shall not be required to, store the removed WF (or any part thereof). The WF permittee shall be liable for the entire cost of such removal, repair, restoration, and storage. The City may, in lieu of storing the removed WF, convert it to the City's use, sell it, or dispose of it in any manner deemed appropriate by the City.

40.29.200. Mandatory Removal and Relocation.

If a WF must be modified or relocated because of an abandonment, undergrounding of utilities, or change of grade, alignment or width of any street, sidewalk or other public facility (including the construction, maintenance, or operation of any other City underground or aboveground facilities including, but not limited to, sewers, storm drains, conduits, gas, water, electric or other utility systems, or pipes owned by City or any other public agency), the permittee shall modify, remove, or relocate its WF, or portion thereof, as necessary without cost or expense to City. Said modification or removal of a WF shall be completed within ninety (90) days of notification by the City unless exigencies dictate a different period of time as established by the Director. In the event a WF is not modified or removed within the requisite period of time, the City may cause the same to be done at the sole expense of permittee. Further, in the event of an emergency, the City may modify, remove, or relocate WFs without prior notice to permittee provided permittee is notified within a reasonable period thereafter. A permittee electing to relocate a WF that was removed pursuant to this section shall be subject to the requirements of this Article applicable to the proposed relocation site.

40.29.210. Appeals.

Any person dissatisfied with the decision to approve, deny, or revoke a conditional use permit for the construction or modification of a WF subject to this Article may file an appeal in accordance with Article 40.35.

40.29.220. Effect of State or Federal Law.

(a) **Ministerial Permits.** In the event the city attorney determines that state or federal law prohibits any discretionary permitting requirements of this Article, all provisions of this Article shall be apply with the exception that the required permit shall be reviewed and administered as a ministerial permit by the Director rather than as a discretionary permit. Any conditions of approval set forth in this Article or deemed necessary by the Director shall be imposed and administered as reasonable time, place, and manner rules. If the city attorney subsequently determines that the law has changed and that discretionary permitting has become permissible, the city attorney shall issue such determination in writing with citations to legal authority and all discretionary permitting requirements shall be reinstated. The city attorney's written determinations under this section shall be a public record.

(b) **Exceptions**. Exceptions to any provision of this article, including, but not limited to, exceptions from findings that would otherwise justify denial, may be granted pursuant to a conditional use permit subject to the following:

(1) An applicant must request the exception at the time its application is submitted. The request must include both the specific provision(s) of this article from which the exception is sought and the legal and factual basis of the request. Any request for an exception after the City has deemed an application complete shall be treated as a new application.

(2) The exception shall only be granted upon a finding that application of the provision of this article from which the exception is sought would in the case of the proposed WF violate federal law, state law, or both. The applicant shall have the burden of proof as to this finding.

(3) The City may hire an independent consultant, at the applicant's expense, to evaluate the issues raised by the exception request and shall have the right to submit rebuttal evidence to refute the applicant's claim.

RESOLUTION _____

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF DAVIS ADOPTING A CITY WIDE POLICY REGARDING PERMITTING REQUIREMENTS AND DEVELOPMENT STANDARDS FOR SMALL WIRELESS FACILITIES

WHEREAS, on September 26, 2018, the Federal Communications Commission ("FCC") adopted its Declaratory Ruling and Third Report and Order ("Report and Order") relating to placement of small wireless facilities in public rights-of-way; and

WHEREAS, the Report and Order purports to give providers of wireless services rights to utilize public rights-of-way and to attach so-called "small wireless facilities" to public infrastructure, including infrastructure of the City of Davis, subject to payment of "presumed reasonable", non-recurring and recurring fees., and the ability of local agencies to regulate use of their rights-of-way is substantially limited under the Report and Order; and

WHEREAS, notwithstanding the limitations imposed on local regulation of small wireless facilities in public rights-of-way by the Report and Order, local agencies retain the ability to regulate the aesthetics of small wireless facilities, including location, compatibility with surrounding facilities, spacing, and overall size of the facility, provided the aesthetic requirements are: (i) "reasonable," i.e., "technically feasible and reasonably directed to avoiding or remedying the intangible public harm or unsightly or out-of-character deployments"; (ii) "objective," i.e., they "incorporate clearly-defined and ascertainable standards, applied in a principled manner"; and (iii) published in advance. Regulations that do not satisfy the foregoing requirements are likely to be subject to invalidation, as are any other regulations that "materially inhibit wireless service," (e.g., overly restrictive spacing requirements); and

WHEREAS, local agencies also retain the ability to regulate small wireless facilities in the public rights-of-way in order to more fully protect the public health and safety, ensure continued quality of telecommunications services, and safeguard the rights of consumers, and pursuant to this authority retained, the City Council has amended the Davis Municipal Code to require all small wireless facilities as defined by the FCC in 47 C.F.R. § 1.60002(l), as may be amended or superseded, to comply with the requirements of a policy adopted by resolution of the City Council entitled "City Wide Policy Regarding Permitting Requirements And Development Standards For Small Wireless Facilities";

NOW THEREFORE, THE CITY COUNCIL OF THE CITY OF DAVIS DOES HEREBY RESOLVE AS FOLLOWS:

Section 1. Findings. The City Council finds each of the facts in the preceding recitals to be true.

Section 2. City Wide Policy Adopted. The City Council of Davis hereby adopts the "City Wide Policy Regarding Permitting Requirements And Development Standards For Small Wireless Facilities" set forth in Exhibit A to this Resolution, which is hereby incorporated as though set forth in full.

Section 3. CEQA. The City of Davis has determined that the adoption of this Resolution is exempt from review under the California Environmental Quality Act ("CEQA") (California Public Resources Code Section 21000, et seq.), pursuant to State CEQA Regulation §15061(B)(3) (14 Cal. Code Regs. § 15061(B)(3)) covering activities with no possibility of having a significant effect on the environment. In addition, the City of Davis has determined that the ordinance is categorically exempt pursuant to Section 15301 of the CEQA Regulations applicable to minor alterations of existing governmental and/or utility-owned structures.

Section 4. Certification. The City Clerk shall certify to the adoption of this resolution and shall cause a certified resolution to be filed in the book of original resolutions.

PASSED AND ADOPTED this __th day of __, 2019.

_____

Mayor

ATTEST:

_____

City Clerk

EXHIBIT A

CITY OF DAVIS
CITY WIDE POLICY REGARDING PERMITTING REQUIREMENTS AND DEVELOPMENT STANDARDS FOR SMALL WIRELESS FACILITIES

SECTION 1. GENERAL PROVISIONS

SECTION 1.1. PURPOSE AND INTENT

(a) On September 27, 2018, the Federal Communications Commission ("FCC") adopted a *Declaratory Ruling and Third Report and Order,* FCC 18-133 (the *"Small Cell Order"),* in connection with two informal rulemaking proceedings entitled *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT* Docket No. 17-79, and *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment,* WC Docket No. 17-84. The regulations adopted in the *Small Cell Order* significantly curtail the local authority over wireless and wireline communication facilities reserved to State and local governments under sections 253 and 704 in the federal Telecommunications Act. Numerous legal challenges to the *Small Cell Order* have been raised but its regulations will become effective while such challenges are pending. Although the provisions may well be invalidated by future action, the City recognizes the practical reality that failure to comply with the *Small Cell Order* while it remains in effect will likely result in greater harm to the City's interests than if the City ignored the FCC's ruling. Accordingly, the City Council adopts this Policy ("Policy") as a means to accomplish such compliance that can be quickly amended or repealed in the future without the need to amend the City's municipal code.

(b) The City of Davis intends this Policy to establish reasonable, uniform and comprehensive standards and procedures for small wireless facilities deployment, construction, installation, collocation, modification, operation, relocation and removal within the City's territorial boundaries, consistent with and to the extent permitted under federal and California state law. The standards and procedures contained in this Policy are intended to, and should be applied to, protect and promote public health, safety and welfare, and balance the benefits from advanced wireless services with local values, which include without limitation the aesthetic character of the City. This Policy is also intended to reflect and promote the community interest by (1) ensuring that the balance between public and private interests is maintained; (2) protecting the City's visual character from potential adverse impacts and/or visual blight created or exacerbated by small wireless facilities and related communications infrastructure; (3) protecting and preserving the City's environmental resources; (4) protecting and preserving the City's public rights-of-way and municipal infrastructure located within the City's public rights-of-way; and (5) promoting access to high-quality, advanced wireless services for the City's residents, businesses and visitors.

(c) This Policy is not intended to, nor shall it be interpreted or applied to: (1) prohibit or effectively prohibit any personal wireless service provider's ability to provide personal wireless services; (2) prohibit or effectively prohibit any entity's ability to provide any telecommunications service, subject to any competitively neutral and nondiscriminatory rules, regulations or other legal requirements for rights-of-way management; (3)

unreasonably discriminate among providers of functionally equivalent personal wireless services; (4) deny any request for authorization to place, construct or modify personal wireless service facilities on the basis of environmental effects of radio frequency emissions to the extent that such wireless facilities comply with the FCC's regulations concerning such emissions; (5) prohibit any collocation or modification that the City may not deny under federal or California state law; (6) impose any unreasonable, discriminatory or anticompetitive fees that exceed the reasonable cost to provide the services for which the fee is charged; or (7) otherwise authorize the City to preempt any applicable federal or California law.

SECTION 1.2. DEFINITIONS

(a) **Undefined Terms**. Undefined phrases, terms or words in this Policy will have the meanings assigned to them in 1 U.S.C. § 1, as may be amended or superseded, and, if not defined therein, will have their ordinary meanings. If any definition assigned to any phrase, term or word in Section 1.2 conflicts with any federal or state-mandated definition, the federal or state-mandated definition will control.

(b) **Defined Terms**.

(1) **"Accessory equipment"** means the same as "antenna equipment" as defined by FCC in 47 C.F.R. § 1.6002(b), as may be amended or superseded.

(2) **"Antenna"** means the same as defined by the FCC in 47 C.F.R. § 1.6002(b), as may be amended or superseded.

(3) **"Approval authority"** means the City official(s) responsible for reviewing applications for small cell permits and vested with the authority to approve, conditionally approve or deny such applications as provided in this Policy.

(4) **"Collocation"** means the same as defined by the FCC in 47 C.F.R. § 1.6002(g), as may be amended or superseded.

(5) **"Concealed"** or **"concealment"** means camouflaging techniques that integrate the transmission equipment into the surrounding natural and/or built environment such that the average, untrained observer cannot directly view the equipment and would not likely recognize the existence of the wireless facility or concealment technique.

(6) **"Decorative pole"** means any pole that includes decorative or ornamental features and/or materials intended to enhance the appearance of the pole. Decorative or ornamental features include, but are not limited to, fluted poles, ornate luminaires and artistic embellishments. Cobra head luminaires and octagonal shafts made of concrete or crushed stone composite material are not considered decorative or ornamental.

(7) **"FCC"** means the Federal Communications Commission or its duly appointed successor agency.

(8) **"FCC Shot Clock"** means the presumptively reasonable time frame within which the City generally must act on a given wireless application, as defined by the FCC and as may be amended or superseded.

(9) **"Ministerial permit"** means any City-issued non-discretionary permit required to commence or complete any construction or other activity subject to the City's jurisdiction. Ministerial permits may include, without limitation, any building permit, construction permit, electrical permit, encroachment permit, excavation permit, traffic control permit and/or any similar over-the-counter approval issued by the City's departments.

(10) **"Personal wireless services"** means the same as defined in 47 U.S.C. § 332(c)(7)(C)(i), as may be amended or superseded.

(11) **"Personal wireless service facilities"** means the same as defined in 47 U.S.C. § 332(c)(7)(C)(ii), as may be amended or superseded.

(12) **"Public right-of-way"** means any land which has been reserved for or dedicated to the City for the use of the general public for public road purposes, including streets, sidewalks and unpaved areas.

(13) **"RF"** means radio frequency or electromagnetic waves.

(14) **"Section 6409"** means Section 6409(a) of the Middle-Class Tax Relief and Job Creation Act of 2012, Pub. **L.** No. 112-96, 126 Stat. 156, codified as 47 U.S.C. § 1455(a), as may be amended or superseded.

(15) **"Small wireless facility"** or **"small wireless facilities"** means the same as defined by the FCC in 47 C.F.R. § 1.6002(1), as may be amended or superseded.

SECTION 2. SMALL WIRELESS FACILITIES

SECTION 2.1. APPLICABILITY; REQUIRED PERMITS AND APPROVALS

(a) **Applicable Facilities**. Except as expressly provided otherwise in this Policy, the provisions in this Policy shall be applicable to all existing small wireless facilities and all applications and requests for authorization to construct, install, attach, operate, collocate, modify, reconstruct, relocate, remove or otherwise deploy small wireless facilities within the City's jurisdictional boundaries.

(b) **Approval Authority**. The approval authority for small wireless facilities in public rights-of-way shall be the Public Works Director or his/her designee. The approval authority for small wireless facilities outside of public rights-of-way shall be the Community Development Director or his/her designee.

(c) **Small Wireless Facility Permit**. A small wireless facility permit, subject to the approval authority's prior review and approval, is required for any small wireless facility proposed on an existing, new or replacement structure.

(d) **Request for Approval Pursuant to Section 6409**. Requests for approval to collocate, replace or remove transmission equipment at an existing wireless tower or base station submitted pursuant to Section 6409 are not be subject to this policy, but shall be reviewed in accordance with the Municipal Code

(e) **Other Permits and Approvals**. In addition to a small wireless facility permit, the applicant must obtain all other permits and regulatory approvals as may be required by any other federal, state or local government agencies, which includes without limitation any ministerial permits and/or other approvals issued by other City departments or divisions. All applications for ministerial permits submitted in connection with a proposed small wireless facility must contain a valid small wireless facility permit issued by the City for the proposed facility. Any application for any ministerial permit(s) submitted without such small cell permit may be denied without prejudice. Furthermore, any small cell permit granted under this Policy shall remain subject to all lawful conditions and/or legal requirements associated with such other permits or approvals.

SECTION 2.2. SMALL WIRELESS FACILITY PERMIT APPLICATION REQUIREMENTS

(a) **Application Contents**. All applications for a small wireless facility must include all the information and materials required in this subsection (a).

(1) **Application Form**. The applicant shall submit a complete, duly executed small wireless facility permit application using the then-current City form which must include the information described in this subsection (a).

(2) **Application Fee.** The applicant shall submit the applicable small wireless facility permit application fee established by City Council resolution. Batched applications must include the applicable small wireless facility permit application fee for each small wireless facility in the batch. If no permit application fee has been established, then the applicant must submit a signed written statement that acknowledges that the applicant will be required to reimburse the City for its reasonable costs incurred in connection with the application within 10 days after the City issues a written demand for reimbursement.

(3) **Construction Drawings.** The applicant shall submit true and correct construction drawings on plain bond paper and electronically, prepared, signed and stamped by a California licensed or registered structural engineer, that depict all the existing and proposed improvements, equipment and conditions related to the proposed project and project site, which includes without limitation any and all poles, posts, pedestals, traffic signals, towers, streets, sidewalks, pedestrian ramps, driveways, curbs, gutters, drains, handholes, manholes, fire hydrants, equipment cabinets, antennas, cables, trees and other landscape features. If the applicant proposes to use existing poles or other existing structures, the structural

engineer must certify that the existing above and below ground structure will be adequate for the purpose. The construction drawings must: (i) contain cut sheets that contain the technical specifications for all existing and proposed antennas and accessory equipment, which includes without limitation the manufacturer, model number and physical dimensions; (ii) identify all structures within 250 feet from the proposed project site and call out such structures' overall height above ground level; (iii) depict the applicant's plan for electric and data backhaul utilities, which shall include the locations for all conduits, cables, wires, handholes, junctions, transformers, meters, disconnect switches, and points of connection; (iv) traffic control plans for the installation phase, stamped and signed by a California licensed or registered civil or traffic engineer; and (v) demonstrate that proposed project will be in full compliance with all applicable health and safety laws, regulations or other rules, which includes without limitation all building codes, electric codes, local street standards and specifications, and public utility regulations and orders.

(4) **Site Plan.** The applicant shall submit a survey prepared, signed and stamped by a California licensed or registered surveyor. The survey must identify and depict all existing boundaries, encroachments, buildings, walls, fences and other structures within 250 feet from the proposed project site, which includes without limitation all: (i) traffic lanes; (ii) all private properties and property lines; (iii) above and below-grade utilities and related structures and encroachments; (iv) fire hydrants, roadside call boxes and other public safety infrastructure; (v) streetlights, decorative poles, traffic signals and permanent signage; (vi) sidewalks, driveways, parkways, curbs, gutters and storm drains; (vii) benches, trash cans, mailboxes, kiosks and other street furniture; and (viii) existing trees, planters and other landscaping features.

(5) **Photo Simulations.** The applicant shall submit site photographs and photo simulations that show the existing location and proposed small wireless facility in context from at least three vantage points within the public streets or other publicly accessible spaces, together with a vicinity map that shows the proposed site location and the photo location for each vantage point. At least one simulation must depict the small wireless facility from a vantage point approximately 50 feet from the proposed support structure or location.

(6) **Project Narrative and Justification.** The applicant shall submit a written statement that explains in plain factual detail why the proposed wireless facility qualifies as a "small wireless facility" as defined by the FCC in 47 C.F.R. § 1.6002(/). A complete written narrative analysis will state the applicable standard and all the facts that allow the City to conclude the standard has been met. Bare conclusions not factually supported do not constitute a complete written analysis. As part of the written statement the applicant must also include (i) whether and why the proposed support is a "structure" as defined by the FCC in 47 C.F.R. § 1.6002(m); and (ii) whether and why the proposed wireless facility meets each required finding as provided in Section 2.4.

(7) **RF Compliance Report.** The applicant shall submit an RF exposure compliance report that certifies that the proposed small wireless facility, as well as any collocated wireless facilities, will comply with applicable federal RF exposure standards and exposure limits. The RF report must be prepared and certified by an RF engineer acceptable to the City. The RF report must include the actual frequency and power levels (in watts effective radiated power) for all existing and proposed antennas at the site and exhibits that show the location and orientation of all transmitting antennas and the boundaries of areas with RF exposures in excess of the uncontrolled/general population limit (as that term is defined by the FCC) and also the boundaries of areas with RF exposures in excess of the controlled/occupational limit (as that term is defined by the FCC). Each such boundary shall be clearly marked and identified for every transmitting antenna at the project site.

(8) **Regulatory Authorization.** The applicant shall submit evidence of the applicant's regulatory status under federal and California law to provide the services and construct the small wireless facility proposed in the application.

(9) **Site Agreement.** For any small wireless facility proposed to be installed on any structure located within the public rights-of-way, the applicant shall submit a partially-executed site agreement on a form prepared by the City that states the terms and conditions for such use by the applicant. No changes shall be permitted to the City's form site agreement except as may be indicated on the form itself. Any unpermitted changes to the City's form site agreement shall be deemed a basis to deem the application incomplete. Refusal to accept the terms and conditions in the City's site agreement shall be an independently sufficient basis to deny the application.

(10) **Property Owner's Authorization.** The applicant must submit a written authorization signed by the property owner that authorizes the applicant to submit a wireless application in connection with the subject property and, if the wireless facility is proposed on a utility-owned support structure, submit a written final utility design authorization from the utility.

(11) **Acoustic Analysis.** The applicant shall submit an acoustic analysis prepared and certified by an engineer licensed by the State of California for the proposed small wireless facility and all associated equipment including all environmental control units, sump pumps, temporary backup power generators and permanent backup power generators demonstrating compliance with the City's noise regulations. The acoustic analysis must also include an analysis of the manufacturers' specifications for all noise-emitting equipment and a depiction of the proposed equipment relative to all adjacent property lines. In lieu of an acoustic analysis, the applicant may submit evidence from the equipment manufacturer(s) that the ambient noise emitted from all the proposed equipment will not, both individually and cumulatively, exceed the applicable noise limits.

(12) **Justification for Non-Preferred Location or Structure.** If a facility is proposed anywhere other than the most preferred location or the most preferred structure within 500 feet of the proposed location as described in Section 2.6, the applicant shall demonstrate with clear and convincing written evidence all of the following:

(A) A clearly defined technical service objective and a map showing areas that meets that objective;

(B) A technical analysis that includes the factual reasons why a more preferred location(s) and/or more preferred structure(s) within 500 feet of the proposed location is not technically feasible;

(C) Bare conclusions that are not factually supported do not constitute clear and convincing written evidence.

(b) **Additional Requirements.** The City Council authorizes the approval authority to develop, publish and from time to time update or amend permit application requirements, forms, checklists, guidelines, informational handouts and other related materials that the approval authority finds necessary, appropriate or useful for processing any application governed under this Policy. All such requirements and materials must be in written form and publicly stated to provide all interested parties with prior notice.

SECTION 2.3. SMALL WIRELESS FACILITY PERMIT APPLICATION SUBMITTAL AND COMPLETENESS REVIEW

(a) **Requirements for a Duly Filed Application.** Any application for a small wireless facility permit will not be considered duly filed unless submitted in accordance with the requirements in this subsection (a).

(1) **Submittal Appointment.** All applications must be submitted to the City at a pre-scheduled appointment with the approval authority. Potential applicants may generally submit either one application or one batched application per appointment as provided below. Potential applicants may schedule successive appointments for multiple applications whenever feasible and not prejudicial to other applicants for any other development project. The approval authority shall use reasonable efforts to offer an appointment within five working days after the approval authority receives a written request from a potential applicant. Any purported application received without an appointment, whether delivered in-person, by mail or through any other means, will not be considered duly filed, whether the City retains, returns or destroys the materials received.

(2) **Pre-Submittal Conferences.** The City encourages, but does not require, potential applicants to schedule and attend a pre-submittal conference with the approval authority for all proposed projects that involve small wireless facilities. A voluntary pre-submittal conference is intended to streamline the review process through informal discussion between the potential applicant and staff that includes, without limitation, the appropriate project classification and review

process; any latent issues in connection with the proposed project, including compliance with generally applicable rules for public health and safety; potential concealment issues or concerns (if applicable); coordination with other City departments responsible for application review; and application completeness issues.

(b) **Applications Deemed Withdrawn.** To promote efficient review and timely decisions, and to mitigate unreasonable delays or barriers to entry caused by chronically incomplete applications, any application governed under this Policy will be automatically deemed withdrawn by the applicant when the applicant fails to tender a substantive response to the approval authority within 60 calendar days after the approval authority deems the application incomplete in a written notice to the applicant. As used in this subsection (b), a "substantive response" must include the materials identified as incomplete in the approval authority's notice.

(c) **Batched Applications.** Applicants may submit applications individually or in a batch; provided, that the number of small wireless facilities in a batch should be limited to five and all facilities in the batch should be substantially the same with respect to equipment, configuration, and support structure. Applications submitted as a batch shall be reviewed together, provided that each application in the batch must meet all the requirements for a complete application, which includes without limitation the application fee for each application in the batch. If any individual application within a batch is deemed incomplete, the entire batch shall be automatically deemed incomplete. If any application is withdrawn or deemed withdrawn from a batch, all other applications in the same batch shall be automatically deemed withdrawn. If any application in a batch fails to meet the required findings for approval, the entire batch shall be denied.

(d) **Additional Procedures.** The City Council authorizes the approval authority to establish other reasonable rules and regulations for duly filed applications, which may include without limitation regular hours for appointments with applicants, as the approval authority deems necessary or appropriate to organize, document and manage the application intake process. All such rules and regulations must be in written form and publicly stated to provide all interested parties with prior notice.

SECTION 2.4. APPROVALS AND DENIALS

(a) **Review by Approval Authority.** The approval authority shall review a complete and duly filed application for a small wireless facility and may act on such application without prior notice or a public hearing.

(b) **Required Findings.** The approval authority may approve or conditionally approve a complete and duly filed application for a small wireless facility permit when the approval authority finds:

(1) The proposed project meets the definition for a "small wireless facility" as defined by the FCC;

(2) The proposed facility would be in the most preferred location within 500 feet from the proposed site in any direction or the applicant has demonstrated with clear and convincing evidence in the written record that any more-preferred location(s) within 500 feet would be technically infeasible;

(3) The proposed facility would not be located on a prohibited support structure identified in this Policy;

(4) The proposed facility would be on the most preferred support structure within 500 feet from the proposed site in any direction or the applicant has demonstrated with clear and convincing evidence in the written record that any more-preferred support structure(s) within 500 feet would be technically infeasible;

(5) The proposed facility complies with all applicable design standards in this Policy except for any design standard that the applicant has demonstrated with clear and convincing evidence in the written record would render the proposed facility technically infeasible;

(6) The applicant has demonstrated that the proposed project will be in planned compliance with all applicable FCC regulations and guidelines for human exposure to RF emissions.

(c) **Conditional Approvals; Denials without Prejudice.** Subject to any applicable federal or California laws, nothing in this Policy is intended to limit the approval authority's ability to conditionally approve or deny without prejudice any small wireless facility permit application as may be necessary or appropriate to ensure compliance with this Policy.

(d) **Decision Notices.** Within five calendar days after the approval authority acts on a small wireless facility permit application or before the FCC Shot Clock expires (whichever occurs first), the approval authority shall notify the applicant by written notice. If the approval authority denies the application (with or without prejudice), the written notice must contain the reasons for the decision.

(e) **Appeals.** Any decision by the approval authority shall be final and not subject to any administrative appeals.

SECTION 2.5. STANDARD CONDITIONS OF APPROVAL

(a) **General Conditions.** In addition to all other conditions adopted by the approval authority permits issued under this Policy shall be automatically subject to the conditions in this subsection (a).

(1) **Permit Term.** This permit will automatically expire 10 years and one day from its issuance unless California Government Code § 65964(b) authorizes the City to establish a shorter term for public safety reasons. Any other permits or approvals issued in connection with any collocation, modification or other change to this wireless facility, which includes without limitation any permits or other approvals deemed-granted or deemed-approved under federal or state law, will not extend this term limit unless

expressly provided otherwise in such permit or approval or required under federal or state law.

(2) **Permit Renewal**. Within one (1) year before the expiration date of this permit, the permittee may submit an application for permit renewal. To be eligible for renewal, the permittee must demonstrate that the subject wireless facility is in compliance with all the conditions of approval associated with this permit and all applicable provisions in the Davis Municipal Code and this Policy that exist at the time the decision to renew the permit is rendered. The approval authority shall have discretion to modify or amend the conditions of approval for permit renewal on a case-by-case basis as may be necessary or appropriate to ensure compliance with this Policy. Upon renewal, this permit will automatically expire 10 years and one day from its issuance, except when California Government Code § 65964(b), as may be amended or superseded in the future, authorizes the City to establish a shorter term for public safety reasons.

(3) **Post-Installation Certification.** Within 60 calendar days after the permittee commences full, unattended operations of a small wireless facility approved or deemed-approved, the permittee shall provide the approval authority with documentation reasonably acceptable to the approval authority that the small wireless facility has been installed and/or constructed in strict compliance with the approved construction drawings and photo simulations. Such documentation shall include without limitation as-built drawings, and site photographs.

(4) **Build-Out Period.** This small wireless facility permit will automatically expire six (6) months from the approval date unless the permittee obtains all other permits and approvals required to install, construct and/or operate the approved small wireless facility, which includes without limitation any permits or approvals required by the any federal, state or local public agencies with jurisdiction over the subject property, the small wireless facility or its use. If this build-out period expires, the City will not extend the build-out period, but the permittee may resubmit a complete application, including all application fees, for the same or substantially similar project.

(5) **Site Maintenance.** The permittee shall keep the site, which includes without limitation any and all improvements, equipment, structures, access routes, fences and landscape features, in a neat, clean and safe condition in accordance with the approved construction drawings and all conditions in this small wireless facility permit. The permittee shall keep the site area free from all litter and debris at all times. The permittee, at no cost to the City, shall remove and remediate any graffiti or other vandalism at the site within 48 hours after the permittee receives notice or otherwise becomes aware that such graffiti or other vandalism occurred.

(6) **Compliance with Laws.** The permittee shall maintain compliance at all times with all federal, state and local statutes, regulations, orders or other rules that carry the force of law ("laws") applicable to the permittee, the subject property, the small wireless facility or any use or activities in connection with the use authorized in this small wireless facility permit, which includes without

limitation any laws applicable to human exposure to RF emissions. The permittee expressly acknowledges and agrees that this obligation is intended to be broadly construed and that no other specific requirements in these conditions are intended to reduce, relieve or otherwise lessen the permittee's obligations to maintain compliance with all laws. No failure or omission by the City to timely notice, prompt or enforce compliance with any applicable provision in the Davis Municipal Code, this Policy any permit, any permit condition or any applicable law or regulation, shall be deemed to relieve, waive or lessen the permittee's obligation to comply in all respects with all applicable provisions in the Davis Municipal Code, this Policy, any permit, any permit condition or any applicable law or regulation.

(7) **Adverse Impacts on Other Properties.** The permittee shall use all reasonable efforts to avoid any and all unreasonable, undue or unnecessary adverse impacts on nearby properties that may arise from the permittee's or its authorized personnel's construction, installation, operation, modification, maintenance, repair, removal and/or other activities on or about the site. The permittee shall not perform or cause others to perform any construction, installation, operation, modification, maintenance, repair, removal or other work that involves heavy equipment or machines except during normal construction work hours authorized by the Davis Municipal Code. The restricted work hours in this condition will not prohibit any work required to prevent an actual, immediate harm to property or persons, or any work during an emergency declared by the City or other state or federal government agency or official with authority to declare a state of emergency within the City. The approval authority may issue a stop work order for any activities that violates this condition in whole or in part.

(8) **Inspections; Emergencies.** The permittee expressly acknowledges and agrees that the City's officers, officials, staff, agents, contractors or other designees may enter onto the site and inspect the improvements and equipment City's officers, officials, staff, agents, contractors or other designees may, but will not be obligated to, enter onto the site area without prior notice to support, repair, disable or remove any improvements or equipment in emergencies or when such improvements or equipment threatens actual, imminent harm to property or persons. The permittee, if present, may observe the City's officers, officials, staff or other designees while any such inspection or emergency access occurs.

(9) **Permittee's Contact Information.** Within 10 days from the final approval, the permittee shall furnish the City with accurate and up-to-date contact information for a person responsible for the small wireless facility, which includes without limitation such person's full name, title, direct telephone number, facsimile number, mailing address and email address. The permittee shall keep such contact information up-to-date at all times and promptly provide the City with updated contact information if either the responsible person or such person's contact information changes.

(10) **Indemnification.** The permittee shall defend, indemnify and hold harmless the City, City Council and the City's boards, commissions, agents, officers, officials, employees and volunteers (collectively, the "indemnitees") from any and all (i) damages, liabilities, injuries, losses, costs and expenses and from any and all claims, demands, law suits, writs and other actions proceedings ("claims") brought against the indemnitees to challenge, attack, seek to modify, set aside, void or annul the City's approval of this permit, and (ii) other claims of any kind or form, whether for personal injury, death or property damage, that arise from or in connection with the permittee's or its agents', directors', officers', employees', contractors', subcontractors', licensees' or customers' acts or omissions in connection with this small cell permit or the small wireless facility. In the event the City becomes aware of any claims, the City will use best efforts to promptly notify the permittee shall reasonably cooperate in the defense. The permittee expressly acknowledges and agrees that the City shall have the right to approve, which approval shall not be unreasonably withheld, the legal counsel providing the City's defense, and the permittee shall promptly reimburse City for any costs and expenses directly and necessarily incurred by the City in the course of the defense. The permittee expressly acknowledges and agrees that the permittee's indemnification obligations under this condition are a material consideration that motivates the City to approve this small cell permit, and that such indemnification obligations will survive the expiration, revocation or other termination of this small cell permit.

(11) **Performance Bond.** Applicable to small wireless facilities within public rights-of-way. Before the City issues any permits required to commence construction in connection with this permit, the permittee shall post a performance bond from a surety and in a form acceptable to the approval authority in an amount reasonably necessary to cover the cost to remove the improvements and restore all affected areas based on a written estimate from a qualified contractor with experience in wireless facilities removal. The written estimate must include the cost to remove all equipment and other improvements, which includes without limitation all antennas, radios, batteries, generators, utilities, cabinets, mounts, brackets, hardware, cables, wires, conduits, structures, shelters, towers, poles, footings and foundations, whether above ground or below ground, constructed or installed in connection with the wireless facility, plus the cost to completely restore any areas affected by the removal work to a standard compliant with applicable laws. In establishing or adjusting the bond amount required under this condition, and in accordance with California Government Code § 65964(a), the approval authority shall take into consideration any information provided by the permittee regarding the cost to remove the wireless facility to a standard compliant with applicable laws. The performance bond shall expressly survive the duration of the permit term to the extent required to effectuate a complete removal of the subject wireless facility in accordance with this condition.

(12) **Permit Revocation.** The approval authority may recall this approval for review at any time due to complaints about noncompliance with applicable laws or any approval conditions attached to this approval after notice and an opportunity to cure the violation is provided to the permittee. If the noncompliance thereafter

continues, the approval authority may, following notice and an opportunity for the permittee to be heard (which hearing may be limited to written submittals), revoke this approval or amend these conditions as the approval authority deems necessary or appropriate to correct any such noncompliance.

(13) **Record Retention.** Applicable to small wireless facilities within public rights-of-way. The permittee must maintain complete and accurate copies of all permits and other regulatory approvals issued in connection with the wireless facility, which includes without limitation this approval, the approved plans and photo simulations incorporated into this approval, all conditions associated with this approval and any ministerial permits or approvals issued in connection with this approval. In the event that the permittee does not maintain such records as required in this condition, any ambiguities or uncertainties that would be resolved through an inspection of the missing records will be construed against the permittee. The permittee may keep electronic records; provided, however, that hard copies or electronic records kept in the City's regular files will control over any conflicts between such City-controlled copies or records and the permittee's electronic copies, and complete originals will control over all other copies in any form.

(14) **Abandoned Wireless Facilities.** A small wireless facility shall be deemed abandoned if not operated for any continuous six-month period. Within 90 days after a small wireless facility is abandoned or deemed abandoned, the permittee shall completely remove the small wireless facility and all related improvements and shall restore all affected areas to a condition compliant with all applicable laws, which includes without limitation the Davis Municipal Code. In the event that the permittee does not comply with the removal and restoration obligations under this condition within said 90-day period, the City shall have the right (but not the obligation) to perform such removal and restoration with or without notice, and the permittee shall be liable for all costs and expenses incurred by the City in connection with such removal and/or restoration activities.

(15) **Landscaping.** The permittee shall replace any landscape features damaged or displaced by the construction, installation, operation, maintenance or other work performed by the permittee or at the permittee's direction on or about the site. If any trees are damaged or displaced, the permittee shall hire and pay for a licensed arborist to select, plant and maintain replacement landscaping in an appropriate location for the species. Only workers under the supervision of a licensed arborist shall be used to install the replacement tree(s). Any replacement tree must be substantially the same size as the damaged tree unless otherwise approved by the approval authority. The permittee shall, at all times, be responsible to maintain any replacement landscape features.

(16) **Cost Reimbursement.** Applicable to small wireless facilities within public rights-of-way. The permittee acknowledges and agrees that (i) the permittee's request for authorization to construct, install and/or operate the wireless facility will cause the City to incur costs and expenses; (ii) the permittee shall be

responsible to reimburse the City for all costs incurred in connection with the permit, which includes without limitation costs related to application review, permit issuance, site inspection and any other costs reasonably related to or caused by the request for authorization to construct, install and/or operate the wireless facility; (iii) any application fees required for the application may not cover all such reimbursable costs and that the permittee shall have the obligation to reimburse City for all such costs 10 days after a written demand for reimbursement and reasonable documentation to support such costs; and (iv) the City shall have the right to withhold any permits or other approvals in connection with the wireless facility until and unless any outstanding costs have been reimbursed to the City by the permittee.

(17) **Future Undergrounding Programs.** Applicable to small wireless facilities within public rights-of-way. Notwithstanding any term remaining on any small cell permit, if other utilities or communications providers in the public rights-of-way underground their facilities in the segment of the public rights-of-way where the permittee's small wireless facility is located, the permittee must also underground its equipment, except the antennas and any approved electric meter, at approximately the same time. Accessory equipment such as radios and computers that require an environmentally controlled underground vault to function shall not be exempt from this condition. Small wireless facilities installed on wood utility poles that will be removed pursuant to the undergrounding program may be reinstalled on a streetlight that complies with the City's standards and specifications. Such undergrounding shall occur at the permittee's sole cost and expense except as may be reimbursed through tariffs approved by the state public utilities commission for undergrounding costs.

(18) **Electric Meter Upgrades.** Applicable to small wireless facilities within public rights-of-way. If the commercial electric utility provider adopts or changes its rules obviating the need for a separate or ground-mounted electric meter and enclosure, the permittee on its own initiative and at its sole cost and expense shall remove the separate or ground-mounted electric meter and enclosure. Prior to removing the electric meter, the permittee shall apply for any encroachment and/or other ministerial permit(s) required to perform the removal. Upon removal, the permittee shall restore the affected area to its original condition that existed prior to installation of the equipment.

(19) **Rearrangement and Relocation.** Applicable to small wireless facilities within public rights-of-way. The permittee acknowledges that the City, in its sole discretion and at any time, may: (i) change any street grade, width or location; (ii) add, remove or otherwise change any improvements in, on, under or along any street owned by the City or any other public agency, which includes without limitation any sewers, storm drains, conduits, pipes, vaults, boxes, cabinets, poles and utility systems for gas, water, electric or telecommunications; and/or (iii) perform any other work deemed necessary, useful or desirable by the City (collectively, "City work"). The City reserves the rights to do any and all City work without any admission on its part that the City would not have such rights

without the express reservation in this small cell permit. If the Public Works Director determines that any City work will require the permittee's small wireless facility located in the public rights-of-way to be rearranged and/or relocated, the permittee shall, at its sole cost and expense, do or cause to be done all things necessary to accomplish such rearrangement and/or relocation. If the permittee fails or refuses to either permanently or temporarily rearrange and/or relocate the permittee's small wireless facility within a reasonable time after the Public Works Director's notice, the City may (but will not be obligated to) cause the rearrangement or relocation to be performed at the permittee's sole cost and expense. The City may exercise its rights to rearrange or relocate the permittee's small wireless facility without prior notice to permittee when the Public Works Director determines that the City work is immediately necessary to protect public health or safety. The permittee shall reimburse the City for all costs and expenses in connection with such work within 10 days after a written demand for reimbursement and reasonable documentation to support such costs.

SECTION 2.6. LOCATION REQUIREMENTS

(a) **Preface to Location Requirements.** To better assist applicants and decision makers understand and respond to the community's aesthetic preferences and values, subsections (b) and (c) set out listed preferences for locations and support structures to be used in connection with small wireless facilities in an ordered hierarchy. Applications that involve less-preferred locations or structures may be approved so long as the applicant demonstrates that either (1) no more preferred locations or structures exist within 500 feet from the proposed site; or (2) any more preferred locations or structures within 500 feet from the proposed site would be technically infeasible as supported by clear and convincing evidence in the written record. Subsection (d) identifies "prohibited" support structures on which the City shall not approve any small cell permit application.

(b) **Locational Preferences.** The City prefers small wireless facilities to be installed in locations, ordered from most preferred to least preferred, as follows:

(1) any location in a non-residential zone or non-residential Specific Plan designation;

(2) any location in a residential zone 250 feet or more from any structure approved for a residential or school use;

(3) If located in a residential area, a location that is as far as possible from any structure approved for a residential or school use.

(c) **Support Structures in Public Rights-of-Way.** The City prefers small wireless facilities to be installed on support structures in the public rights-of-way, ordered from most preferred to least preferred, as follows:

(1) Existing or replacement streetlight poles;

(2) New, non-replacement streetlight poles;

(3) New or replacement traffic signal poles;

(4) New, non-replacement poles;

(5) Existing or replacement wood utility poles.

(d) **Prohibited Support Structures in Public Rights-of-Way.** The City prohibits small wireless facilities to be installed on the following support structures:

(1) Decorative poles;

(2) Signs;

(3) Any utility pole scheduled for removal or relocation within 12 months from the time the approval authority acts on the small cell permit application;

(4) New, non-replacement wood poles.

SECTION 2.7. DESIGN STANDARDS

(a) **General Standards.**

(1) **Noise.** Noise emitted from small wireless facilities and all accessory equipment and transmission equipment must comply with all applicable City noise control standards.

(2) **Lights.** Small wireless facilities shall not include any lights that would be visible from publicly accessible areas, except as may be required under Federal Aviation Administration, FCC, other applicable regulations for health and safety. All equipment with lights (such as indicator or status lights) must be installed in locations and within enclosures that mitigate illumination impacts visible from publicly accessible areas. The provisions in this subsection (a)(2) shall not be interpreted or applied to prohibit installations on streetlights or luminaires installed on new or replacement poles as may be required under this Policy.

(3) **Landscape Features.** No small wireless facility shall encroach into the protected zone of a protected oak or landmark tree. Small wireless facilities shall not displace any other existing landscape features unless: (A) such displaced landscaping is replaced with native and/or drought-resistant plants, trees or other landscape features approved by the approval authority and (B) the applicant submits and adheres to a landscape maintenance plan. The landscape plan must include existing vegetation, and vegetation proposed to be removed or trimmed, and the landscape plan must identify proposed landscaping by species type, size and location. Landscaping and landscape maintenance must be performed in accordance with all applicable provisions of the Davis Municipal Code.

(4) **Site Security Measures.** Small wireless facilities may incorporate reasonable and appropriate site security measures, such as locks and anti-climbing devices, to

prevent unauthorized access, theft or vandalism. The approval authority shall not approve any barbed wire, razor ribbon, electrified fences or any similarly dangerous security measures. All exterior surfaces on small wireless facilities shall be constructed from or coated with graffiti-resistant materials.

(5) **Signage; Advertisements.** All small wireless facilities must include signage not to exceed one (1) square feet in sign area that accurately identifies the site owner/operator, the owner/operator's site name or identification number and a toll-free number to the owner/operator's network operations center. Small wireless facilities may not bear any other signage or advertisements unless expressly approved by the City, required by law or recommended under FCC, Occupational Safety and Health Administration or other United States governmental agencies for compliance with RF emissions regulations.

(6) **Compliance with Health and Safety Regulations.** All small wireless facilities shall be designed, constructed, operated and maintained in compliance with all generally applicable health and safety regulations, which includes without limitation all applicable regulations for human exposure to RF emissions and compliance with the federal Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12101 *et seq.).*

(7) **Overall Height.** Small wireless facilities must comply with the minimum separation from electrical lines required by applicable safety regulations (such as CPUC General Order 95 and 128).

(b) **Small Wireless Facilities within Public Rights-of-Way.**

(1) **Antennas.**

(A) **Concealment.** All antennas and associated mounting equipment, hardware, cables or other connecters must be completely concealed within an opaque antenna shroud or radome. The antenna shroud or radome must be painted a flat, non-reflective color to match the underlying support structure.

(B) **Antenna Volume.** Each individual antenna may not exceed three cubic feet in volume.

(2) **Accessory Equipment.**

(A) **Installation Preferences.** All non-antenna accessory equipment shall be installed in accordance with the following preferences, ordered from most preferred to least preferred: (i) underground in any area in which the existing utilities are primarily located underground; (ii) on the pole or support structure; or (iii) integrated into the base of the pole or support structure. Applications that involve lesser-preferred installation locations may be approved so long as the applicant demonstrates that no more

preferred installation location would be technically feasible as supported by clear and convincing evidence in the written record.

(B) **Undergrounded Accessory Equipment.** All undergrounded accessory equipment must be installed in an environmentally controlled vault that is load-rated to meet the City's standards and specifications. Underground vaults located beneath a sidewalk must be constructed with a slip-resistant cover. Vents for airflow shall be flush-to-grade when placed within the sidewalk and may not exceed two feet above grade when placed off the sidewalk. Applicants shall not be permitted to install an underground vault in a location that would cause any existing tree to be materially damaged or displaced. The Noise restrictions apply to underground equipment as well, especially ventilation/cooling equipment.

(C) **Pole-Mounted Accessory Equipment.** All pole-mounted accessory equipment must be installed flush to the pole to minimize the overall visual profile. If any applicable health and safety regulations prohibit flush-mounted equipment, the maximum separation permitted between the accessory equipment and the pole shall be the minimum separation required by such regulations. All pole-mounted equipment and required or permitted signage must be placed and oriented away from adjacent sidewalks and structures. Pole-mounted equipment may be installed behind street, traffic or other signs to the extent that the installation complies with applicable public health and safety regulations. All cables, wires and other connectors must be routed through conduits within the pole, and all conduit attachments, cables, wires and other connectors must be concealed from public view. To the extent that cables, wires and other connectors cannot be routed through the pole, applicants shall route them through a single external conduit or shroud that has been finished to match the underlying support structure.

(D) **Base-Mounted Accessory Equipment.** All base-mounted accessory equipment must be installed within a shroud, enclosure or pedestal integrated into the base of the support structure. All cables, wires and other connectors routed between the antenna and base-mounted equipment must be concealed from public view.

(E) **Ground-Mounted Accessory Equipment.** The approval authority shall not approve any ground-mounted accessory equipment including, but not limited to, any utility or transmission equipment, pedestals, cabinets, panels or electric meters.

(F) **Accessory Equipment Volume.** All accessory equipment associated with a small wireless facility installed above ground level shall not cumulatively exceed: (i) nine (9) cubic feet in volume if installed in a residential district; or (ii) seventeen (17) cubic feet in volume if installed in a non-residential district. The volume calculation shall include any

shroud, cabinet or other concealment device used in connection with the non-antenna accessory equipment. The volume calculation shall not include any equipment or other improvements placed underground.

(3) **Streetlights.** Applicants that propose to install small wireless facilities on an existing streetlight must remove and replace the existing streetlight with one substantially similar to the design(s) for small wireless facilities on streetlights described in the City's Road Design and Construction Standards. To mitigate any material changes in the streetlighting patterns, the replacement pole must: (A) be located as close to the removed pole as possible; (B) be aligned with the other existing streetlights; and (C) include a luminaire at substantially the same height and distance from the pole as the luminaire on the removed pole. All antennas must be installed above the pole within a single, canister style shroud or radome that tapers to the pole.

(4) **Wood Utility Poles.** Applicants that propose to install small wireless facilities on an existing wood utility pole must install all antennas in a radome above the pole unless the applicant demonstrates that mounting the antennas above the pole would be technically infeasible as supported by clear and convincing evidence in the written record. Side-mounted antennas on a stand-off bracket or extension arm must be concealed within a shroud. All cables, wires and other connectors must be concealed within the radome and stand-off bracket. The maximum horizontal separation between the antenna and the pole shall be the minimum separation required by applicable health and safety regulations.

(5) **New, Non-Replacement Poles.** Applicants that propose to install a small wireless facility on a new, non-replacement pole must install a new streetlight substantially similar to the City's standards and specifications but designed to accommodate wireless antennas and accessory equipment located immediately adjacent to the proposed location. If there are no existing streetlights in the immediate vicinity, the applicant may install a metal or composite pole capable of concealing all the accessory equipment either within the pole or within an integrated enclosure located at the base of the pole. The pole diameter shall not exceed twelve (12) inches and any base enclosure diameter shall not exceed sixteen (16) inches. All antennas, whether on a new streetlight or other new pole, must be installed above the pole within a single, canister style shroud or radome that tapers to the pole.

(6) **Encroachments over Private Property.** Small wireless facilities may not encroach onto or over any private or other property outside the public rights-of-way without the property owner's express written consent.

(7) **Backup Power Sources.** Fossil-fuel based backup power sources shall not be permitted within the public rights-of-way; provided, however, that connectors or receptacles may be installed for temporary backup power generators used in an emergency declared by federal, state or local officials.

(8) **Obstructions; Public Safety and Circulation.** Small wireless facilities and any associated equipment or improvements shall not physically interfere with or impede access to any: (A) worker access to any aboveground or underground infrastructure for traffic control, streetlight or public transportation, including without limitation any curb control sign, parking meter, vehicular traffic sign or signal, pedestrian traffic sign or signal, barricade reflectors; (B) access to any public transportation vehicles, shelters, street furniture or other improvements at any public transportation stop; (C) worker access to above-ground or underground infrastructure owned or operated by any public or private utility agency; (D) fire hydrant or water valve; (E) access to any doors, gates, sidewalk doors, passage doors, stoops or other ingress and egress points to any building appurtenant to the rights-of-way; (F) access to any fire escape or (G) above ground improvements must be setback a minimum of 2 feet from existing or planned sidewalks, trails, curb faces or road surfaces.

(9) **Utility Connections.** All cables and connectors for telephone, data backhaul, primary electric and other similar utilities must be routed underground in conduits large enough to accommodate future collocated wireless facilities. Undergrounded cables and wires must transition directly into the pole base without any external doghouse. All cables, wires and connectors between the underground conduits and the antennas and other accessory equipment shall be routed through and concealed from view within: (A) internal risers or conduits if on a concrete, composite or similar pole; or (B) a cable shroud or conduit mounted as flush to the pole as possible if on a wood pole or other pole without internal cable space. The approval authority shall not approve new overhead utility lines or service drops merely because compliance with the undergrounding requirements would increase the project cost.

(10) **Spools and Coils.** To reduce clutter and deter vandalism, excess fiber optic or coaxial cables shall not be spooled, coiled or otherwise stored on the pole outside equipment cabinets or shrouds.

(11) **Electric Meters.** Small wireless facilities shall use flat-rate electric service or other method that obviates the need for a separate above-grade electric meter. If flat-rate service is not available, applicants may install a shrouded smart meter. The approval authority shall not approve a separate ground-mounted electric meter pedestal unless required by the utility company.

(12) **Street Trees.** To preserve existing landscaping in the public rights-of-way, all work performed in connection with small wireless facilities shall not cause any street trees to be trimmed, damaged or displaced. If any street trees are damaged or displaced, the applicant shall be responsible, at its sole cost and expense, to plant and maintain replacement trees at the site for the duration of the permit term.

(13) **Lines of Sight.** No wireless facility shall be located so as to obstruct pedestrian or vehicular lines-of-sight.

(c) **Small Wireless Facilities Outside of Public Rights-of-Way**

(1) **Setbacks.** Small wireless facilities on private property may not encroach into any applicable setback for structures in the subject zoning district.

(2) **Backup Power Sources.** The Approval Authority shall not approve any diesel generators or other similarly noisy or noxious generators in or within 250 feet from any residence; provided, however, the Approval Authority may approve sockets or other connections used for temporary backup generators.

(3) **Parking; Access.** Any equipment or improvements constructed or installed in connection with any small wireless facilities must not reduce any parking spaces below the minimum requirement for the subject property. Whenever feasible, small wireless facilities must use existing parking and access rather than construct new parking or access improvements. Any new parking or access improvements must be the minimum size necessary to reasonably accommodate the proposed use.

(4) **Freestanding Small Wireless Facilities.** All new poles or other freestanding structures that support small wireless facilities must be made from a metal or composite material capable of concealing all the accessory equipment, including cables, mounting brackets, radios, and utilities, either within the support structure or within an integrated enclosure located at the base of the support structure. All antennas must be installed above the pole in a single, canister-style shroud or radome. The support structure and all transmission equipment must be painted with flat/neutral colors that match the support structure. The pole diameter shall not exceed twelve (12) inches and any base enclosure diameter shall not exceed sixteen (16) inches.

(5) **Small Wireless Facilities on Existing Buildings.**

(A) All components of building-mounted wireless facilities must be completely concealed and architecturally integrated into the existing facade or rooftop features with no visible impacts from any publicly accessible areas. Examples include, but are not limited to, antennas and wiring concealed behind existing parapet walls or facades replaced with RF-transparent material and finished to mimic the replaced materials.

(B) If the applicant demonstrates with clear and convincing evidence that integration with existing building features is technically infeasible, the applicant may propose to conceal the wireless facility within a new architectural element designed to match or mimic the architectural details of the building including length, width, depth, shape, spacing, color, and texture.

(6) **Small Wireless Facilities on Existing Lattice Tower Utility Poles**

(A) Antennas must be flush-mounted to the side of the pole and designed to match the color and texture of the pole. If technologically infeasible to flush-mount an antenna, it may be mounted on an extension arm that protrudes as little as possible from the edge of the existing pole provided that the wires are concealed inside the extension arm. The extension arm shall match the color of the pole.

(B) Wiring must be concealed in conduit that is flush-mounted to the pole. The conduit and mounting hardware shall match the color of the pole.

(C) All accessory equipment must be placed underground unless undergrounding would be technically infeasible as supported by clear and convincing evidence in the written record. Above-ground accessory equipment mounted on a pole, if any, shall be enclosed in a cabinet that matches the color and finish of the structures on which they are mounted. Above-ground cabinets not mounted on a structure, if any, shall be dark green in color.

(D) No antenna or accessory equipment shall be attached to a utility line, cable or guy wire.

(7) **Small Wireless Facilities on Existing Wood Utility Poles.**

(A) All antennas must be installed within a cylindrical shroud (radome) above the top of the pole unless the applicant demonstrates that mounting antennas above the pole would be technically infeasible as supported by clear and convincing evidence in the written record.

(B) All antennas must be concealed within a shroud (radome) designed to match the color or the pole, except as described in (8) (E).

(C) No antenna or accessory equipment shall be attached to a utility line, cable or guy wire.

(D) If it is technically infeasible to mount an antenna above the pole it may be flush-mounted to the side of the pole. If it is technically infeasible to flush-mount the antenna to the side of the pole it may be installed at the top of a stand-off bracket/extension arm that protrudes as little as possible beyond the side of the pole. Antenna shrouds on stand-off brackets must be a medium gray color to blend in with the daytime sky.

(E) Wires must be concealed within the antenna shroud, extension bracket/extension arm and conduit that is flush-mounted to the pole. The conduit and mounting hardware shall match the color of the pole.

(F) All accessory equipment must be placed underground, unless undergrounding would be technically infeasible as supported by clear and convincing evidence in the written record. Above ground accessory equipment mounted on a pole, if any, shall be enclosed in a cabinet that matches the color and finish of the pole. Above-ground cabinets not mounted on a structure, if any, shall be dark green in color.

PUBLIC CORRESPONDENCE

Sarah Fasig

From: Lena Pu <lhpdesign@gmail.com>
Sent: Monday, October 7, 2019 1:02 PM
To: Sherri Metzker; Brett Lee; Gloria Partida; Will Arnold; Dan Carson; Lucas Frerichs; Herman Boschken; Cheryl Essex; Stephen Mikesell; David Robertson; Greg Rowe; Darryl Rutherford; Stephen Streeter; Emily Shandy; planningcommision@cityofdavis.org; CMOWeb; Kelly Stachowicz; Ashley Feeney; amirabile@cityofdavis.org; Clerk Web
Cc: Lena Pu; Paul McGavin
Subject: Request to Postpone October 9th Meeting Regarding WTF Ordinance with Planning Commission

October 7, 2019

To: Ms. Sherri Metzker <smetzker@cityofdavis.org>
City of Davis
Community Development
23 Russell Blvd.
Davis, CA 95616
530-757-5610 ext. 7239

To City of Davis Council Members:
Mayor Brett Lee <blee@cityofdavis.org>
Mayor Pro Tempore Gloria Partida <gpartida@cityofdavis.org>
Council Member Will Arnold <warnold@cityofdavis.org>
Council Member Dan Carson <dcarson@cityofdavis.org>
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To City of Davis Planning Commissioners:
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Cheryl Essex <cessex@cityofdavis.org>
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Stephen Streeter <sstreeter@cityofdavis.org>
Emily Shandy <eshandy@cityofdavis.org>
Planning Commission <PlanningCommission@cityofdavis.org>

cc: Michael Webb <cmoweb@cityofdavis.org>
Assistant City Manager Kelly Stachowicz <kstachowicz@cityofdavis.org>
Assistant City Manager, Ashley Feeney <AFeeney@cityofdavis.org>
City Clerk Zoe Mirabile <aMirabile@cityofdavis.org>
Clerk Web <clerkweb@cityofdavis.org>

Re: Postponing Agendized Item for Consideration by the City of Davis Planning Commission the Proposed Amendments to the Wireless Telecommunications Ordinance

[Request of City Clerk Mirabile: Please add this email to the City of Davis Public Record for the proposed Amendments to the Municipal Wireless Ordinance that the City of Davis Planning Commission will be considering during its next planned meeting on October 9, 2019. Thank you.]

Dear Planning Staff and Planning Commission,

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Other problems with the October 9th date are:

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"…..the central premise of Yom Kippur…..the fundamental basis of Jewish ethics is that human beings have moral agency. Sometimes we make good choices and sometimes we make bad choices; but it is our very ability to choose that makes us human. Yom Kippur

serves as a bold challenge reminding us that our mistakes belong to nobody but ourselves, and yet, if we so determine, we can rise up to our potential by choosing a new path forward."
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Respectfully and In Truth,

Lena Pu
Environmental Health Consultant
NACST.org

Sarah Fasig

From: Lena Pu <lhpdesign@gmail.com>
Sent: Tuesday, October 8, 2019 1:22 PM
To: Sherri Metzker; Brett Lee; Gloria Partida; Will Arnold; Dan Carson; Lucas Frerichs; Herman Boschken; Cheryl Essex; Stephen Mikesell; David Robertson; Greg Rowe; Darryl Rutherford; Stephen Streeter; Emily Shandy; planningcommision@cityofdavis.org; CMOWeb; Kelly Stachowicz; Ashley Feeney; amirabile@cityofdavis.org; Clerk Web
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Subject: Re: Request to Postpone October 9th Meeting Regarding WTF Ordinance with Planning Commission

October 8, 2019

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City of Davis
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23 Russell Blvd.
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Dear Council Member Lucas Frerichs and Assistant City Manager Ashley Feeney:

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I have left a voice message with Ashley Feeney this morning regarding this matter and related.

Lucas and/or Ashley, please call me for any questions and/or comments at: 530-231-5478. Thank you.

Respectfully and In Truth,
Lena Pu
Environmental Health Consultant
NACST.org

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October 7, 2019

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- Rabbi Abraham Joshua Heschel

Respectfully and In Truth,

Lena Pu
Environmental Health Consultant
NACST.org

Sarah Fasig

From: Lena Pu <lhpdesign@gmail.com>
Sent: Wednesday, October 9, 2019 12:06 AM
To: Ashley Feeney
Cc: Sherri Metzker; Brett Lee; Gloria Partida; Will Arnold; Dan Carson; Lucas Frerichs; Herman Boschken; Cheryl Essex; Stephen Mikesell; David Robertson; Greg Rowe; Darryl Rutherford; Stephen Streeter; Emily Shandy; planningcommision@cityofdavis.org; CMOWeb; Kelly Stachowicz; amirabile@cityofdavis.org; Clerk Web; Paul McGavin; Ellen Cohen; Martha Sperry; Nina Locker; Meredith Herman; jilltheg@gmail.com; 5GAwarenessNow; annalynndayton@yahoo.com; Eric Windheim; Pat Suyama; Larry Rollins; Jim Trask; Lauren Ayers; Carla A. Visha, M.D.
Subject: Re: Request to Postpone October 9th Meeting Regarding WTF Ordinance with Planning Commission

Follow Up Flag: Follow up
Flag Status: Completed

Dear Mr. Feeney,

Thank you and your staff and the Planning Commission so very much for your kind consideration and efforts in helping make, by postponing, this meeting happen for those in the public who desire full participation in the planning process. It is very much appreciated!

With Gratitude,
Lena Pu
Environmental Health Consultant
NACST.org

> On Oct 8, 2019, at 5:19 PM, Ashley Feeney <AFeeney@cityofdavis.org> wrote:
>
> Dear Ms. Pu,
>
> Staff has spoken to the Chair of the Planning Commission in regards to the concern you voiced that many of the individuals that have expressed an interest in this matter are not able to attend the Planning Commission meeting tomorrow night. Staff recommended and the Planning Commission Chair supports continuing this item to the next Planning Commission meeting which will occur on Wednesday, October 23, 2019 at 7:00 PM.
>
> Kind regards,
>
> Ashley Feeney
> Assistant City Manager
> (530) 757-5654

From: Lena Pu <lhpdesign@gmail.com>
Sent: Tuesday, October 8, 2019 1:22 PM
To: Sherri Metzker <SMetzker@cityofdavis.org>; Brett Lee <BLee@cityofdavis.org>; Gloria Partida <GPartida@cityofdavis.org>; Will Arnold <WArnold@cityofdavis.org>; Dan Carson <DCarson@cityofdavis.org>; Lucas Frerichs <lucasf@cityofdavis.org>; Herman Boschken <herman.boschken@sjsu.edu>; Cheryl Essex <cheryl.essex.davis@gmail.com>; Stephen Mikesell <stephenmikesell@outlook.com>; David Robertson <robertsondl@sbcglobal.net>; Greg Rowe <gregrowe50@comcast.net>; Darryl Rutherford <darryl.rutherford@gmail.com>; Stephen Streeter <stevestreeter@comcast.net>; Emily Shandy <emily.dt.shandy@gmail.com>; planningcommision@cityofdavis.org; CMOWeb <CMOWeb@cityofdavis.org>; Kelly Stachowicz <KStachowicz@cityofdavis.org>; Ashley Feeney <AFeeney@cityofdavis.org>; amirabile@cityofdavis.org; Clerk Web <ClerkWeb@cityofdavis.org>
Cc: Paul McGavin <paul@mystreetmychoice.com>; Ellen Cohen <ellenruthcohen@gmail.com>; Martha Sperry <m5sperry@sbcglobal.net>; Nina Locker <nlocker1969@yahoo.com>; Meredith Herman <merriherman@gmail.com>; jilltheg@gmail.com; 5GAwarenessNow <5gawarenessnow@gmail.com>;annalynndayton@yahoo.com; Eric Windheim <e.windheim@comcast.net>; Pat Suyama <patsuyama@gmail.com>; Larry Rollins <almandine09@gmail.com>; Jim Trask <jctrask1@gmail.com>; Lauren Ayers <lauren.yolocounty@gmail.com>; Carla A. Visha, M.D. <globalhealthnow@yahoo.com>; Lena Pu <lhpdesign@gmail.com>
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October 8, 2019

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Respectfully and In Truth,

Lena Pu
Environmental Health Consultant
NACST.org

Sarah Fasig

From:	Paul McGavin <paul.mcgavin@octowired.com>
Sent:	Thursday, October 3, 2019 3:54 PM
To:	Brett Lee; Sherri Metzker; Gloria Partida; Will Arnold; Dan Carson; Lucas Frerichs; Herman Boschken; Cheryl Essex; Stephen Mikesell; David Robertson; Greg Rowe; Darryl Rutherford; Stephen Streeter; Emily Shandy; Planning Commission
Cc:	CMOWeb; Kelly Stachowicz; Ashley Feeney; Zoe Mirabile; Clerk Web; Lena Pu
Subject:	Important Considerations for the City of Davis' 2019 Wireless Telecommunications Ordinance
Attachments:	Oath-of-Office-Councilmember.pdf

October 3, 2019

To: Ms. Sherri Metzker
City of Davis
Community Development
23 Russell Blvd.
Davis, CA 95616
530-757-5610 ext. 7239

To City of Davis Council Members:

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cc: Michael Webb
Assistant City Manager Kelly Stachowicz
Assistant City Manager, Ashley Feeney <AFeeney@cityofdavis.org>

City Clerk Zoe Mirabile
Clerk Web
Lena Pu

Re: Important Considerations for the City of Davis' 2019 Wireless Telecommunications Ordinance

[Request of City Clerk Mirabile: will you please add this email the City of Davis Public Record for the new Municipal Wireless Ordinance that the City of Davis will be considering at the Planning Commission on October 9, 2019 and the City Council possibly as early as October 22, 2019? Thank you for doing so.]

The City of Davis' Current Municipal Code for regulating the placement, construction and modification of personal Wireless Telecommunications Facilities (WTFs) at **Article 40.29 WIRELESS TELECOMMUNICATION FACILITIES** is based on **conditional use permit process and requirements** for installations in **the public rights-of-way** in **residential** and **school zones**. Please do not move away from conditional use permits for Wireless Telecommunications Facilities (WTFs) applications. The public deserves a role in this process -- the very reason why a team of us worked so hard to get a veto of CA Senate Bill 649 in 2017 to preserve local control:

- https://scientists4wiredtech.com/2017/10/gov-brown-be-smart-veto-sb649/
- https://scientists4wiredtech.com/2017/10/thank-you-gov-brown/

In the 2012 Davis Wireless Code, the City expresses its local values: before any WTFs are built, they first must go through a **public review process** to **balance** the business goals of the Wireless Carriers with **local needs to preserve** the residential character of Davis neighborhoods, **ensure** the residents' **quiet enjoyment of streets** and **protect** school-age children and their families in both residential and school zones from well-established "**negative health consequences**" and "**safety concerns**" -- which have been defined as **part of a City's aesthetics standards,** per the April 4, 2019 CA Supreme Court ruling in case Case No. S238001: T-Mobile vs. San Francisco:

In this game-changing case (https://scientists4wiredtech.com/2019-ca-supreme-court-decision-t-mobile-v-san-francisco/), the CA Supreme Court judges redefined incommode to include "negative health consequences" and "safety concerns".

> "travel is not the sole use of public roads; **other uses may be incommoded beyond the obstruction of travel**. (T-Mobile West, at pp. 355-356.) For example, lines or equipment might
>
> - generate noise,
> - **cause negative health consequences,** or
> - **create safety concerns**
>
> All these impacts could disturb public road use, or disturb its quiet enjoyment."

This State ruling is consistent with the **express** language of the 1996 Telecommunications Act (1996-Act) which sets up a cooperative Federalism between the Federal state and local governments when it states in **47 U.S. Code § 332(c):**

> *(7) Preservation of local zoning authority.*
>
> > *(A) General authority. — Except as provided in this paragraph,* ***nothing in this Act shall limit or affect the authority of a State or local government*** *or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.*
> >
> > *(B) Limitations. —*
> >
> > *(iv) No State or local government or instrumentality thereof may regulate the* ***placement, construction, and modification*** *of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.*

Any reader of the plain language of the 1996-Act and the 2019 CA Supreme Court decision can understand two important items:

1. There is a clear distinction, in the US Ninth Circuit between **environmental effects** and **negative health consequences** because -- as stated by the City of Davis' city attorney (see her email below) --- there are **no Ninth Circuit Court of Appeals rulings or US Supreme Court rulings** that interpret or redefine the term "environmental effects" to mean anything other than what is stated in this 1996-Act's plain language. The 1996-Act is Black letter law. No judge has the right to rewrite any statute passed by our US Senators and House Members and no Federal or State Agency can establish regulations that are inconsistent with the **legislative intent** of such Federal Black letter laws. The intent of the 1996-TCA authors can be established in a comparison of the penultimate and ultimate versions of the 1996-Act (see http://mystreetmychoice.com/press.html#tca) and in pages 207-209 of the "1996 Telecommunications Act Conference Report" (see https://scientists4wiredtech.com/legislation/1996-telecommunications-act-conference-report/) which proves that both FCC-proposed shot clocks for WTFs and the FCC's attempt to preempt local zoning authority over the public rights-of-way are **not consistent with the congressional intent** of the US Senators and House Members who voted through 1996-TCA.

   First, the following July 15, 2015 testimony **in the public record** in front of the CA Senate Governance and Finance Committee establishes that 2014 FCC regulations and a 2015 CA State Bill (AB.57) are not consistent with the congressional intent of the 1996-TCA :

Part 1: 7/15/15 Testimony Against CA Assembly Bill 57 (the Wireless Telecommunications Facilities Shot Clock Bill) --> https://youtu.be/W8Q3tifo-3o

Part 2: 7/15/15 Testimony Against CA Assembly Bill 57 (the Wireless Telecommunications Facilities Shot Clock Bill) --> https://youtu.be/vZ58zMLN4OA

7/15/15 Testimony:
Lena Pu and I will be introducing a number of exhibits today as evidence into the public record as part of our testimony. We have read and quantitatively evaluated many peer-reviewed, Supreme Court admissible, Daubert rule, scientific studies that conclude direct damages to humans (and other living organisms) from pulsed, data-modulated, Radio-frequency Electromagnetic Microwave Radiation exposures (RF-EMR, for short).

We will submit the primary scientific sources into the public record today as substantiating evidence of our statements. We are speaking to you today not about issues of mere concern, worry or risk. We are talking about established hazards from RF-EMR exposures. We both attest and affirm that the following statements are true, accurate and within our own personal knowledge.

The same logic that led the firefighters to flip-flop from opposition to support of this bill — meaning that they protected their own — needs to be applied to the public, as well. If they are going to protect themselves from these RF-EMR exposures, then the same thing applies to everyone who lives in a neighborhood. **These [wireless] antennas need to be far away from people in order to not inflict direct damages and harm to them, as we will see in Lena's testimony**.

I am a software engineer. I am an expert in measuring and mitigating exposures to man-made pulsed, Radio-frequency Electromagnetic Microwave Radiation. I hold a degree in Biology and Medicine from Brown University. **I can tell you with confidence that RF-EMR is a hazardous pollutant**. It is emitted 24/7 from mobile communications facilities, cell phone towers, building-mounted antennas and industrial strength wireless access points — equipment that is being deployed quite close — in fact much too close to very sensitive populations: children, [pregnant women, the elderly and Electromagnetic Sensitive, or EMS, Californians].

. . . **The current deployments and the FCC's RF-EMR exposure guideline violate the Congressional intent of the 1996 Telecommunications Act (1996-Act) and violate the 1990 Americans with Disabilities Act**. AB.57 is a deemed-approved power grab that attempts to preempt the powers of local governments -- powers that cannot be preempted, according to the 1996-TCA. Senators, you must recognize the Congressional intent of the TCA, as evidenced in the Congressional Record in reporting out HR.1555; the US Commerce Committee said the following:

> **Commerce Committee**: "The Committee believes that it is in the national interest that consistent requirements **with adequate safeguards of the public health and safety** be established, as soon as possible."

Language in AB.57 means that [wireless] co-locations would be threatening public health and safety. As I shared with the Senators' staffers last week, in this book titled "Captured Agency", the FCC is such an agency. It is controlled by the Industry it presumably regulates. **The FCC RF-EMR maximum public exposure guideline is meaningless and has been denounced by the many scientists listed in our exhibits. The guideline has never been protective of public health**.

. . . We need this committee to hear expert testimony from the scientists whose work has refuted the myth and fables . . . created by the Wireless industry's lawyers and lobbyists, which can no longer stand when substantial evidence to the contrary is entered into the public record. Lena, let's get started."

Second, the 1996-TCA conference report states:

- "The **conferees do not intend** that if a State or local government grants a permit [for a WTF] in a commercial district, it must also grant a permit for a competitor's 50-foot [WTF] tower in a residential district."
- "The **conferees also intend that** the phrase ''unreasonably discriminate among providers of functionally equivalent services'' will provide localities with the flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted **under generally applicable zoning requirements."**
- "If a request for placement of a personal wireless service facility involves a zoning variance or a public hearing or comment process, the time period for rendering a decision will be the usual period under such circumstances. **It is not the intent of this provision to give preferential treatment to the personal wireless service industr**y in the processing of requests, or to subject their requests to any but the generally applicable time frames for zoning decision"

2. There is a clear statement in the 1996-Act that the consideration of "environmental effects of radio frequency emissions" applies **only** to decisions about the "placement, construction, and modification" of WTFs and, therefore, the consideration of "environmental effects of radio frequency emissions" **does not apply** other local decisions that were **never** preempted from local authorities. Examples of duties which were not preempted from the City of Davis include the City's' duty to regulate the **operations** of WTFs, (maximum power output levels, hours of operations, noise, and reduction of levels of pulsed, data-modulated, Radio-frequency Electromagnetic Microwave Radiation (RF-EMR) emissions to levels that would not "disturb public road use, or disturb its quiet enjoyment" **and** do not result in "negative health

consequences" or "safety concerns".

When making these decisions, the City of Davis is not bound to allow RF-EMR emissions up to the FCC public exposure maximum. The City, can instead, do its own due diligence and choose a scientifically-based RF-EMR exposure guideline (from Bioinitiative.org or the International Institute of Building Biology and Ecology, for example) that can protect its residents from the adverse, medically-established "negative health consequences" that accompany long-term RF-EMR exposure **doses** (i.e. the **total amount** of RF-EMR exposures over time -- and **not just the rate** of RF-EMR exposure.

Few realize that the **FCC RF-EMR maximum public exposure guideline only considers a rate of exposure, not the total dose of RF-EMR exposure over time**, which means that the FCC RF-EMR guideline has been nonsense since it was first adopted in 1997. This is clearly explained in September 25, 2018 testimony before the San Francisco Board of Appeals (see the video on this page -- http://mystreetmychoice.com/sanfrancisco.html -- and listen to testimony at **0:03:30 to 0:06:30** and again from **0:24:05to 0:27:25.**

So, what are the duties of the City of Davis Council members when it completes its due diligence, before considering and voting on any new City of Davis Wireless Municipal code? Yesterday, I received from Sarah Fasig, Deputy City Clerk II in the City of Davis City Manager's Office the **Oath-of-Office-Councilmember.pdf** (attached), which states:

A. Oath or Affirmation of Allegiance for Public Officers

. . . of the State of California, County of Yolo, City of Davis

> "I, [Name], do solemnly swear (or affirm) that I will **support and defend** the Constitution of the United States and the **Constitution of the State of California** against all enemies, foreign and domestic, and that I will **bear true faith and allegiance to** the Constitution of the United States and the **Constitution of the State of California**; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and **faithfully discharge the duties upon which I am about to enter**."

I presume that signed copies of this oath are in the public record of the City of Davis. **We request that the City of Davis Council Members signed oaths (from Brett Lee, Gloria Partida, Will Arnold, Dan Carson, and Lucas Frerichs) be added to the public record** for the City of Davis Public Record for the new Municipal Wireless Ordinance that the City of Davis will be considering at the Planning Commission on October 9, 2019 and the City Council possibly as early as October 22, 2019.

These City Council members' oaths to support and defend the Constitution are important because Article I, Section 1 of the Constitution of the State of California states:

B. Link to **Constitution of the State of California**

ARTICLE I DECLARATION OF RIGHTS

SECTION 1. "All people are by nature free and independent and have **inalienable rights**. Among these are enjoying and **defending life** and liberty, acquiring, possessing, and **protecting property**, and pursuing and **obtaining safety**, happiness, **and privacy**."

Davis residents' privacy and safety are being attacked by the envisioned densified 4G and 5G Close Proximity Microwave Radiation Antennas (CPMRAs) proposed for Davis' residential and school zones. Despite what you might have been told by various city attorneys, including Inder Kahlsa from Richards Watson Gershon, **the Davis City Council Members' hands are not tied**. The City of Davis retains its dual-regulatory authority, under the notion of Cooperative Federalism that is laid out in the 1996-TCA.

The City of Davis has a duty to regulate the operations of Wireless Telecommunications equipment to protect Davis residents' inalienable rights to privacy and safety. This will require more robust zoning regulations, setbacks (both horizontal and vertical setbacks) from not only fire facilities (as required by CA AB.57), but also police facilities, elder care facilities, schools, parks and residences

- http://scientists4wiredtech.com/legislation/ca-ab-57-august-18-2015/
- https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB57

SECTION 1. Section 65964.1 is added to the Government Code, to read:

65964.1.
(f) Due to the unique duties and infrastructure requirements for the swift and effective deployment of firefighters, this section does not apply to a collocation or siting application for a wireless telecommunications facility where the project is proposed for placement on fire department facilities.

The firefighter extension was included in the vetoed SB.649 bill, as well. If CA is protecting the firefighters, it needs to protect the public, as well -- just as I said on 7/15/15 in Sacramento --> https://youtu.be/W8Q3tifo-3o

Protecting Davis residents needn't be difficult. Petaluma did it in July, 2018 by adding about 210 additional words. to its Wireless Ordinance

C. Petaluma Municipal Wireless Code

See the current Petaluma, CA Municipal Wireless code --> https://scientists4wiredtech.com/petaluma/petaluma-municipal-code/

The following two sections are the **only** ones updated in 2018 (search for "2018" on the web page at the link above)

14.44.020 Definitions.

9. "Telecommunications facility – small cell" means a telecommunications facility that is pole mounted to existing public utility infrastructure.

(Ord. 2662 NCS § 2 (part), 2018; Ord. NCS 2029 (part), 1996.)

14.44.095 Small cell facilities — Basic requirements.

Small cell facilities as defined in Section 14.44.020 may be installed, erected, maintained and/or operated in any commercial or industrial zoning district where such antennas are permitted under this title, upon the issuance of a minor conditional use permit, so long as all the following conditions are met:

A. The small cell antenna must connect to an already existing utility pole that can support its weight.

B. All new wires needed to service the small cell must be installed within the width of the existing utility pole so as to not exceed the diameter and height of the existing utility pole.

C. All ground-mounted equipment not installed inside the pole must be undergrounded, flush to the ground, within three feet of the utility pole.

D. Each small cell must be at least one thousand five hundred feet away from the nearest small cell facility.

E. Aside from the transmitter/antenna itself, no additional equipment may be visible.

F. Each small cell must be at least five hundred feet away from any existing or approved residence.

G. An encroachment permit must be obtained for any work in the public right-of-way.

(Ord. 2662 NCS § 2 (part), 2018)

The rest of this email quotes my 10/1/19 email to Inder Kahlsa, the Davis City Attorney from Richards Watson Gershon, her 10/2/18 response and a few concluding remarks.

>>> Paul McGavin wrote to Inder Kahlsa, City Attorney from Richards Watson Gershon and Sherri Metzker, City of Davis Principal Planner on 10/1/2019 4:56 PM:

Hi, Inder.

Thank you for taking my call today. I understand you are busy. I will look forward to your reply.

As you can see on this page: http://mystreetmychoice.com/davis.html

. . . in the video at the Davis City Council from 9/24/18**,** this is what you said:

> **At 2:36:50** Inder Kahlsa: "The Federal Government has expressly stated that we [the City of Davis] cannot adopt regulations to mitigate the impact of environmental impacts or health impacts of telecommunications facilities -- full stop. We are completely prohibited from taking health impacts into account in adopting our local regulations. And that has been the case since 1996."

This, however is actually what the 1996 TCA **expressly** states (http://mystreetmychoice.com/press.html#tca):

> (7) **Preservation of local zoning authority.** —
>
> **(A) General authority.** — Except as provided in this paragraph, **nothing in this Act shall limit or affect the authority of a State or local government** or instrumentality thereof over decisions regarding the **placement, construction, and modification** of personal wireless service facilities.
>
> **(B) Limitations**. —
>
> (i) The **regulation of the placement, construction, and modification** of personal wireless service facilities by any State or local government or instrumentality thereof —
>
> (I) shall not unreasonably discriminate among providers of functionally equivalent services; and
>
> (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.
>
> (ii) A State or local government or instrumentality thereof shall act on any request for authorization to **place, construct, or modify** personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.
>
> (iii) Any decision by a State or local government or instrumentality thereof to deny a request to **place, construct, or modify** personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.
>
> (iv) No State or local government or instrumentality thereof may regulate the **placement, construction, and modification** of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

. . . so you must have meant that Judge **TBD** in **TBD** case in **TBD** in State **TBD** or in Federal Circuit **TBD** Court has interpreted "environmental effects" to mean "environmental and human health

effects".

We just need to know the **TBDs**, above. I don't believe any such determination has been made at the US Supreme Court, but, if it has, we would love to see that reference, as well.

I also invite you to read the following briefs and court decisions:

A. Brief for Case 19-70123: Intervenors THE CITY OF NEW YORK and NATOA, et al. v FCC
https://scientists4wiredtech.com/ny-and-natoa-v-fcc/

Read the full brief here.

The brief argues for the Ninth Circuit judges to vacate the following 2018 FCC Orders:

- **FCC 18-111 — the "Moratorium Order" —** Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, Third Report and Order and Declaratory Ruling FCC 18-111, WC Docket No. 17-84, WT Docket No. 17-79 (rel. Aug. 3, 2018).
- **FCC 18-133 — the "Streamline Small Cell Deployment Order" —** Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Declaratory Ruling and Third Report and Order, FCC 18-133, WT Docket No. 17-79, WC Docket No. 17-84 (rel. Sept. 27, 2018).

"The FCC attempts to expand its preemptive authority under the Act by lowering the threshold for what acts of a state or local government constitute an effective prohibition. **Intervenors agree with local-government petitioners that the FCC's new reading of the Act is irrational**. What's more, the mere fact that the FCC must strain so hard to find a hook on which to hang its authority to issue the Orders is itself powerful evidence that the Act contains no clear congressional authorization for them."

Sections 253(c) and 332(c)(7)(A) in the Act were included by Congress for the specific purpose of preserving state and local rights. They are precisely the kind of statutory limitations that an unaccountable federal agency ought not to be able to displace without a clear statement from Congress."

B. April 4, 2019 CA Supreme Court decision
https://scientists4wiredtech.com/2019-ca-supreme-court-decision-t-mobile-v-san-francisco/

Read these excerpts from the 2019 CA Supreme Court Decision:

p. 8-9

. . . **the City has inherent local police power to determine the appropriate uses of land within its jurisdiction**. That power includes the authority to establish aesthetic conditions for land use . . . We also disagree with plaintiffs' contention that section

7901's incommode clause limits their right to construct [telephone] lines only if the installed lines and equipment would obstruct the path of travel. Contrary to plaintiffs' argument, the incommode clause need not be read so narrowly.

As the Court of Appeal noted, the word " 'incommode' " means " 'to give inconvenience or distress to: disturb.' " (T-Mobile West, supra, 3 Cal.App.5th at p. 351, citing Merriam-Webster Online Dict., available at http://www.merriam-webster.com/dictionary/incommode [as of April 3, 2019].)8 The Court of Appeal also quoted the definition of "incommode" from the 1828 version of Webster's Dictionary. Under that definition, "incommode" means " '**to give inconvenience to; to give trouble to; to disturb or molest in the quiet enjoyment of something, or in the facility of acquisition**.' " (T-Mobile West, supra, 3 Cal.App.5th at p. 351, citing Webster's Dict. 1828—online ed., available at [as of April 3, 2019].)

For our purposes, it is sufficient to state that the meaning of incommode has not changed meaningfully since section 7901's enactment. Obstructing the path of travel is one way that telephone lines could disturb or give inconvenience to public road use. **But travel is not the sole use of public roads; other uses may be incommoded beyond the obstruction of travel**. (T-Mobile West, at pp. 355-356.) For example, lines or equipment might

- generate **noise**,
- **cause negative health consequences**, or
- create **safety** concerns.

All these impacts could disturb public road use, or disturb its quiet enjoyment.

C. 2019: Federal Court Overturns FCC Order Bypassing Environmental Review For 4G/5G Wireless Small Cell Densification

See https://scientists4wiredtech.com/2019/08/federal-court-overturns-fcc-order-bypassing-environmental-review-for-4g-5g-wireless-small-cell-densification/

The court vacated the portions of the order that exempted small cells from NEPA and NHPA reviews, delivering a setback to the FCC's efforts to speed up small cell deployment of densified 4G and 5G networks. Cases challenging another recent FCC order that limits local government control over small wireless facilities are currently pending before the U.S. Court of Appeals for the Ninth Circuit.

In an appeal brought by the Natural Resources Defense Council and several Native American Tribes, the Court found that the FCC had failed to adequately address possible harms of its deregulatory efforts and the benefits of environmental and historic preservation review. In particular, the Court observed that the FCC had failed to address the cumulative harms that may result from "densification":

- the crowding of multiple cell towers in a limited area;
- the potential harms from co-location of multiple cell antennas on a pole simultaneously transmitting voice and data on multiple frequency bands (potentially from 600 MHz to 90,000 MHz)
- the FCC quickly and prematurely deploying this densification of Wireless Telecommunications Facilities (WTFs) scheme before the FCC had completed its ongoing investigation into the potential health effects of pulsed, data-modulated, Radio-frequency Electromagnetic Microwave Radiation (RF-EMR) from antennas in such close proximity to where people live, work, study, play, sleep and heal (antennas installed as close as 15 to 50 feet from homes and only 25 to 50 feet off the ground).

  The Court found that the FCC's Order was arbitrary and capricious and, therefore, unlawful. Consequently, the Court vacated the FCC's Order 18-30, thereby reinstating prior regulations requiring environmental and historic preservation reviews of densified 4G and 5G cell tower deployments.

D. I hope the Davis ordinance is structured something like the following:

Ask the City of Davis to vote through **two** versions of its Municipal Wireless Code at the same time:

- **Version A** -- whatever a City thinks is *consistent enough* with the Aug and Sept 2018 FCC Orders (18-111 and 18-133) so they won't get sued by the Wireless carriers, recognizing that the FCC's "effective prohibition" attempt is considered irrational and has little chance of not getting vacated by the Ninth Circuit judges. The current 2005 Ninth Circuit Decision (https://scientists4wiredtech.com/metro-pcs-vs-san-francisco/) is the rule of law in CA: **significant gap** in [Carrier-specific] coverage [not specific to any frequency] and the **least intrusive means** to address the alleged gap. That means if the Carrier has coverage in **any** frequency, then there is **no preemption of local law** to deploy cell towers to transmit other additional frequencies. So, if 700 MHz coverage is present, then there is no gap. There are no rulings that say a Carrier has a right to close a gap in each and every desired frequency.

- **Version B** -- whatever a City would actually like for their Municipal Wireless Code (reflecting the City's local values) **if** the Aug and Sept 2018 FCC Orders were vacated, which we expect to happen by March, 2020.

Then the City could vote through **both versions** with a clause that says if the Ninth Circuit judges vacate FCC Orders 18-111 and 18-133, then Version B is in force and it applies retroactively to any applications received after the date of the vote that accepts both Versions A and B, above

>>> Inder Khalsa wrote to Paul McGavin on 10/2/2019 7:04 PM: (note emphases below are McGavin's)

> Paul, I'm sorry I was short with you on the phone yesterday, I am working under a number of pressing deadlines right now. You asked for legal citations supporting the

conclusion that "environmental effects" include "health impacts" for purposes of the rule that cities cannot regulate wireless facilities on the basis of the environmental effects of RF emissions. Cf. 47 USC, Section 332(c)(7)(B)(iv).

The best statement of the rule comes from T-Mobile Ne. LLC v. Town of Ramapo, 701 F. Supp. 2d 446, 460 (S.D.N.Y. 2009), where the court said, "**Environmental effects within the meaning of the provision include health concerns about the biological effects of RF radiation**." (**Emphasis** added.)

I did **not** find any Ninth Circuit or California cases similarly on point, but there are numerous cases from other circuits in which local decisions based on health impacts were found to violate the rule regarding environmental effects; including Cellular Tel. Co. v. Town of Oyster Bay, 166 F.3d 490, 495 (2d Cir. 1999), which stated:

"The statute uses the term 'environmental effects' to describe an impermissible basis for decision. Although one court has questioned whether 'environmental effects' and 'health concerns' are the same, see Iowa Wireless Servs., L.P. v. City of Moline, Illinois, 29 F.Supp.2d 915, 924 (C.D.Ill.1998), **we believe that the terms are interchangeable** and will use 'health concerns' to refer to the constituent testimony on the connection between [radio frequency emmissions] and cancer and other health problems." (**Emphasis** added.)

Although there are **no cases in California or the Ninth circuit** that are directly on point here, any attempt to regulate wireless facilities based on "health impacts" that attempts to argue that health impacts are different than environmental impacts would be sure to be challenged by the Telecom providers, with the City bearing the costs of litigation, likely to the 9th circuit and potentially beyond, with what appears to be a very low chance of success given the clear guidance in other circuits.

I remember telling the Council that environmental impacts includes health impacts. If I said "expressly," that was a misstatement on my part, but the courts have concluded that environmental and health are synonymous for purposes of Section 332(c).

We are working to get the proposed Telecommunications Ordinance out to Planning Commission and the public ASAP.

Inder Khalsa
Attorney

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According to this map:
https://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf

> **Ramapo, New Jersey** is in the US Court of Appeals in the **Second Circuit**: The case (https://www.casemine.com/judgement/us/5914b144add7b049347582b1#p461) was filed in the US District Court, Southern Division on 9/26/2009, **so a lower court not in the Ninth Circuit.**
>
> **Oyster Bay, New York** is in the US Court of Appeals in the **Second Circuit**. The case (https://www.casemine.com/judgement/us/5914bb4dadd7b04934795eb8#p494) was filed in the United States Court of Appeals, Second Circuit on 1/29/99, **also not in the Ninth Circuit and not taken to the US Supreme Court**.
>
> **Iowa** is in the US Court of Appeals in the **Eighth Circuit**. The case (https://www.casemine.com/judgement/us/5914bb70add7b04934796aa3#p924) was filed in US District Court, Central Division on 11/10/1998, so **another lower court -- not in the Ninth Circuit**.
>
> We are in the **Ninth Circuit.** We all must open our eyes and recognize that the "legal precedent" for concluding that "environmental effects" including "negative health consequences" is very thin and **not applicable** to the Ninth Circuit. Our Ninth Circuit judges have an opportunity to settle this obvious issue **that environmental effects do not equal health effects in** the Ninth Circuit, considering scientific data of harms from RF-EMR exposures through 2019. We are allowing "legally fashionable" opinions of some attorneys and judges from lower courts -- not in the Ninth Circuit -- to affect crucially important life-and-death decisions made by the City Council, due to insufficient due diligence. This is wrong.

Conclusion: This very threat/warning that has been used (by the wireless carriers/city attorneys) for 23 years to bully cities into submission: "any attempt to regulate wireless facilities based on "health impacts" that attempts to argue that health impacts are different than environmental impacts would be sure to be challenged by the Telecom providers, with the City bearing the costs of litigation, likely to the 9th circuit and potentially beyond,"

Don't buy this erroneous myth/fable. It is time for the Davis City Council members to say enough-is-enough. The City has the authority to allow additional 4G and/or 5G service into Davis **if there is a significant gap in coverage** as established by substantial, verifiable hard data placed in

the public record that independent RF-EMR professionals and the public can inspect and analyze. Cities should not just rely on proprietary wireless carrier projections of Wireless Carriers' wishes. That is not sufficient due diligence. This analysis does **not** extend to carriers wishes to sell wireless video, gaming or internet services in Davis, which are information services, not telecommunications services. There is no preemption of local authority for information services. Such information services are better provided by Fiber Optic to the Premises (FTTP), which delivers **uncapped** data at higher speeds, with lower latency and much more energy-efficiently than wireless service and with no hazardous RF-EMR pollution.

Balancing of needs can only be established via a **Conditional Use Permit and public notification process, like Davis has in its current wireless ordinance from 2012**. There cannot be just a ministerial process for approving WTFs near homes, schools, parks and medical facilities as the Wireless Industry (and your City Attorney) desires. Please rethink this position.

Davis can protect its residents and preserve the quiet enjoyment of its streets -- which is an aesthetics consideration -- by setting and policing a sane maximum power output cap for each WTF -- considering the distance-power trade off of maximum power output vs. vertical and horizontal offsets for wireless antennas. This requires careful analysis and forward-looking policies. Do not rush this. RF-EMR exposure analysis expertise can be paid for by the Wireless Carrier.

An important consideration is to **not** actually prohibit telecommunications service (the ability to make 911 calls, other calls and texts). There is preemption of local authority in the Ninth Circuit if **there is a significant gap** in coverage. Then, in closing a proven gap in telecommunications coverage, the Wireless Carrier must use the **least intrusive means** to do so, which is often best addressed by adding additional antennas to existing or new macros towers -- a strategy which is **much less intrusive than installing** Close Proximity Microwave Radiation Antenna (CPMRA) **much too low to the ground** on Wireless Telecommunications Facilities (WTFs) that are a mere **15 to 50 feet from homes and other sensitive areas**.

The FCC cannot wipe out CA Case law (2005 Metro-PCS vs. San Francisco --> https://scientists4wiredtech.com/metro-pcs-vs-san-francisco/) by fiat. It also lacks the authority to regulate the public rights-of-way. That is why the FCC is destined to lose in the Ninth Circuit challenge to FCC Orders 18-111 and 18-133. Establishing Davis' Municipal code to be consistent with FCC 18-111 and 18-133 would be both dangerous and foolish.

If Davis wishes to be a sustainable, green city, it should encourage Big Data to flow in Davis via FTTP instead of filling Davis with a hazardous pollutant (RF-EMR exposures). Feel free to call if you have any questions.

Regards,

Paul McGavin
work: 707-559-9536
text: 707-939-5549
skype: paulmcgavin

Oath or Affirmation of Allegiance for Public Officers

State of California
County of Yolo
City of Davis }

I, Name, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic, and that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter.

Subscribed and sworn to before me this 2nd day of October, 2019.

_____

Administering Oath:
Name

_____

Elected City Councilmember:
Name

Sarah Fasig

From:	Paul McGavin <paul.mcgavin@octowired.com>
Sent:	Saturday, October 5, 2019 10:25 AM
To:	Sherri Metzker; Brett Lee; Gloria Partida; Will Arnold; Dan Carson; Lucas Frerichs; Herman Boschken; Cheryl Essex; Stephen Mikesell; David Robertson; Greg Rowe; Darryl Rutherford; Stephen Streeter; Emily Shandy; Planning Commission
Cc:	CMOWeb; Kelly Stachowicz; Ashley Feeney; Zoe Mirabile; Clerk Web; Lena Pu
Subject:	One Important Question and 10/4/19 Article re: How the Telecom Companies Are Losing the Battle to Impose Densified 4G/5G Wireless Radiation Against the Will of the People

October 5, 2019

To: Ms. Sherri Metzker
City of Davis
Community Development
23 Russell Blvd.
Davis, CA 95616
530-757-5610 ext. 7239

To City of Davis Council Members:

Mayor Brett Lee
Mayor Pro Tempore Gloria Partida
Council Member Will Arnold
Council Member Dan Carson
Council Member Lucas Frerichs

To City of Davis Planning Commissioners:

Herman Boschken
Cheryl Essex
Stephen Mikesell
David Robertson
Greg Rowe
Rutherford
Stephen Streeter
Emily Shandy
Planning Commission

cc: Michael Webb
Assistant City Manager Kelly Stachowicz

Assistant City Manager, Ashley Feeney <afeeney@cityofdavis.org>
City Clerk Zoe Mirabile
Clerk Web
Lena Pu

Dear Ms. Metzker, City of Davis Planning Commissioners and City Council Members,

[Request of City Clerk Mirabile: will you please add this email and its attachment(s) the City of Davis Public Record for the proposed Municipal Wireless Ordinance that the City of Davis will be considering at the Planning Commission on October 9, 2019 and at the City Council possibly as early as October 22, 2019? Thank you for doing so.]

Please read the important article, below, that was **released the very day** that the City Planning staff released it's Staff Report recommending approval of the City's weak Wireless Ordinance. The Staff report is easily accessible to all **reading the cityofdavis.org web site** directly from City of Davis City Agendas page at the links listed at the bottom of the agenda--> https://www.cityofdavis.org/city-hall/commissions-and-committees/planning-commission/agendas

PDF Documents:

Planning Commission meeting agenda for October 9, 2019

- 05A PC Minutes 09 11 19
- 06A SR 628 C Street
- 06B Zoning Ordinance Amendment (this is the link leading to the Staff Report -- a link which resolves to http://documents.cityofdavis.org/Media/Default/Documents/PDF/CityCouncil/Planning-Commission/Agendas/20191009/06B-Zoning-Ordinance-Amendment.pdf
- 07A Subdivision Committee Action
- 07C Upcoming Meeting Items

What is **missing** from this Staff report is a link to or a copy of my October 3, 2019 email (and all other relevant public correspondence) that was sent to Ms. Metzker (and to City of Davis Planning Commissioners and City Council Members). This public correspondene contains substantial written evidence relevant to the proposed City Wireless Ordinance -- correspondence that has been expressly entered into the City of Davis public record. The correspondence is substantial written evidence that contradicts the Planning Department's recommendation, so leaving it out of the staff report (or without any link to it on the agenda) may **evidence a bias in filtering out information** from what the City of Davis Planning Commissioners and City Council Members and the public might read to prepare for the October 9, 2019 Planning Commission meeting.

The issue is one of **equal accessibility** to all information and viewpoints expressed in the City of

Davis' public record during this allegedly democratic process of reviewing the proposed City of Davis Wireless Code .

- The City of **Palo Alto, CA** addresses this important democratic need by **linking to all public correspondence** directly on the Agenda that is **available to all who visit City of Palo Alto web site to** research any particular agendized item: See the following examples here: -->
    - **Agenda** --> https://www.cityofpaloalto.org/civicax/filebank/blobdload.aspx?t=39129.15&BlobID=71254 which links to the public correspondence
    - **Public Correspondence**--> https://www.cityofpaloalto.org/civicax/filebank/blobdload.aspx?t=39290.03&BlobID=71256 and https://www.cityofpaloalto.org/civicax/filebank/blobdload.aspx?t=58534.82&BlobID=71327 (search for "wireless" in these pdfs)

- The City of Sonoma, CA does the same thing:
    - **Agenda** --> https://sonomacity.civicweb.net/filepro/document/25691/Planning%20Commission%20-%2012%20Sep%202019%20Agenda.pdf?widget=true
    - **Public Correspondence** -->https://sonomacity.civicweb.net/filepro/documents/24238

Question: Will the City of Davis **please ensure equal access** to all information in the public record regarding the proposed City of Davis Wireless Ordinance (the City's Staff Report recommending approval **and** the public correspondence suggesting significant changes to the Ordinance) -- by **adding a link to the agenda web page** to the public correspondence, similar to what Palo Alto and Sonoma already do? Not immediately addressing this current problem in the City of Davis' democratic process would mean that the City of Davis would be willfully participating in a **due process obstruction**, and therefore the Wireless Ordinance item must be removed from the 10/9/19 Planning Commission agenda --- until this problem is corrected.

I look forward to your prompt response on this important issue.

Here is the Oct 4, 2019 article . . .

How the Telecom Companies Are Losing the Battle to Impose Densified 4G/5G Wireless Radiation Against the Will of the People

By Claire Edwards, Oct 4, 2019 | Original Global Research article here.

The telecommunications companies and the mainstream media would have you believe that the race to roll out Densified 43G + 5G is unstoppable. That you are nothing and no one in the face of a lethal multi-trillion-dollar agenda imposed by some of the most powerful entities on the planet.

They thought that if they called their new, alleged "communications technology", adapted from the military Active Denial Technology, "5G" or fifth generation, the public would just assume that it was more of the same as 4G, 3G or 2G. And if they could characterize the roll-out as a race, the public would not have enough time to find out what a killer technology 5G actually has been and will continue to be. How wrong they were! Not only has the public found out, but now they know how lethal previous generations of wireless technology – to be used concurrently with 5G – have been and continue to be, as well.

See the evidence. below. from a number of different countries that show that the pushback against densified 4G + 5G Wireless Telecommunications Facilities (WTFs) in neighborhoods is huge and growing. The Telecom firms are losing the propaganda war, despite their control of the mainstream media

- Not a whisper of the dangers of Densified 4G + 5G from mainsteam news outlets and web sites
- Social media and Youtube, have been desperately deleting millions of accounts to silence the naysayers.

As this article went to press, support arrived from an unlikely source. In an impassioned speech before the United Nations General Assembly on 24 September 2019, UK **Prime Minister Boris Johnson** stated that digital authoritarianism is not the stuff of dystopian fantasy but of an emerging reality. He described the Internet of Things, "smart" cities and AI as a giant, dark thundercloud lowering ever more oppressively over the human race, a gathering force reshaping the future of humanity over which the human race has no control and from which, in future, there may be nowhere to hide.

He asked if algorithms could be trusted with our lives and hopes and whether machines should be allowed to doom us to a cold and heartless future in an Orwellian world designed for censorship, repression and control. He recalled the Universal Declaration of Human Rights and endorsed its ideals of upholding freedom of opinion and expression, the privacy of home and correspondence, and the right to seek and impart information and ideas.

He exhorted the academic committees, company boards and industry standards groups who are writing the rulebooks of the future, making ethical judgments, and choosing what will or will not be rendered possible to find the right balance . . .

- between freedom and control,
- between innovation and regulation,
- between private enterprise and government oversight.

He insisted that the ethical judgments inherent in the design of new technology must be made transparent to all and that joint efforts must be made to agree a common set of global principles to shape the norms and standards that will guide the development of emerging technology.

What follows is a citizen journalist's list of the actions taken to halt Densifed 4G + 5G installations. The table, below, also lists reports and complaints that have discredited this Machiavellian attempt to foist a disastrous technology on the world in 2019. It is not an exhaustive list and I extend my apologies to all those whose efforts I may have overlooked here. Much gratitude to all who have contributed to making this pushback so successful.

We cannot afford to be complacent and, in particular, we must work to stop the use of the Earth orbits and the stratosphere to beam 4G and 5G down to Earth, for this puts the ionosphere and the entire planet at risk. We must also work to ensure that the use of street lights with blue light for this anti-life agenda is rapidly reversed.

The effort to stop Densified 4G + 5G is still gathering momentum and we must continue to work together and tirelessly to protect all life on Earth and the planet itself until this demented plan is relegated to the history books as the most Mephistophelian scheme in the history of humankind.

1	**USA** 24 June 18	Author Naomi Wolf reports EMF reactions, cloud anomalies and their correlation with irritable and stressed behavior in New York.
2	**Taiwan** 28 Dec 18	Taiwan's five wireless carriers say that they will not rush to roll out 5G services in the absence of a profitable business model to sell the revolutionary technology, in spite of all the use cases that have been suggested.
3	**Switzerland** 2018	The government appoints a group of experts to probe the risks involved with introducing 5G, whose findings should be published by the end of 2019. The Swiss Federation of Doctors also urges caution, maintaining that "as long as there is no scientific proof that raising the radiation limits will not impact health, one must refrain from raising them."
4	**Austria** 4 January 19	After 5G is officially switched on in Vienna in November 2018, former UN staff member reports Vienna's first EMF injuries.
5	**Europe** 13 January	Journalist group Investigate Europe publishes "The ICNIRP Cartel: Who's Who in the EMF Research World, an interactive graphic", exposing conflicts of interest among ICNIRP members.
6	**USA** 14 January	Congresswomen Eshoo and Speier introduce BillHR530 to block FCC cell tower pre-emption and preserve local government control and invalidate the Federal Communications Commission's (FCC) 26 September 2018 ruling to accelerate the deployment of 5G small cells throughout the US.
7	**USA** 14 January	*Russia Today (RT) America* airs the first of 7 reports on the dangers of 5G: 5G Wireless: A Dangerous 'Experiment on Humanity'. "Is there a catch?", asks the presenter. "Just a small one", comes the reply, "It just might kill you". The segment is viewed 1.8 million times.
8	**European Commission** 14 January	The Scientific Committee on Health, Environmental and Emerging Risks (SCHEER) rates the potential effects on wildlife of increases in electromagnetic radiation from 5G a maximum 3 in terms of scale, urgency and interactions with other ecosystems and species, stating that "The lack of clear evidence to inform the development of exposure guidelines to 5G technology leaves open the possibility of unintended biological consequences".

9	**Italy** 16 January	The Lazio regional administrative court decrees that the ministries of environment, health and education have six months to launch information campaigns on the risks associated with the use of mobile phones.
10	**USA** 25 January	The Illinois Supreme Court rules that a woman can sue Six Flags Great America for fingerprinting her child without telling her how the data would be used in violation of the state's biometric law. "This is no mere 'technicality,'" Chief Justice Lloyd Karmeier writes in the opinion. "The injury is real and significant."
11	**Italy** 30 January	An Italian Court in the city of Monza rules the acoustic neuroma brain tumour of an airport employee to be an occupational disease caused by exposure to the radiation from a cell phone he used for over 10 years for his work.
12	**USA** 6 February	US Senator Blumenthal definitively establishes that no safety studies have been done on 5G.
13	**USA** February	At least 21 US cities/regions pass ordinances restricting "small cell" installation, and many are charging "recertification fees" to make it unprofitable for the wireless industry.
14	**Switzerland** 18 February	Study: Radiation From Smartphones May Impair Memory In Teens. A research team at the Swiss Tropical and Public Health Institute says that radio frequency electromagnetic fields (RF-EMF) may negatively affect an adolescent's brain from cellphone exposure, causing potentially harmful effects on his or her memory performance. The authors say having the device close to one's head lead to the greatest amount of radiation exposure.
15	**UN** 22 February	The Planetary Association for Clean Energy (PACE) submits a statement to the UN revealing that allowable international "radiation limits will have to be increased by 30 to 40%" in order to make 5G deployment technologically feasible and calls 5G "an experiment on humanity that constitutes cruel, inhuman and degrading treatment" in violation of more than 15 international treaties and agreements.
16	**ICNIRP** 3 March	Eric Van Rongen, Chair of ICNIRP [self-proclaimed international commission on non-ionizing radiation protection, but actually just a German NGO], the organisation whose non-transparent pronouncements on the international limits at which phones can emit radiofrequency are strangely adopted by UN bodies, calls 5G "a public health experiment", stating that "It will be necessary to gain more information about the exposure and any health problems that might come from an effect of that exposure".
17	**UK** 3 March	*The Daily Telegraph* asks, Do smartphones cause cancer? World Health Organisation to assess brain tumour link.
18	**USA** 7 March	A class action lawsuit is filed against the FCC by 62 entities and municipalities across the USA. aimed at first slowing down and then vacating the FCC "order and declaratory ruling purporting to streamline the deployment of wireless facilities by pre-empting local government authority".
19	**Netherlands** 9 March	Utrecht City Council decides unanimously to postpone decision-making on 4G and 5G infrastructure on new lamp posts until the risks to health and privacy are better understood.
20	**France** 10 March	Popular French astrophysicist and philosopher Aurélien Barrau causes a storm In France when he announces on Twitter "5G kills … We have already killed 70% of the living (with almost no global warming). Do we want to choose life or the speed of the telephone network?"
21	**Guernsey** 11 March	Call to halt 5G technology in Guernsey due to health fears, ITV News.
22	**UK** 17 March	Insurers announce premature death trend. British insurer Legal & General CEO says: "There's been a long discussion about whether this is a blip or a trend, and sadly it's looking like a trend."

23	**Germany** 20 March	Without invoking the precautionary principle, the Federal Office for Radiation Protection (BfS) admits that the effects of the higher frequencies of 5G are not yet well researched and advises that 5G should be developed cautiously. It states that consideration needs to be given to whether people will be exposed to much higher radiation.
24	**UK** 23 March	Sacha Stone publishes documentary 5G Apocalypse: The Extinction Event. (565,354 views as at 3 October 2019).
25	**USA** 24 March	Portland, Oregon city officials state clear opposition to the installation of 5G networks around the city, supported by the mayor and two commissioners.
26	**Italy** 28 March	Florence applies the precautionary principle, refusing permissions for 5G and referring to "the ambiguity and the uncertainty of supranational bodies and private bodies (like ICNIRP)", which "have very different positions from each other, despite the huge evidence of published studies".
27	**Italy** 28 March	One Roman district votes against 5G trials, with others expected to follow. Other motions to Stop 5G are expected in the four regional councils, one provincial council and other municipal councils of Italy.
28	**Russia** 28 March	The Russian Ministry of Defense refuses to transfer frequencies for 5G, which effectively delays any 5G rollout there for several years.
29	**USA** 28 March	New Jersey Congressman Andy Kim sends a letter, noting that, "Current regulations governing radiofrequency (RF) safety were put in place in 1996 and have not yet been reassessed for newer generation technologies."
30	**Belgium** 31 March	Belgian Environment Minister announces that Brussels is halting the 5G rollout, saying, "The people of Brussels are not guinea pigs whose health I can sell at a profit." It turns out that there is now no methodology to effectively measure the radiation of MIMO antennas, which have the characteristic of varying field in time, space and intensity, unlike antennas used for 2G, 3G and 4G, which emit radiation of constant intensity and space. Celine Fremault therefore asserted that, as this technical obstacle was not resolved, she would not go further in the legislative process.
31	**USA** April	The Blue Cross Blue Shield health insurance association reports that millennials – the first generation to grow up using cell phones – are experiencing an unprecedented decline in their health when they reach their late 20s,
32	**EU** April	An EU report admits that 5G is a massive experiment, lamenting that "it is not possible to accurately simulate or measure 5G emissions in the real world" and stating that "complex interference effects … may result, especially in dense urban areas."
33	**Germany** 4 April	[54,600 Germans sign a petition to force the German Bundestag to debate 5G](https://www.telecompaper.com/news/ germans-petition-parliament-to-stop-5g-auction-on-health-grounds–1287962).
34	**Netherlands** 4 April	Members of Parliament in the Netherlands insist that radiation research must be carried out before any approval of the 5G network.
35	**USA** 4 April	The California Supreme Court publishes an **opinion** supporting municipal authority to make regulations on so-called 'small cell' PROW (public right of way) towers and uses of the public's right-of-way. This opinion affirms the 2016 appellate **court ruling**.
36	**USA** 5 April	The California Supreme Court Justices unanimously uphold a 2011 San Francisco ordinance requiring telecommunications companies to get permits before placing antennas on city infrastructure.
37	**Switzerland** 9 April	The Canton of Vaud adopts a resolution calling for a moratorium on 5G antennas until the publication of a report on 5G by the Swiss Federal Office for the Environment.

38	**Switzerland** 10 April	Geneva adopts a motion for a moratorium on 5G, calling on the Council of State to request WHO to monitor independent scientific studies to determine the harmful effects of 5G.
39	**France**The Dangers of 5G to Children's Health 11 April	French lawmaker Jean-Paul Lecoq raises the wide range of risks posed by the 5G deployment in the National Assembly.
40	**USA** 15 April	Oregon Representative Peter A. DeFazio, House Transportation and Infrastructure Committee Chairman, writes a letter to FCC Chairman Ajit Pai and acting FDA Commissioner Sharpless regarding the status of the government's research into the potential health effects of RF radiation and its relation to the FCC's guidelines for safe human RF exposure levels.
41	**USA** 16 April	New York Congressman Thomas Suozzi sends a letter to the FCC seeking answers about the technology. "Small cell towers are being installed in residential neighborhoods in close proximity to houses throughout my district. ,,, My constituents are worried that should this technology be proven hazardous in the future, the health of their families and value of their properties would be at serious risk."
42	**Switzerland** 17 April	The Federal Office for the Environment (FOEN) sends a 7-page information letter to all cantonal governments for the purpose of "calming the situation". It claims that the new 5G adaptive (directional) antennas would mean much lower exposures for the population: "The beam cone is now aligned directly to the user and in all other radiation directions the radiation is lower [sic]."
43	**Switzerland** 17 April	The Swiss government announces the introduction of a monitoring system to assuage concerns about the potential health impact of fifth-generation (5G) mobile frequency emissions and smooth the cutting-edge technology's rollout. The move comes as some Swiss cantons baulk at authorizing new antennas needed to support 5G services after a spectrum auction in February that raised 380 million Swiss francs ($377 million).
44	**USA** 26 April	The US National Oceanic and Atmospheric Administration (NOAA) and NASA clash with the Federal Communications Commission (FCC), which oversees US wireless networks, saying that next-generation mobile technology could interfere with crucial satellite-based Earth observations.
45	**France** 26 April	French farmers sue the state over mystery cow deaths they blame on electromagnetic fields. A group of French cattle farmers is suing the state over the mysterious death of hundreds of cows, which they believe are the victims of harmful electromagnetic fields. Several studies have shown that livestock, particularly cattle, are affected by even low-level electromagnetic fields
46	**Swiss Re** May	Insurance company Swiss Re"s report on New Emerging Risk Insights states that "Existing concerns regarding potential negative health effects from electromagnetic fields (EMF) are only likely to increase. An uptick in liability claims could be a potential long-term consequence. … interruption and subversion of the 5G platform could trigger catastrophic, cumulative damage."
47	**Denmark** 4 May	A legal opinion by a Danish law firm states that rolling out 5G is illegal under EU and international law: *It is the conclusion of this legal opinion that establishing and activating a 5G-network, as it is currently described, would be in contravention of current human and environmental laws enshrined in the European Convention on Human Rights, the UN Convention on the Rights of the Child, EU regulations, and the Bern- and Bonn-conventions. … This also applies when the radiation remains within the limits recommended by ICNIRP and currently used in Denmark as well as broadly within the EU.*

48	**International** 4 May	Meteorologists warn that the introduction of 5G mobile phone networks could seriously affect weather forecasters' ability to predict major storms by disrupting the delicate satellite instruments they use to monitor changes in the atmosphere. The result will be impaired forecasts, poorer warnings about major storms, and loss of life, they say.
49	**France** 15 May	French health authority ANSES warns in a 400-page report that [LED lights in your house can cause irreversible damage to the eyes](https://www.dailymail.co.uk/health/article-7032303/LED-lights-irreversiblydamage- eyes-French-health-authority-warns.html) and lead to a vision-robbing condition.
50	**Italy** 20 May	Montecitori Palace, Rome, Italy Stop 5G: a parliamentary motion commits the Government to the moratorium. Ortica Web.
51	**USA** 22 May	The US National Oceanic and Atmospheric Administration (NOAA) and US National Aeronautics and Space Administration (NASA) criticize FCC plans for opening a 24 GHz spectrum band to 5G telecommunications providers, stating that US weather forecasting capabilities would be set back decades. The matter is on the agenda for international treaty negotiations at the International Telecommunication Union's World Radio Conference (WRC) in the fall of 2019, but with respect to 24 GHz, the Department of State has already submitted the FCC's out-of-band emission limits as the US position during preliminary negotiations.
52	**USA** 29 May	The US state of Louisiana unanimously votes to stop 5G, calling for study of effects on health and environment before 5G is launched (Resolution 145).
53	**France** 31 May	An [LED lamp post is destroyed in France](https://www.facebook.com/hassaine.said/videos/10220448833439317/UzpfSTEyMjMyNjE5NDY6MTAyMjAxMjgzMTE2NTc3MTM/).
54	**USA** June 2019	Ongoing lawsuits against the US Federal Communications Commission (FCC) over the [constitutional overreach](https://ecfsapi.fcc.gov/file/103154366759/MOTON FOR STAY.pdf) in the rollout of 5G: · National League of Cities (19,000 cities & towns) · US Conference of Mayors (1,192 cities) · National Association of Counties (3,069 counties) · National Association of Regional Councils (500 councils and metropolitan & regional planning organizations) · National Association of Towns and Townships (10,000 towns) · National Association of Telecommunications Officers & Advisers (local government officials) · Colorado Communications Utility Alliance · League of Arizona Cities and Towns · League of California Cities · League of Oregon Cities · Michigan Coalition to Protect Public Rights of Way · Michigan Municipal League · Michigan Townships Association · Texas Coalition of Cities for Utility Issues · 7 Counties · 45 Cities
55	**Europe** June	EMFOff publishes an exposé of corruption at the World Health Organization: *The WHO Cover-Up That is Costing Us the Earth*. Video and PDF document.
56	**Canada** June	In Toronto, the Canadian Civil Liberties Association files a court application to stop (Alphabet/Google subsidiary) Sidewalk Labs' "smart city" project as "unconstitutional" because it would allow "historically unprecedented, non-consensual, inappropriate mass-capture surveillance and commoditization of personal data."
57	**Australia** June	Step-by-Step Action Plan: We say No to 5G in Australia: devised by barrister Raymond Broomhall, who has stopped 25K antenna projects across Australia.
58	**Ireland** June	Councillor Clare Colloran Molloy, with support from other councillors, raises concerns to Clare County Council about dangers of 5G.
59	**Switzerland** 4 June	The Canton of Fribourg introduces a licensing requirement for 5G antennas in order to give those affected a chance to object.

60	**Russia** 6 June	A man living in the Tver region saws down a cell tower because he believes the radiation from it is destroying the vegetable, berry and fruit crops growing on his land located nearby.
61	**Switzerland** 10 June	A [telephone antenna is destroyed by an explosion](https://www.rts.ch/info/regions/vaud/10496248-une-antenne-telephoniquedetruite- par-une-explosion-a-denens-vd-.html) in Vaud, Switzerland.
62	**UK** 11 June	Glastonbury Town Council opposes the introduction of 5G technology in Glastonbury until further information has been obtained on the health effects on residents, adopting the following motion: "*This council has a social responsibility to protect the public and environment from exposure to harm, albeit unpredictable in the current state of scientific knowledge, and therefore opposes the roll-out of 5G in the Parish of Glastonbury – based on the precautionary principle – until further information is revealed from a newly convened 5G advisory committee (working group).*"
63	**UK** 11 June	Shadow Minister (Environment, Food and Rural Affairs) David Drew asks the Secretary of State for Digital, Culture, Media and Sport, what discussions he has had with the [providers of 5G on whether they have made any provision for personal liability on health and safety grounds](https://www.theyworkforyou.com/wrans/?id=2019-06- 03.258951.h&s="5G") and whether any provision has been made for white zones. He also asks the Secretary of State for Health and Social Care, what investigations the Government has commissioned on the health and safety implications of the 5G rollout.
64	**USA** 12 June	5G installer discusses the consequences of 5G. Current radiofrequency emitted by cell towers uses relatively low power (1.5-2.8 MHz), which at short range superheats the water molecules in your brain, eyes and testicles. It dissipates over distance as it has a long wave trough. 5G will be up close, in offices, outside homes, everywhere, including in the back of self-driving cars. It broadcasts in GHz not MHz — 30 GHz is 15,000 times more powerful than current previous levels.
65	**Ireland** 18 June	A motion calling on Clare County Council to oppose the rollout of 5G on health grounds is backed by the elected representatives. Leitrim County Council follows suit.
66	**USA** 18 June	Pennsylvania lawmakers cancel a vote on proposed legislation to facilitate infrastructure next-generation 5G wireless services. It is the third defeat for the Verizon- and AT&T-backed legislation.
67	**US** 20 June	The Centers for Disease Control and Prevention report that US suicide rates are at the highest level since World War II. Life expectancy, perhaps the broadest measure of a nation's health, has fallen for three straight years, the first three-year drop since 1915 to 1918.
68	**UK** 25 June	UK parliamentary committee discusses concerns about the health effects of electromagnetic fields and 5G, especially with regard to electrohypersensitivity Tonia Antoniazzi, MP, asks why the inaccurate and discredited 2012 report of AGNIR is still on the Public Health England website. Transcript. Video (from 16. 35).
69	**France** 25 June	"Bees are producing nothing!": French beekeepers announce a catastrophic year for French honey.
70	**USA** 27 June	The state of New Hampshire asks a series of questions about 5G in Bill HB 522.
71	**USA** 27 June	US Senator Dianne Feinstein introduces SB 2012, ''Restoring Local Control Over Public Infrastructure Act of 2019'', to repeal FCC rules that limit state and local government control over telecom infrastructure. The bill is supported by the US Conference of Mayors, National Association of Telecommunications Officers and Advisors, American Public Power Association, Communications Workers of America, National Association of Counties, League of California Cities and American Public Works Association.

72	**France** 27 June	After victories for "electrohypersenstive" (EHS) people in Toulouse (March) and Bordeaux (May), the Tribunal de grande instance of FOIX issues a decision protecting EHS people who cannot tolerate dirty electricity diffused by "smart" meters.
73	**Glastonbury, UK** 29 June	Glastonbury festival-goers are used as guinea pigs in a 5G trial and [document multiple injuries online](https://www.facebook.com/photo.php?fbid=2259190527504752&set=pcb.2259192350837903&type=3&theater .).
74	**Europe** 29 June	The European Stop 5G Alliance comprising representatives from 19 European countries is officially founded at an international conference in Mendrisio, Switzerland.
75	**France** July	French baby-clothing firm Petit Bateau decides not to wait for the "conclusive" data and launches clothing line to protect babies from electromagnetic radiation.
76	**Ireland** July	Councillor Orla Leyden proposes a motion with Roscommon County Council to oppose 5G and this is passed.
77	**USA** 1 July	The Ninth Circuit Court of Appeals affirms the City of Berkeley's right to require cell phone retailers in the city to notify prospective customers about cell phone manufacturers' safety guidelines to ensure consumer safety, adopted in May 2015.
78	**Russia** 1 July	In the Urals, police detain a woman who tried to burn down a communications tower because of concerns about health. The woman believed that her malaise and insomnia related to the fact that this tower was located directly near her home.
79	**USA** 3 July	Prof. Em. Martin L. Pall states that 5G effects will take months, not years, and he expects a breakdown in mental function, sterility, damaged heart function and societal collapse.
80	**Italy** 4 July	60 regions, autonomous provinces and municipalities question 5G, a moratorium is established in Italy and 14 municipalities approve Stop 5G city council resolutions or motions. The Mayor of Marsaglia issues Italy's first Stop 5G ordinance and the Mayor of San Gregorio Matese bans the installation of 5G antennas on the municipal territory.
81	**Russia** 4 July	Ban on cell phones in schools expected in September 2019.
82	**Ireland** 4 July	Councillor Justin Warnock calls on Leitrim Council to halt the roll-out of 5G on health grounds**.**
83	**Switzerland** 2 July	Renowned Swiss law firm provides legal opinion stating that the Swiss Federal government's modification of its ordinance to privilege directional antennas is not legally admissible because it would undermine health protection.
84	**Switzerland** July	As a result of the above legal opinion, the Swiss Canton of Zug suspends ongoing licensing procedures.
85	**USA** 8 July	California Assembly Bill 272 asks all school districts, county offices of education, and charter schools to come up with smartphone policies to limit or prohibit student use at school.
86	**Russia** 9 July	President Putin emphasizes the environmental risks of new technologies, saying "Hopes that the new technologies themselves will save the planet from the growing anthropogenic influence turned out to be illusions. Nature and climate degradation continues."
87	**USA** 11 July	Leading senators submit bill restoring local control and abolishing FCC regulations: Restoring Local Control Over Public Infrastructure Act of 2019.
88	**EU** 14 July	Galileo, the EU global navigation satellite system, is non-operational for at least four days as of 11 July following a mysterious outage. The Galileo satellite system was launched in 2016 and was funded by the EU as an alternative to the US Air Force's Global Positioning System (GPS) and the Russian global navigation satellite system GLONASS.
89	**USA** 16 July	The telcos belatedly realise that the public has found out about the dangers of 5G and launches a propaganda war of fake news, starting with *The New York Times*. It blames all

		the bad news on 5G on the Russians, and this meme is taken up and repeated obediently by major media outlets around the world, including the BBC, *Le Monde*, [*The Guardian*](https://www.theguardian.com/technology/2019/jul/26/how-baseless-fearsover-5g-rollout-created-a-health-scare), [*The Infographics Show*](https://www.facebook.com/TheInfographics Show/videos/2347568198849742/) and *Wired Online*.
90	**France** 18 July	French NGO Alert Phonegate launches class action lawsuit against telco Nokia for selling "smart" phones that were shown by the French National Frequency Agency (ANFR) to exceed the European specific absorption rate (SAR) limit. This deception is facilitated by the entry into force of the new European Directive (2014/53/EU), which has relaxed controls by allowing manufacturers to self-certify their products.
91	**Switzerland** 26 July	The Green party in Lausanne (Vaud) insists on the precautionary principle, saying that 5G antennas are being installed while the consequences of these new technologies are not known. Green representatives call for a moratorium in Vaud and commit to opposing all new antennas until they receive clear and satisfactory answers relating to the impact of 5G.
92	**USA** 28 July	Bees dropping out of the sky near two 5G cell towers, California.
93	**Austria** 8 August	The Austrian parliament commissions a study on the health effects of 5G networks in response to concern from the public.
94	**Switzerland** 5 August	Swiss mainstream magazine *L'Illustré* reports on the injuries of Geneva's first 5G victims: "[With 5G, we feel like guinea pigs](https://www.globalresearch.ca/swiss-magazine-reports-first-5g-injuriesgeneva/ 5684233)".
95	**USA** 9 August	The US Court of Appeals for the D.C. Circuit finds that the FCC did not adequately address the potential harms of deregulation or the benefits of environmental and historic-preservation reviews.
96	**USA** 9 August	The Oregon state legislative assembly declares a health emergency in Senate Bill 283 and directs the state health authority to review studies of the health effects of exposure to RF-radiation in schools and to recommend how to reduce children's exposure in schools and to report back not later than 2 January 2021.
97	**USA** 9 August	The Natural Resources Defense Council, joined by various American Indian tribes, as well as the National Association of Tribal Historic Preservation Officers and the National Trust for Historic Preservation, win a victory when the federal appeals court in D.C. ruled that the FCC illegally eliminated historic-preservation and environmental review—and important opportunities for public participation—for 5G wireless infrastructure projects. Emphasizing the importance of such review, the court held that that the FCC's attempted explanations for the elimination "did not meet the standard of reasoned decision-making."
98	**USA** 21 August	The Chicago Tribune finds that popular cell phones tested for radiofrequency radiation measure over the legal safety limit, in some cases more than double what Apple reported to federal regulators from its own testing. The FCC is investigating.
99	**USA** 23 August	*Cardiology Magazine*reports on smart phones and obesity. A poster abstract, presented at the Latin America Conference 2019, found that university students who used their smartphones five or more hours a day had a 43 percent increased risk of obesity.
100	**Russia** 26 August	Oleg Gregoriev, Chairman of the Russian National Committee on Non-Ionizing Radiation Protection, states that "5G may be like a slow Hiroshima".
101	**USA** 26 Aug-1 Sept	The 5G Crisis Awareness and Accountability Summit attracts 200,000+ viewers from around the world, who send over 200,000 liability letters to their government representatives.

102	**Russia** 1 Sept	The Russian Defence Ministry refuses to hand over 3.4–3.8 GHz for 5G because these frequencies are used for satellite communications, instead suggesting that 4.4–4,99 GHz be used, which are popular only in China and Japan.
103	**Kuwait** 1 Sept	The Kuwait Times publishes an article on the threats to health from 5G technology, saying "RF-EMF exposure and health outcomes. In the meantime, they recommend that cell towers should be distanced from homes, daycare centers, schools, and places frequented by pregnant women, men who wish to father healthy children, and the young".
104	**USA** 3 Sept	T-Mobile cancels 5G installation nationwide. Anonymous employee blames 15 states' lawsuits against the Sprint merger.
105	**USA** 11 Sept	Cellphone Users Sue Apple and Samsung Over Radiation Exposure. Andrus Anderson in San Francisco is representing 16 plaintiffs against Apple and Samsung in a controversy some in the medical and scientific community are allegedly calling "Phone Gate."
106	**International** 13 Sept	Edward Snowdon describes his role in the creation of the totalitarian surveillance state, enabling the new wave of authoritarianism by the political and commercial classes that are realizing they can use technology to influence the world on a massive scale, bringing societies' systems under attack.
107	**Switzerland** 13 Sept	5G opponents block applications on 320 out of 326 antennas. 5G opponents have raised objections to almost all of the applications for planning permission for antennas.
108	**UK** 16 Sept	Smart meter rollout delayed by four years. The government's deadline to have smart meters in 30 million homes by the end of 2020 has been pushed back to 2024.
109	**Australia** 18 Sept	Telco TPG (Total Peripherals Group) says community health fears stopped its 5G rollout in Australia – as experts blame disinformation campaigns on social media.
110	**United Nations** 24 Sept	UK Prime Minister Boris Johnson describes the Internet of Things, "smart" cities and AI as a giant, dark thundercloud lowering oppressively over the human race, threatening a cold and heartless future in an Orwellian world designed for censorship, repression and control. He appeals for joint efforts on agreeing a common set of global principles to shape norms and standards to guide the development of emerging technology.
111	**Cyprus** 26 Sept	The Parliamentary Committees on Health and Environment in Cyprus hold discussions on the negative aspects of 5G. Proposals are put forward to freeze 5G deployment and keep Cyprus radiation-free as a detoxing zone attractive for tourism.
112	**Italy** 26 Sept	Italian parliament to vote on 7 October for a moratorium to stop the 5G rollout throughout Italy. The text proposes that the government should suspend any form of technological experimentation of 5G in Italian cities, pending the production of sufficient scientific evidence to judge its harmlessness.
113	**US** Sept-Oct	Journal *Municipal Lawyer* publishes article entitled [*Putting the Cart Before the Horse – The FCC's '5G First, Safety Second' Policy*](https://www.khlaw.com/Files/40925_CATALANO ET AL-SEPT-OCT 2019 ML – 5G ARTICLE – 9-3-2019.pdf?fbclid=IwAR1wEF09vq8naU2HPrQf4ImqipO5_cLlwTdw-aKc2ZlTfy96Am50Qj-QnQ4), which states that the FCC should have completed the review of its RF standards before opening the floodgates for the deployment of hundreds of thousands of small cell transmitters for 5G. The rules adopted by the FCC in 1996 were designed to protect only against the thermal effects of RF exposure.
114	**International** Sept	The authors of *5G Wireless Communication and Health Effects—A Pragmatic Review Based on Available Studies Regarding 6 to 100 GHz*, funded by Deutsche Telekom, state that "The available studies do not provide adequate and sufficient information for a meaningful safety assessment, or for the question about non-thermal effects and conclude that, "In summary, the majority of studies with MMW exposures show biological responses".

115	**USA** 25 Sept	Lawsuit filed over cell phone radiation. A new lawsuit claims that cell phone companies may try to hide how much radiation their devices emit. West Des Moines Iowa Attorney Bart Goplerud files lawsuit claiming that Apple and Samsung misrepresent safety risks.
116	**European Parliament** 1 October	MEPs Philippe Lamberts, Michèle Rivasi and Klaus Buchner invite Dr. Marc Arazi of Phonegate, Prof. Em. Martin Pall and European Stop 5G Alliance promoter Maurizio Martucci to a press conference to discuss the health risks of 5G and the precautionary principle.
117	**France** 2 October	A group of French NGOs calls for a moratorium on the rollout of 5G, saying it could "push the planet and our society into a world with out-of-control consequences".
118	**Ireland** 2 October	Councillor calls for more debate on use of 5G technologies. Cllr Kevin Murphy raised the motion at a meeting of West Cork local authority last week and said the issue of 5G might not be something that will affect people now, but will do so in the future. Fears over claims that 5G mobile technology may be linked to cancer.
119	**Germany** October	*Manager* magazine reports that protests by hundreds of protest groups aiming to stop 5G are hindering the multibillion 5G rollout. Mast-Hass: Wie Proteste das Multimilliardenprojekt bremsen.
120	**USA** 3 October	Erin Brokovich firm joins citizens 5G lawsuit brought by People's Initiative Foundation against the FCC and the 1996 Telecom Act.

Claire Edwards, BA Hons, MA, worked for the United Nations as Editor and Trainer in Intercultural Writing from 1999 to 2017. Since May 2018, she has collaborated with Arthur Firstenberg to publish the International Appeal to Stop 5G on Earth and in Space (www.5gspaceappeal.org), which is available in 28 languages. The Appeal has attracted over 94,000 individual and group signatories from more than 170 countries. Claire warned the Secretary-General about the dangers of 5G during a meeting with UN staff in May 2018, calling for a halt to its rollout at UN duty stations.

--
Regards,

Paul McGavin
work: 707-559-9536
text: 707-939-5549
skype: paulmcgavin

Sarah Fasig

From:	Paul McGavin <paul.mcgavin@octowired.com>
Sent:	Wednesday, October 9, 2019 12:27 AM
To:	Ashley Feeney
Cc:	Sherri Metzker; Brett Lee; Gloria Partida; Will Arnold; Dan Carson; Lucas Frerichs; Herman Boschken; Cheryl Essex; Stephen Mikesell; David Robertson; Greg Rowe; Darryl Rutherford; Stephen Streeter; Emily Shandy; planningcommision@cityofdavis.org; CMOWeb; Kelly Stachowicz; amirabile@cityofdavis.org; Clerk Web; Ellen Cohen; Martha Sperry; Nina Locker; Meredith Herman; jilltheg@gmail.com; 5GAwarenessNow; annalynndayton@yahoo.com; Eric Windheim; Pat Suyama; Larry Rollins; Jim Trask; Lauren Ayers; Carla A. Visha, M.D.; Lena Pu
Subject:	Re: Request to Postpone October 9th Meeting Regarding WTF Ordinance with Planning Commission
Follow Up Flag:	Follow up
Flag Status:	Completed

Dear Mr. Feeney et al.

I second Lena Pu's thanks for the City of Davis postponing the public hearing on the new Davis Wireless Ordinance for two weeks and for respecting the democratic process in the City of Davis.

>>> Lena Pu wrote on 10/9/2019 12:05 AM:

> Dear Mr. Feeney,
>
> Thank you and your staff and the Planning Commission so very much for your kind consideration and efforts in helping make, by postponing, this meeting happen for those in the public who desire full participation in the planning process. It is very much appreciated!
>
> With Gratitude,
> Lena Pu
> Environmental Health Consultant
> NACST.org

There is great deal to learn at the following links. Please explore.

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Key Telecom Legal Links

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Key Technical and Scientific Links

- http://mystreetmychoice.com/press.html#guidelines
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- https://scientists4wiredtech.com/what-are-4g-5g/science/
- https://bioinitiative.org
- https://mdsafetech.org
- https://www.saferemr.com/

--
Regards,

Paul McGavin
work: 707-559-9536
text: 707-939-5549
skype: paulmcgavin

Sarah Fasig

From: Paul Albritton <pa@mallp.com>
Sent: Wednesday, October 9, 2019 12:00 PM
To: Planning Commission; Sherri Metzker; Inder Khalsa
Subject: Verizon Wireless Comments on Draft Small Cells Policy - Tonight's Planning Commission Agenda Item 6(B) [Davis]
Attachments: Verizon Wireless Letter 10.09.19.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

Dear Commissioners, attached for tonight's meeting is our letter prepared on behalf of Verizon Wireless providing comment on the draft small cells policy.

We urge the Commission to defer recommendation of the policy, and direct staff to work with industry on needed revisions.

Thank you.

--
Paul Albritton
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October 9, 2019

VIA EMAIL

Chair Stephen Streeter
Vice Chair Cheryl Essex
Commissioners Herman Boschken,
Stephen Mikesell, David Robertson,
Darryl Rutherford and Greg Rowe
Planning Commission
City of Davis
23 Russell Boulevard, Suite 2
Davis, California 95616

Re: Draft Policy, Small Cell Wireless Facilities
Commission Agenda Item 6(B), October 9, 2019

Dear Chair Streeter, Vice Chair Essex and Commissioners:

We write on behalf of Verizon Wireless to provide comment on the draft policy regulating small cell wireless facilities (the "Draft Policy"). Verizon Wireless appreciates the City's efforts to accommodate recent federal actions intended to promote deployment of small cell wireless facilities within specified time periods. In particular, Verizon Wireless acknowledges the benefit of the proposed administrative permit process, which is consistent with the expedited, objective review of small cells required by the Federal Commnications Commisison (the "FCC").

As the Planning Commission conducts its initial review, we encourage you to carefully consider several Draft Policy provisions that appear contrary to the FCC's 2018 order that outlines appropriate small cell approval criteria. For example, technically infeasible design standards are unreasonable according to the FCC, particularly requirements for antenna shrouding and placement of associated equipment underground. Other provisions contradict state law granting telephone corporations the right to place their equipment along any right-of-way. Accordingly, Verizon Wireless requests that the Commission allow wireless carriers to work with staff to revise the Draft Policy to achieve workable standards and procedures acceptable all parties. To that end, we ask that the Commission defer recommendation of the Draft Policy.

The FCC's Small Cells Order

By way of background, the FCC adopted its September 2018 order to provide guidance on appropriate approval criteria for small cells and to expedite their deployment. *See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment,* Declaratory Ruling and Third Report and Order, FCC 18-133 (September 27, 2018) (the "Small Cells Order"). Among other topics, the FCC addressed appropriate aesthetic criteria for approval of qualifying small cells, concluding that they must be: "(1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments, and (3) objective and published in advance." Small Cells Order, ¶ 86. "Reasonable" standards are "technically feasible" and meant to avoid "out-of-character deployments." *Id.*, ¶ 87. Objective standards must "incorporate clearly-defined and ascertainable standards, applied in a principled manner." *Id.*, ¶ 88.

As we explain, several requirements of the Draft Policy contradict the FCC's directives or state law and must be removed or revised. Our comments are as follows.

Location and Structure Preferences Should Be Revised To Be Consistent with Federal and State Law.

The Draft Policy requires applicants to show that any higher-preference locations or structures within a 500-foot radius are unavailable or technically infeasible. Draft Policy §§ 2.4(b)(2), 2.4(b)(4), 2.6(a). This would require evaluation of most if not all possibilities within an 18-acre area, an onerous and excessive requirement. Steering small cells up to 500 feet distant from a required location could result in a target coverage area remaining underserved or unserved. This would also thwart the objectives of "densifying a wireless network, introducing new services, or otherwise improving service capabilities," and it would pose an effective prohibition of service in violation of the Telecommunications Act. *See* 47 U.S.C. § 253(a), Small Cells Order, ¶ 37. One unintended consequence of the 500-foot threshold is that numerous small cells could end up clustered together instead of distributed along a right-of-way. The 500-foot radius should be reduced to a practicable distance. *At most, applicants for right-of-way facilities should demonstrate unavailability or technical infeasibility of any reasonable higher-preference locations or structures within 200 feet along the subject right-of-way.*

In the list of location preferences, Preference 2 is residential zone sites that are 250 feet or more from residences or schools, while Preference 3—the least-favored option—is actually a standard to place small cells "as far as possible" from any residence or school. Draft Policy § 2.6(b). Without a clear scope of review, the open-ended standard of Preference 3 lacks objectivity, whereas the FCC requires objective review of small cells. *Preference 3 should be revised simply to disfavor residential zone sites within 250 feet of residences.*

Wireless facilities pose no more aesthetic or other land use impact near schools than elsewhere. There can be no other reason for the discouragement near schools than

concern over radio frequency emissions. However, the federal Telecommunications Act bars local governments from regulating wireless facilities over emissions concerns if facilities are shown to comply with FCC exposure guidelines. 47 U.S.C. § 332(c)(7)(B)(iv). In times of emergency, when the demand on existing infrastructure is greatest, the networks will be incapable of shouldering additional burdens if wireless carriers cannot deploy small cells near schools. *References to schools should be stricken from Section 2.6(b).*

The right-of-way structure preferences should not favor street light poles, most of which are owned by the City. Draft Policy § 2.6(c). If strictly applied, a top preferences for City-owned assets in a particular area would contradict California Government Code Section 65964(c) which bars local governments from limiting wireless facilities to sites owned by particular parties. Verizon Wireless has the right to place its telephone equipment on joint utility poles as a member of the Northern California Joint Pole Authority (the "JPA"). Small cell equipment is not "out-of-character" on utility poles, given existing utility lines and infrastructure, and structure preferences used to deny this option would be unreasonable. Support structure preferences should be relaxed to accommodate use of joint utility poles where they are found along the right-of-way, giving them a preference equal with street light poles. *We suggest that the right-of-way structure preferences simply favor existing/replacement structures over new poles.*

Undergrounding Requirements Are Unreasonable.

The FCC determined that undergrounding requirements, similar to aesthetic requirements, must be reasonable, non-discriminatory and objective. Small Cells Order, ¶¶ 86, 90. The Draft Policy prefers that small cell accessory equipment be placed underground in rights-of-way where utilities are primarily underground, or where a chosen utility pole is on private property. Draft Policy §§ 2.7(b)(2)(A), 2.7(c)(7)(F). There are exceptions if evidence shows that undergrounding is technically infeasible, which generally is the case due to sidewalk space constraints, presence of utility lines that already have been routed underground, and undue environmental and operational impacts for required active cooling and dewatering equipment.

Feasibility aside, these undergrounding requirements are also unreasonable because small equipment boxes elevated on the side of a pole are not "out-of-character" on street light poles that remain in underground utility areas, or on utility poles on private property that already support other utility infrastructure. *For objective criteria to allow typical small cell equipment required for service, Section 2.7(b)(2)(A) should be revised to permit up to five cubic feet of associated equipment on the side of a street light pole before any undergrounding is considered. Section 2.7(c)(7)(F) should be revised to allow up to nine cubic feet of associated equipment on the side of a utility pole before any undergrounding is considered.*

Design Standards Must Be Revised To Be Reasonable.

The blanket requirement to contain all small cell antennas within a single shroud or radome generally is infeasible and unreasonable. Draft Policy §§ 2.7(b)(1), 2.7(b)(4), 2.7(c)(7)(A-B). In most circumstances, shrouds or radomes impede frequencies that Verizon Wireless recently licensed from the FCC for new wireless technology including 5G service, and such coverings are infeasible for signal propagation. Any antenna standards for right-of-way facilities must accommodate new higher-frequency facilities that integrate antennas and radios into one small box, and cannot impose shrouding. Further, any requirement to place all antennas within a single shroud is infeasible on poles supporting both 4G and 5G antennas because these two types of antennas require vertical separation to avoid signal interference. *Draft Policy Sections 2.7(b)(1), 2.7(b)(4) and 2.7(c)(7)(A-B) should be revised to excuse antenna shrouding requirements if technically infeasible.*

The effective ban on new overhead service lines is unreasonable. Draft Policy § 2.7(b)(9). This is because new aerial utility lines are not "out-of-character" where there are existing lines between utility poles. *Draft Policy Section 2.7(b)(9) should be revised to allow new aerial lines if there are already existing aerial lines attached to the subject pole or to utility poles within 100 feet.*

The City Must Accommodate Ground Cabinets and New Stand-Alone Poles for Small Cells.

The flat ban on ground-mounted equipment cabinets for small cells contradicts state and federal law. Draft Policy § 2.7(b)(2)(E). Public Utilities Code Section 7901 grants telephone corporations a statewide right to place equipment such as ground cabinets "upon" public roadways, and the FCC definition of small cell contemplates up to 28 cubic feet of "wireless equipment associated with the structure" without confining it to a pole or underground vault. 47 C.F.R. § 1.6002(l)(3). Ground cabinets are occasionally deployed to enclose batteries that provide continued service during emergencies. If other utilities place ground-mounted cabinets in Davis rights-of-way, the City must, at a minimum, accommodate the same-size cabinets for Verizon Wireless to avoid discriminatory treatment. *Instead of banning ground cabinets, the City should provide reasonable, objective standards for them.*

For new poles in the right-of-way, the City cannot require Verizon Wireless to install a street light fixture or other non-wireless apparatus. Draft Policy § 2.7(b)(5). This clearly contradicts Verizon Wireless's right under Section 7901 to erect new poles in the right-of-way solely to elevate telephone equipment. The City's limited aesthetic review extends to wireless facility equipment, but lighting is not a functional requirement for wireless service. As described, pole-mounted equipment components are not "out-of-character" in the right-of-way. The alternate integrated pole option is technically infeasible given the limited 12- and 16-inch diameter pole and base sizes. Remote radio units, other Verizon Wireless network equipment and mounting hardware cannot fit

within these limited dimensions. *The City should consult with wireless carriers regarding new designs for stand-alone small cell poles to serve as the basis for objective standards.*

Several Submittal Requirements Should Be Revised.

The City cannot require telephone corporations such as Verizon Wireless to submit a "site agreement" with the City for any pole in the right-of-way, only for those poles that the City owns. Draft Policy § 2.2(a)(9). Section 7901 grants telephone corporations a statewide franchise to place their equipment along any right-of-way, including new poles, and Verizon Wireless may place small cells on utility poles as a member of the JPA. The City cannot exert any proprietary right over poles it does not own. *We suggest inserting the term "City-owned" before the phrase "structure located within the public rights-of-way" at the beginning of this provision.*

The requirement to submit a "property owner's authorization" should not apply to JPA utility poles. Draft Policy § 2.2(a)(10). Verizon Wireless becomes a co-owner of a utility pole after other utilites already using the pole grant their approval. This approval is memorialted on a joint pole authorization form which includes the scope of work for proposed wireless attachments. *For joint utility poles, applicants should be required to submit only a joint pole authorization form demonstrating approval of the other utilities.*

For the justification of a non-preferred location or structure, the City cannot require Verizon Wireless to submit a "technical service objective and a map showing areas that meets that objective." Draft Policy § 2.2(a)(12)(A). Service objectives are usually irrelevant to the factors that render a particular location or structure to be infeasible, which may include lack of available space for equipment or insufficient structural capacity. Evidence of those factors would fall under Item (B) which requires a technical analysis of infeasibility. Further, as noted above, the FCC found that small cells are needed for densifying networks and enhancing existing service, while disfavoring dated service standards such "significant gap" determinations that are shown by service coverage maps. *See* Small Cells Order, ¶¶ 37-40. *Item (A) of Draft Policy Section 2.2(a)(12) should be deleted.*

Verizon Wireless appreciates the City's thoughtful approach to preparing a new policy to accommodate the FCC's Small Cells Order. As noted above, the Draft Policy includes several provisions that contradict the Small Cells Order or state law. We encourge the Commission to defer recommendation of the Draft Policy, and to allow staff to work with Verizon Wireless on revisions that will acommodate new small cells to provide service to Davis residents and visitors.

Very truly yours,

Paul B. Albritton

cc: Inder Khalsa, Esq.
Sherri Metzker

Sarah Fasig

From: Ashley Feeney
Sent: Tuesday, October 8, 2019 5:20 PM
To: 'Lena Pu'; Sherri Metzker; Brett Lee; Gloria Partida; Will Arnold; Dan Carson; Lucas Frerichs; Herman Boschken; Cheryl Essex; Stephen Mikesell; David Robertson; Greg Rowe; Darryl Rutherford; Stephen Streeter; Emily Shandy; planningcommision@cityofdavis.org; CMOWeb; Kelly Stachowicz; amirabile@cityofdavis.org; Clerk Web
Cc: Paul McGavin; Ellen Cohen; Martha Sperry; Nina Locker; Meredith Herman; jilltheg@gmail.com; 5GAwarenessNow; annalynndayton@yahoo.com; Eric Windheim; Pat Suyama; Larry Rollins; Jim Trask; Lauren Ayers; Carla A. Visha, M.D.
Subject: RE: Request to Postpone October 9th Meeting Regarding WTF Ordinance with Planning Commission

Follow Up Flag: Follow up
Flag Status: Completed

Dear Ms. Pu,

Staff has spoken to the Chair of the Planning Commission in regards to the concern you voiced that many of the individuals that have expressed an interest in this matter are not able to attend the Planning Commission meeting tomorrow night. Staff recommended and the Planning Commission Chair supports continuing this item to the next Planning Commission meeting which will occur on Wednesday, October 23, 2019 at 7:00 PM.

Kind regards,

Ashley Feeney
Assistant City Manager
(530) 757-5654

From: Lena Pu <lhpdesign@gmail.com>
Sent: Tuesday, October 8, 2019 1:22 PM
To: Sherri Metzker <SMetzker@cityofdavis.org>; Brett Lee <BLee@cityofdavis.org>; Gloria Partida <GPartida@cityofdavis.org>; Will Arnold <WArnold@cityofdavis.org>; Dan Carson <DCarson@cityofdavis.org>; Lucas Frerichs <lucasf@cityofdavis.org>; Herman Boschken <herman.boschken@sjsu.edu>; Cheryl Essex <cheryl.essex.davis@gmail.com>; Stephen Mikesell <stephenmikesell@outlook.com>; David Robertson <robertsondl@sbcglobal.net>; Greg Rowe <gregrowe50@comcast.net>; Darryl Rutherford <darryl.rutherford@gmail.com>; Stephen Streeter <stevestreeter@comcast.net>; Emily Shandy <emily.dt.shandy@gmail.com>; planningcommision@cityofdavis.org; CMOWeb <CMOWeb@cityofdavis.org>; Kelly Stachowicz <KStachowicz@cityofdavis.org>; Ashley Feeney <AFeeney@cityofdavis.org>; amirabile@cityofdavis.org; Clerk Web <ClerkWeb@cityofdavis.org>
Cc: Paul McGavin <paul@mystreetmychoice.com>; Ellen Cohen <ellenruthcohen@gmail.com>; Martha Sperry <m5sperry@sbcglobal.net>; Nina Locker <nlocker1969@yahoo.com>; Meredith Herman <merriherman@gmail.com>; jilltheg@gmail.com; 5GAwarenessNow <5gawarenessnow@gmail.com>; annalynndayton@yahoo.com; Eric Windheim <e.windheim@comcast.net>; Pat Suyama <patsuyama@gmail.com>; Larry Rollins <almandine09@gmail.com>; Jim Trask <jctrask1@gmail.com>; Lauren Ayers <lauren.yolocounty@gmail.com>; Carla A. Visha, M.D.

<globalhealthnow@yahoo.com>; Lena Pu <lhpdesign@gmail.com>
Subject: Re: Request to Postpone October 9th Meeting Regarding WTF Ordinance with Planning Commission

CAUTION: External email. Please verify sender before opening attachments or clicking on links.

October 8, 2019

To: Ms. Sherri Metzker <smetzker@cityofdavis.org>
City of Davis
Community Development
23 Russell Blvd.
Davis, CA 95616
530-757-5610 ext. 7239

To City of Davis Council Members:
Mayor Brett Lee <blee@cityofdavis.org>
Mayor Pro Tempore Gloria Partida <gpartida@cityofdavis.org>
Council Member Will Arnold <warnold@cityofdavis.org>
Council Member Dan Carson <dcarson@cityofdavis.org>
Council Member Lucas Frerichs <lucasf@cityofdavis.org>

To City of Davis Planning Commissioners:
Herman Boschken <hboschken@cityofdavis.org>
Cheryl Essex <cessex@cityofdavis.org>
Stephen Mikesell <smikesell@cityofdavis.org>
David Robertson <drobertson@cityofdavis.org>
Greg Rowe <growe@cityofdavis.org>
Rutherford <drutherford@cityofdavis.org>
Stephen Streeter <sstreeter@cityofdavis.org>
Emily Shandy <eshandy@cityofdavis.org>
Planning Commission <PlanningCommission@cityofdavis.org>

cc: Michael Webb <cmoweb@cityofdavis.org>
Assistant City Manager Kelly Stachowicz <kstachowicz@cityofdavis.org>
Assistant City Manager, Ashley Feeney <AFeeney@cityofdavis.org>
City Clerk Zoe Mirabile <aMirabile@cityofdavis.org>
Clerk Web <clerkweb@cityofdavis.org>

Re: Postponing Agendized Item for Consideration by the City of Davis Planning Commission the Proposed Amendments to the Wireless Telecommunications Ordinance

[Request of City Clerk: Please add this email to the City of Davis Public Record for the proposed Amendments to the Municipal Wireless Ordinance that the City of Davis Planning Commission will be considering during its next planned meeting on October 9, 2019. Thank you.]

Dear Council Member Lucas Frerichs and Assistant City Manager Ashley Feeney:

It has come to my attention the posting of additional material for public review regarding the City of Davis Proposed Draft Wireless Ordinance was inserted this past Monday, late afternoon near closing hour, October the 7th. By law, there is a required 72 hour notice of publication before any formal review/meeting/discussion can be made on any agendized item. Therefore, based upon this reason and several others as stated below in my letter dated October 7th (which also should have been found amongst the other public comments along with the Staff Report) the meeting before the Planning Commission to discuss this agendized item demands to be postponed.

I have left a voice message with Ashley Feeney this morning regarding this matter and related.

Lucas and/or Ashley, please call me for any questions and/or comments at: 530-231-5478. Thank you.

Respectfully and In Truth,
Lena Pu
Environmental Health Consultant
NACST.org

On Oct 7, 2019, at 1:01 PM, Lena Pu <lhpdesign@gmail.com> wrote:

October 7, 2019

To: Ms. Sherri Metzker <smetzker@cityofdavis.org>
City of Davis
Community Development
23 Russell Blvd.
Davis, CA 95616
530-757-5610 ext. 7239

To City of Davis Council Members:
Mayor Brett Lee <blee@cityofdavis.org>
Mayor Pro Tempore Gloria Partida <gpartida@cityofdavis.org>
Council Member Will Arnold <warnold@cityofdavis.org>
Council Member Dan Carson <dcarson@cityofdavis.org>
Council Member Lucas Frerichs <lucasf@cityofdavis.org>

To City of Davis Planning Commissioners:
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Cheryl Essex <cessex@cityofdavis.org>
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Stephen Streeter <sstreeter@cityofdavis.org>
Emily Shandy <eshandy@cityofdavis.org>
Planning Commission <PlanningCommission@cityofdavis.org>

cc: Michael Webb <cmoweb@cityofdavis.org>
Assistant City Manager Kelly Stachowicz <kstachowicz@cityofdavis.org>
Assistant City Manager, Ashley Feeney <AFeeney@cityofdavis.org>
City Clerk Zoe Mirabile <aMirabile@cityofdavis.org>
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It is my hope you and your staff can honor this so very important Jewish holiday and postpone the date of the discussion of the agenda item, Wireless Ordinance Amendments, and allow the people in my group the ability to observe Yom Kippur without any conflict of commitment, duty and desire.

Other problems with the October 9th date are:

- The Staff Report was posted on the City of Davis website just this past Friday and the public has had only two full working days to review and obviously no time to submit any substantial comments.

- In addition, the Staff Report also contains no additive material generated from the public - emails, letters, notices, binders, collections of science and studies and reports of all kinds to provide a balanced review for the Planning Commission to consider in addition to the staff generated proposed Amended Wireless Telecommunications Ordinance. Therefore, it is a ***biased*** submittal of material.

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The reasons for postponing the meeting for this Wednesday are serious and many. It is my hope we can all actively observe this great holiday the Yom Kippur and reflect on what our role as citizens of this town, state and country are regardless of where we stand on issues and that we recognize there are larger effects and affects of our decision making powers that go beyond our understanding for which we all will be held responsible for, especially for those who have taken an oath of office and have taken on roles of leadership.

To quote these great leaders, I, myself, take heart and responsible matters they so eloquently describe:

"…..the central premise of Yom Kippur…..the fundamental basis of Jewish ethics is that human beings have moral agency. Sometimes we make good choices and sometimes we make bad choices; but it is our very ability to choose that makes us human. Yom Kippur serves as a bold challenge reminding us that our mistakes belong to nobody but ourselves, and yet, if we so determine, we can rise up to our potential by choosing a new path forward."
-Rabbi Elliot Cosgrove

"In a free society, some are guilty, but all are responsible." In both the public and private sector, ours is an age when willful ignorance abounds, an era in need of more, not fewer whistleblowers. It is not enough to believe ourselves innocent because we are not guilty. Yom Kippur calls us to account for sins of both commission and omission – one of which being the failure to speak out. Yom Kippur reminds us that we are all moral contributors to our world."
- Rabbi Abraham Joshua Heschel

Respectfully and In Truth,

Lena Pu
Environmental Health Consultant
NACST.org

Sarah Fasig

From: Ellen Cohen <ellenruthcohen@gmail.com>
Sent: Monday, October 7, 2019 7:47 PM
To: Brett Lee; Gloria Partida; Will Arnold; hboschkem@cityofdavis.org; David Robertson; Darryl Rutherford; Stephen Streeter; PlanningCommision@cityofdavis.org; Sherri Metzker
Cc: ksrachiwutz@cityofdavis.org; AFeeny@cityofdavis.org; aMirabile@cityofdavis.org; Clerk Web; CMOWeb
Subject: October 9 meeting

CAUTION: External email. Please verify sender before opening attachments or clicking on links.

Dear Planning Staff, Planning Commission; I found out just today that the meeting to discuss the proposed Zoning Ordinance Amendment-Wireless Ordinance is to be held two days from now, on Wednesday, October 9. This hardly gives us, concerned residents of Davis, adequate time within which to review and prepare.
For the sake of due process and the need for the public to be notified and be able to ask questions and give input, I am requesting that you postpone this most important discussion for a future date.
Additionally, the date chosen happens to be the evening of the most significant Jewish holiday of the year. During this time, those observing the holiday of Yom Kippur will be finishing religious services and breaking their day-long fast.
I urge you to consider my request for the sake of the Davis community at large.
I would ask, additionally, that you include this email in the public records.
Respectfully,
Ellen Cohen

Sent from my iPhone

Sarah Fasig

From: Ellen Cohen <ellenruthcohen@gmail.com>
Sent: Tuesday, October 15, 2019 10:41 AM
To: Planning Commission
Subject: October 23 Meeting

Follow Up Flag: Follow up
Flag Status: Flagged

CAUTION: External email. Please verify sender before opening attachments or clicking on links.

Dear Commission Members;
I'm looking forward to meeting you all at the upcoming meeting in October 23, during which we will discuss the new draft of the wireless ordinance.
I've attended many city council meetings in order to participate in the public comments portion on the subject of the great dangers of microwave technology.
At one of the meetings, I presented the work of Arthur Firstenberg, who gathered over 400,000 signatures of electromagnetic experts (scientists, engineers, physicians, etc) to be presented to the UN in an effort to stop the deployment of 5G technology.
I hope that the Davis community can count on you for advocacy and representation, as we prepare for this important discussion which will culminate in your drafting a new and, I pray, protective wireless ordinance.
Respectfully,
Ellen Cohen

Sent from my iPhone

Sarah Fasig

From: Lena Pu <lhpdesign@gmail.com>
Sent: Wednesday, October 23, 2019 1:19 AM
To: Brett Lee; Gloria Partida; Will Arnold; Dan Carson; Lucas Frerichs; Herman Boschken; Cheryl Essex; Stephen Mikesell; David Robertson; Greg Rowe; Darryl Rutherford; Stephen Streeter; Emily Shandy; CMOWeb; Kelly Stachowicz; Ashley Feeney; Clerk Web
Cc: Paul McGavin; 5GAwarenessNow; Mark; Eric Windheim; MARTHA SPERRY; Johansson@statmail.com; Ellen Cohen; Pat Suyama; Larry Rollins; Nina Locker; Noah Fader; Lauren Ayers; Anna Dayton; Nora Oldwin - Slide Hill; Trish Trombly; Charmaine Jennings; Rena Nayyar; Carla A. Visha, M.D.; Jim Trask; kmblomquist@juno.com; Diana K Davis; Visse Storm; Meredith Herman; jilltheg@gmail.com; C Rairdan; Lena Pu
Subject: Additions to Draft Wireless Ordinance
Attachments: Page 8 Revisions.docx

Dear Planning Staff and Planning Commissioners:

[Please add this message into the public records please, thank you]

I have made additional revisions to this section of the draft ordinance:

SECTION 2.3. SMALL WIRELESS TELECOMMUNICATION FACILITY PERMIT APPLICATION SUBMITTAL AND COMPLETENESS REVIEW

Best Regards,
Lena Pu
Environmental Research & Design

SECTION 2.3. SMALL WIRELESS TELECOMMUNICATION FACILITY PERMIT APPLICATION SUBMITTAL AND COMPLETENESS REVIEW

SECTION 2.4. APPROVALS AND DENIALS

(a) **Review by Approval Authority.** The approval authority shall review a complete and duly filed application for a small wireless facility and may act on such application without prior notice or a public hearing.

(b) **Required Findings.** The approval authority may approve or conditionally approve a complete and duly filed application for a small wireless telecommunication facility permit when the approval authority finds:

(1) The proposed project meets the definition for a "small wireless telecommunication facility" and/or "small wireless facility" as defined by the FCC;

~~The proposed facility would be in the most preferred location within 500 feet from the proposed site in any direction or the applicant has demonstrated with clear and convincing evidence in the written record that any more preferred location(s) within 500 feet would be technically infeasible;~~ The proposed facility must connect to an already existing utility pole that can support its weight.

(2) The proposed facility would not be located on a prohibited support structure identified in this Policy;

(3) All new wires needed to service the small wireless telecommunication facility must be installed within the width of the existing utility pole so as to not exceed the diameter and height of the existing utility pole.

(4) All ground-mounted equipment not installed inside the pole must be undergrounded, flush to the ground, within three feet of the utility pole.

(5) Aside from the transmitter/antenna itself, no additional equipment may be visible.

(6) Each small wireless telecommunication facility must be at least one thousand five hundred feet away from the nearest small wireless telecommunication facility and/or wireless telecommunication facility.

(7) Each small wireless telecommunication facility must be at least one thousand five hundred feet away from any existing or approved residential dwelling in areas of both single and mixed use.

(8) An encroachment permit must be obtained for any work in the public right-of-way.

~~(9) The proposed facility would be on the most preferred support structure within~~

~~500 feet from the proposed site in any direction or the applicant has demonstrated with clear and convincing evidence in the written record that any more-preferred support structure(s) within 500 feet would be technically infeasible;~~

(10) The proposed facility complies with all applicable design standards in this Policy;

(11) The applicant has demonstrated that the proposed project will be in planned compliance with all applicable FCC regulations and guidelines for human exposure to RF emissions. The facilities will not expose people to radio frequency (RF) radiation in excess of FCC standards being that the power density cannot exceed 5% of the power density exposure limit applicable to that transmitter or facility or in a field strength that, when squared, exceeds 5% of the square of the electric or magnetic field strength limit applicable to that transmitter or facility (47 CFR 1.1310).

(c) **Conditional Approvals; Denials without Prejudice.** Subject to any applicable federal or California laws, nothing in this Policy is intended to limit the approval authority's ability to conditionally approve or deny without prejudice any small wireless facility permit application as may be necessary or appropriate to ensure compliance with this Policy.

(d) **Decision Notices.** Within five calendar days after the approval authority acts on a small wireless facility permit application or before the FCC Shot Clock expires (whichever occurs first), the approval authority shall notify the applicant by written notice. If the approval authority denies the application (with or without prejudice), the written notice must contain the reasons for the decision.

(e) **Appeals.** Any decision by the approval authority shall be final and not subject to any administrative appeals.

Sarah Fasig

From: Ashley Feeney
Sent: Tuesday, October 8, 2019 5:20 PM
To: 'Lena Pu'; Sherri Metzker; Brett Lee; Gloria Partida; Will Arnold; Dan Carson; Lucas Frerichs; Herman Boschken; Cheryl Essex; Stephen Mikesell; David Robertson; Greg Rowe; Darryl Rutherford; Stephen Streeter; Emily Shandy; planningcommision@cityofdavis.org; CMOWeb; Kelly Stachowicz; amirabile@cityofdavis.org; Clerk Web
Cc: Paul McGavin; Ellen Cohen; Martha Sperry; Nina Locker; Meredith Herman; jilltheg@gmail.com; 5GAwarenessNow; annalynndayton@yahoo.com; Eric Windheim; Pat Suyama; Larry Rollins; Jim Trask; Lauren Ayers; Carla A. Visha, M.D.
Subject: RE: Request to Postpone October 9th Meeting Regarding WTF Ordinance with Planning Commission

Follow Up Flag: Follow up
Flag Status: Completed

Dear Ms. Pu,

Staff has spoken to the Chair of the Planning Commission in regards to the concern you voiced that many of the individuals that have expressed an interest in this matter are not able to attend the Planning Commission meeting tomorrow night. Staff recommended and the Planning Commission Chair supports continuing this item to the next Planning Commission meeting which will occur on Wednesday, October 23, 2019 at 7:00 PM.

Kind regards,

Ashley Feeney
Assistant City Manager
(530) 757-5654

From: Lena Pu <lhpdesign@gmail.com>
Sent: Tuesday, October 8, 2019 1:22 PM
To: Sherri Metzker <SMetzker@cityofdavis.org>; Brett Lee <BLee@cityofdavis.org>; Gloria Partida <GPartida@cityofdavis.org>; Will Arnold <WArnold@cityofdavis.org>; Dan Carson <DCarson@cityofdavis.org>; Lucas Frerichs <lucasf@cityofdavis.org>; Herman Boschken <herman.boschken@sjsu.edu>; Cheryl Essex <cheryl.essex.davis@gmail.com>; Stephen Mikesell <stephenmikesell@outlook.com>; David Robertson <robertsondl@sbcglobal.net>; Greg Rowe <gregrowe50@comcast.net>; Darryl Rutherford <darryl.rutherford@gmail.com>; Stephen Streeter <stevestreeter@comcast.net>; Emily Shandy <emily.dt.shandy@gmail.com>; planningcommision@cityofdavis.org; CMOWeb <CMOWeb@cityofdavis.org>; Kelly Stachowicz <KStachowicz@cityofdavis.org>; Ashley Feeney <AFeeney@cityofdavis.org>; amirabile@cityofdavis.org; Clerk Web <ClerkWeb@cityofdavis.org>
Cc: Paul McGavin <paul@mystreetmychoice.com>; Ellen Cohen <ellenruthcohen@gmail.com>; Martha Sperry <m5sperry@sbcglobal.net>; Nina Locker <nlocker1969@yahoo.com>; Meredith Herman <merriherman@gmail.com>; jilltheg@gmail.com; 5GAwarenessNow <5gawarenessnow@gmail.com>; annalynndayton@yahoo.com; Eric Windheim <e.windheim@comcast.net>; Pat Suyama <patsuyama@gmail.com>; Larry Rollins <almandine09@gmail.com>; Jim Trask <jctrask1@gmail.com>; Lauren Ayers <lauren.yolocounty@gmail.com>; Carla A. Visha, M.D.

<globalhealthnow@yahoo.com>; Lena Pu <lhpdesign@gmail.com>
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October 8, 2019

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- Rabbi Abraham Joshua Heschel

Respectfully and In Truth,

Lena Pu
Environmental Health Consultant
NACST.org

STAFF REPORT

DATE: October 9, 2019

TO: Planning Commission

FROM: Sherri Metzker, Principal Planner

SUBJECT: **Zoning Ordinance Amendment - Wireless Ordinance**

Recommendation

Hold a public hearing and recommend approval to the City Council of:

1. AN ORDINANCE OF THE CITY OF DAVIS REGARDING WIRELESS TELECOMMUNICATION FACILITIES AND AMENDING AND RESTATING ARTICLE 40.29 OF THE DAVIS MUNICIPAL CODE IN ITS ENTIRETY REGARDING THESAME
2. A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF DAVIS ADOPTING A CITY WIDE POLICY REGARDING PERMITTING REQUIREMENTS AND DEVELOPMENT STANDARDS FOR SMALL WIRELESS TELECOMMUNICATION FACILITIES (please add throughout document "Telecommunication" back in for sake of consistency)

Project Description

The City of Davis is proposing an amendment to the Davis Municipal Code, thereby amending and restating Article 40.29 entitled Wireless Telecommunication Facilities to bring the City's regulation into compliance with Federal and State laws. This amendment will ensure to the greatest extent possible that wireless facilities are located, designed, installed, constructed, maintained and operated in a manner that meets the aesthetic and public health and safety requirements of the City. The proposed ordinance addresses they type of wireless facilities that are exempt, permitted, conditionally permitted, and prohibited. Further, it outlines the procedure for permit approval, design standards, and abandonment procedures.

The City of Davis is also proposing a resolution establishing permitting requirements and development standards for small cell wireless telecommunication facilities. The Federal Communication Commission adopted its Declaratory Ruling and Third Report and Order relating to the placement of small wireless telecommunication facilities in the public right of way. The Report and Order gives providers of wireless services certain rights to utilize public right of way and to attach small wireless facilities to public infrastructure subject to the payment of reasonable fees.

Background

On September 24, 2019, an informational item on wireless telecommunications regulations was presented to City Council. The presentation was intended to help get information out to the community and provide an update to the City Council on Wireless Telecommunications regulations. The majority of the background section of this staff report is duplicative to the information that was presented to the City Council at that meeting. The following section of this staff report provides a background summary on recent FCC (Federal Communications Commission) rules and requirements related to wireless telecommunications and the restrictions imposed on state and local government's ability to regulate them.

SUMMARY OF FCC REPORT AND ORDER

On September 27, 2018, the Federal Communications Commission's ("FCC's") Declaratory Ruling and Third Report and Order ("Report and Order") was issued, which established a new category of "small wireless telecommunication facilities" and imposed substantial restrictions on state and local governments' ability to regulate them. These restrictions include a new federal requirement that requires cities to allow small wireless telecommunication facilities on city-owned infrastructure in the public right-of- way, such as streetlights. The Report and Order does allow cities to establish aesthetic and (to a limited degree) locational requirements for small cell facilities. However, the City's small wireless telecommunication facility regulations are required to be "reasonable, objective, non-discriminatory, and published in advance." It further imposes tight deadlines for approving or denying small wireless telecommunication facility applications and limits the fees the city can charge for applications and for the use of City-owned infrastructure in the public right-of-way.

These requirements are in addition to existing federal requirements, which provide that "[n]o state or local statute or regulation, or other state or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide … telecommunications service."[1] Thus, any regulations that the City adopts must not "effectively prohibit" the provision of wireless service in the City. This is particularly relevant for any locational or zoning requirements the City may impose on wireless telecommunication facilities; the City may not restrict the location of wireless telecommunication facilities in a manner that eliminates wireless coverage in any area of the City.

Small Wireless Facilities are defined as follows:

- Must show proof of need for any gap in coverage of communications services under Title II.
- Must determine the least intrusive means to achieve this gap in coverage.
- They are mounted on either structures 50 feet or less in height including their antennas, or no more than 10 percent taller than other adjacent structures, or do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater; and
- Each antenna is no more than three cubic feet in volume, excluding associated antenna equipment; and
- All equipment associated with the antenna and any pre-existing associated equipment is no more than 28 cubic feet in volume; and

[1] Federal Telecommunications Act of 1996, 47 U.S.C. § 253.

- The facilities do not expose people to radio frequency (RF) radiation in excess of FCC standards. These standards being that the power density cannot exceed 5% of the power density exposure limit applicable to that transmitter or facility or in a field strength that, when squared, exceeds 5% of the square of the electric or magnetic field strength limit applicable to that transmitter or facility (47 CFR 1.1310).
- Submittal of report of proof of safety testing and/or SAR and/or similar calculable means for RF power levels from all antennas, transmitters and electronic components that utilize frequencies past 6GHz determined at ground level, second and third storied buildings.
- Submittal of prepared Environmental Assessment (EA) by the FCC as required by the National Environmental Protection Act (NEPA) for actions that may have significant environmental effect (47 CFR 1.1307).

Preemption of Local Aesthetic Regulations. The Report and Order requires that local regulations of small wireless telecommunication facilities concerning aesthetics, undergrounding, and spacing must be:

- Reasonable, meaning technically feasible and reasonably related to the harms created by unsightly deployments;
- No more burdensome than those applied to other types of infrastructure deployments;
- Objective; and
- Published in advance.

These requirements went into effect on April 15, 2019. Local agencies were not required to adopt new standards by that date, but any standards in effect that do not meet the requirements after that date are unenforceable. In an effort to maintain local control allowed under the law, City of Davis staff did develop and implement design criteria prior to the April 15, 2019 thereby preserving local control over design aesthetics to the extent permissible under the FCC Report and Order.

New Shot Clock Deadlines. Local agencies must act on all small wireless facility applications before the following "shot clock" deadlines: 60 days for a collocation on an existing structure; and 90 days for new small wireless facilities on a new structure. These extremely tight deadlines apply to all applications, regardless of whether they are submitted in large batches, and all permits and approvals required by the local agency, including but not limited to building permits, planning permits, encroachment permits, license agreements, etc. If the City fails to act within the required deadline, the City is presumptively in violation of the Federal Telecommunications Act, entitling the applicant to seek injunctive relief from the court.

New Limits on Local Fees. The Report and Order further limits the extent to which local agencies may impose fees on small wireless facility deployments. Local fees must now be shown to be a reasonable approximation of the state or local government's costs, and no higher than the fees charged to similarly situated competitors in similar situations. These limits apply to fees imposed for:

- Processing applications;
- The use of the public right-of-way; and
- The privilege of attaching to or using fixtures and structures in the public right-of-way that are owned or controlled by the government.

The Report and Order's impact on fees is most severe with respect to this last category because it intrudes on any leases, licenses, or other agreements with a wireless provider. Local agencies were previously under no obligation to allow wireless providers access to their physical property in the public-right-of-way, such as streetlights, traffic lights, and signs, and could therefore negotiate with providers for compensation. Under the Report and Order, however, local agencies can no longer refuse to allow facilities on their property or even leverage their properties in the right-of-way for additional revenue, but can only recover fees that are reasonably related to their actual

costs. Whether existing agreements violate the fee limits in the Report and Order will depend upon all the facts and circumstances of the specific case.

The Report and Order also established presumptively reasonable "safe harbor" fees as follows:

- Either $500 for non-recurring fees, including application fees for up to five small wireless facilities, with an additional $100 for each application beyond five; or $1,000 for non-recurring fees for a new pole (i.e., not a collocation) intended to support one or more Small Wireless Facilities; and
- $270 per Small Wireless Facility per year for all recurring fees, including any possible public right-of-way access fee or fee for attachment to municipally-owned structures in the public right-of-way.

Local agencies may still charge higher fees, but they must establish such fees are reasonable and non-discriminatory and constitute a reasonable approximation of costs.

PENDING LEGAL CHALLENGE TO THE REPORT AND ORDER

Numerous municipalities have filed legal challenges to the Report and Order in federal court, arguing on various grounds that the Federal Communications Commission (the "FCC") exceeded its statutory authority and abused its discretion by acting in an arbitrary and capricious manner. Several wireless providers have also filed challenges on the grounds that the FCC should have adopted a "deemed approved" remedy for small wireless facility shot clock violations.

These cases have been consolidated as *City of San Jose v. FCC* and transferred to the Ninth Circuit Court of Appeals. Briefing is scheduled to conclude this month, but staff is unaware of any date scheduled for oral arguments. Unfortunately, the municipalities' motion to stay the effect of the Report and Order pending their legal challenge was denied. The Report and Order therefore remains in effect for the time being

~~**CONSEQUENCES OF NON-COMPLIANCE**~~

~~Under the current provisions of Article 40.29 of the Davis Municipal Code ("Municipal Code" or "DMC"), all wireless telecommunication facilities are subject to a thorough permitting process and must comply with detailed design requirements and standards. (*See* DMC § 40.29.010 *et seq*.) Under the Report and Order, however, many of these provisions are now unenforceable with respect to small wireless facilities because they are too subjective. Moreover, the City's current regulations are not sufficiently streamlined to allow expedient, ministerial approval of small wireless facility applications within the strict confines of the new shot clock. For this reason, City staff has prepared the recommended amendments to Article 40.29 to comply with other developments in telecommunications law. Those changes are discussed further below.~~

~~**THE MASTER LICENSE AGREEMENT**~~

~~All cities are facing the challenge of complying with the Report and Order, and there is no one-size-fits-all solution. Staff, together with legal counsel has developed a Master License Agreement (MLA) as a mechanism to respond to requests from wireless providers to attach to City-owned~~ *("attach to City owned facilities in the public right of way as required by the new FCC rules"* to note: becomes a dangerous condition of liability for the city melding a private facility to a publicly owned one) ~~facilities in the public right-of-way as required by the new FCC rules until the City can amend its~~

~~telecommunications ordinance. That said, the MLA will continue in effect and will become subject to any future ordinance or design standards adopted by the City. The MLA does not lock in design standards or City fees at the time of approval, so any future applications the company might submit would be subject the City's regulations in place at that time. This is advisable because: (1) the City cannot readily predict how wireless technology might change in the future; (2) cost-based fees will certainly increase in the future; and (3) the entire Report and Order – including the cap on annual license fees – could be overturned if the lawsuit against the FCC is successful.~~

~~Thus, the MLA provides that the annual license fees would automatically increase the annual license fee to $1,250 per installation in the event the relevant provisions of the Report and Order are no longer legally effective. The MLA does not involve the expenditure of City funds. As explained above, the fees that can be collected for small wireless facilities on City property have been essentially capped at a low "safe harbor" amount. Finally, the approval of the small wireless facilities themselves is non-discretionary, subject to compliance with limited objective standards. For these reasons, we believe that the MLA is an appropriate tool for the City to use in effort to condition and memorialize City discretion to the greatest extent allowed under the law.~~

PROPOSED CHANGES TO THE CITY'S WIRELESS REGULATIONS

With regard to the wireless telecommunications ordinance, staff recommends that amendments to Article 40.29 of the Municipal Code ("Wireless Telecommunication Facilities") include a provision that~~: (1) exempts small wireless facilities that meet the FCC's definition from Article 40.29; and (2)~~ make such small wireless telecommunication facilities subject to a separate Small Wireless Facility Policy ("Policy") that the City Council would adopt by resolution. The Policy would apply to small wireless telecommunication facilities in both the right-of-way and on private property.

The purpose of adopting the Policy by resolution rather than by an ordinance amending the Municipal Code is to maintain the City's ability to update its regulations quickly to respond to changes in technology and federal law.

~~LIMITS ON CONSIDERATION OR~~ RADIO FREQUENCY (RF) EMISSIONS

Concerns about the possible negative health effects of radio frequency (RF) emissions generated by wireless telecommunication facilities are often raised whenever cities consider approving new wireless regulations or approve new wireless telecommunication facility applications. ~~However, federal law has preempted the City's ability to consider such matters to the extent wireless facilities comply with RF standards promulgated by the FCC.~~ The Federal Telecommunications Act of 1996 states in part:

> *"No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [FCC's] regulations concerning such emissions."*

~~(47 U.S.C. § 332(c)(7)(B)(iv) (emphasis added).) This rule predates the Report and Order, and therefore applies to all wireless telecommunication facilities, including small wireless facilities.~~

~~The City may not regulate wireless facilities, including small wireless facilities, based on concerns regarding RF emissions, including health concerns. All that the City can do is to require that such~~

~~facilities meet the FCC requirements for RF emissions. Therefore,~~ staff recommends that the City's Policy for small wireless telecommunication facilities include the following provisions:

- Applications should be required to include an RF exposure compliance report that certifies that the proposed small wireless facility, as well as any collocated wireless telecommunication facilities, will comply with applicable federal RF exposure standards and exposure limits. That report ~~would be required to be~~ shall be prepared by a third party independent certified ~~and certified by an~~ RF engineer determined by ~~acceptable to~~ the City and funded by the applicant.

- No small wireless telecommunication facility would be approved unless the City finds that the applicant has demonstrated that the proposed project will be in compliance with all applicable FCC regulations and guidelines for human exposure to RF emissions.

- Any approved project would be subject to a standard condition of approval that requires all small wireless telecommunication facilities to be maintained in compliance at all times with all federal, state and local statutes, regulations, orders or other rules applicable to human exposure to RF emissions.

- All small wireless telecommunication facilities would be required to be designed, constructed, operated and maintained in compliance with all generally applicable health and safety regulations, which includes without limitation all applicable regulations for human exposure to RF emissions.

- All small wireless telecommunication facilities locations consideration shall be in compliance with the United States Access Board and Americans with Disabilities Act (ADA) both recognizing individuals and city residents with electro-sensitivity (ES) as a disability and providing safe access to and from and within their places of dwelling, places of work, education and community. Electro-sensitivity is also known as radar sickness and microwave sickness but not limited to these.

~~CONCLUSION~~

~~In conclusion, the FCC's Report and Order places substantial new limitations on the City's ability to regulate small wireless facilities, one of which is that local aesthetic regulations must be objective and published in advance. The City continues to be prohibited from regulating small wireless facilities (or any wireless facilities) based on RF emissions or health impacts. The MLA is strongly recommended as an appropriate means of complying with the Report and Order with regard to the pending and future applications while maximizing the ability to condition and memorialize City discretion to the greatest extent allowed under the law. The proposed amendments and the MLA process, would protect the City's interests and preserve the maximum authority allowed under the new law~~

~~Project Analysis~~

~~The last time the City of Davis did a major update to the Wireless Telecommunications Ordinance was in 2012. At that time, the city was able to maintain much of its local authority with regard to regulations in the wireless industry. However, since that time, the Federal Government has adopted new regulation removing much of the local discretionary authority and replacing it with~~

~~simple ministerial authority. In particular, as described above, this applies to small cell facilities. It is staff's expectation that these antennas will be located in various places around the City in the public right of way and will make use of City light poles for their structural mechanism. Staff has worked with legal counsel to include provisions in the ordinance that allow for locational~~

~~preferences and other aesthetic measures to the extent allowed under the law. The following is a brief explanation of each new section of Article 40.29.~~

40.29.010 – 030 Purpose, Authority and Definitions

These three sections are simply updated to reflect the current code format. The definitions have been updated to reflect current provisions. In particular, those terms that are subject to change by the Federal Communications Commission (FCC), have been redefined to refer to the appropriate Federal code. This will prevent the need to redefine the term every time the FCC modifies the definition.

40.29.040 – Applicability; Exemptions

This section outlines the applicability of the Article and lists those types of antennas that are exempt from permitting by the City. These types of antenna include satellite dishes, amateur radio operators, public safety repeaters, and temporary emergency antennas, just to name a few. These antennas may need a building permit but are not subject to discretionary approval.

40.29.050 – Conditionally Permitted Wireless Facilities

This section makes approval of a conditional use permit a requirement for all wireless telecommunication facilities except those listed in 40.29.060, 40.29.070, or 40.29.080.

40.29.60 – Permitted Wireless Telecommunication Facilities

Eligible Facility Requests, as defined by the FCC, are permitted uses. Therefore, there is no discretionary approval permitted if the application meets this definition. Currently, an eligible facility request must meet the following requirements;

1. A modification substantially changes a wireless tower on private property if it increases the height of the tower as it existed on February 22, 2012 by more than 10% or 20 feet (whichever is greater). 47 C.F.R. § 1.40001(b)(7)(i).
2. A modification substantially changes a wireless tower on private property if it adds an appurtenance that protrudes from the tower by more than 20 feet or by the width of the tower at the level of the appurtenance (whichever is greater). 47 C.F.R. § 1.40001(b)(7)(ii).
3. A modification substantially changes a wireless tower on private property if it involves more than four (4) new equipment cabinets. 47 C.F.R. § 1.40001(b)(7)(ii).
4. A modification substantially changes a wireless tower on private property if it entails any excavation or deployment outside the current boundaries of the leased or owned property surrounding the tower and any access or utility easements related to the site. 47 C.F.R. §§ 1.40001(b)(6), 1.40001(7)(iv).
5. A modification substantially changes a wireless tower on private property if it would defeat the concealment elements of the tower. 47 C.F.R. § 1.40001(b)(7)(v).
6. A modification substantially changes a wireless tower on private property if it does not comply with conditions associated with the siting approval for the original construction or subsequent modification(s) of the tower. Noncompliance with prior permit conditions

related to height, width, equipment cabinets and excavation would not cause a substantial change to the extent the condition is more restrictive than the applicable FCC thresholds. 47 C.F.R. § 1.40001(b)(7)(vi).

40.29.070 – Prohibited Wireless Telecommunication Facilities

This section contains the types of wireless facilities that are prohibited in the City. Those that exceed the radio frequency emissions standards adopted by the FCC, those in areas zoned for residential uses, zoned for schools, sensitive habitat areas or historical resources. It should be noted that this section applies to those antennas that would otherwise require a conditional use permit. They do not apply to small wireless telecommunication facilities as they have their own locational preferences.

40.29.80 – Small Wireless Telecommunication Facilities

Small Wireless Telecommunication Facilities are defined by the FCC as follows:

(1) The facilities—
(i) are mounted on structures 50 feet or less in height including their antennas as defined in section 1.1320(d), or
(ii) are mounted on structures no more than 10 percent taller than other adjacent structures, or
(iii) do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater;

(2) Each antenna associated with the deployment, excluding associated antenna equipment (as defined in the definition of antenna in section 1.1320(d)), is no more than three cubic feet in volume;

(3) All other wireless equipment associated with the structure, including the wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than 28 cubic feet in volume;

(4) The facilities do not require antenna structure registration under part 17 of this chapter;

(5) The facilities are not located on Tribal lands, as defined under 36 CFR 800.16(x); and

(6) The facilities do not result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified in section 1.1307(b).

The Federal regulations permit the local jurisdictions to establish certain aesthetic design standards. In light of that provision, staff is recommending adoption of the attached resolution entitled, "Citywide Policy Regarding Permitting Requirements and Development Standards for Small Wireless Facilities." Adopting the standards by resolution, as opposed to ordinance will allow the City to react more quickly to the changing provisions for small wireless telecommunication facilities.

40.29.090 – Applications

The provisions for a conditional use permit for a wireless telecommunication facility are very similar to those in effect today. This section explains the requirements for obtaining a conditional use permit, including recommending pre submittal conference and a submittal appointment.

40.29.100 – General Requirements and Design Standards

This section describes the requirements and standards that apply to all permitted and conditionally permitted wireless telecommunication facilities.

40.29.110 – Public Hearing and Noticing Radius
40.29.120 - Findings
40.29.130 - Regulatory Compliance

These three sections describe procedures and findings for approving a conditional use permit. The regulatory compliance section requires the permittee to ensure compliance with the current regulations.

40.29.140 – Existing Conforming and Legal Nonconforming Wireless Facilities
40.29.150 – Periodic Review

These sections provide provisions for dealing with changes to non-conforming wireless facilities and the periodic review of facilities to determine if the facility is conforming.

40.29.160 – Transfer of Operation
40.29.170 – Abandonment or Discontinuation of Use

These sections deal with the transfer of ownership of a permit and the abandonment of discontinuation of a wireless facility.

40.29.180 – Violations; Public Nuisance
40.29.190 – Revocation of Permit
40.29.200 – Mandatory Removal and Relocation
40.29.210 – Appeals
40.29.220 – Effect of State or Federal Law

These five sections describe procedural provisions for violations and revocations of permits.

Resolution of the City Council of the City of Davis Adopting a Citywide Policy Regarding Permitting Requirements and Development Standards for Small Wireless Telecommunication Facilities

As mentioned earlier, the purpose of adopting development standards via a resolution is to facilitate prompt updates to the City's standards. The resolution outlines application requirements. It also describes submittal and completeness review requirements. The approval or denial provisions are followed by a list of standard conditions of approval.

One area of particular public concern is the locational preference requirements. Staff is recommending three levels of preference, starting with,

1 nonresidential zones,

2 any location in a residential zone ~~250~~ 1000 feet or more from any structure approved for a residential or school use,

~~3~~ if located in a residential area, no pole mounted antennas shall be placed directly in front, on the side or behind a residential home. ~~a location that is as far as possible from any structure approved for a residential use.~~

Applications for less preferred locations or structures may be approved so long as the applicant demonstrates that either,

1) no more preferred locations or structures exist within 500 feet from the proposed site, or
2) any more preferred locations or structures within 500 feet from the proposed site would be technically infeasible as supported by clear and convincing written evidence.

Prohibited support structures would also be denied a permit.

The resolution also includes design standards for a variety of factors. Issues such as noise, lighting, landscaping, signage, concealment, installation preferences, and accessory equipment provisions. These design provisions address both steel and wooden poles.

Environmental Determination

~~The City of Davis (City) has determined that the lease applicant has to adopt the requirements of the adoption of the resolution is exempt from review under the California Environmental Quality Act.(CEQA) (California Public Resources Code Section 21000, et seq.), pursuant to State CEQA Regulation Section 15061 (B)(3) (14 Cal. Code Regs. Section 15061 (b)(3)) covering activities with no possibility of having a significant effect on the environment. In addition, the City of Davis has determined that the ordinance is categorically exempt pursuant to Section 15301 of the CEQA regulations applicable to minor alterations of existing governmental and/or utility owned structures.~~

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ORDINANCE NO.

AN ORDINANCE OF THE CITY OF DAVIS REGARDING WIRELESS TELECOMMUNICATION FACILITIES AND AMENDING AND RESTATING ARTICLE 40.29 OF THE DAVIS MUNICIPAL CODE IN ITS ENTIRETY REGARDING THE SAME

WHEREAS, there have been significant changes in the types of wireless telecommunication facilities used to provide communications services within the City; and

WHEREAS, both federal and state law has been modified regarding the regulation of wireless telecommunication facilities both in the public rights or way and on private property outside of the public rights of way; and

WHEREAS, the City desires ensure to the greatest extent allowed under federal state law that wireless telecommunication facilities are located, designed, installed, constructed, maintained, and operated in a manner that meets the aesthetic and public health and safety requirements of the City; and

WHEREAS, the City deems it necessary and appropriate to adopt standards and regulations relating to the location, design, installation, construction, maintenance, and operation of wireless telecommunication facilities, including towers, antennas, and other structures both in the public rights or way and on private property outside of the public rights of way and to provide for the enforcement of these standards and regulations consistent with federal and state legal requirements;

NOW, THEREFORE, the City Council of the City of Davis does hereby ordain as follows:

Section 1. Code Amendment. Article 40.29 of the Davis Municipal Code is hereby amended and restated in its entirety and replaced and reenacted as set forth in **Exhibit A** attached hereto and incorporated herein. The provisions of Article 40.29, insofar as they are substantially the same as provisions of ordinances previously adopted by the City relating to the same matter, shall be construed as restatements and continuations of the earlier enactment, and not as new enactments. The adoption of this Ordinance shall not affect any actions and proceedings that began before the effective date of this Ordinance; prosecution for ordinance violations committed before the effective date of this Ordinance; licenses and penalties due and unpaid at the effective date of this Ordinance.

Section 2. Severability. If any provision of this Ordinance, or its application to any person or circumstance, is determined by a court of competent jurisdiction to be unlawful, unenforceable or otherwise void, that determination shall have no effect on any other provision of this Ordinance or the application of this Ordinance to any other person or circumstance and, to that end, the provisions of this Ordinance are severable.

Section 3. Effective Date and Notice. The City Clerk shall certify to the adoption of this

Ordinance, and the City Clerk shall, at least five (5) days prior to meeting at which this Ordinance is to be adopted and within fifteen (15) days of its adoption, cause a summary of this Ordinance to published in a newspaper of general circulation published and circulated in the City of Davis and a certified copy of the full text of the Ordinance to be posted in the office of the City Clerk. This Ordinance shall take effect thirty (30) days following its adoption.

INTRODUCED on the_____day of,_____, and PASSED AND ADOPTED by the City Council of the City of Davis on the_____day of, _____, by the following vote:

AYES:

NOES:

ABSTAIN:

ATTEST:

_____
Zoe S. Mirabile, CMC
City Clerk

EXHIBIT A

Article 40.29 WIRELESS TELECOMMUNICATION FACILITIES

40.29.010. Purpose.

The purpose of this Article is to provide uniform standards for the establishment and modification of wireless telecommunications facilities (WTFs) in the City and to provide for the desired location, design, installation, construction, maintenance, and operation of WTFs consistent with applicable federal and state requirements. These standards are intended to address and balance the potentially adverse visual and aesthetic impacts of WTFs while providing for the communication needs of residents, local businesses, and government agencies; manage the public rights-of-way and ensure the public is not incommoded by the placement of WTFs in the public rights-of-way.

40.29.020. Authority.

This Article is enacted pursuant to the City's police power to regulate for the public health, safety and welfare subject to the limitations of that power under federal and state law, including but not necessarily limited to the Federal Telecommunications Act of 1996, Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, state laws regulating the processing and procedures associated with local WTF approvals. This Article shall be interpreted in conjunction with the federal and state laws and regulations regarding the processing and placement of telecommunications facilities within the City.

40.29.030. Definitions.

For the purposes of this Article, the following terms shall have the meanings set forth below:

(a) **Antenna**. Any system of wires, poles, rods, discs, reflecting discs, panels, flat panels, dishes, whip antennae, or other similar devices used for the transmission or reception of wireless signals. Antennae includes devices having active elements extending in any direction, and directional beam-type arrays having elements carried by and disposed from a generally horizontal boom that may be mounted upon and rotated through a vertical mast or tower interconnecting the boom and antenna support, all of which elements are deemed to be a part of the antenna. The height of the antenna shall include all array structures.

(1) **Antenna—Amateur radio**. A ground, building, or tower mounted antenna, or similar antenna structure, operated by a federally licensed amateur radio operator as part of the Amateur Radio Service, and as designated by the Federal Communications Commission (FCC).

(2) **Antenna array**. A group of antennas located on the same structure.

(3) **Antenna—Building mounted**. An antenna, other than an antenna with its supports resting on the ground, directly attached, façade-mounted or affixed to a building, tank, or structure other than a tower.

(4) **Antenna—Roof mounted**. Any antenna which is mounted to the roof of a building, tank, or similar structure.

(5) **Antenna—Flush mounted**. An antenna mounted to the wall of a structure that does not project above the façade to which it is mounted

(6) **Antenna—Direct broadcast satellite service (DBS)**. An antenna, usually a small home receiving satellite dish.

(7) **Antenna—Directional**. A device used to transmit and/or receive radio frequency signals in a directional pattern of less than three hundred sixty degrees. Also known as panel antenna.

(8) **Antenna—Ground mounted**. Any antenna with its base, single or multiple posts, placed directly on the ground.

(9) **Antenna—Satellite earth station (SES)**. An antenna designed to receive and/or transmit radio frequency signals directly to and/or from a satellite.

(10) **Antenna—Television broadcast service (TVBS)**. An antenna designed to receive only television broadcast signals.

(11) **Antenna—Radio antennas**. An antenna designed to receive AM/FM radio broadcast signals, or similar signals used for commercial purposes.

(12) **Antenna—Distributed Antenna System (DAS)**. Network of spatially separated antenna sites connected to a common source that provides wireless communication service within a geographic area or structure.

(13) **Antenna—All other antennas**. All other antenna(s) not previously covered in this section.

(b) **Base Station**. The same as defined by the FCC in 47 C.F.R. § 1.60001(b)(1), as may be amended or superseded.

(c) **CPCN**. A Certificate of Public Convenience and Necessity granted by the California Public Utility Commission, or its duly appointed successor agency, pursuant to California Public Utilities Code Sections 1001 *et seq.*, as may be amended or superseded.

(d) **Collocation**. The mounting of one or more WTFs, including antennas, on an existing or proposed WF or utility pole.

(e) **Director**. The Director of the City's Community Development and Sustainability Department or his or her designee.

(f) **Equipment building, shelter, or cabinet**. A cabinet or building used by telecommunications providers to house equipment at a site or facility.

(g) **Eligible Facilities Request**. An eligible facility request within the meaning of 47 C.F.R.§ 1.6100(b)(3) as may be amended or superseded.

(h) **FCC**. The Federal Communications Commission or its lawful successor.

(i) **Lattice tower**. A tower constructed of metal crossed strips or bars to support WTF antennas and related equipment.

(j) **Monopole**. A tower that consists of a single pole structure (non-lattice), designed and erected on the ground or on top of a structure, to support WTF antennas and related equipment.

(k) **Permittee**. The recipient, or its heirs, successors, or assigns of a permit issued pursuant to this Article or any predecessors to this Article, or any operator, user, or lessee of any permitted WTF issued a permit pursuant to this or any predecessors to this Article.

(l) **Personal Wireless Services**. Commercial mobile services, unlicensed wireless services and common carrier wireless exchange access services as defined in 47 U.S.C. Section 332(c)(7)(C)(i), as may be amended or superseded.

(m) **Public Right-of-Way (PROW)**. Any public road, highway, or waterway subject to Public Utilities Code section 7901 (as it may be amended from time to time).

(n) **RF**. Radio frequency or electromagnetic waves generally between 30 kHz and 300 GHz in the electromagnetic spectrum.

(o) **Section 6409**. Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156, codified as 47 U.S.C. Section 1455 (a), as may be amended.

(p) **Shot Clock**. The presumptively reasonable time under federal law in which a local government must act on an application or request for authorization to place, construct, or modify WTF facilities.

(q) **Small Wireless Telecommunication Facilities (SWTF)**. A small wireless telecommunication facility within the meaning of 47 C.F.R. § 1.6002(*l*) or any successor provision.

(r) **Stealth technology/techniques**. Methods of camouflaging or otherwise rendering minimally visible to the casual observer the visual appearance of WTF towers, antenna, cabinets, and/or other related equipment. Stealth techniques render WTF more visually appealing or blend WTF into an existing structure and may utilize, but does not require, concealment of all components of the WTF.

(s) **Tower**. A freestanding mast, pole, monopole, guyed tower, lattice tower, free standing tower or other structure designed and primarily used to support WTF antennae.

(t) **Temporary Wireless Telecommunication Facilities**. A portable wireless telecommunication facility intended or used to provide personal wireless services on a temporary or emergency basis, such as a large scale special event in which more users than usually gather in a confined location or when a disaster disables permanent wireless facilities. Temporary wireless facilities include, without limitation, cells on wheels (COWS), sites on wheels (SOWs), cells on light trucks (COLTs) or other similarly portable wireless facilities not permanently affixed to the site on which it is located.

(u) **Wireless Telecommunication Facility (WTF)**. The transmitters, antenna structures and other types of installations used for the provision of personal wireless services at a fixed location, including but not limited to associated towers, support structures, base stations, poles, pipes, mains, conduits, ducts, pedestals, and electronic equipment, and antennas.

(v) **Wireless**. Transmissions through the airwaves including, but not limited to, infrared line of sight, cellular, PCS, microwave, satellite, radio, or television.

40.29.040. Applicability; Exemptions.

(a) **Applicability**. No person shall construct, install, attach, operate, collocate, modify, reconstruct, relocate, or otherwise deploy any WTF within the City's jurisdictional and territorial boundaries, on private property and within the public right of way except in compliance with this Article.

(b) **Other Permits and Regulatory Approvals**. In addition to any permit or approval required under this Article, the applicant, owner or operator, who owns or controls an WTF, must obtain all other permits and regulatory approvals (such as environmental assessment (EA) compliance with the National Environmental Protection Act (NEPA) and California Environmental Quality Act) required by the City, any federal, state or local government agencies; and the applicant, owner or operator must comply with all applicable federal state and local government agency laws and regulations applicable to the WFs including without limitation, any applicable laws and regulations governing RF emissions.

(c) **Exemptions**. Notwithstanding Section 40.29.040(a), this Article shall not apply to any of the following:

(1) Television antennae, satellite dishes, and amateur radio facilities, whether interior or exterior, as follows:

(A) Direct broadcast satellite (DBS) antennae and television broadcast service (TBS) antennae or other similarly scaled telecommunication device that neither exceeds one meter in diameter nor extends above the roof peak or parapet.

(B) Ground mounted antennas and support structures: (i) located entirely on-site and not overhanging or extending beyond any property line; (ii) not located within any required front or side yard setback; and (iii) screened from public view to the extent practical.

(C) Antenna height shall not exceed the maximum allowable building height for the zoning district in which it is located by more than ten feet. The antenna support structure shall not exceed a width or diameter of twenty four inches.

(2) WTFs used only for public safety purposes, including transmitters, repeaters, and remote cameras so long as the facilities are designed to match the supporting structure.

(3) WTFs that are accessory to other publicly owned or operated equipment used for data acquisition such as irrigation controls, well monitoring, and traffic signal controls.

(4) WTFs erected and operated for emergency situations, as designated by the police chief, fire chief, or City manager so long as the facility is removed at the conclusion of the emergency.

(5) Multipoint distribution service (MDS) antennas and other temporary mobile wireless service including mobile WFs and services providing public information coverage of news events (less than two-weeks duration).

(6) Mobile WTFs when placed on a site for less than seven consecutive days, provided any necessary building permit is obtained.

(7) SES in a commercial or industrial zone that meet the following standards:

(A) The antennas do not exceed two meters in either diameter or diagonal measurement.

(B) The antennas are located as far away as possible from the edges of rooftops or are otherwise adequately screened to eliminate visibility from adjacent properties. The method of screening shall be approved by the director.

(8) Commercial television (TVBS) and AM/FM radio antennas not extending more than twelve feet beyond the maximum allowed building height for the zone.

(9) Personal wireless internet equipment, such as a wireless router, provided that the equipment is included entirely within a building or residence.

~~(10) Any WF that is specifically and expressly exempt from local regulation pursuant to federal or state law, but only to the extent of any such exemption and provided that the applicant must provide the documentation necessary to prove the exemption to the satisfaction of the Director.~~

40.29.050. Conditionally Permitted WTFs.

All WFs subject to this Article shall be conditionally permitted unless permitted under Section 40.29.060, prohibited under Section 40.29.070, or subject to Section 40.29.080 regarding small wireless facilities.

40.29.060. Permitted WTFs.

The following types of WTFs are permitted in any zone.

(a) Eligible facility requests.

(b) Collocation facilities that meets the requirements of California Government Code § 65850.6, as may be amended or superseded.

40.29.070. Prohibited WTFs.

The following types of WTFs are prohibited.

(a) WTFs that exceed current standards for RF emissions standards adopted by the FCC.

(b) WTFs in areas zoned or designated on the general plan land use map for residential uses; or within five hundred feet of areas so designated or zoned. Mixed use zones are subject to this prohibition.

(c) WTFs on sites containing existing or planned public or private school facilities; or within five hundred feet of said areas so designated or zoned.

(d) WTFs in designated sensitive habitat areas, such as habitat restoration areas, as designated by the City. The community development and sustainability department shall maintain a map identifying such areas.

(e) WTFs on a property that has been designated an historical resource in accordance with Article 40.23.

40.29.080. Small Wireless Telecommunication Facilities.

Notwithstanding any other provision of the Davis Municipal Code to the contrary, all small wireless telecommunication facilities shall be subject only to and must comply with the "Citywide Policy Regarding Permitting Requirements and Development Standards for Small Wireless Facilities" adopted by City Council resolution. No person shall construct, install, attach, operate, collocate, modify, reconstruct, relocate, remove, or otherwise deploy any small wireless telecommunication facility in violation of such policy.

40.29.090. Applications.

(a) **Application required**. All conditional use permit applications for WTFs shall be submitted under the conditional use permit procedures set forth in Article 40.30 and must include the following:

(1) All application materials generally required for a conditional use permit under Article 40.30

(2) Any other information or materials the Director may require in order to properly assess a particular application. The Director shall determine the required number, size, and contents of any required plans.

(3) A vicinity map, including topographic areas, one-thousand-foot radius from proposed site/facility, residential and school zones and major roads/highways. The distance of the existing or proposed WTF from existing residentially designated/zoned areas, existing residences, schools, major roads and highways, and all other telecommunication sites and facilities (including other providers locations) within a one-thousand-foot radius shall be delineated on the vicinity map.

(4) A site plan that includes and identifies:

(A) All facility related support and protection equipment;

(B) A description of general project information, including the type of facility, number of antennas, height to top of antenna(s), radio frequency types, propagation techniques and range, wattage output of equipment, and a statement of compliance with current FCC requirements.

(C) All RF values shall be shown, described and graphed out at maximum peak measurements.

(D) Elevations of all proposed telecommunication structures and appurtenances, and composite elevations from the street(s) showing the proposed project and all buildings on the site.

(5) Photo simulations, photo-montage, story poles, elevations and/or other visual or graphic illustrations necessary to determine potential visual impact of the proposed project. Visual impact demonstrations shall include accurate scale and coloration of the proposed facility. The visual simulation shall show the proposed structure as it would be seen from surrounding properties from perspective points to be determined in consultation with the community development and sustainability department prior to preparation. The City may also require the simulation analyzing stealth designs, and/or on-site demonstration mock-ups before the public hearing.

(6) Landscape plan that shows existing vegetation, vegetation to be removed, and proposed plantings by type, size, and location. If deemed necessary, the community development and sustainability director may require a report by a licensed landscape architect to verify project impacts on existing vegetation. This report may recommend protective measures to be implemented during and after construction. Where deemed appropriate by the community development and sustainability department, a landscape plan may be required for the entire parcel and leased area.

(7) A written statement and supporting information describing the least intrusive means and proof of need for gap in coverage, as requested by staff and/or the planning commission, regarding alternative site selection and co-location opportunities in the service area. The application shall describe the preferred location sites within the geographic service area, a statement why each alternative site was rejected, and a contact list used in the site selection process. Provide a statement and evidence of refusal regarding lack of co-location opportunities.

(8) Noise and acoustical information for the base transceiver station(s), equipment buildings, and associated equipment such as air conditioning units and back-up generators. Such information shall be provided by a qualified firm or individual, approved by the City, and paid for by the project applicant.

(9) An RF analysis conducted and certified by a state-licensed/registered RF engineer or qualified consultant to determine the maximum peak potential RF power density of the proposed WF at full build-out, along with a comparison of the maximum RF exposure calculations at ground level with the FCC's RF safety standards. The engineer shall use accepted industry standards for evaluating compliance with FCC-guidelines for human

exposure to RF, such as OET 65, or any superseding reports/standards. The RF analysis

shall be provided by a qualified firm or individual, approved by the City, and paid for by the project applicant.

(10) A cumulative impact analysis for the proposed facility and other WTFs on the project site or within one thousand three hundred feet of the proposed WTF site. The analysis shall include all existing and proposed (application submitted to the community development and sustainability department) WTFs on or near the site, dimensions of all antennas and support equipment on or near the site, power rating for all existing and proposed back-up equipment, and a report estimating the ambient RF fields and maximum potential cumulative electromagnetic radiation at, and surrounding, the proposed site that would result if the proposed WTF were operating at full buildout.

(11) Statement by the applicant of willingness to allow other carriers to co-locate on their facilities wherever technically and economically feasible and aesthetically desirable.

(12) A signed copy of the proposed property lease agreement, exclusive of the financial terms of the lease, including provisions for removal of the WTF and appurtenant equipment within ninety days of its abandonment and provisions for City access to the WTF for removal where the provider fails to remove the WTF and appurtenant equipment within ninety days of its abandonment pursuant to Section 40.29.025(b). The final agreement shall be submitted at the building permit stage.

(13) An evidence of needs report detailing operational and capacity needs of the provider's system within the City of Davis and the immediate area adjacent to the City. The report shall detail how the proposed WTF is technically necessary to address current demand and technical limitations of the current system, including technical evidence regarding significant gaps in the provider's coverage, if applicable, and that there are no less intrusive means to close that significant gap. Such report shall be evaluated by a qualified firm or individual, chosen by the City, and paid for by the project applicant. The qualified firm or individual chosen by the City may request additional information from the applicant to sufficiently evaluate the proposed project.

(14) A security plan which includes emergency contact information, main breaker switch, emergency procedures to follow, and any other information as required by Section 40.29.180 and/or the community development and sustainability director.

(15) A description of the anticipated maintenance program and back-up generator power testing schedule.

(16) Any other documents, information, and other materials the Director deems necessary to make the findings required for approval and ensure that the WTF will comply with applicable federal and state law, the City Code.

(17) The name of the applicant, its telephone number and contact information, and if the applicant is a wireless infrastructure provider, the name and contact information for the wireless service provider that will be using the personal wireless services facility;

(18) A complete description of the proposed WTF and the work that will be required to install or modify it, including, but not limited to, detail regarding proposed excavations, if any; detailed site plans showing the location of the WTF, and specifications for each element of the WTF, clearly describing the site and all structures and facilities at the site before and after installation or modification; and describing the distance to the nearest residential dwelling unit and any historical structure within 500 feet of the facility. Before and after 360 degree photosimulations must be provided.

(19) Documentation sufficient to show that the proposed facility will comply with generally-applicable health and safety provisions of the City Code and the FCC's radio frequency emissions standards. The facilities do not expose people to radio frequency (RF) radiation in excess of FCC standards. These standards being that the power density cannot exceed 5% of the power density exposure limit applicable to that transmitter or facility or in a field strength that, when squared, exceeds 5% of the square of the electric or magnetic field strength limit applicable to that transmitter or facility (47 CFR 1.1310).

(20) Submittal of report of proof of safety testing and/or SAR and/or similar calculable means for RF power levels from all antennas, transmitters and electronic components that utilize frequencies past 6GHz determined at ground level, second and third storied buildings.

(21) Submittal of prepared Environmental Assessment (EA) by the FCC as required by the National Environmental Protection Act (NEPA) for actions that may have significant environmental effect (47 CFR 1.1307).

(22) A copy of the lease or other agreement between the applicant and the owner of the property to which the proposed facility will be attached.

(23) If the application is for a small cell facility, the application shall state as such and shall explain why the proposed facility meets the definition of small cell facility in this Article.

(24) If the application is for an eligible facilities request, the application shall state as such and must contain information sufficient to show that the application qualifies as an eligible facilities request, which information must show that there is an existing WTF that was approved by the City. Before and after 360 degree photosimulations must be provided, as well as documentation sufficient to show that the proposed facility will comply with generally-applicable health and safety provisions of the City Code and the FCC's radio frequency emissions standards.

(25) Proof that notice has been mailed to owners of all property owners, and the resident manager for any multi-family dwelling unit that includes ten (10) or more units, within 300 feet of the proposed personal wireless services facility.

(26) If applicant contends that denial of the application would prohibit or effectively prohibit the provision of service in violation of federal law, or otherwise violate applicable law, the application must provide all information on which the applicant relies on in support of that claim. Applicants are not permitted to supplement this showing if doing so would prevent City from complying with any deadline for action on an application.

(27) The electronic version of an application must be in a standard format that can be easily uploaded on a web page for review by the public.

(28) Any required fees.

(29) If the proposed WTF is to be located in the public right of way, sufficient evidence of the permittee's regulatory status as a telephone corporation under the California Public Utilities Code (such as a valid CPCN).

(b) The Director may develop, publish, and from time to time update or amend any forms, checklists, guidelines, informational handouts, or other related materials that the Director finds necessary, appropriate, or useful for processing any application governed under this Article.

(c) The Director may establish any other reasonable rules and regulations as the Director deems necessary or appropriate to organize, document and manage the application intake process, which may include without limitation regular hours for appointments with applicants. All such rules and regulations must be in written form and publicly stated to provide applicants with prior notice.

(d) If deemed necessary by the Director, the City may hire a third party independent RF engineer to evaluate any technical aspect or siting issues proposed in the application. The applicant will be responsible to pay for all charges of this analysis.

(e) **Pre-submittal Conference**.

(1) The pre-submittal conference is intended to streamline the review process through informal discussion that includes, without limitation, the appropriate project classification and review process, any latent issues in connection with the proposed or existing wireless tower or base station, including compliance with generally applicable rules for public health and safety, potential concealment issues or concerns, if applicable; coordination with other departments responsible for application review; and application completeness issues. To mitigate unnecessary delays due to application incompleteness, applicants are encouraged, but not required to, bring any draft applications or other materials so that staff may provide informal feedback and guidance about whether such applications or other materials may be incomplete or unacceptable. The City shall use reasonable efforts to provide the applicant within an appointment within five working days after receiving a request and any applicable fee or deposit to reimburse the City for its reasonable costs to provide the services rendered in the pre-submittal conference.

(2) A pre-submittal conference is required for all permitted and conditionally permitted WTFs. Pre-submittal conferences are allowed and encouraged, but not required, for small wireless telecommunication facilities.

(b) **Submittal Appointment**. All applications must be submitted to the City at a pre-scheduled meeting with the director. The director shall use reasonable efforts to provide the applicant with an appointment within five working days after receipt of a request and if applicable, confirms that the applicant complied with the pre-submittal conference requirement. Any application received without an appointment, whether delivered in person, by mail or through any other means, will not be considered duly filed unless the applicant received a written exemption from the City of Davis at a pre-submittal conference.

40.29.100. General Requirements and Design Standards.

The following general requirements and development standards are applicable to all permitted and conditionally permitted WTFs.

(a) **Upgrades**. If technological improvements or developments occur that allow the use of materially smaller or less visually obtrusive equipment, the service provider may be required to replace or upgrade an approved WTF upon application for a new permit in order to minimize the WTF's adverse impacts on land use compatibility and aesthetics. This provision would only apply to the specific site where the application for modification is requested.

(b) **Business License**. Each service provider with a WTF in the City shall obtain a City business license prior to initiation of service.

(c) **Mixed Use Projects**. New mixed-use planned developments over fifty acres in size shall be encouraged to identify a preferred site or sites for WTFs under the terms of the planned development. Such sites may be developed with WTFs, even if subsequent land use development occurs.

(d) **Code Compliance**. All WTFs shall be installed and maintained in compliance with the requirements of the Uniform Building Code, National Electrical Code, the Americans with Disabilities Act, the United States Access Board, as well as other restrictions specified in this Article and other applicable provisions of the Davis Municipal Code.

(e) **Permit Term**. The City may impose a condition limiting the duration of any conditional use permit for a WTF located on any property, but in no event shall such duration be less than 10 years. Prior to expiration, the permittee may apply for an extension of its conditional use permit. An extension of the conditional use permit would be for a period of time determined by the City, and would be subject to the then existing requirements of this Article. The City may approve, modify, or deny the application for extension subject to the then existing requirements of this Article and applicable law.

(f) **Height**. All WTFs shall be designed to the minimum functional height required.

(1) The height of the WTF shall be measured from the natural, undisturbed ground surface below the center of the base of the structure to either the top of the structure or the highest antenna or related equipment attached thereto, whichever is higher.

(2) If the WTF is not attached to a building, the height of the facility shall be reviewed for the visual impact on the surrounding land uses and the community.

(g) Setbacks.

(1) All WTFs shall comply with the building setbacks applicable to the zoning district in which it is located, provided that in no instance, shall the WTF (including antennae and equipment) be located closer than five feet to any property line unless a reduced setback is approved pursuant to a conditional use permit based on a finding that aesthetic impacts would be reduced and/or open space improved.

(2) No WTF shall be located within any required front, ~~or~~ side, or back yard unless approved by pursuant to a conditional use permit based on a finding that aesthetic impacts would be reduced and/or open space improved.

(h) **Landscaping.** Landscaping shall be used for screening as appropriate to reduce visual impacts of WTFs.

(1) Existing landscaping in the vicinity of a proposed WTF shall be protected from damage during and after construction. Submission of a tree protection plan may be required to ensure compliance with this requirement.

(2) Offsite landscaping may be required to mitigate off site impacts, subject to willing property owners. Additional landscaping may also be required in the public right of way to obscure visibility of a WTF from passing motorists, bicyclists, and pedestrians.

(i) **Towers**. Towers, where utilized, must be monopoles. Lattice towers are prohibited. Monopoles shall not exceed 4 feet in diameter unless technical evidence is provided showing that a larger diameter is necessary to attain the proposed tower height and the proposed tower height is necessary.

(j) **Stealth Design**. All WTFs shall employ state of the art stealth technology and techniques shall be used, as appropriate to the site and the facility, to minimize visual impacts and provide appropriate screening to make the WTF as visually inconspicuous as possible and to hide the WTF from the predominant views from surrounding properties. In the case of WTF mounted on existing structures, the WTF shall also be located in a manner so as to minimize visual impacts from surrounding properties and PROW. Where no stealth technology is proposed for the site, a detailed analysis as to why stealth technology is physically and technically infeasible for the project shall be submitted with the application.

(k) **Building Mounted Antenna**. All flush mounted antenna and support structures mounted on a building shall be painted to be architecturally compatible with the building on which it is located or painted to minimize the visual impacts where the structures extend above the roof line and minimize visual impacts from surrounding properties. The specific color is subject to City review based on a visual analysis of the particular site.

(l) **Accessory Equipment**. All accessory equipment shall be designed and screened from public view. The specific design is subject to City review based on a visual analysis of the particular site.

(m) **Collocation**. Support structures and site area for WTFs shall be designed and of adequate size to allow at least one additional service provider to potentially collocate on the structure, subject to any specific design standards and aesthetic considerations required as a condition of approval.

(n) **Fencing**. All proposed fencing shall be decorative and compatible with the adjacent buildings and properties within the surrounding area and shall be designed to limit and/or allow for removal of graffiti.

(o) **Noise**. WTFs and all related equipment must comply with all noise regulations and shall not exceed such regulations, either individually or cumulatively. The City may require the applicant to incorporate appropriate noise baffling materials and/or strategies to avoid any ambient noise from equipment reasonably likely to exceed the applicable noise regulations. Back-up generators

shall only be operated during power outages and/or for testing and maintenance purposes on weekdays between the hours of 9:00 a.m. and 4:00 p.m.

(p) **Security**. WTFs may incorporate reasonable and appropriate site security measures, such as locks and anti-climbing devices to prevent unauthorized access, theft or vandalism. All WTFs shall be constructed of graffiti resistant materials. Barbed wire, razor wire, electrified fences or any similar security measures are prohibited.

(q) **Power Sources**. Permanent backup power sources that emit noise or exhaust fumes are prohibited.

(r) **Lighting**. WTFs may not include exterior lights other than as may be required by an applicable governmental regulation or applicable pole owner policies related to public or worker safety. All exterior lights permitted or required to be installed must comply with the City's Dark Sky Ordinance, No. 1966, if applicable, and shall be installed in locations and within enclosures that mitigate illumination impacts on other properties to the maximum extent feasible. The provisions of this subsection shall not be interpreted to prohibit installations on street lights or the installation of luminaires on new poles when required.

(s) **Signage**. All WTFs must include signage that accurately identifies the equipment owner/operator, the owner/operator's site name or identification number and a toll free number to the owner/operator's network operations center. WTFs shall not bear any other signage or advertisements unless expressly approved by the City, required by law or recommended under governmental agencies for compliance with RF emissions regulations.

(t) **Utilities**. All cables and connectors for telephone, primary electric and other similar utilities must be routed underground to the extent feasible in conduits large enough to accommodate future collocated WTFs. To the extent feasible, undergrounded cables and wires must transition directly into the pole base without any external cabinet, doghouse, or similar equipment housing. Meters, panels, disconnect switches and other associated improvements must be placed in inconspicuous locations to the extent feasible. The City shall not approve new overhead utility lines or service drops merely because compliance with the undergrounding requirements would increase the project cost. Microwave or other wireless backhaul is discouraged when it would involve a separate and unconcealed antenna.

(u) **Public Safety**.

(1) No WTF shall interfere with access to any fire hydrant, fire station, fire escape, water valve, underground vault, valve housing structure, or any other public health or safety facility. No person shall install, use, or maintain any WTF, which in whole or in part rest upon, in or over any public right of way, when such installation , use or maintenance endangers or is reasonably likely to endanger the safety of persons or property, or when such site or location is used for public utility, public transportation purposes, or other governmental purpose, or when such facility unreasonable interferes with or unreasonably impedes the flow of pedestrian or vehicular traffic including any legally parked or stopped vehicle, the ingress into to egress from any residence or place of business, the use of poles,

posts, traffic signs or signals, hydrants, mailboxes, permitted sidewalk dining, permitted street furniture or other objects permitted at or near the location where the WTFs are located.

(2) For the protection of emergency response personnel, each WTF shall have a main breaker switch to disconnect electrical power at the site. For co-location WTF sites, a single main switch shall be installed to disconnect electrical power for all carriers at the site in the event of an emergency.

(3) WTFs shall not be operated in any manner that would cause interference with the City's existing and/or future emergency telecommunication system. If such interference occurs, it is the service provider's responsibility to remedy the issue to the satisfaction of the City.

(v) **Security Plan.** A security plan, subject to the Director's approval, must be kept on file with the City. Permittee must comply with the security plan at all times.

(w) **Indemnification; Liability**. The following requirements shall be conditions of approval of all permits approved by the City for any WTF.

(1) The permittee shall provide proof of third party insurance, it cannot provide self as its own insurance.

(2) The permittee shall defend, indemnify, and hold harmless the City of Davis, its officers, employees, or agents from or against any action or challenge to attack, set aside, void, or annul any approval or condition of approval of the City of Davis concerning this approval, including but not limited to any approval or condition of approval of the City council, planning commission, or Director.

(3) The permittee shall further defend, indemnify and hold harmless the City of Davis, its officers, agents, and employees from any damages, liabilities, claims, suits, or causes of action of any kind or form, whether for personal injury, death or property damage, arising out of or in connection with the activities or performance of the permittee, its agents, employees, licensees, contractors, subcontractors, or independent contractors, pursuant to the approval issued by the City.

(4) WTF operators and permittees shall be strictly liable for interference their WTF causes with City communications systems and they shall be responsible for the all costs associated with determining the source of the interference, eliminating the interference (including but not limited to filtering, installing cavities, installing directional antennas, powering down systems, and engineering analysis), and arising from third party claims against the City attributable to the interference.

(5) The City shall promptly notify the permittee of any claim, action, or proceeding concerning the project and the City shall cooperate fully in the defense of the matter. The City reserves the right, at its own option, to choose its own attorney to represent the City, its officers, employees and agents in the defense of the matter.

(6) Failure to comply with any of these conditions shall constitute grounds for revoking a WTF permit.

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40.29.110. Public Hearing and Noticing Radius.

Public hearings on proposed conditionally permitted WTFs shall be conducted and noticed in accordance with Sections 40.30.070 of the Davis Municipal Code. The noticing radius for proposed WTFs shall be five hundred feet. The noticing radius shall be measured from the outer boundary of the subject parcel, or, for those facilities in the PROW, from the outer boundary of the closest parcel adjacent to the subject PROW site.

40.29.120. Findings.

In addition to the required findings for a conditional use permit, and other standards set forth in this Article, the following findings shall be met prior to approval of any WTF requiring a conditional use permit:

(a) The proposed WTF has been designed to minimize its visual and environmental impacts, including the utilization of stealth technology, when applicable.

(b) The proposed site has the appropriate zoning, dimensions, slope, design, and configuration for the development of a WTF.

(c) That proposed site will be appropriately landscaped as required by this Article.

(d) Based on information submitted, the proposed WTF is in compliance with all FCC and California Public Utilities Commission (PUC) requirements.

40.29.130. Regulatory Compliance and Monitoring.

(a) Permittees shall ensure that its WTF complies at all times with all current regulatory and operational requirements, including but not limited to RF emission standards adopted by the FCC, antenna height standards adopted by the Federal Aviation Administration, and any other regulatory or operational standard established by any other government agency with regulatory authority over the WTF.

(b) No WTF, either by itself or in combination with other such facilities, shall generate at any time, electromagnetic or RF emissions in excess of the FCC-adopted standards for human exposure, as they may be amended over time.

(c) The permittee shall, at its own expense, obtain and maintain the most current information from the FCC regarding allowable RF emissions and all other applicable regulations and standards, and shall file a monitoring report documenting its WTFs' current emissions (including field measurements). The field measurements shall be conducted in accordance with accepted industry standards or above, whichever one is more precise in measurement of actual real time data such as taking peak measurements. The report shall include findings from a qualified independent third party engineer or consultant of the city's choice as to whether the monitoring results are in compliance with FCC standards.

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(1) The monitoring report shall be filed with the Director as follows:

(A) For WTFs approved after June 1, 2012, within five days of the WTF's first day of operation (i.e., within 5 days of when the WTF "goes live"), or as set forth in the permit issued under this Article;

(B) For WTFs approved after June 1, 2012, annually on the anniversary of the initial compliance report submittal date, and for existing WTFs, upon request by the Director and annually thereafter;

(C) Within six months of the effective date of any amendment or revision of applicable regulatory and operational standards, unless the controlling agency mandates a more stringent compliance schedule, in which case the report shall be filed consistent with the more stringent compliance schedule

(D) Upon any change or alteration in the WTF's equipment or operation, including but not limited to addition of new antennas, change in frequency use, increase in effective radiated power, propagation techniques, or addition of a new wireless provider to an existing WTF (e.g., addition of a new tenant to a DAS WTF).

(2) At the Director's sole discretion, a qualified independent RF engineer or consultant, selected by and under contract to the City, may be retained to review and verify monitoring reports for compliance with FCC regulations. All costs associated with the City's review of these monitoring reports shall be the responsibility of the permittee, which shall reimburse the City for the review costs within 30 days of the City's demand for reimbursement.

(3) If a new WTF is not in compliance with applicable FCC standards and conditions of approval, a final building permit shall not be issued, any operation of the WTF shall cease immediately, and the permittee will be subject to the revocation procedures under this Article if compliance is not achieved within a reasonable period as specified by the Director following written notice and an opportunity to cure.

(4) The FCC's own RF guidelines will be enforced so that the facilities do not expose people to radio frequency (RF) radiation in excess of FCC standards. These standards being that the power density cannot exceed 5% of the power density exposure limit applicable to that transmitter or facility or in a field strength that, when squared, exceeds 5% of the square of the electric or magnetic field strength limit applicable to that transmitter or facility (47 CFR 1.1310).

(5) Submittal of report of proof of safety testing and/or SAR and/or similar calculable means for RF power levels from all antennas, transmitters and electronic components that utilize frequencies past 6GHz determined at ground level, second and third storied buildings.

40.29.140. Existing Conforming and Legal Nonconforming WTFs.

(a) Except as may otherwise be required by state or federal law (as in the case of an eligible facility request), modification of an existing legal nonconforming WTF shall be subject to same

permitting requirements as a new WTF.

(b) Without otherwise limiting the applicability of any other provision of the Davis Municipal Code, all existing conforming and legal nonconforming WTFs are subject to, Sections 40.29.130, 40.29.150, 40.29.160, and 40.29.170 of this Article.

40.29.150. Periodic Review.

The City may conduct a periodic review of any WTF to consider whether or not the facility is conforming with the conditions of its entitlements and permits.

40.29.160. Transfer of Operation.

Permittee shall not assign or transfer any interest in its permits for WTFs without advance written notice to the Director. The notice shall specify the identity of the assignee or transferee of the permit, as well as the assignee or transferee's address, telephone number, name of primary contact person(s), and other applicable contact information, such as an e-mail address or facsimile number. The new assignee or transferee shall comply with all of the WTF's conditions of approval.

40.29.170. Abandonment or Discontinuation of Use.

(a) All permittees who intend to abandon or discontinue the use of any WTF shall notify the City of such intentions no less than sixty (60) days prior to the final day of use. Said notification shall be in writing, shall specify the date of termination, the date the WTF will be removed, and the method of removal.

(b) Non-operation, disuse (including, but not limited to, cessation of wireless telecommunication services) or disrepair for ninety (90) days or more shall constitute abandonment by the permittee under this Article or any predecessors to this Article. The Director shall send a written notice of abandonment to the permittee.

(c) Upon abandonment, the conditional use permit shall become null and void. Absent a timely request for a hearing pursuant to subdivision (e) of this section, the WTF shall be physically removed at the permittee's expense no more than ninety (90) days from the date of the abandonment notice. The WTF shall be removed in accordance with applicable health and safety requirements and the site upon which the WTF was located shall be restored to the condition that existed prior to the installation of the WTF, or as required by the Director. The permittee shall be responsible for obtaining all necessary permits for the removal of the WTF and site restoration.

(d) At any time after ninety (90) days following abandonment, the Director may have the WTF removed and restore the premises as he/she deems appropriate. The City may, but shall not be required to, store the removed WTF (or any part thereof). The WTF permittee shall be liable for the entire cost of such removal, repair, restoration, and storage. The City may, in lieu of storing the removed WTF, convert it to the City's use, sell it, or dispose of it in any manner deemed appropriate by the City.

(e) The permittee may request a hearing before a hearing officer appointed by the City manager regarding the notice of abandonment, provided a written hearing request is received by the Director within 10 days of the date of the notice of abandonment. The appeal hearing shall be conducted pursuant to Section 23.04.060(d). The hearing officer shall issue a written decision. The decision of the hearing officer regarding abandonment of the WTF shall constitute the final administrative decision of the City and shall not be appealable to the City council or any committee or commission of the City. Failure to file a timely hearing request means the notice of abandonment is final and the WTF shall be removed within 90 days from the date of the abandonment notice.

(f) Prior to commencing operations of a WTF, the permittee shall file with the City, and shall maintain in good standing throughout the term of its approval, a bond or other sufficient security in an amount equal to the cost of physically removing the WTF and all related facilities and equipment on the site, as determined by the Director. However, the City may not require the owner

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or operator to post a cash deposit or establish a cash escrow account as security under this subsection. In setting the amount of the bond or security, the Director shall take into consideration the permittee's estimate of removal costs.

40.29.180. Violations; Public Nuisance.

Any violation of this Article is deemed a public nuisance subject to abatement and shall, in addition to any other available legal penalty or remedy, constitute grounds for revocation of any permits and/or approvals granted under this Article or any predecessors to this Article.

40.29.190. Revocation of Permit.

(a) Permittees shall fully comply with all conditions related to any permit or approval granted under this Article or any predecessors to this Article. Failure to comply with any condition of approval or maintenance of the WTF in a matter that creates a public nuisance or otherwise causes jeopardy to the public health, welfare or safety shall constitute grounds for revocation. If such a violation is not remedied within a reasonable period, following written notice and an opportunity to cure, the Director may schedule a public hearing before the planning commission to consider revocation of the permit. The planning commission revocation action may be appealed to the City council pursuant to Article 40.35.

(b) If the permit is revoked pursuant to this section, the permittee shall remove its WTF at its own expense and shall repair and restore the site to the condition that existed prior to the WTF's installation or as required by the Director within ninety (90) days of revocation in accordance with applicable health and safety requirements. The permittee shall be responsible for obtaining all necessary permits for the WTF's removal and site restoration.

(c) At any time after ninety (90) days following permit revocation, the Director may have the WTF removed and restore the premises as he/she deems appropriate. The City may, but shall not be required to, store the removed WTF (or any part thereof). The WTF permittee shall be liable for the entire cost of such removal, repair, restoration, and storage. The City may, in lieu of storing the removed WTF, convert it to the City's use, sell it, or dispose of it in any manner deemed appropriate by the City.

40.29.200. Mandatory Removal and Relocation.

If a WTF must be modified or relocated because of an abandonment, undergrounding of utilities, or change of grade, alignment or width of any street, sidewalk or other public facility (including the construction, maintenance, or operation of any other City underground or aboveground facilities including, but not limited to, sewers, storm drains, conduits, gas, water, electric or other utility systems, or pipes owned by City or any other public agency), the permittee shall modify, remove, or relocate its WTF, or portion thereof, as necessary without cost or expense to City. Said modification or removal of a WTF shall be completed within ninety (90) days of notification by the City unless exigencies dictate a different period of time as established by the Director. In the event a WTF is not modified or removed within the requisite period of time, the City may cause the same to be done at the sole expense of permittee. Further, in the event of an emergency, the City may modify, remove, or relocate WTFs without prior notice to permittee provided permittee is notified within a reasonable period thereafter. A permittee electing to relocate a WTF that was removed

pursuant to this section shall be subject to the requirements of this Article applicable to the proposed relocation site.

40.29.210. Appeals.

Any person dissatisfied with the decision to approve, deny, or revoke a conditional use permit for the construction or modification of a WTF subject to this Article may file an appeal in accordance with Article 40.35.

40.29.220. Effect of State or Federal Law.

~~(a) **Ministerial Permits.** In the event the city attorney determines that state or federal law prohibits any discretionary permitting requirements of this Article, all provisions of this Article shall be apply with the exception that the required permit shall be reviewed and administered as a ministerial permit by the Director rather than as a discretionary permit. Any conditions of approval set forth in this Article or deemed necessary by the Director shall be imposed and administered as reasonable time, place, and manner rules. If the city attorney subsequently determines that the law has changed and that discretionary permitting has become permissible, the city attorney shall issue such determination in writing with citations to legal authority and all discretionary permitting requirements shall be reinstated. The city attorney's written determinations under this section shall be a public record.~~

(b) **Exceptions**. Exceptions to any provision of this article, including, but not limited to, exceptions from findings that would otherwise justify denial, may be granted pursuant to a conditional use permit subject to the following:

(1) An applicant must request the exception at the time its application is submitted. The request must include both the specific provision(s) of this article from which the exception is sought and the legal and factual basis of the request. Any request for an exception after the City has deemed an application complete shall be treated as a new application.

(2) The exception shall only be granted upon a finding that application of the provision of this article from which the exception is sought would in the case of the proposed WTF violate federal law, state law, or both. The applicant shall have the burden of proof as to this finding.

(3) The City may hire an independent consultant, at the applicant's expense, to evaluate the issues raised by the exception request and shall have the right to submit rebuttal evidence to refute the applicant's claim.

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RESOLUTION _____

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF DAVIS ADOPTING A CITYWIDE POLICY REGARDING PERMITTING REQUIREMENTS AND DEVELOPMENT STANDARDS FOR SMALL WIRELESS TELECOMMUNICATION FACILITIES

WHEREAS, on September 26, 2018, the Federal Communications Commission ("FCC") adopted its Declaratory Ruling and Third Report and Order ("Report and Order") relating to placement of small wireless telecommunication facilities in public rights-of-way; and

WHEREAS, the Report and Order purports to give providers of wireless telecommunication services rights to utilize public rights-of-way and to attach so-called "small wireless telecommunication facilities" to public infrastructure, including infrastructure of the City of Davis, subject to payment of "presumed reasonable", non-recurring and recurring fees., and the ability of local agencies to regulate use of their rights-of-way is substantially limited under the Report and Order; and

WHEREAS, notwithstanding the limitations imposed on local regulation of small wireless telecommunication facilities in public rights-of-way by the Report and Order, local agencies retain the ability to regulate the aesthetics of small wireless telecommunication facilities, including location, compatibility with surrounding facilities, spacing, and overall size of the facility, provided the aesthetic requirements are: (i) "reasonable," i.e., "technically feasible and reasonably directed to avoiding or remedying the intangible public harm or unsightly or out-of-character deployments"; (ii) "objective," i.e., they "incorporate clearly-defined and ascertainable standards, applied in a principled manner"; and (iii) published in advance. Regulations that do not satisfy the foregoing requirements are likely to be subject to invalidation, as are any other regulations that "materially inhibit wireless telecommunication service," (e.g., overly restrictive spacing requirements); and

WHEREAS, local agencies also retain the ability to regulate small wireless telecommunication facilities in the public rights-of-way in order to more fully protect the public health and safety, ensure continued quality of telecommunications services, and safeguard the rights of consumers, and pursuant to this authority retained, the City Council has amended the Davis Municipal Code to require all small wireless telecommunication facilities as defined by the FCC in 47 C.F.R. § 1.60002(l), as may be amended or superseded, to comply with the requirements of a policy adopted by resolution of the City Council entitled "City Wide Policy Regarding Permitting Requirements And Development Standards For Small Wireless Telecommunication Facilities";

NOW THEREFORE, THE CITY COUNCIL OF THE CITY OF DAVIS DOES HEREBY RESOLVE AS FOLLOWS:

Section 1. Findings. The City Council finds each of the facts in the preceding recitals to be true.

Section 2. City Wide Policy Adopted. The City Council of Davis hereby adopts the "City

Wide Policy Regarding Permitting Requirements and Development Standards for Small

Wireless Telecommunication Facilities" set forth in Exhibit A to this Resolution, which is hereby incorporated as though set forth in full.

Section 3. NEPA/CEQA. The City of Davis requires the necessary Federal regulation that the National Environmental Protection Act environmental assessment be conducted as the national deployment of small WTF is considered a significant environmental effect (47 CFR 1.1307), and as such, the necessary CEQA requirement in conjunction must follow suit. ~~has determined that the adoption of this Resolution is exempt from review under the California Environmental Quality Act ("CEQA") (California Public Resources Code Section 21000, et seq.), pursuant to State CEQA Regulation §15061(b)(3) (14 Cal. Code Regs. § 15061(b)(3)) covering activities with no possibility of having a significant effect on the environment. In addition, the City of Davis has determined that the ordinance is categorically exempt pursuant to Section 15301 of the CEQA Regulations applicable to minor alterations of existing governmental and/or utility owned structures.~~

Section 4. Certification. The City Clerk shall certify to the adoption of this resolution and shall cause a certified resolution to be filed in the book of original resolutions.

PASSED AND ADOPTED this day of____, 2019.

_____

Mayor

ATTEST:

_____

City Clerk

EXHIBIT A

CITY OF DAVIS
CITY WIDE POLICY REGARDING PERMITTING REQUIREMENTS AND DEVELOPMENT STANDARDS FOR SMALL WIRELESS TELECOMMUNICATION FACILITIES

SECTION 1. GENERAL PROVISIONS

SECTION 1.1. PURPOSE AND INTENT

(a) On September 27, 2018, the Federal Communications Commission ("FCC") adopted a *Declaratory Ruling and Third Report and Order,* FCC 18-133 (the *"Small Cell Order"),* in connection with two informal rulemaking proceedings entitled *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT* Docket No. 17-79, and *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment,* WC Docket No. 17-84. The regulations adopted in the *Small Cell Order* significantly curtail the local authority over wireless and wireline communication facilities reserved to State and local governments under sections 253 and 704 in the federal Telecommunications Act. Numerous legal challenges to the *Small Cell Order* have been raised but its regulations will become effective while such challenges are pending. Although the provisions may well be invalidated by future action, the City recognizes the practical reality that failure to comply with the *Small Cell Order* while it remains in effect will likely result in greater harm to the City's interests than if the City ignored the FCC's ruling. Accordingly, the City Council adopts this Policy ("Policy") as a means to accomplish such compliance that can be quickly amended or repealed in the future without the need to amend the City's municipal code.

(b) The City of Davis intends this Policy to establish reasonable, uniform and comprehensive standards and procedures for small wireless facilities deployment, construction, installation, collocation, modification, operation, relocation and removal within the City's territorial boundaries, consistent with and to the extent permitted under federal and California state law. The standards and procedures contained in this Policy are intended to, and should be applied to, protect and promote public health, safety and welfare, and balance the benefits from advanced wireless services with local values, which include without limitation the aesthetic character of the City. This Policy is also intended to reflect and promote the community interest by (1) ensuring that the balance between public and private interests is maintained; (2) police power is maintained to enforce the quiet enjoyment of streets and ability to protect city residents their health and safety in regards to the small WTF whether it be harm and endangerment from RF exposures, high voltage induced fires, live wires and/or electrical arcs but not limited to these; and, (2) protecting the City's visual character from potential adverse impacts and/or visual blight created or exacerbated by small wireless facilities and related communications infrastructure; (3) protecting and preserving the City's environmental resources; (4) protecting and preserving the City's public rights-of-way and municipal infrastructure located within the City's public rights- of-way; and (5) promoting access to high-quality, advanced wireless services for the City's residents, businesses and visitors.

(c) This Policy is not intended to, nor shall it be interpreted or applied to: (1) prohibit or effectively prohibit any personal wireless service provider's ability to provide personal wireless services; (2) prohibit or effectively prohibit any entity's ability to provide any telecommunications service, subject to any competitively neutral and nondiscriminatory

rules, regulations or other legal requirements for rights-of-way management; (3)

unreasonably discriminate among providers of functionally equivalent personal wireless services; (4) deny any request for authorization to place, construct or modify personal wireless service facilities on the basis of environmental effects of radio frequency emissions to the extent that such wireless facilities comply with the FCC's regulations concerning such emissions; (5) prohibit any collocation or modification that the City may not deny under federal or California state law; (6) impose any unreasonable, discriminatory or anticompetitive fees that exceed the reasonable cost to provide the services for which the fee is charged; or (7) otherwise authorize the City to preempt any applicable federal or California law.

SECTION 1.2. DEFINITIONS

(a) **Undefined Terms**. Undefined phrases, terms or words in this Policy will have the meanings assigned to them in 1 U.S.C. § 1, as may be amended or superseded, and, if not defined therein, will have their ordinary meanings. If any definition assigned to any phrase, term or word in Section 1.2 conflicts with any federal or state-mandated definition, the federal or state-mandated definition will control.

(b) **Defined Terms**.

(1) **"Accessory equipment"** means the same as "antenna equipment" as defined by FCC in 47 C.F.R. § 1.6002(b), as may be amended or superseded.

(2) **"Antenna"** means the same as defined by the FCC in 47 C.F.R. § 1.6002(b), as may be amended or superseded.

(3) **"Approval authority"** means the City official(s) responsible for reviewing applications for small cell permits and vested with the authority to approve, conditionally approve or deny such applications as provided in this Policy.

(4) **"Collocation"** means the same as defined by the FCC in 47 C.F.R. § 1.6002(g), as may be amended or superseded.

(5) **"Concealed"** or **"concealment"** means camouflaging techniques that integrate the transmission equipment into the surrounding natural and/or built environment such that the average, untrained observer cannot directly view the equipment and would not likely recognize the existence of the wireless facility or concealment technique.

(6) **"Decorative pole"** means any pole that includes decorative or ornamental features and/or materials intended to enhance the appearance of the pole. Decorative or ornamental features include, but are not limited to, fluted poles, ornate luminaires and artistic embellishments. Cobra head luminaires and octagonal shafts made of concrete or crushed stone composite material are not considered decorative or ornamental.

(7) **"FCC"** means the Federal Communications Commission or its duly appointed successor agency.

(8) **"FCC Shot Clock"** means the presumptively reasonable time frame within which the City generally must act on a given wireless application, as defined by the FCC and as may be amended or superseded.

~~(9) **"Ministerial permit"** means any City-issued non-discretionary permit required to commence or complete any construction or other activity subject to the City's jurisdiction. Ministerial permits may include, without limitation, any building permit, construction permit, electrical permit, encroachment permit, excavation permit, traffic control permit and/or any similar over-the-counter approval issued by the City's departments.~~

(10) **"Personal wireless services"** means the same as defined in 47 U.S.C. § 332(c)(7)(C)(i), as may be amended or superseded.

(11) **"Personal wireless service facilities"** means the same as defined in 47 U.S.C. § 332(c)(7)(C)(ii), as may be amended or superseded.

(12) **"Public right-of-way"** means any land which has been reserved for or dedicated to the City for the use of the general public for public road purposes, including streets, sidewalks and unpaved areas.

(13) **"RF"** means radio frequency or electromagnetic microwaves.

(14) **"Section 6409"** means Section 6409(a) of the Middle-Class Tax Relief and Job Creation Act of 2012, Pub. **L.** No. 112-96, 126 Stat. 156, codified as 47 U.S.C. § 1455(a), as may be amended or superseded.

(15) **"Small wireless telecommunication facility"** or **"small wireless facilities"** means the same as defined by the FCC in 47 C.F.R. § 1.6002(1), as may be amended or superseded.

SECTION 2. SMALL WIRELESS TELECOMMUNICATION FACILITIES

SECTION 2.1. *PUBLIC HEARING AND NOTICING RADIUS*

Public hearings on proposed conditionally permitted WTFs shall be conducted and noticed in accordance with Sections 40.30.070 of the Davis Municipal Code. The noticing radius for proposed small WTFs shall be five hundred feet. The noticing radius shall be measured from the outer boundary of the subject parcel, or, for those facilities in the PROW, from the outer boundary of the closest parcel adjacent to the subject PROW site.

SECTION 2.2. APPLICABILITY; REQUIRED PERMITS AND APPROVALS

(a) **Applicable Facilities**. Except as expressly provided otherwise in this Policy, the provisions in this Policy shall be applicable to all existing small wireless telecommunication facilities and all applications and requests for authorization to construct, install, attach, operate, collocate, modify, reconstruct, relocate, remove or

otherwise deploy small wireless telecommunication facilities within the City's jurisdictional boundaries.

(b) **Approval Authority**. The approval authority for small wireless telecommunication facilities in public rights-of-way shall be the Public Works Director or his/her designee. The approval authority for small wireless telecommunication facilities outside of public rights-of-way shall be the Community Development Director or his/her designee.

(c) **Small Wireless Telecommunication Facility Permit**. A small wireless telecommunication facility permit, subject to the approval authority's prior review and approval, is required for any small wireless telecommunication facility proposed on an existing, new or replacement structure.

(d) **Request for Approval Pursuant to Section 6409**. Requests for approval to collocate, replace or remove transmission equipment at an existing wireless tower or base station submitted pursuant to Section 6409 are not be subject to this policy, but shall be reviewed in accordance with the Municipal Code.

(e) **Other Permits and Approvals**. In addition to a small wireless facility permit, the applicant must obtain all other permits and regulatory approvals as may be required by any other federal, state or local government agencies, which includes the necessary environmental assessment (EA) as conducted and fulfilled by the FCC required under the National Environmental Protection Act (NEPA), and resultant CEQA. ~~without limitation any ministerial permits and/or other approvals issued by other City departments or divisions. All applications for ministerial permits submitted in connection with a proposed small wireless facility must contain a valid small wireless facility permit issued by the City for the proposed facility. Any application for any ministerial permit(s) submitted without such small cell permit may be denied without prejudice.~~ Furthermore, any small cell permit granted under this Policy shall remain subject to all lawful conditions and/or legal requirements associated with such other permits or approvals.

SECTION 2.2. SMALL WIRELESS FACILITY PERMIT APPLICATION REQUIREMENTS

(a) **Application Contents**. All applications for a small wireless telecommunication facility must include all the information and materials required in this subsection (a).

(1) **Application Form**. The applicant shall submit a complete, duly executed small wireless facility permit application using the then-current City form which must include the information described in this subsection (a).

(2) **Application Fee.** The applicant shall submit the applicable small wireless facility permit application fee established by City Council resolution. Batched applications must include the applicable small wireless telecommunication facility permit application fee for each small wireless telecommunication facility in the batch. If no permit application fee has been established, then the applicant must submit a signed written statement that acknowledges that the applicant will be required to reimburse the City for its reasonable costs incurred in connection with the application within 10 days after the City issues a written demand for reimbursement.

(3) **Construction Drawings.** The applicant shall submit true and correct construction drawings on plain bond paper and electronically, prepared, signed and stamped by a California licensed or registered structural engineer, that depict all the existing and proposed improvements, equipment and conditions related to the proposed project and project site, which includes without limitation any and all poles, posts, pedestals, traffic signals, towers, streets, sidewalks, pedestrian ramps, driveways, curbs, gutters, drains, handholes, manholes, fire hydrants, equipment cabinets, antennas, cables, trees and other landscape features. If the

applicant proposes to use existing poles or other existing structures, the structural

engineer must certify that the existing above and below ground structure will be adequate for the purpose. The construction drawings must: (i) contain cut sheets that contain the technical specifications for all existing and proposed antennas and accessory equipment, which includes without limitation the manufacturer, model number and physical dimensions; (ii) identify all structures within 250 feet from the proposed project site and call out such structures' overall height above ground level; (iii) depict the applicant's plan for electric and data backhaul utilities, which shall include the locations for all conduits, cables, wires, handholes, junctions, transformers, meters, disconnect switches, and points of connection; (iv) traffic control plans for the installation phase, stamped and signed by a California licensed or registered civil or traffic engineer; and (v) demonstrate that proposed project will be in full compliance with all applicable health and safety laws, regulations or other rules, which includes without limitation all building codes, electric codes, local street standards and specifications, and public utility regulations and orders.

(4) **Site Plan.** The applicant shall submit a survey prepared, signed and stamped by a California licensed or registered surveyor. The survey must identify and depict all existing boundaries, encroachments, buildings, walls, fences and other structures within 250 feet from the proposed project site, which includes without limitation all: (i) traffic lanes; (ii) all private properties and property lines; (iii) above and below-grade utilities and related structures and encroachments; (iv) fire hydrants, roadside call boxes and other public safety infrastructure; (v) streetlights, decorative poles, traffic signals and permanent signage; (vi) sidewalks, driveways, parkways, curbs, gutters and storm drains; (vii) benches, trash cans, mailboxes, kiosks and other street furniture; and (viii) existing trees, planters and other landscaping features.

(5) **Photo Simulations.** The applicant shall submit site photographs and photo simulations that show the existing location and proposed small wireless facility in context from at least three vantage points within the public streets or other publicly accessible spaces, together with a vicinity map that shows the proposed site location and the photo location for each vantage point. At least one simulation must depict the small wireless facility from a vantage point approximately 50 feet from the proposed support structure or location.

(6) **Project Narrative and Justification.** The applicant shall submit a written statement that explains in plain factual detail why the proposed wireless facility qualifies as a "small wireless facility" as defined by the FCC in 47 C.F.R. § 1.6002(/). A complete written narrative analysis will state the applicable standard and all the facts that allow the City to conclude the standard has been met. Bare conclusions not factually supported do not constitute a complete written analysis. As part of the written statement the applicant must also include (i) whether and why the proposed support is a "structure" as defined by the FCC in 47 C.F.R. § 1.6002(m); and (ii) whether and why the proposed wireless facility meets each required finding as provided in Section 2.4.

(7) **RF Compliance Report.** The applicant shall submit an RF exposure compliance report that certifies that the proposed small wireless facility, as well as any collocated wireless facilities, will comply with applicable federal RF exposure standards and exposure limits. The RF report must be prepared and certified by an independent third party RF engineer acceptable to the City. The RF report must include the actual frequency at peak power and power levels (in watts effective radiated power) for all existing and proposed antennas at the site and exhibits that show the location and orientation of all transmitting antennas and the boundaries of areas with RF exposures in excess of the uncontrolled/general population limit (as that term is defined by the FCC) and also the boundaries of areas with RF exposures in excess of the controlled/occupational limit (as that term is defined by the FCC). Each such boundary shall be clearly marked and identified for every transmitting antenna at the project site.

(8) **Cumulative Impact RF Analysis.** The applicant must submit a cumulative impact analysis for the proposed facility and other WTFs on the project site or within one thousand three hundred feet of the proposed WTF site. The analysis shall include all existing and proposed (application submitted to the community development and sustainability department) WTFs on or near the site, dimensions of all antennas and support equipment on or near the site, power rating for all existing and proposed back-up equipment, and a report estimating the ambient RF fields and maximum potential cumulative electromagnetic radiation at, and surrounding, the proposed site that would result if the proposed WTF were operating at full buildout.

(9) **Proof of Safety Testing Above 6GHz**. The applicant shall provide substantial record of third party conducted safety tests such as SAR and/or related of RF emissions levels from frequencies used above 6GHz.

(10) **Environmental Assessment (EA) from the FCC.** The applicant shall provide a copy of the EA from the FCC that shows proof of negative effect on the environment from the nationwide deployment of the small WTF (47 CFR 1.1307).

(11) **Proof of Insurance.** The applicant shall submit evidence of ability to attain independent third party insurance, cannot show self as being the insurer.

(12) **Regulatory Authorization.** The applicant shall submit evidence of the applicant's regulatory status under federal and California law to provide the services and construct the small wireless telecommunication facility proposed in the application.

(13) **Site Agreement.** For any small wireless telecommunication facility proposed to be installed on any structure located within the public rights-of-way, the applicant shall submit a partially-executed site agreement on a form prepared by the City that states the terms and conditions for such use by the applicant. No changes shall be permitted to the City's form site agreement except as may be indicated on the form itself. Any unpermitted changes to the City's form site agreement shall be deemed a basis to deem the application incomplete. Refusal to accept the terms and conditions in the City's site agreement shall be an independently sufficient basis to

deny the application.

(14) **Property Owner's Authorization.** The applicant must submit a written authorization signed by the property owner that authorizes the applicant to submit a wireless telecommunication application in connection with the subject property and, if the wireless telecommunication facility is proposed on a utility-owned support structure, submit a written final utility design authorization from the utility.

(15) **Acoustic Analysis.** The applicant shall submit an acoustic analysis prepared and certified by an engineer licensed by the State of California for the proposed small wireless telecommunication facility and all associated equipment including all environmental control units, sump pumps, temporary backup power generators and permanent backup power generators demonstrating compliance with the City's noise regulations. The acoustic analysis must also include an analysis of the manufacturers' specifications for all noise-emitting equipment and a depiction of the proposed equipment relative to all adjacent property lines. In lieu of an acoustic analysis, the applicant may submit evidence from the equipment manufacturer(s) that the ambient noise emitted from all the proposed equipment will not, both individually and cumulatively, exceed the applicable noise limits.

(16) **Justification for Non-Preferred Location or Structure.** If a facility is proposed anywhere other than the most preferred location or the most preferred structure within 500 feet of the proposed location as described in Section 2.6, the applicant shall demonstrate with clear and convincing written evidence all of the following:

(A) Proof of need to close gap in coverage and finding least intrusive means;

(B) A clearly defined technical service objective and a map showing areas that meets that objective;

(C) A technical analysis that includes the factual reasons why a more preferred location(s) and/or more preferred structure(s) within 500 feet of the proposed location is not technically feasible;

(D) Bare conclusions that are not factually supported do not constitute clear and convincing written evidence.

(b) **Additional Requirements.** The City Council authorizes the approval authority to develop, publish and from time to time update or amend permit application requirements, forms, checklists, guidelines, informational handouts and other related materials that the approval authority finds necessary, appropriate or useful for processing any application governed under this Policy. All such requirements and materials must be in written form and publicly stated to provide all interested parties with prior notice.

SECTION 2.3. SMALL WIRELESS TELECOMMUNICATION FACILITY PERMIT APPLICATION SUBMITTAL AND COMPLETENESS REVIEW

(a) **Requirements for a Duly Filed Application.** Any application for a small wireless telecommunication facility permit will not be considered duly filed unless submitted in accordance with the requirements in this subsection (a).

(1) **Submittal Appointment.** All applications must be submitted to the City at a pre-scheduled appointment with the approval authority. Potential applicants may generally submit either one application or one batched application per appointment as provided below. Potential applicants may schedule successive appointments for multiple applications whenever feasible and not prejudicial to other applicants for any other development project. The approval authority shall use reasonable efforts to offer an appointment within five working days after the approval authority receives a written request from a potential applicant. Any purported application received without an appointment, whether delivered in-person, by mail or through any other means, will not be considered duly filed, whether the City retains, returns or destroys the materials received.

(2) **Pre-Submittal Conferences.** The City encourages, but does not require, potential applicants to schedule and attend a pre-submittal conference with the approval authority for all proposed projects that involve small wireless telecommunication facilities. A voluntary pre-submittal conference is intended to streamline the review process through informal discussion between the potential applicant and staff that includes, without limitation, the appropriate project classification and review

process; any latent issues in connection with the proposed project, including compliance with generally applicable rules for public health and safety; potential concealment issues or concerns (if applicable); coordination with other City departments responsible for application review; and application completeness issues.

(b) **Applications Deemed Withdrawn.** To promote efficient review and timely decisions, and to mitigate unreasonable delays or barriers to entry caused by chronically incomplete applications, any application governed under this Policy will be automatically deemed withdrawn by the applicant when the applicant fails to tender a substantive response to the approval authority within 60 calendar days after the approval authority deems the application incomplete in a written notice to the applicant. As used in this subsection (b), a "substantive response" must include the materials identified as incomplete in the approval authority's notice.

(c) **Batched Applications.** Applicants may submit applications individually or in a batch; provided, that the number of small wireless facilities in a batch should be limited to five and all facilities in the batch should be substantially the same with respect to equipment, configuration, and support structure. Applications submitted as a batch shall be reviewed together, provided that each application in the batch must meet all the requirements for a complete application, which includes without limitation the application fee for each application in the batch. If any individual application within a batch is deemed incomplete, the entire batch shall be automatically deemed incomplete. If any application is withdrawn or deemed withdrawn from a batch, all other applications in the same batch shall be automatically deemed withdrawn. If any application in a batch fails to meet the required findings for approval, the entire batch shall be denied.

(d) **Additional Procedures.** The City Council authorizes the approval authority to establish other reasonable rules and regulations for duly filed applications, which may include without limitation regular hours for appointments with applicants, as the approval authority deems necessary or appropriate to organize, document and manage the application intake process. All such rules and regulations must be in written form and publicly stated to provide all interested parties with prior notice.

SECTION 2.4. APPROVALS AND DENIALS

(a) **Review by Approval Authority.** The approval authority shall review a complete and duly filed application for a small wireless facility and may act on such application without prior notice or a public hearing.

(b) **Required Findings.** The approval authority may approve or conditionally approve a complete and duly filed application for a small wireless facility permit when the approval authority finds:

(1) The proposed project meets the definition for a "small wireless facility" as defined by the FCC;

(2) The proposed facility would be in the most preferred location within 500 feet from the proposed site in any direction or the applicant has demonstrated with clear and convincing evidence in the written record that any more-preferred location(s) within 500 feet would be technically infeasible;

(3) The proposed facility would not be located on a prohibited support structure identified in this Policy;

(4) The proposed facility would be on the most preferred support structure within 500 feet from the proposed site in any direction or the applicant has demonstrated with clear and convincing evidence in the written record that any more-preferred support structure(s) within 500 feet would be technically infeasible;

(5) The proposed facility complies with all applicable design standards in this Policy;

(6) The applicant has demonstrated that the proposed project will be in planned compliance with all applicable FCC regulations and guidelines for human exposure to RF emissions. The facilities will not expose people to radio frequency (RF) radiation in excess of FCC standards being that the power density cannot exceed 5% of the power density exposure limit applicable to that transmitter or facility or in a field strength that, when squared, exceeds 5% of the square of the electric or magnetic field strength limit applicable to that transmitter or facility (47 CFR 1.1310).

(c) **Conditional Approvals; Denials without Prejudice.** Subject to any applicable federal or California laws, nothing in this Policy is intended to limit the approval authority's ability to conditionally approve or deny without prejudice any small wireless facility permit application as may be necessary or appropriate to ensure compliance with this Policy.

(d) **Decision Notices.** Within five calendar days after the approval authority acts on a small wireless facility permit application or before the FCC Shot Clock expires (whichever occurs first), the approval authority shall notify the applicant by written notice. If the approval authority denies the application (with or without prejudice), the written notice must contain the reasons for the decision.

(e) **Appeals.** Any decision by the approval authority shall be final and not subject to any administrative appeals.

SECTION 2.5. STANDARD CONDITIONS OF APPROVAL

(a) **General Conditions.** In addition to all other conditions adopted by the approval authority permits issued under this Policy shall be automatically subject to the conditions in this subsection (a).

(1) **Conditional Use Permit Term.** This permit will automatically expire ~~10~~ 3 years and one day from its issuance unless California Government Code § 65964(b) authorizes the City to establish a shorter term for public safety reasons. Any other permits or approvals issued in connection with any collocation, modification or other change to this wireless telecommunication facility, which includes without limitation any permits or other approvals deemed-granted or deemed-approved under federal or state law, will not extend this term limit unless expressly provided otherwise in such permit or approval or

required under federal or state law.

(2) **Permit Renewal**. Within one (1) year before the expiration date of this permit, the permittee may submit an application for permit renewal. To be eligible for renewal, the permittee must demonstrate that the subject wireless telecommunication facility is in compliance with all the conditions of approval associated with this permit and all applicable provisions in the Davis Municipal Code and this Policy that exist at the time the decision to renew the permit is rendered. The approval authority shall have discretion to modify or amend the conditions of approval for permit renewal on a case-by-case basis as may be necessary or appropriate to ensure compliance with this Policy. Upon renewal, this permit will automatically expire 10 years and one day from its issuance, except when California Government Code § 65964(b), as may be amended or superseded in the future, authorizes the City to establish a shorter term for public safety reasons.

(3) **Post-Installation Certification.** Within 60 calendar days after the permittee commences full, unattended operations of a small wireless facility approved or deemed-approved, the permittee shall provide the approval authority with documentation reasonably acceptable to the approval authority that the small wireless telecommunication facility has been installed and/or constructed in strict compliance with the approved construction drawings and photo simulations. Such documentation shall include without limitation as-built drawings, and site photographs.

(4) **Build-Out Period.** This small wireless telecommunication facility permit will automatically expire six (6) months from the approval date unless the permittee obtains all other permits and approvals required to install, construct and/or operate the approved small wireless telecommunication facility, which includes without limitation any permits or approvals required by the any federal, state or local public agencies with jurisdiction over the subject property, the small wireless telecommunication facility or its use. If this build-out period expires, the City will not extend the build-out period, but the permittee may resubmit a complete application, including all application fees, for the same or substantially similar project.

(5) **Site Maintenance.** The permittee shall keep the site, which includes without limitation any and all improvements, equipment, structures, access routes, fences and landscape features, in a neat, clean and safe condition in accordance with the approved construction drawings and all conditions in this small wireless telecommunication facility permit. The permittee shall keep the site area free from all litter and debris at all times. The permittee, at no cost to the City, shall remove and remediate any graffiti or other vandalism at the site within 48 hours after the permittee receives notice or otherwise becomes aware that such graffiti or other vandalism occurred.

(6) **Compliance with Laws.** The permittee shall maintain compliance at all times with all federal, state and local statutes, regulations, orders or other rules that carry the force of law ("laws") applicable to the permittee, the subject property, the small wireless telecommunication facility or any use or activities in connection with the use authorized in this small wireless telecommunication facility permit, which includes without limitation any laws applicable to human exposure to RF emissions. The permittee expressly acknowledges and agrees that

this obligation is intended to be broadly construed and that no other specific requirements in these conditions

are intended to reduce, relieve or otherwise lessen the permittee's obligations to maintain compliance with all laws. No failure or omission by the City to timely notice, prompt or enforce compliance with any applicable provision in the Davis Municipal Code, this Policy any permit, any permit condition or any applicable law or regulation, shall be deemed to relieve, waive or lessen the permittee's obligation to comply in all respects with all applicable provisions in the Davis Municipal Code, this Policy, any permit, any permit condition or any applicable law or regulation.

(7) **Adverse Impacts on Other Properties.** The permittee shall use all reasonable efforts to avoid any and all unreasonable, undue or unnecessary adverse impacts on nearby properties that may arise from the permittee's or its authorized personnel's construction, installation, operation, modification, maintenance, repair, removal and/or other activities on or about the site. The permittee shall not perform or cause others to perform any construction, installation, operation, modification, maintenance, repair, removal or other work that involves heavy equipment or machines except during normal construction work hours authorized by the Davis Municipal Code. The restricted work hours in this condition will not prohibit any work required to prevent an actual, immediate harm to property or persons, or any work during an emergency declared by the City or other state or federal government agency or official with authority to declare a state of emergency within the City. The approval authority may issue a stop work order for any activities that violates this condition in whole or in part.

(8) **Inspections; Emergencies.** The permittee expressly acknowledges and agrees that the City's officers, officials, staff, agents, contractors or other designees may enter onto the site and inspect the improvements and equipment City's officers, officials, staff, agents, contractors or other designees may, but will not be obligated to, enter onto the site area without prior notice to support, repair, disable or remove any improvements or equipment in emergencies or when such improvements or equipment threatens actual, imminent harm to property or persons. The permittee, if present, may observe the City's officers, officials, staff or other designees while any such inspection or emergency access occurs.

(9) **Permittee's Contact Information.** Within 10 days from the final approval, the permittee shall furnish the City with accurate and up-to-date contact information for a person responsible for the small wireless telecommunication facility, which includes without limitation such person's full name, title, direct telephone number, facsimile number, mailing address and email address. The permittee shall keep such contact information up-to-date at all times and promptly provide the City with updated contact information if either the responsible person or such person's contact information changes.

(10) **Indemnification.** The permittee shall defend, indemnify and hold harmless the City, City Council and the City's boards, commissions, agents, officers, officials, employees and volunteers (collectively, the "indemnitees") from any and all (i) damages, liabilities, injuries, losses, costs and expenses and from any and all

claims, demands, law suits, writs and other actions proceedings ("claims") brought against the indemnitees to challenge, attack, seek to modify, set aside, void or annul the City's approval of this permit, and (ii) other claims of any kind or form, whether for personal injury, death or property damage, that arise from or in connection with the permittee's or its agents', directors', officers', employees', contractors', subcontractors', licensees' or customers' acts or omissions in connection with this small cell permit or the small wireless telecommunication facility. In the event the City becomes aware of any claims, the City will use best efforts to promptly notify the permittee shall reasonably cooperate in the defense. The permittee expressly acknowledges and agrees that the City shall have the right to approve, which approval shall not be unreasonably withheld, the legal counsel providing the City's defense, and the permittee shall promptly reimburse City for any costs and expenses directly and necessarily incurred by the City in the course of the defense. The permittee expressly acknowledges and agrees that the permittee's indemnification obligations under this condition are a material consideration that motivates the City to approve this small cell permit, and that such indemnification obligations will survive the expiration, revocation or other termination of this small cell permit.

(11) **Performance Bond.** Applicable to small wireless telecommunication facilities within public rights-of-way. Before the City issues any permits required to commence construction in connection with this permit, the permittee shall post a performance bond from a surety and in a form acceptable to the approval authority in an amount reasonably necessary to cover the cost to remove the improvements and restore all affected areas based on a written estimate from a qualified contractor with experience in wireless telecommunication facilities removal. The written estimate must include the cost to remove all equipment and other improvements, which includes without limitation all antennas, radios, batteries, generators, utilities, cabinets, mounts, brackets, hardware, cables, wires, conduits, structures, shelters, towers, poles, footings and foundations, whether above ground or below ground, constructed or installed in connection with the wireless facility, plus the cost to completely restore any areas affected by the removal work to a standard compliant with applicable laws. In establishing or adjusting the bond amount required under this condition, and in accordance with California Government Code § 65964(a), the approval authority shall take into consideration any information provided by the permittee regarding the cost to remove the wireless telecommunication facility to a standard compliant with applicable laws. The performance bond shall expressly survive the duration of the permit term to the extent required to effectuate a complete removal of the subject wireless telecommunication facility in accordance with this condition.

(12) **Permit Revocation.** The approval authority may recall this approval for review at any time due to complaints about noncompliance with applicable laws or any approval conditions attached to this approval after notice and an opportunity to cure the violation is provided to the permittee. If the noncompliance thereafter continues, the approval authority may, following notice and an opportunity for the permittee to be heard (which hearing may be limited to written submittals), revoke this approval or amend these conditions as the approval authority deems necessary or appropriate to correct any such noncompliance.

(13) **Record Retention.** Applicable to small wireless telecommunication facilities within public rights- of-way. The permittee must maintain complete and accurate copies of all permits and other regulatory approvals issued in connection with the wireless telecommunication facility, which includes without limitation this approval, the approved plans and photo simulations incorporated into this approval, all conditions associated with this approval and any ministerial permits or approvals issued in connection with this approval. In the event that the permittee does not maintain such records as required in this condition, any ambiguities or uncertainties that would be resolved through an inspection of the missing records will be construed against the permittee. The permittee may keep electronic records; provided, however, that hard copies or electronic records kept in the City's regular files will control over any conflicts between such City-controlled copies or records and the permittee's electronic copies, and complete originals will control over all other copies in any form.

(14) **Abandoned Wireless Facilities.** A small wireless facility shall be deemed abandoned if not operated for any continuous six-month period. Within 90 days after a small wireless facility is abandoned or deemed abandoned, the permittee shall completely remove the small wireless facility and all related improvements and shall restore all affected areas to a condition compliant with all applicable laws, which includes without limitation the Davis Municipal Code. In the event that the permittee does not comply with the removal and restoration obligations under this condition within said 90-day period, the City shall have the right (but not the obligation) to perform such removal and restoration with or without notice, and the permittee shall be liable for all costs and expenses incurred by the City in connection with such removal and/or restoration activities.

(15) **Landscaping.** The permittee shall replace any landscape features damaged or displaced by the construction, installation, operation, maintenance or other work performed by the permittee or at the permittee's direction on or about the site. If any trees are damaged or displaced, the permittee shall hire and pay for a licensed arborist to select, plant and maintain replacement landscaping in an appropriate location for the species. Only workers under the supervision of a licensed arborist shall be used to install the replacement tree(s). Any replacement tree must be substantially the same size as the damaged tree unless otherwise approved by the approval authority. The permittee shall, at all times, be responsible to maintain any replacement landscape features.

(16) **Cost Reimbursement.** Applicable to small wireless facilities within public rights-of-way. The permittee acknowledges and agrees that (i) the permittee's request for authorization to construct, install and/or operate the wireless facility will cause the City to incur costs and expenses; (ii) the permittee shall be responsible to reimburse the City for all costs incurred in connection with the permit, which includes without limitation costs related to application review, permit issuance, site inspection, independent third party RF analysis engineer or consultant and any other costs reasonably related to or caused by the request for authorization to construct, install and/or operate the wireless facility; (iii) any application fees required for the application may not

cover all such reimbursable costs and that the permittee shall have the obligation to reimburse City for all such costs 10 days after a written demand for reimbursement and reasonable documentation to support such costs; and (iv) the City shall have the right to withhold any permits or other approvals in connection with the wireless facility until and unless any outstanding costs have been reimbursed to the City by the permittee.

(17) **Future Undergrounding Programs.** Applicable to small wireless telecommunication facilities within public rights-of-way. Notwithstanding any term remaining on any small cell permit, if other utilities or communications providers in the public rights-of- way underground their facilities in the segment of the public rights-of-way where the permittee's small wireless telecommunication facility is located, the permittee must also underground its equipment, except the antennas and any approved electric meter, at approximately the same time. Accessory equipment such as radios and computers that require an environmentally controlled underground vault to function shall not be exempt from this condition. Small wireless telecommunication facilities installed on wood utility poles that will be removed pursuant to the undergrounding program may be reinstalled on a streetlight that complies with the City's standards and specifications. Such undergrounding shall occur at the permittee's sole cost and expense except as may be reimbursed through tariffs approved by the state public utilities commission for undergrounding costs.

(18) **Electric Meter Upgrades.** Applicable to small wireless telecommunication facilities within public rights-of-way. If the commercial electric utility provider adopts or changes its rules obviating the need for a separate or ground-mounted electric meter and enclosure, the permittee on its own initiative and at its sole cost and expense shall remove the separate or ground-mounted electric meter and enclosure. Prior to removing the electric meter, the permittee shall apply for any encroachment and/or other ministerial permit(s) required to perform the removal. Upon removal, the permittee shall restore the affected area to its original condition that existed prior to installation of the equipment.

(19) **Rearrangement and Relocation.** Applicable to small wireless telecommunication facilities within public rights-of-way. The permittee acknowledges that the City, in its sole discretion and at any time, may: (i) change any street grade, width or location;
(ii) add, remove or otherwise change any improvements in, on, under or along any street owned by the City or any other public agency, which includes without limitation any sewers, storm drains, conduits, pipes, vaults, boxes, cabinets, poles and utility systems for gas, water, electric or telecommunications; and/or (iii) perform any other work deemed necessary, useful or desirable by the City (collectively, "City work"). The City reserves the rights to do any and all City work without any admission on its part that the City would not have such rights without the express reservation in this small cell permit. If the Public Works Director determines that any City work will require the permittee's small wireless facility located in the public rights-of-way to be rearranged and/or relocated, the permittee shall, at its sole cost and expense, do or cause to be done all things necessary to accomplish such rearrangement and/or relocation. If the permittee

fails or refuses to either permanently or temporarily rearrange and/or relocate the permittee's small wireless facility within a reasonable time after the Public Works Director's notice, the City may (but will not be obligated to) cause the rearrangement or relocation to be performed at the permittee's sole cost and expense. The City may exercise its rights to rearrange or relocate the permittee's small wireless telecommunication facility without prior notice to permittee when the Public Works Director determines that the City work is immediately necessary to protect public health or safety. The permittee shall reimburse the City for all costs and expenses in connection with such work within 10 days after a written demand for reimbursement and reasonable documentation to support such costs.

SECTION 2.6. LOCATION REQUIREMENTS

(a) **Preface to Location Requirements.** To better assist applicants and decision makers understand and respond to the community's aesthetic preferences and values, subsections (b) and (c) set out listed preferences for locations and support structures to be used in connection with small wireless telecommunication facilities in an ordered hierarchy. Applications that involve less-preferred locations or structures may be approved so long as the applicant demonstrates that either (1) no more preferred locations or structures exist within 500 feet from the proposed site; or (2) any more preferred locations or structures within 500 feet from the proposed site would be technically infeasible as supported by clear and convincing evidence in the written record. Subsection (d) identifies "prohibited" support structures on which the City shall not approve any small cell permit application for any competitor or potential competitor.

~~(b)~~ **Locational Preferences.** The City prefers small wireless facilities to be installed in ~~locations, ordered from most preferred to least preferred, as follows:~~

(1) any location in a non-residential zone or non-residential Specific Plan designation;

~~(2) any location in a residential zone 250 feet or more from any structure approved for a residential or school use;~~

~~(3) If located in a residential area, a location that is as far as possible from any structure approved for a residential or school use.~~

(c) **Support Structures in Public Rights-of-Way.** The City prefers small wireless telecommunication facilities to be installed on support structures in the public rights-of-way, ordered from most preferred to least preferred, as follows:

(1) Existing or replacement streetlight poles;

(2) New, non-replacement streetlight poles;

(3) New or replacement traffic signal poles;

(4) New, non-replacement poles;

(5) Existing or replacement wood utility poles.

(d) **Prohibited Support Structures in Public Rights-of-Way.** The City prohibits small wireless facilities to be installed on the following support structures:

(1) Decorative poles;

(2) Signs;

(3) Any utility pole scheduled for removal or relocation within 12 months from the time the approval authority acts on the small cell permit application;

(4) New, non-replacement wood poles.

SECTION 2.7. DESIGN STANDARDS

(a) General Standards.

(1) **Noise.** Noise emitted from small wireless facilities and all accessory equipment and transmission equipment must comply with all applicable City noise control standards.

(2) **Lights.** Small wireless telecommunication facilities shall not include any lights that would be visible from publicly accessible areas, except as may be required under Federal Aviation Administration, FCC, other applicable regulations for health and safety. All equipment with lights (such as indicator or status lights) must be installed in locations and within enclosures that mitigate illumination impacts visible from publicly accessible areas. The provisions in this subsection (a)(2) shall not be interpreted or applied to prohibit installations on streetlights or luminaires installed on new or replacement poles as may be required under this Policy.

(3) **Landscape Features.** No small wireless telecommunication facility shall encroach into the protected zone of a protected oak or landmark tree. Small wireless telecommunication facilities shall not displace any other existing landscape features unless: (A) such displaced landscaping is replaced with native and/or drought-resistant plants, trees or other landscape features approved by the approval authority and (B) the applicant submits and adheres to a landscape maintenance plan. The landscape plan must include existing vegetation, and vegetation proposed to be removed or trimmed, and the landscape plan must identify proposed landscaping by species type, size and location. Landscaping and landscape maintenance must be performed in accordance with all applicable provisions of the Davis Municipal Code.

(4) **Site Security Measures.** Small wireless telecommunication facilities may incorporate reasonable and appropriate site security measures, such as locks and anti-climbing devices, to prevent unauthorized access, theft or vandalism. The approval authority shall not approve any barbed wire, razor ribbon, electrified fences or any similarly dangerous security measures. All exterior surfaces on small wireless telecommunication facilities shall be constructed from or coated with graffiti-resistant materials.

(5) **Signage; Advertisements.** All small wireless telecommunication facilities must include signage not to exceed one (1) square feet in sign area that accurately identifies the site owner/operator, the owner/operator's site name or identification number and a toll-free number to the owner/operator's network operations center. Small wireless telecommunication facilities may not bear any other signage or advertisements unless expressly approved by the City, required by law or recommended under FCC, Occupational Safety and Health Administration or other United States governmental agencies for compliance with RF emissions regulations.

(6) **Compliance with Health and Safety Regulations.** All small wireless telecommunication facilities shall be designed, constructed, operated and maintained in compliance with all generally applicable health and safety regulations, which includes without limitation all applicable regulations for human exposure to RF emissions where the facilities do not expose people to radio frequency (RF) radiation in excess of FCC standards. These standards being that the power density cannot exceed 5% of the power density exposure limit applicable to that transmitter or facility or in a field strength that, when squared, exceeds 5% of the square of the electric or magnetic field strength limit applicable to that transmitter or facility (47 CFR 1.1310).

(7) **Safety Testing Report Past 6GHz.** Submittal of report of proof of safety testing and/or SAR and/or similar calculable means for RF power levels from all antennas, transmitters and electronic components that utilize frequencies past 6GHz determined at ground level, second and third storied buildings.

(8) Compliance with the United States Access Board and the federal Americans with Disabilities Act (ADA) of 1990 (42 U.S.C. §§ 12101 *et seq.)* and accommodations for individuals with electro-sensitivity, also known as radar sickness and microwave sickness.

(9) **Overall Height.** Small wireless telecommunication facilities must comply with the minimum separation from electrical lines required by applicable safety regulations (such as CPUC General Order 95 and 128).

(b) Small Wireless Telecommunication Facilities within Public Rights-of-Way.

(1) Antennas.

(A) **Concealment.** All antennas and associated mounting equipment, hardware, cables or other connecters must be completely concealed within an opaque antenna shroud or radome. The antenna shroud or radome must be painted a flat, non-reflective color to match the underlying support structure.

(B) **Antenna Volume.** Each individual antenna may not exceed three cubic feet in volume.

(2) Accessory Equipment.

(A) **Installation Preferences.** All non-antenna accessory equipment shall be installed in accordance with the following preferences, ordered from most preferred to least preferred: (i) underground in any area in which the existing utilities are primarily located underground; (ii) on the pole or support structure; or (iii) integrated into the base of the pole or support structure. Applications that involve lesser-preferred installation locations may be approved so long as the applicant demonstrates that no more preferred installation location would be technically feasible as supported by clear and convincing evidence in the written record.

(B) **Undergrounded Accessory Equipment.** All undergrounded accessory equipment must be installed in an environmentally controlled vault that is load-rated to meet the City's standards and specifications. Underground

vaults located beneath a sidewalk must be constructed with a slip-resistant cover. Vents for airflow shall be flush-to-grade when placed within the sidewalk and may not exceed two feet above grade when placed off the sidewalk. Applicants shall not be permitted to install an underground vault in a location that would cause any existing tree to be materially damaged or displaced. The Noise restrictions apply to underground equipment as well, especially ventilation/cooling equipment.

(C) **Pole-Mounted Accessory Equipment.** All pole-mounted accessory equipment must be installed flush to the pole to minimize the overall visual profile. If any applicable health and safety regulations prohibit flush-mounted equipment, the maximum separation permitted between the accessory equipment and the pole shall be the minimum separation required by such regulations. All pole-mounted equipment and required or permitted signage must be placed and oriented away from adjacent sidewalks and structures. Pole-mounted equipment may be installed behind street, traffic or other signs to the extent that the installation complies with applicable public health and safety regulations. All cables, wires and other connectors must be routed through conduits within the pole, and all conduit attachments, cables, wires and other connectors must be concealed from public view. To the extent that cables, wires and other connectors cannot be routed through the pole, applicants shall route them through a single external conduit or shroud that has been finished to match the underlying support structure.

(D) **Base-Mounted Accessory Equipment.** All base-mounted accessory equipment must be installed within a shroud, enclosure or pedestal integrated into the base of the support structure. All cables, wires and other connectors routed between the antenna and base-mounted equipment must be concealed from public view.

(E) **Ground-Mounted Accessory Equipment.** The approval authority shall not approve any ground-mounted accessory equipment including, but not limited to, any utility or transmission equipment, pedestals, cabinets, panels or electric meters.

(F) **Accessory Equipment Volume.** All accessory equipment associated with a small wireless telecommunication facility installed above ground level shall not cumulatively exceed: (i) nine (9) cubic feet in volume if installed in a residential district; or (ii) seventeen (17) cubic feet in volume if installed in a non-residential district. The volume calculation shall include any shroud, cabinet or other concealment device used in connection with the non-antenna accessory equipment. The volume calculation shall not include any equipment or other improvements placed underground.

(3) **Streetlights.** Applicants that propose to install small wireless telecommunication facilities on an existing streetlight must remove and replace the existing streetlight with one

substantially similar to the design(s) for small wireless telecommunication facilities on streetlights described in the City's Road Design and Construction Standards. To mitigate any material changes in the streetlighting patterns, the replacement pole must: (A) be located as close to the removed pole as possible; (B) be aligned with the other existing streetlights; and (C) include a luminaire at substantially the same height and distance from the pole as the luminaire on the removed pole. All antennas must be installed above the pole within a single, canister style shroud or radome that tapers to the pole.

(4) **Wood Utility Poles.** Applicants that propose to install small wireless telecommunication facilities on an existing wood utility pole must install all antennas in a radome above the pole unless the applicant demonstrates that mounting the antennas above the pole would be technically infeasible as supported by clear and convincing evidence in the written record. Side-mounted antennas on a stand-off bracket or extension arm must be concealed within a shroud. All cables, wires and other connectors must be concealed within the radome and stand-off bracket. The maximum horizontal separation between the antenna and the pole shall be the minimum separation required by applicable health and safety regulations.

(5) **New, Non-Replacement Poles.** Applicants that propose to install a small wireless telecommunication facility on a new, non-replacement pole must install a new streetlight substantially similar to the City's standards and specifications but designed to accommodate wireless antennas and accessory equipment located immediately adjacent to the proposed location. If there are no existing streetlights in the immediate vicinity, the applicant may install a metal or composite pole capable of concealing all the accessory equipment either within the pole or within an integrated enclosure located at the base of the pole. The pole diameter shall not exceed twelve (12) inches and any base enclosure diameter shall not exceed sixteen (16) inches. All antennas, whether on a new streetlight or other new pole, must be installed above the pole within a single, canister style shroud or radome that tapers to the pole.

(6) **Encroachments over Private Property.** Small wireless telecommunication facilities may not encroach onto or over any private or other property outside the public rights-of- way without the property owner's express written consent.

(7) **Backup Power Sources.** Fossil-fuel based backup power sources shall not be permitted within the public rights-of-way; provided, however, that connectors or receptacles may be installed for temporary backup power generators used in an emergency declared by federal, state or local officials.

(8) **Obstructions; Public Safety and Circulation.** Small wireless telecommunication facilities and any associated equipment or improvements shall not physically interfere with or impede access to any: (A) worker access to any aboveground or underground infrastructure for traffic control, streetlight or public transportation, including without limitation any curb control sign, parking meter, vehicular traffic sign or signal, pedestrian traffic sign or signal,

barricade reflectors; (B) access to any public transportation vehicles, shelters, street furniture or other improvements at any public transportation stop; (C) worker access to above-ground or underground infrastructure owned or operated by any public or private utility agency; (D) fire hydrant or water valve; (E) access to any doors, gates, sidewalk doors, passage doors, stoops or other ingress and egress points to any building appurtenant to the rights-of-way; (F) access to any fire escape or (G) above ground improvements must be setback a minimum of 2 feet from existing or planned sidewalks, trails, curb faces or road surfaces.

(9) **Utility Connections.** All cables and connectors for telephone, data backhaul, primary electric and other similar utilities must be routed underground in conduits large enough to accommodate future collocated wireless telecommunication facilities. Undergrounded cables and wires must transition directly into the pole base without any external doghouse. All cables, wires and connectors between the underground conduits and the antennas and other accessory equipment shall be routed through and concealed from view within: (A) internal risers or conduits if on a concrete, composite or similar pole; or (B) a cable shroud or conduit mounted as flush to the pole as possible if on a wood pole or other pole without internal cable space. The approval authority shall not approve new overhead utility lines or service drops merely because compliance with the undergrounding requirements would increase the project cost.

(10) **Spools and Coils.** To reduce clutter and deter vandalism, excess fiber optic or coaxial cables shall not be spooled, coiled or otherwise stored on the pole outside equipment cabinets or shrouds.

(11) **Electric Meters.** Small wireless telecommunication facilities shall use flat-rate electric service or other method that obviates the need for a separate above-grade electric meter. If flat-rate service is not available, applicants may install a shrouded smart meter. The approval authority shall not approve a separate ground-mounted electric meter pedestal unless required by the utility company.

(12) **Street Trees.** To preserve existing landscaping in the public rights-of-way, all work performed in connection with small wireless telecommunication facilities shall not cause any street trees to be trimmed, damaged or displaced. If any street trees are damaged or displaced, the applicant shall be responsible, at its sole cost and expense, to plant and maintain replacement trees at the site for the duration of the permit term.

(13) **Lines of Sight.** No wireless telecommunication facility shall be located so as to obstruct pedestrian or vehicular lines-of-sight.

(c) Small Wireless Telecommunication Facilities Outside of Public Rights-of-Way

(1) **Setbacks.** Small wireless telecommunication facilities on private property may not encroach into any applicable setback for structures in the subject zoning district.

(2) **Backup Power Sources.** The Approval Authority shall not approve any diesel generators or other similarly noisy or noxious generators in or within 250 feet from any residence; provided, however, the Approval Authority may approve sockets or other connections used for temporary backup generators.

(3) **Parking; Access.** Any equipment or improvements constructed or installed in connection with any small wireless telecommunication facilities must not reduce any parking spaces below the minimum requirement for the subject property. Whenever feasible, small wireless facilities must use existing parking and access rather than construct new parking or access improvements. Any new parking or access improvements must be the minimum size necessary to reasonably accommodate the proposed use.

(4) **Freestanding Small Wireless Facilities.** All new poles or other freestanding structures that support small wireless telecommunication facilities must be made from a metal or composite material capable of concealing all the accessory equipment, including cables, mounting brackets, radios, and utilities, either within the support structure or within an integrated enclosure located at the base of the support structure. All antennas must be installed above the pole in a single, canister-style shroud or radome. The support structure and all transmission equipment must be painted with flat/neutral colors that match the support structure. The pole diameter shall not exceed twelve (12) inches and any base enclosure diameter shall not exceed sixteen (16) inches.

(5) Small Wireless Telecommunication Facilities on Existing Buildings.

(A) All components of building-mounted wireless facilities must be completely concealed and architecturally integrated into the existing facade or rooftop features with no visible impacts from any publicly accessible areas. Examples include, but are not limited to, antennas and wiring concealed behind existing parapet walls or facades replaced with RF-transparent material and finished to mimic the replaced materials.

(B) If the applicant demonstrates with clear and convincing evidence that integration with existing building features is technically infeasible, the applicant may propose to conceal the wireless telecommunication facility within a new architectural element designed to match or mimic the architectural details of the building including length, width, depth, shape, spacing, color, and texture.

(6) Small Wireless Telecommunication Facilities on Existing Lattice Tower Utility Poles

(A) Antennas must be flush-mounted to the side of the pole and designed to match the color and texture of the pole. If technologically infeasible to flush-mount an antenna, it may be mounted on an extension arm that protrudes as little as possible from the edge of the existing pole provided that the wires are concealed inside the extension arm. The extension arm shall match the color of the pole.

(B) Wiring must be concealed in conduit that is flush-mounted to the pole. The conduit and mounting hardware shall match the color of the pole.

(C) All accessory equipment must be placed underground unless undergrounding would be technically infeasible as supported by clear and convincing evidence in the written record. Above-ground accessory equipment mounted on a pole, if any, shall be enclosed in a cabinet that matches the color and finish of the structures on which they are mounted. Above-ground cabinets not mounted on a structure, if any, shall be dark green in color.

(D) No antenna or accessory equipment shall be attached to a utility line, cable or guy wire.

(7) Small Wireless Telecommunication Facilities on Existing Wood Utility Poles.

(A) All antennas must be installed within a cylindrical shroud (radome) above the top of the pole unless the applicant demonstrates that mounting antennas above the pole would be technically infeasible as supported by clear and convincing evidence in the written record.

(B) All antennas must be concealed within a shroud (radome) designed to match the color or the pole, except as described in (8) (E).

(C) No antenna or accessory equipment shall be attached to a utility line, cable or guy wire.

(D) If it is technically infeasible to mount an antenna above the pole it may be flush-mounted to the side of the pole. If it is technically infeasible to flush-mount the antenna to the side of the pole it may be installed at the top of a stand-off bracket/extension arm that protrudes as little as possible beyond the side of the pole. Antenna shrouds on stand-off brackets must be a medium gray color to blend in with the daytime sky.

(E) Wires must be concealed within the antenna shroud, extension bracket/extension arm and conduit that is flush-mounted to the pole. The conduit and mounting hardware shall match the color of the pole.

(F) All accessory equipment must be placed underground, unless undergrounding would be technically infeasible as supported by clear and convincing evidence in the written record. Above ground accessory equipment mounted on a pole, if any, shall be enclosed in a cabinet that matches the color and finish of the pole. Above-ground cabinets not mounted on a structure, if any, shall be dark green in color.

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IEQ Indoor Environmental Quality Project

The Architectural and Transportation Barriers Compliance Board (Access Board) is an independent federal agency devoted to accessibility for people with disabilities. The Access Board is responsible for developing and maintaining accessibility guidelines to ensure that newly constructed and altered buildings and facilities covered by the Americans with Disabilities Act and the Architectural Barriers Act are accessible to and usable by people with disabilities. In November 1999, the Access Board issued a proposed rule to revise and update its accessibility guidelines. During the public comment period on the proposed rule, the Access Board received approximately 600 comments from individuals with multiple chemical sensitivities (MCS) and electromagnetic sensitivities (EMS). They reported that chemicals released from products and materials used in construction, renovation, and maintenance of buildings, electromagnetic fields, and inadequate ventilation are barriers that deny them access to most buildings.

Americans spend about 90 percent of their time indoors, where concentrations of air pollutants are often much higher than those outside. According to the U.S. EPA Healthy Buildings, Healthy People: A Vision for the 21st Century, "Known health effects of indoor pollutants include asthma; cancer; developmental defects and delays, including effects on vision, hearing, growth, intelligence, and learning; and effects on the cardiovascular system (heart and lungs). Pollutants found in the indoor environment may also contribute to other health effects, including those of the reproductive and immune systems." (p. 4). The report further notes that "Most chemicals in commercial use have not been tested for possible health effects. (p. 8).

There are a significant number of people who are sensitive to chemicals and electromagnetic fields. Surveys conducted by the California and New Mexico Departments of Health and by medical researchers in North Carolina found 16 to 33 percent of the people interviewed reported that they are unusually sensitive to chemicals, and in the California and New Mexico health departments' surveys 2 percent to 6 percent reported that they have been diagnosed as having multiple chemical sensitivities C. Miller and N. Ashford, "Multiple Chemical Intolerance and Indoor Air Quality," in Indoor Air Quality Handbook Chapter 27.8 (McGraw-Hill 2001). Another California Department of Health Services survey has found that 3 percent of the people interviewed reported that they are unusually sensitive to electric appliances or power lines. P. LeVallois, et al., "Prevalence and Risk Factors of Self-Reported Hypersensitivity to Electromagnetic Fields in California," in California EMF Program, "An Evaluation of the Possible Risks From Electric and Magnetic Fields (EMFs From Power Lines, Internal Wiring, Electrical Occupations and Appliances, Draft 3 for Public Comment, April 2001" Appendix 3.

Individuals with multiple chemical sensitivities and electromagnetic sensitivities who submitted written comments and/or attended the public information meetings on the draft final rule, requested that the Access Board include provisions in the final rule to make buildings and facilities accessible for them.

RESEARCH

Completed Research
Other Resources

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The Board has not included such provisions in their rules, but they have taken the commentary very seriously and acted upon it. As stated in the Background for its Final Rule Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities; Recreation Facilities

"The Board recognizes that multiple chemical sensitivities and electromagnetic sensitivities may be considered disabilities under the ADA if they so severely impair the neurological, respiratory or other functions of an individual that it substantially limits one or more of the individual's major life activities. The Board plans to closely examine the needs of this population, and undertake activities that address accessibility issues for these individuals.

The Board plans to develop technical assistance materials on best practices for accommodating individuals with multiple chemical sensitivities and electromagnetic sensitivities. The Board also plans to sponsor a project on indoor environmental quality. In this project, the Board will bring together building owners, architects, building product manufacturers, model code and standard-setting organizations, individuals with multiple chemical sensitivities and electromagnetic sensitivities, and other individuals. This group will examine building design and construction issues that affect the indoor environment, and develop an action plan that can be used to reduce the level of chemicals and electromagnetic fields in the built environment."

This report and the recommendations included within are a direct outgrowth from that public comment process. The Access Board contracted with the National Institute of Building Sciences (NIBS) to establish this Indoor Environmental Quality Project as a first step in implementing that action plan.

A broad and distinguished Steering Committee was established and met in January 2004 in Bethesda, Maryland, to review the project objectives. Subsequently four task teams (committees) were established to address specific issues in buildings related to Operations & Maintenance, Cleaner Air Rooms, Design and Construction, and Products and Materials. The following reports from these four committees offer recommendations for improving IEQ in buildings. They also list valuable resources and references to allow readers to investigate the pertinent issues in greater depth. The focus of the project was on commercial and public buildings, but many of the issues addressed and recommendations offered are applicable in residential settings.

Many volunteers worked diligently to create the recommendations in this report. These individuals are listed in the separate committee sections of the report, but special thanks go to the committee chairs: respectively Hal Levin, Building Ecology Research Group; Michael Mankin, California Division of the State Architect; Roger Morse, Morse-Zentner Associates; and Brent Kynoch, Kynoch Environmental Management, Inc. Lastly, an enormous debt of gratitude is owed to four amazing individuals who made significant contributions to the work of all four committees: Mary Lamielle, National Center for Environmental Health Strategies; Ann McCampbell, MD, Multiple Chemical Sensitivities Task Force of New Mexico; Susan Molloy, National Coalition for the Chemically Injured; and Toni Temple, Ohio Network for the Chemically Injured.

The overall objectives of this project were to establish a collaborative process among a range of stakeholders to recommend practical, implementable actions to both improve access to buildings for people with MCS and EMS while at the same time raising the bar and improving indoor environmental quality to create healthier buildings for the entire population.

This IEQ project supports and helps achieve the goals of the Healthy Buildings, Healthy People project, which acknowledges that "We will create indoor environments that are healthier for everyone by making indoor environments safer for the most vulnerable among us, especially children." (p.17)

Summary Recommendations

The recommendations in this report are only a first step toward the action plan envisioned by the Access Board.

The NIBS IEQ committee offers several recommendations for further action. It is recommended that a follow-on project organize and convene one, or more, workshops to deliberate the issues and recommendations in this report. It is also recommended that a project be organized to develop a single guidelines document. Such guidelines would be built on refinement and coordination of the recommendations of the Design & Construction and Products & Materials committees in this report. This same, or a separate project, should develop new building code provisions to accelerate the implementation of improved IEQ. Lastly, it is recommended that a project be organized to develop guidelines for the design of an "ideal space" for people with MCS and EMS. The recommended follow-up projects should involve collaborative effort and funding from a range of organizations across the building community; e.g., American Institute of Architects (AIA), Associated General Contractors of America (AGC), Building Owners & Managers Association International (BOMA), American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE), Environmental Protection Agency (EPA), and, of course, the Access Board.

Steering Committee

Nicolas Ashford, Massachusetts Institute of Technology
Kathy Barcus, Clarke Construction Company, Inc.
Marilyn Golden, Disability Rights Education and Defense Fund (DREDF)
Harry Gordon, Burt Hill Kosar and Rittelmann Associates
Mark Jackson, Lennox Industries, Inc.
Brent Kynoch, Kynoch Environmental Management, Inc.
Mary Lamielle, National Center for Environmental Health Strategies
Ann McCampbell, Multiple Chemical Sensitivities Task Force of New Mexico
Claudia Miller, University of Texas Health Sciences Center - San Antonio
Susan Molloy, National Coalition for the Chemically Injured
Roger Morse, Morse Zentner Associates
Larry Perry, Building Owners and Managers Association
Bruce Small, Building Inspections
Toni Temple, Ohio Network for the Chemically Injured
James Wasley, University of Wisconsin-Milwaukee

James Raggio, Access Board
Alexander Shaw, National Institute of Building Sciences

Recommendations for Accommodations

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People with chemical and/or electromagnetic sensitivities can experience debilitating reactions from exposure to extremely low levels of common chemicals such as pesticides, cleaning products, fragrances, and remodeling activities, and from electromagnetic fields emitted by computers, cell phones, and other electrical equipment.

The severity of sensitivities varies among people with chemical and/or electromagnetic sensitivities. Some people can enter certain buildings with minor accommodations while others may be so severely impacted that they are unable to enter these same spaces without debilitating reactions. Furthermore individual tolerances to specific exposures can vary greatly from one individual to the next. Meanwhile some exposures, such as the application of certain pesticides or extensive remodeling, for example, may be devastating to all chemically sensitive people and make a building or facility inaccessible for a substantial period of time.

According to the Americans with Disabilities Act (ADA) and other disability laws, public and commercial buildings are required to provide reasonable accommodations for those disabled by chemical and/or electromagnetic sensitivities. These accommodations are best achieved on a case-by-case basis.

Reasonable accommodations for a chemically sensitive and/or electromagnetically sensitive individual can include providing a space or meeting area that addresses one or more of the Cleaner Air criteria, upon request, such as

- Remove fragrance-emitting devices (FEDS)
- Delay or postpone indoor or outdoor pesticide applications, carpet cleaning, or other cleaning or remodeling until after the meeting
- Provide room or meeting area near exterior door or with window(s) that can be opened
- Require cell phones and computers be turned off
- Provide incandescent lighting in lieu of fluorescent lighting
- Provide at least one nonsmoking, fragrance-free person per shift to provide services (e.g. nurse, police officer, security guard, clerk)

For individuals who are unable to use or meet in a building or facility, or who are too severely impacted by chemical and/or electromagnetic exposures to use a designated Cleaner Air Room, accommodations may include:

- Meet an individual at the door or outside to conduct business
- Allow a person to wait outside or in car until appointment
- Provide a means, such as a phone, intercom, bell, or buzzer to summon staff to an outside door for assistance
- Permit business to be conducted by phone, fax, mail, or e-mail rather than in person
- Allow participation in a meeting by speakerphone

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FIRSTENBERG v. CITY OF SANTA FE, N.M.

No. 11-2156.

696 F.3d 1018 (2012)

Arthur FIRSTENBERG, Plaintiff-Appellant, v. CITY OF SANTA FE, NEW MEXICO; AT & T Mobility Services, LLC, Defendants-Appellees.

United States Court of Appeals, Tenth Circuit.

October 9, 2012.

Attorney(s) appearing for the Case

Lindsay A. Lovejoy, Jr. , Law Office of Lindsay A. Lovejoy, Jr., Santa Fe, NM, for Plaintiff-Appellant.

Marcos D. Martínez , Assistant City Attorney, Santa Fe, NM, (Eugene I. Zamora , City Attorney, Santa Fe, NM, with him on the brief), for Defendant-Appellee City of Santa Fe.

Hans J. Germann , Mayer Brown LLP, Chicago, IL (John E. Muench and Kyle J. Steinmetz , Mayer Brown LLP, Chicago, IL; Mark A. Basham , Basham & Basham P.C., Santa Fe, NM, with him on the brief), for Defendant-Appellee AT & T Mobility Services, LLC.

Before BRISCOE, Chief Judge, BALDOCK and HOLMES, Circuit Judges.

HOLMES, Circuit Judge.

Electromagnetic radiation is a form of energy ubiquitous in our modern world, associated with everything from WiFi networks to microwave ovens to power lines. Most of us do not notice it. Some individuals, however, apparently suffer from a condition known as electromagnetic hypersensitivity ("EHS"), which requires them to avoid exposure to sources of electromagnetic radiation. These sources include cell-phone towers, sometimes called "base stations," which emit a form of energy

known as radiofrequency ("RF") radiation. See generally Federal Communications Commission, Radio Frequency Safety, http://transition.fcc.gov/oet/rfsafety/.

Arthur Firstenberg allegedly suffers from EHS, and he brought this lawsuit against the City of Santa Fe, New Mexico ("City"), and AT & T Mobility Services, LLC ("AT & T"), asserting that signal upgrades at AT & T base stations in Santa Fe adversely affected his health and that the City is required to regulate those upgrades. Litigation proceeded apace and the district court dismissed Mr. Firstenberg's action against the City and AT & T for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). And Mr. Firstenberg appealed.

After a full round of appellate briefing, we noted a potential jurisdictional infirmity: the failure of Mr. Firstenberg's complaint to satisfy the well-pleaded complaint rule for purposes of federal-question jurisdiction under 28 U.S.C. § 1331. We asked for supplemental briefing, which the parties provided. They all insisted that federal jurisdiction is proper. After careful review, we disagree. We are therefore constrained to reverse the district court's dismissal orders and resulting judgment and to remand the case to the district court with directions to vacate its judgment and remand the case to state court.

I

Mr. Firstenberg is a resident of Santa Fe. As an EHS sufferer, he must avoid exposure to RF radiation from cell phones, base stations, and other sources. AT & T owns and operates several base stations in Santa Fe. In November 2010, AT & T upgraded its broadcast signals from 2G (second generation) to 3G (third generation),[1] increasing the amount and intensity of RF radiation from its base stations and causing Mr. Firstenberg to suffer insomnia, irritability, eye pain, dizziness, nausea, and itching.

Over the years, AT & T has been granted "special exceptions" under the City's Land Development Code ("Code") to construct its base stations. AT & T did not apply for or obtain additional special exceptions prior to initiating the 3G broadcasts. Mr. Firstenberg believes this was improper under the Code and points to § 14-3.6(B)(4)(b), which requires the City's Board of Adjustment to approve an additional special exception if there is a "more intense use" of an existing structure.[2]

Proceeding pro se, Mr. Firstenberg petitioned for a writ of mandamus in New Mexico state court, naming the City and AT & T as defendants. He claimed that "[t]he City of Santa Fe has a duty under § 14-3.6(B)(4)(b) to require AT & T to apply for a new Special Exception ... for each of its existing base stations before it is permitted to increase their intensity of

[696 F.3d 1021]

use." Aplt.App. at 172 (Second Am. Pet. for Writ of Mandamus, filed Dec. 29, 2010). He also alleged that he suffered from EHS, that he was "a qualified individual with a disability" under the Americans with Disabilities Act ("ADA"), id. at 171, and that he was therefore "beneficially interested in the enforcement of this ordinance," id. at 172.

Based on his prior experience — specifically, a public hearing at which the Board of Adjustment refused to regulate AT & T's antenna upgrades — Mr. Firstenberg anticipated that the City might raise a preemption defense under Section 704 of the Telecommunications Act of 1996 ("TCA"). Section 704 prohibits local governments from regulating "the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions." 47 U.S.C. § 332(c)(7)(B)(iv). His petition thus set forth the following under the heading "Argument":

> 20. Section 704 of the [TCA] is not the only federal law that the City of Santa Fe must obey. The City also has to obey Title II of the Americans with Disabilities Act, which prohibits public entities from subjecting any person to discrimination by reason of their disability (42 USC § 12132), and the Fifth and Fourteenth Amendments of the Constitution, which guarantee to every citizen the equal protection of the laws, and provide that no citizen be deprived of life, liberty, or property without due process....
>
> 21. There is actually no conflict between the [TCA] and other federal laws.... The [TCA] contains no language expressly modifying, impairing, or superseding the ADA. In fact the only mention of the ADA in the [TCA] (Section 255) requires compliance with it. Neither does the [TCA] supersede or modify the U.S. Constitution, nor could it.... If regulation of radio frequency radiation is required in order to comply with the Americans with Disabilities Act or the Constitution, a city is obligated to do so.
>
> [illegible] required to enforce its laws, as well as to take jurisdiction over the intensity of [illegible]

> 22. The City of Santa Fe is required to enforce its laws, as well as to take jurisdiction over the intensity of radio frequency radiation from permitted facilities, in order to fulfill its obligations under the ADA and the Constitution.

Aplt.App. at 176-77. In the next section, entitled "Cause of Action," Mr. Firstenberg reiterated that the City "has a clear legal duty to enforce the requirements of its Land Development Code, including, in particular, § 14-3.6(B)(4)(b)," that the City "has refused to enforce that section of the Code," and that mandamus was therefore appropriate. Id. at 178. In this section, Mr. Firstenberg made no reference to the ADA or the U.S. Constitution. He was similarly silent regarding these sources of federal law in his prayer for relief. There, Mr. Firstenberg requested the court to "issue a writ of mandamus directing the City of Santa Fe ... to commence enforcement proceedings, as provided in ... its [Code], by giving notice to AT & T that it must discontinue its 3G broadcasts within the City of Santa Fe within 30 days, and that it must submit an application for a Special Exception for each base station from which it proposes to broadcast such signals." Id.

The state court issued an alternative writ of mandamus, ordering the City to prohibit the 3G broadcasts unless and until special exceptions were granted or to show cause why it had not done so. AT & T and the City then removed the action to federal district court, asserting jurisdiction based on the existence of a federal question under 28 U.S.C. § 1331. They each

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filed a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). The City joined in the arguments of AT & T; as such, they both contended that § 14-3.6(B)(4)(b) did not apply to broadcast-signal upgrades, but that even if it did, the TCA preempted Mr. Firstenberg's claim. They also argued that Mr. Firstenberg was "not making any claim under the ADA" and that even if he was, the claim failed. Aplt.App. at 197 (AT & T Mem. in Supp. of Mot. to Dismiss, filed Jan. 28, 2011).

The district court granted the defendants' motions to dismiss and it issued separate, though similar, opinions. [3] The court briefly addressed its jurisdiction over Mr. Firstenberg's claims:

> Plaintiff's claim hinges on whether the City has authority under the [Code] to regulate wireless transmissions. To resolve this issue the Court must answer a substantial question of federal law, which is whether the City can enforce its [Code] in light of [Section 704 of the TCA]. In addition, Plaintiff invokes his right to protection under the ADA and under the Equal Protection and Due Process Clauses of the United States Constitution.

Id. at 258-59 (citation omitted) (quoting Morris v. City of Hobart, 39 F.3d 1105, 1111 (10th Cir.1994)). The court then reached the merits of the claims and defenses, concluding that the TCA preempted the City's authority to regulate AT & T's broadcast upgrades. The court construed Mr. Firstenberg's complaint — that is, his state-court mandamus petition [4] — as raising separate equal protection, procedural due process, and substantive due process claims. The court briefly addressed those claims and denied each of them. Mr. Firstenberg timely appealed and retained counsel.

After a full round of appellate briefing but prior to oral argument, we asked the parties to file supplemental briefs addressing whether Mr. Firstenberg's complaint was sufficiently "well-pleaded" to satisfy the requirements for federal-question jurisdiction under 28 U.S.C. § 1331. The parties filed supplemental briefs, and all contended that the district court's jurisdiction was proper. We heard oral argument on both the jurisdictional and merits issues. Contrary to the parties' arguments, we conclude that the district court lacked subject-matter jurisdiction over Mr. Firstenberg's case, and, consequently, so do we.

II

Federal subject matter jurisdiction is elemental. It cannot be consented to or waived, and its presence must be established in every cause under review in the federal courts. Cook v. Rockwell Int'l Corp., 618 F.3d 1127, 1135 n. 4 (10th Cir. 2010) ("[W]e must satisfy ourselves not only of our own jurisdiction, but also that of the lower courts in the cause under review.") (quoting Estate of Harshman v.

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Jackson Hole Mountain Resort Corp., 379 F.3d 1161, 1164 (10th Cir.2004)) (internal quotation marks omitted); accord New York v. Shinnecock Indian Nation, 686 F.3d 133, 137 (2d Cir.2012). A case originally filed in state court may be removed to federal court if, but only if, "federal subject-matter jurisdiction would exist over the claim." Hansen v. Harper Excavating, Inc., 641 F.3d 1216, 1220 (10th Cir.2011). There are different bases for the exercise of federal jurisdiction. Only one is at issue here: the district court's jurisdiction over "civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 — so-called federal-question jurisdiction.

To assess the presence of a federal question, our task is to look to the "face of the complaint." Sac & Fox Nation of Okla. v. Cuomo, 193 F.3d 1162, 1165 (10th Cir.1999) ("[F]ederal question jurisdiction must appear on the face of the complaint...."). We must "look to the way the complaint is drawn" and ask, is it "drawn so as to claim a right to recover under the Constitution and laws of the United States"? Bell v. Hood, 327 U.S. 678, 681, 66 S.Ct. 773, 90 L.Ed. 939 (1946).

For a case to arise under federal law within the meaning of § 1331, the plaintiff's "well-pleaded complaint" must establish one of two things: "either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." Nicodemus v. Union Pac. Corp., 440 F.3d 1227, 1232 (10th Cir.2006) (quoting Morris, 39 F.3d at 1111) (internal quotation marks omitted); accord Gilmore v. Weatherford, 694 F.3d 1160, 1170-72 (10th Cir.2012); see also Viqueira v. First Bank, 140 F.3d 12, 17 (1st Cir.1998) ("[T]he well-pleaded complaint rule restricts the exercise of federal question jurisdiction to instances in which a federal claim is made manifest within the four corners of the plaintiffs' complaint."). "The `substantial question' branch of federal question jurisdiction is exceedingly narrow — a `special and small category' of cases." Gilmore, 694 F.3d at 1171 (quoting Empire Healthchoice Assurance Inc. v. McVeigh, 547 U.S. 677, 699, 126 S.Ct. 2121, 165 L.Ed.2d 131 (2006)).

The well-pleaded complaint rule makes the plaintiff the "master" of his claim. Nicodemus, 440 F.3d at 1232 (quoting Caterpillar Inc. v. Williams, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987)). The plaintiff can elect the judicial forum-state or federal-based on how he drafts his complaint. Although he "may not circumvent federal jurisdiction by omitting federal issues that are essential to his ... claim," id., he can nevertheless "avoid federal jurisdiction by exclusive reliance on state law," id. (quoting Caterpillar, 482 U.S. at 392, 107 S.Ct. 2425) (internal quotation marks omitted). "Neither the plaintiff's anticipation of a federal defense nor the defendant's assertion of a federal defense is sufficient to make the case arise under federal law." Turgeau v. Admin. Review Bd., 446 F.3d 1052, 1060 (10th Cir.2006); see Devon Energy Prod. Co. v. Mosaic Potash Carlsbad, Inc., 693 F.3d 1195, 1202 (10th Cir.2012) ("To determine whether [a] claim arises under federal law, [courts] examine the well[-]pleaded allegations of the complaint and ignore potential defenses...." (alterations in original) (ellipsis in original) (quoting Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 6, 123 S.Ct. 2058, 156 L.Ed.2d 1 (2003)) (internal quotation marks omitted)). [5]

[696 F.3d 1024]

A

Before specifically examining the averments of Mr. Firstenberg's complaint, we pause to address an important preliminary matter: the pro se nature of his complaint. See Dudnikov v. Chalk & Vermilion Fine Arts, Inc., 514 F.3d 1063, 1073 n. 7 (10th Cir.2008) ("The fact that plaintiffs were represented by counsel during this appeal does not affect the solicitous construction we must afford their earlier pro se filings."). "We read pro se complaints more liberally than those composed by lawyers." Andrews v. Heaton, 483 F.3d 1070, 1076 (10th Cir.2007). However, as we often reiterate, the generous construction that we afford pro se pleadings has limits, and we must avoid becoming the plaintiff's advocate. See, e.g., Gallagher v. Shelton, 587 F.3d 1063, 1067 (10th Cir.2009). Though we do not hold the pro se plaintiff to the standard of a trained lawyer, we nonetheless rely on "the plaintiff's statement of his own cause of action." Turgeau, 446 F.3d at 1060 (quoting Schmeling, 97 F.3d at 1339) (internal quotation marks omitted). Thus, we "may not rewrite a [complaint] to include claims that were never presented." Barnett v. Hargett, 174 F.3d 1128, 1133 (10th Cir.1999) (quoting Parker v. Champion, 148 F.3d 1219, 1222 (10th Cir.1998)) (internal quotation marks omitted).

Quite often we are called upon to apply these liberal-construction principles where the focus is on the substance of the claim — viz., the question that we must determine is whether the pro se plaintiff has sufficiently pleaded a substantive claim for relief. See, e.g., Dudnikov, 514 F.3d at 1073 ("[C]rediting the complaint as true as we must at this stage of the litigation, and further giving it the solicitous construction due a pro se filing, the facts described above are sufficient to permit an inference that defendants tortiously interfered with plaintiffs' business." (footnote omitted) (citation omitted)); Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991) ("[I]f the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements."). However, we are content to assume without deciding that these same liberal-construction principles apply with full force to the distinct jurisdictional inquiry we are obliged to undertake here. Compare Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 474, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987) ("The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation[.]" (quoting Am. Fire & Cas. Co. v. Finn,

341 U.S. 6, 17, 71 S.Ct. 534, 95 L.Ed. 702 (1951)) (internal quotation marks omitted)), and Sac & Fox Nation, 193 F.3d at 1168 ("[W]hen the question to be considered is one involving the jurisdiction of a federal court, jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it." (alteration in original) (quoting Shipping Fin. Servs. Corp. v. Drakos, 140 F.3d 129, 131 (2d Cir. 1998)) (internal quotation marks omitted)), with Coando v. Coastal Oil & Gas Corp., 44 Fed.Appx. 389, 395-96 (10th Cir.2002) (affording plaintiff's pro se complaint "the considerable benefit of the doubt" as to federal-question jurisdiction, but stating: "[T]he district court's task in assessing

[696 F.3d 1025]

the substantiality of a claim for purposes of [federal-question] jurisdiction can be difficult. This is especially true in cases, such as this one, that are brought by pro se litigants who may lack the legal training necessary to allege any more than facts sufficient to describe his or her alleged injury." (citation omitted))

We must determine whether the averments of Mr. Firstenberg's complaint present a federal question upon which the district court could properly ground its subject matter jurisdiction. In other words, quite apart from the substantive viability of those averments, we must assess whether they satisfy the well-pleaded complaint rule, for purposes of establishing federal-question jurisdiction. And we assume that liberal-construction principles squarely apply to that jurisdictional inquiry. Even affording a liberal construction to the averments of Mr. Firstenberg's complaint, however, we conclude that they are not sufficient to demonstrate the presence of federal-question jurisdiction. Accordingly, the district court lacked subject-matter jurisdiction over this case.

B

Our review of the complaint — a petition seeking mandamus under New Mexico law — convinces us that it does not state a claim arising under federal law within the meaning of § 1331. Plainly, the pith of the complaint, which Mr. Firstenberg never sought to amend, is a state-law cause of action. Mr. Firstenberg asserted a claim based on Code § 14-3.6(B)(4)(b), arguing that the City was duty-bound to regulate AT & T's 3G broadcasts. Federal law neither created this cause of action nor is federal law a necessary element of it. It is purely a state-law claim.

Of course, Mr. Firstenberg did make reference in the complaint to four different sources of federal law: the TCA, the ADA, the Fourteenth Amendment, and the Fifth Amendment. The parties argue that invocation of these sources of federal law is sufficient to bring the case into federal court. We do not agree.

First, as to the TCA, Mr. Firstenberg made no claim under this statute. Rather, his reference to it was in anticipation of the City's and AT & T's preemption defense based on Section 704. But neither anticipation by a plaintiff nor assertion by a defendant of a defense based on federal law — including a preemption defense — is enough to confer federal jurisdiction. See Caterpillar, 482 U.S. at 393, 107 S.Ct. 2425 ("[A] case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue."); Nicodemus, 440 F.3d at 1232. [6]

[696 F.3d 1026]

Next, as to the ADA and the Constitution, all parties argue that Mr. Firstenberg's complaint states affirmative claims under these laws. As support, they point to the following language in the complaint: "The City of Santa Fe is required to enforce its laws, as well as to take jurisdiction over the intensity of [RF] radiation from permitted facilities, in order to fulfill its obligations under the ADA and the Constitution." Aplt.App. at 177 (emphasis added). This, however, will not pass jurisdictional muster.

The district court's task — and consequently, ours, too — is to "look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States." Bell, 327 U.S. at 681, 66 S.Ct. 773. A right to recover under federal law cannot be deemed to be present through the assertion of a state-law cause of action just because that assertion is predicated on the notion that compliance with that state law would effectively vindicate the plaintiff's federal rights. Drawing up a complaint that way, as Mr. Firstenberg did here, simply does not satisfy the well-pleaded complaint rule. See Gully, 299 U.S. at 116, 57 S.Ct. 96 ("By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby. With no greater reason can it be said to arise thereunder because permitted thereby." (citation omitted))

The thrust of Mr. Firstenberg's complaint remains a state-law-created claim for relief. See Aplt.App. at 177-78 (styling as his "Cause of Action" the claim that the City "has a clear legal duty to enforce the requirements of its Land Development Code, including, in particular, § 14-3.6(B)(4)(b)"). And the necessary elements of that claim do not "rise or fall on the resolution of a question of federal law." Pinney, 402 F.3d at 449; see MSOF Corp. v. Exxon Corp., 295 F.3d 485, 490 (5th Cir.2002) (holding that a complaint alleging state-law torts and whose only reference to federal law was an allegation that defendant's facility "was maintained in violation of federal regulations as well as in violation of state and local regulations" did not "suffice to render the action one arising under federal law"); Martinez v. U.S. Olympic Comm., 802 F.2d 1275, 1280 (10th Cir.1986) (holding that complaint that alleged common-law negligence and conclusorily asserted that federal constitutional rights "were violated" and "federal questions [we]re involved" did not satisfy well-pleaded complaint rule (quoting portions of the complaint) (internal quotation marks omitted)). Indeed, as noted, Mr. Firstenberg makes no reference to the ADA or the U.S. Constitution in the "Cause of Action" section of his complaint, and his complaint's prayer for relief seeks only an order directing the City to enforce its Code.

This would be a different case had Mr. Firstenberg asserted in his complaint that the City's failure to regulate AT & T's 3G broadcasts resulted in violations of the ADA or the Constitution. Such a complaint would almost certainly state a claim "directly under" federal law. See Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 69 n. 13, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978). However, Mr. Firstenberg's complaint seems to invoke the ADA and the Constitution for an altogether different purpose — not for stating affirmative claims thereunder, but for inoculating against the federal preemption defense that he rightly predicted would emerge in the case.

Mr. Firstenberg's argument was that, whatever the preemptive effect of Section 704, it was overridden by the ADA

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and the Constitution — viz., that the City had to enforce § 14-3.6(B)(4)(b) in order to fulfill its other federal obligations, Section 704 notwithstanding. See id. at 176-77 ("Section 704 of the [TCA] is not the only federal law that the City of Santa Fe must obey.... There is actually no conflict between the [TCA] and other federal laws."). This argument — embodied in his complaint's terms — was plainly designed to parry the preemption defense. But federal-question jurisdiction turns upon thrusts, not parries, and anticipatory rebuttals based on federal law do not confer jurisdiction any more than anticipated federal defenses do. See Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152, 29 S.Ct. 42, 53 L.Ed. 126 (1908) ("It is not enough that the plaintiff alleges some anticipated defense to his cause of action, and asserts that the defense is invalidated by some provision of the Constitution...."); Cal. Shock Trauma Air Rescue v. State Comp. Ins. Fund, 636 F.3d 538, 541 (9th Cir.2011) (noting that a "potential response to a defense" based on federal law did not satisfy the well-pleaded complaint rule); Bracken v. Matgouranis, 296 F.3d 160, 163-64 (3d Cir.2002) ("[S]peculation on possible defenses and responding to such defenses in an attempt to demonstrate that a federal question would likely arise is not a necessary element of a plaintiff's cause of action, and thus does not create federal subject matter jurisdiction.").

Our conclusion in this regard is not altered even if we were to look beyond Mr. Firstenberg's complaint and liberally construe the allegations of other papers that he filed in the district court. As we noted, after removing Mr. Firstenberg's action from state court to federal district court, AT & T moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. In that motion, with the City joining, AT & T contended that § 14-3.6(B)(4)(b) did not apply to broadcast-signal upgrades, but that even if it did, the TCA preempted Mr. Firstenberg's claim. They also argued that Mr. Firstenberg was "not making any claim under the ADA" and that even if he was, the claim failed. Aplt.App. at 197. Specifically, AT & T argued that Mr. Firstenberg's "status under the ADA [wa]s irrelevant because federal law [i.e., the TCA] expressly bars the relief [he] seeks," and, "[a]s a result, the Court need not consider the ADA further." Id.

Mr. Firstenberg, proceeding pro se, responded that § 14-3.6(B)(4)(b) imposed a non-discretionary duty on the City to regulate AT & T's signal upgrades. He acknowledged the force of the defendants' preemption argument. But, employing it as a defense to preemption, Mr. Firstenberg insisted that the Fourteenth Amendment overrode the TCA's preemptive effect. See Aplt.App. at 216 (Resp. to AT & T Mot. to Dismiss, filed Feb. 14, 2011) ("If a state or local government needs to regulate radio frequency radiation in order to protect the Fourteenth Amendment rights of citizens, then it is required to do so, regardless of Section 704 of the [TCA]."). As for the ADA, he conceded that his claim was "not `under' the ADA" and explained that he was "not asking the Court to determine that the City is in violation of the ADA." Id. at 219. And we do not read his invocation of the Constitution any differently. See id. ("Rather, Plaintiff alleges... that the City is required to enforce that ordinance [§ 14-3.6(B)(4)(b)] in a manner consistent with its obligations under the ADA and the Fourteenth Amendment."). In essence, Mr. Firstenberg's argument was simply that "the City is required to enforce that

ordinance [§ 14-3.6(B)(4)(b)] in a manner consistent with its obligations under the ADA and the Fourteenth Amendment." Id.

[696 F.3d 1028]

Accordingly, even affording a liberal construction to Mr. Firstenberg's post-complaint filings, we cannot conclude that Mr. Firstenberg's references to federal law are sufficient to demonstrate that his complaint is founded on federal law. Thus, we conclude that the averments of Mr. Firstenberg's complaint fail to satisfy the well-pleaded complaint rule, for purposes of demonstrating federal-question jurisdiction.

The parties interpose a couple of arguments to the contrary, but we do not find them persuasive. The City contends that "the TCA, ADA, the Fourteenth Amendment, and the Fifth Amendment are essential elements of" Mr. Firstenberg's claim, without which the City "would owe no duty to" Mr. Firstenberg. City Supp. Br. at 5. That is plainly wrong. Mr. Firstenberg's claim is a state-law claim in form and substance, and no element of the claim necessarily turns upon, or requires a court to construe, any federal statute or the Constitution. Cf. Gilmore, 694 F.3d at 1175-76 (holding federal-question jurisdiction was present where "plaintiffs have framed their state-law claim in such a fashion that they succeed only if they are correct that the defendants failed to meet federal requirements for [chat] removal").

Relatedly, AT & T asserts that the Supreme Court's decision in City of Chicago v. International College of Surgeons, 522 U.S. 156, 118 S.Ct. 523, 139 L.Ed.2d 525 (1997), supports jurisdiction here. But that case stands for the unremarkable proposition that federal-question jurisdiction exists over a state-law cause of action when the "right to relief under state law requires resolution of a substantial question of federal law." Id. at 164, 118 S.Ct. 523 (emphasis added) (quoting Franchise Tax Bd. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 13, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983)) (internal quotation marks omitted). In that case, the plaintiff asserted federal constitutional claims in a state-court complaint for administrative review. See id. at 160, 118 S.Ct. 523. Because the federal claims were an essential part of the plaintiff's case-in-chief, they "unquestionably" arose under federal law, and removal was proper. Id. at 164, 118 S.Ct. 523; see Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 311, 125 S.Ct. 2363, 162 L.Ed.2d 257 (2005) (holding that federal-question jurisdiction existed because the resolution of plaintiff's state-law quiet-title action against defendant necessarily turned on whether the Internal Revenue Service failed under federal law to give proper notice of the seizure of plaintiff's property); Nicodemus, 440 F.3d at 1235 (holding that federal-question jurisdiction was present because whether plaintiffs could recover on their state-law claims necessarily turned on whether defendant railroad's use of its right-of-way was improper under federal law); see also Gilmore, 694 F.3d at 1176 ("Although plaintiffs could lose their conversion claim without the court reaching the federal question, it seems that they cannot win unless the court answers that question. Thus, plaintiffs' `right to relief necessarily depends on resolution of a substantial question of federal law.'" (quoting Nicodemus, 440 F.3d at 1232)); Devon Energy, 693 F.3d at 1210-12 (explicating the holdings of Grable & Sons and Nicodemus).

Here, by contrast, Mr. Firstenberg's claim turns exclusively upon a question of state law. Federal issues enter only by way of a defense and a response to a defense. See Gully, 299 U.S. at 117, 57 S.Ct. 96 ("The most one can say is that a question of federal law is lurking in the background, just as farther in the background there lurks a question of constitutional law, the question of state power in

[696 F.3d 1029]

our federal form of government. A dispute so doubtful and conjectural, so far removed from plain necessity, is unavailing to extinguish the jurisdiction of the states.").

III

For the reasons stated, we conclude that Mr. Firstenberg's state-court complaint does not articulate a claim arising under federal law within the meaning of § 1331. We therefore REVERSE the district court's dismissal orders and resulting judgment and REMAND the case to the district court, with instructions to VACATE its judgment and remand the case to state court. We express no views on the merits of Mr. Firstenberg's state-law claim or on the federal preemption defense raised by the City and AT & T.

FootNotes

1. As the district court explained, "Third Generation or `3G' internet access technology provides users with global cell phone roaming capabilities, better voice quality using wireless internet access, and simultaneous voice and data services. Second Generation or `2G' internet access technology provides internet and mobile data services at a slower rate." Firstenberg v. City of Santa Fe, 782 F.Supp.2d 1262, 1267 n. 5 (D.N.M.2011).

2. At the time, § 14-3.6(B)(4)(b) provided in full: "The special exceptions listed in this chapter, when granted, are considered granted for a specific use and intensity, any change of use or more intense use shall be allowed only if such change is approved by the Board of Adjustment under a special exception." Firstenberg, 782 F.Supp.2d at 1267 (quoting Santa Fe, N.M. Land Development Code § 14-3.6(B)(4)(b) (2001)) (internal quotation marks omitted). This provision has since been amended and recodified at § 14-3.6(C)(3), but those changes do not affect our decision here.

3. The opinion granting the City's motion to dismiss was published. See Firstenberg, 782 F.Supp.2d at 1262. The opinion granting AT & T's motion to dismiss was not. See Aplt. App. at 252 (Am. Mem. Op. & Order, filed Apr. 12, 2011).

4. We pause to note that what we refer to in this opinion as Mr. Firstenberg's complaint is his Second Amended Petition for Writ of Mandamus. This was filed on December 28, 2010 — after the state court actually issued the alternative writ of mandamus on December 22, 2010. The second amended petition was filed in order to change the name of one of the defendants from "AT & T, Inc." to "AT & T Mobility Services, LLC," the local New Mexico entity. Despite that chronological wrinkle, for practical purposes, we, like the district court, look to the second amended petition as Mr. Firstenberg's complaint.

5. The "exception" or "corollary" to the well-pleaded complaint rule known as the complete-preemption doctrine is not implicated in this case. Schmeling v. NORDAM, 97 F.3d 1336, 1339 (10th Cir.1996); see Devon Energy, 693 F.3d at 1204 n. 4, 1204-05 (explicating the complete-preemption doctrine).

6. The Fourth Circuit faced a situation very similar to the one we confront here and reached the same conclusion. See Pinney v. Nokia, Inc., 402 F.3d 430 (4th Cir.2005). There, the plaintiffs brought state-law claims against Nokia, contending that their wireless phones emitted unsafe levels of RF radiation. The district court thought that federal-question jurisdiction existed because "(1) ... Nokia would raise the affirmative defense that the state law claims are preempted by the [Federal Communications Act] and federal RF radiation standards and (2) ... the ... plaintiffs would be called upon to rebut that defense." Id. at 445-46. The Fourth Circuit found this to be error, concluding that although "the affirmative defense of preemption" was "lurking in the background," that did not transform the plaintiffs' claims "into ones arising under federal law." Id. at 446 (quoting Gully v. First Nat'l Bank, 299 U.S. 109, 117, 57 S.Ct. 96, 81 L.Ed. 70 (1936)) (internal quotation marks omitted). That reasoning applies with equal force here.

RANCHO PALOS VERDES v. ABRAMS [03-1601]

United States Supreme Court

CITY OF RANCHO PALOS VERDES et al. v. ABRAMS(2005)

No. 03-1601

Argued: January 19, 2005Decided: March 22, 2005

After petitioner City denied respondent Abrams permission to construct a radio tower on his property, he filed this action seeking, *inter alia*, injunctive relief under §332(c)(7)(B)(v) of the Communications Act of 1934, 47 U. S. C. §332(c)(7), as added by the Telecommunications Act of 1996 (TCA), and money damages under 42 U. S. C. §1983. Section 332(c)(7) imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of wireless communications facilities, and provides, in §332(c)(7)(B)(v), that anyone "adversely affected by any final action ... by [such] a ... government ... may ... commence an action in any court of competent jurisdiction." The District Court held that §332(c)(7)(B)(v) provided the exclusive remedy for the City's actions and, accordingly, ordered the City to grant respondent's application for a conditional-use permit, but refused respondent's request for damages under §1983. The Ninth Circuit reversed on the latter point.

Held: An individual may not enforce §332(c)(7)'s limitations on local zoning authority through a §1983 action. The TCA--by providing a judicial remedy different from §1983 in §332(c)(7) itself--precluded resort to §1983. Pp. 5-13.

(a) Even after a plaintiff demonstrates that a federal statute creates an individually enforceable right in the class of beneficiaries to which he belongs, see *Gonzaga Univ.* v. *Doe*, 536 U. S. 273, 285, the defendant may rebut the presumption that the right is enforceable under §1983 by, *inter alia*, showing a

contrary congressional intent from the statute's creation of a "comprehensive remedial scheme that is inconsistent with individual enforcement under §1983," *Blessing* v. *Freestone*, 520 U. S. 329, 341. The Court's cases demonstrate that the provision of an express, private means of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a remedy under §1983. Pp. 5-8.

(b) Congress could not have meant the judicial remedy expressly authorized by §332(c)(7) to co-exist with an alternative remedy available under §1983, since enforcement of the former through the latter would distort the scheme of expedited judicial review and limited remedies created by §332(c)(7)(B)(v). The TCA adds no remedies to those available under §1983, and limits relief in ways that §1983 does not. In contrast to a §1983 action, TCA judicial review must be sought within 30 days after the governmental entity has taken "final action," and, once the action is filed, the court must "hear and decide" it "on an expedited basis." §332(c)(7)(B)(v). Moreover, unlike §1983 remedies, TCA remedies perhaps do not include compensatory damages, and certainly do not include attorney's fees and costs. The Court rejects Abrams's arguments for borrowing §332(c)(7)(B)(v)'s 30-day limitations period, rather than applying the longer statute of limitations authorized under 42 U. S. C. §1988 or 28 U. S. C. §1658, in §1983 actions asserting §332(c)(7)(B) violations. Pp. 8-12.

(c) In concluding that Congress intended to permit plaintiffs to proceed under §1983, the Ninth Circuit misinterpreted the TCA's so-called "saving clause," which provides: "This Act ... shall not be construed to ... impair ... Federal ... law." Construing §332(c)(7), as this Court does, to create rights that may be enforced only through the statute's express remedy, does not "impair" §1983 because it leaves §1983's pre-TCA operation entirely unaffected. Pp. 12-13.

354 F. 3d 1094, reversed and remanded.

Scalia, J., delivered the opinion of the Court, in which *Rehnquist, C. J.,* and *O'Connor, Kennedy, Souter, Thomas, Ginsburg,* and *Breyer, JJ.,* joined. *Breyer, J.,* filed a concurring opinion, in which *O'Connor, Souter,* and *Ginsburg*, JJ., joined. *Stevens, J.,* filed an opinion concurring in the judgment.

CITY OF RANCHO PALOS VERDES, CALIFORNIA, *et al.*, PETITIONERS *v.* MARK J. ABRAMS

on writ of certiorari to the united states court of appeals for the ninth circuit

[March 22, 2005]

Justice Scalia delivered the opinion of the Court.

We decide in this case whether an individual may enforce the limitations on local zoning authority

set forth in §332(c)(7) of the Communications Act of 1934, 47 U. S. C. §332(c)(7), through an action under Rev. Stat. §1979, 42 U. S. C. §1983.

I

Congress enacted the Telecommunications Act of 1996 (TCA), 110 Stat. 56, to promote competition and higher quality in American telecommunications services and to "encourage the rapid deployment of new telecommunications technologies." *Ibid*. One of the means by which it sought to accomplish these goals was reduction of the impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers. To this end, the TCA amended the Communications Act of 1934, 48 Stat. 1064, to include §332(c)(7), which imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of such facilities, 110 Stat. 151, codified at 47 U. S. C. §332(c)(7). Under this provision, local governments may not "unreasonably discriminate among providers of functionally equivalent services," §332(c)(7)(B)(i)(I), take actions that "prohibit or have the effect of prohibiting the provision of personal wireless services," §332(c)(7)(B)(i)(II), or limit the placement of wireless facilities "on the basis of the environmental effects of radio frequency emissions," §332(c)(7)(B)(iv). They must act on requests for authorization to locate wireless facilities "within a reasonable period of time," §332(c)(7)(B)(ii), and each decision denying such a request must "be in writing and supported by substantial evidence contained in a written record," §332(c)(7)(B)(iii). Lastly, §332(c)(7)(B)(v), which is central to the present case, provides as follows:

> "Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction."

Respondent Mark Abrams owns a home in a low-density, residential neighborhood in the City of Rancho Palos Verdes, California (City). His property is located at a high elevation, near the peak of the Rancho Palos Verdes Peninsula. *Rancho Palos Verdes* v. *Abrams*, 101 Cal. App. 4th 367, 371, 124 Cal. Rptr. 2d 80, 82 (2002). The record reflects that the location is both scenic and, because of its high elevation, ideal for radio transmissions. *Id*., at 371-372, 124 Cal. Rptr. 2d, at 82-83.

In 1989, respondent obtained a permit from the City to construct a 52.5-foot antenna on his property for amateur use.[1] He installed the antenna shortly thereafter, and in the years that followed placed several smaller, tripod antennas on the property without prior permission from the City. He used the antennas both for noncommercial purposes (to provide an amateur radio service and to relay signals from other amateur radio operators) and for commercial purposes (to provide customers two-way radio communications from portable and mobile transceivers, and to repeat the signals of customers so as to enable greater range of transmission). *Ibid*.

In 1998, respondent sought permission to construct a second antenna tower. In the course of investigating that application, the City learned that respondent was using his antennas to provide a commercial service, in violation of a City ordinance requiring a "conditional-use permit" from the City Planning Commission (Commission) for commercial antenna use. See Commission Resolution No. 2000-12 ("A Resolution of the Planning Commission of the City of Rancho Palos Verdes Denying With Prejudice Conditional Use Permit No. 207 for the Proposed Commercial Use of Existing Antennae on an Existing Antenna Support Structure, Located at 44 Oceanaire Drive in the *Del Cerro* Neighborhood"), App. to Pet. for Cert. 54a. On suit by the City, Los Angeles County Superior Court enjoined respondent from using the antennas for a commercial purpose. *Rancho Palos Verdes*, 101 Cal. App. 4th, at 373, 124 Cal. Rptr. 2d, at 84; App. to Pet. for Cert. 35a.

Two weeks later, in July of 1999, respondent applied to the Commission for the requisite conditional-use permit. The application drew strong opposition from several of respondent's neighbors. The Commission conducted two hearings and accepted written evidence, after which it denied the application. *Id.*, at 54a-63a. The Commission explained that granting respondent permission to operate commercially "would perpetuate ... adverse visual impacts" from respondent's existing antennas and establish precedent for similar projects in residential areas in the future. *Id.*, at 57a. The Commission also concluded that denial of respondent's application was consistent with 47 U. S. C. §332(c)(7), making specific findings that its action complied with each of that provision's requirements. App. to Pet. for Cert. 61a-62a. The city council denied respondent's appeal. *Id.*, at 52a. See, generally, No. CV00-09071-SVW (RNBx) (CD Cal., Jan. 9, 2002), App. to Pet. for Cert. 22a-23a.

On August 24, 2000, respondent filed this action against the City in the District Court for the Central District of California, alleging, as relevant, that denial of the use permit violated the limitations placed on the City's zoning authority by §332(c)(7). In particular, respondent charged that the City's action discriminated against the mobile relay services he sought to provide, §332(c)(7)(B)(i)(I), effectively prohibited the provision of mobile relay services, §332(c)(7)(B)(i)(II), and was not supported by substantial evidence in the record, §332(c)(7)(B)(iii). Pet. App. 17a. Respondent sought injunctive relief under §332(c)(7)(B)(v), and money damages and attorney's fees under 42 U. S. C. §§1983 and 1988. Plaintiff/Petitioner's Brief Re: Remedies and Damages, Case No. 00-09071-SVW (RNBx) (CD Cal., Feb. 25, 2002), App. to Reply Brief for Petitioners 2a-7a.

Notwithstanding §332(c)(7)(B)(v)'s direction that courts "hear and decide" actions "on an expedited basis," the District Court did not act on respondent's complaint until January 9, 2002, 16 months after filing; it concluded that the City's denial of a conditional-use permit was not supported by substantial evidence. App. to Pet. for Cert. 23a-26a. The court explained that the City could not rest its denial on aesthetic concerns, since the antennas in question were already in existence and would remain in place whatever the disposition of the permit application. *Id.*, at 23a-24a. Nor, the court said, could the City reasonably base its decision on the fear of setting precedent for the location of commercial antennas in residential areas, since adverse impacts from new structures would always be a basis for permit denial. *Id.*, at 25a. In light of the paucity of support for the City's action, the court concluded that denial of the

permit was "an act of spite by the community." *Id.*, at 24a. In an order issued two months later, the District Court held that §332(c)(7)(B)(v) provided the exclusive remedy for the City's actions. Judgment of Injunction, No. CV00-09071-SVW (RNBx) (CD Cal., Mar. 18, 2002), App. to Pet. for Cert. 14a. Accordingly, it ordered the City to grant respondent's application for a conditional-use permit, but refused respondent's request for damages under §1983. Respondent appealed.

The Court of Appeals for the Ninth Circuit reversed on the latter point, and remanded for determination of money damages and attorney's fees. 354 F. 3d 1094, 1101 (2004). We granted certiorari. 542 U. S. ___ (2004).

II

A

Title 42 U. S. C. §1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

In *Maine* v. *Thiboutot*, 448 U. S. 1 (1980), we held that this section "means what it says" and authorizes suits to enforce individual rights under federal statutes as well as the Constitution. *Id.*, at 4.

Our subsequent cases have made clear, however, that §1983 does not provide an avenue for relief every time a state actor violates a federal law. As a threshold matter, the text of §1983 permits the enforcement of "*rights*, not the broader or vaguer 'benefits' or 'interests.' " *Gonzaga Univ.* v. *Doe*, 536 U. S. 273, 283 (2002) (emphasis in original). Accordingly, to sustain a §1983 action, the plaintiff must demonstrate that the federal statute creates an individually enforceable right in the class of beneficiaries to which he belongs. See *id.*, at 285.

Even after this showing, "there is only a rebuttable presumption that the right is enforceable under §1983." *Blessing* v. *Freestone*, 520 U. S. 329, 341 (1997). The defendant may defeat this presumption by demonstrating that Congress did not intend that remedy for a newly created right. See *ibid.*; *Smith* v. *Robinson*, 468 U. S. 992, 1012 (1984). Our cases have explained that evidence of such congressional intent may be found directly in the statute creating the right, or inferred from the statute's creation of a "comprehensive enforcement scheme that is incompatible with individual enforcement under §1983." *Blessing*, *supra*, at 341.[2] See also *Middlesex County Sewerage Authority* v. *National Sea Clammers*

Assn., 453 U. S. 1, 19-20 (1981). "The crucial consideration is what Congress intended." *Smith*, *supra*, at 1012.

B

The City conceded below, and neither the City nor the Government as *amicus* disputes here, that §332(c)(7) creates individually enforceable rights; we assume, *arguendo*, that this is so. The critical question, then, is whether Congress meant the judicial remedy expressly authorized by §332(c)(7) to coexist with an alternative remedy available in a §1983 action. We conclude not.

The provision of an express, private means of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under §1983. As we have said in a different setting, "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Alexander* v. *Sandoval*, 532 U. S. 275, 290 (2001). Thus, the existence of a more restrictive private remedy for statutory violations has been the dividing line between those cases in which we have held that an action would lie under §1983 and those in which we have held that it would not.

We have found §1983 unavailable to remedy violations of federal statutory rights in two cases: *Sea Clammers* and *Smith.* Both of those decisions rested upon the existence of more restrictive remedies provided in the violated statute itself. See *Smith*, *supra*, at 1011-1012 (recognizing a §1983 action "would . . . render superfluous most of the detailed procedural protections outlined in the statute"); *Sea Clammers*, *supra*, at 20 ("[W]hen a state official is alleged to have violated a federal statute which provides its own comprehensive enforcement scheme, the requirements of that enforcement procedure may not be bypassed by bringing suit directly under §1983" (internal quotation marks omitted)). Moreover, in *all* of the cases in which we have held that §1983 *is* available for violation of a federal statute, we have emphasized that the statute at issue, in contrast to those in *Sea Clammers* and *Smith*, *did not* provide a private judicial remedy (or, in most of the cases, even a private administrative remedy) for the rights violated. See *Blessing*, *supra*, at 348 ("Unlike the federal programs at issue in *[Sea Clammers and Smith]*, Title IV-D contains no private remedy--either judicial or administrative--through which aggrieved persons can seek redress"); *Livadas* v. *Bradshaw,* 512 U. S. 107, 133-134 (1994) (there was a "complete absence of provision for relief from governmental interference" in the statute); *Golden State Transit Corp.* v. *Los Angeles,* 493 U. S. 103, 108-109 (1989) ("There is . . . no comprehensive enforcement scheme for preventing state interference with federally protected labor rights that would foreclose the §1983 remedy"); *Wilder* v. *Virginia Hospital Assn.*, 496 U. S. 498, 521 (1990) ("The Medicaid Act contains no . . . provision for private judicial or administrative enforcement" comparable to those in *Sea Clammers* and *Smith*); *Wright* v. *Roanoke Redevelopment and Housing Authority,* 479 U. S. 418, 427 (1987) ("In both *Sea Clammers* and *Smith . . .* , the statutes at issue themselves provided for private judicial remedies, thereby evidencing congressional intent to supplant the §1983 remedy. There is nothing of that kind found in the . . . Housing Act").

The Government as *amicus*, joined by the City, urges us to hold that the availability of a private judicial remedy is not merely indicative of, but conclusively establishes, a congressional intent to preclude §1983 relief. Brief for United States 17; Brief for Petitioners 35. We decline to do so. The ordinary inference that the remedy provided in the statute is exclusive can surely be overcome by textual indication, express or implicit, that the remedy is to complement, rather than supplant, §1983.

There is, however, no such indication in the TCA, which adds no remedies to those available under §1983, and limits relief in ways that §1983 does not. Judicial review of zoning decisions under §332(c)(7)(B)(v) must be sought within 30 days after the governmental entity has taken "final action," and, once the action is filed, the court must "hear and decide" it "on an expedited basis." §332(c)(7)(B)(v). The remedies available, moreover, perhaps do not include compensatory damages (the lower courts are seemingly in disagreement on this point[3]), and certainly do not include attorney's fees and costs.[4] A §1983 action, by contrast, can be brought much later than 30 days after the final action,[5] and need not be heard and decided on an expedited basis. And the successful plaintiff may recover not only damages but reasonable attorney's fees and costs under 42 U. S. C. §1988. *Thiboutot*, 448 U. S., at 9. Liability for attorney's fees would have a particularly severe impact in the §332(c)(7) context, making local governments liable for the (often substantial) legal expenses of large commercial interests for the misapplication of a complex and novel statutory scheme. See *Nextel Partners Inc.* v. *Kingston Township*, 286 F. 3d 687, 695 (CA3 2002) (Alito, J.) ("TCA plaintiffs are often large corporations or affiliated entities, whereas TCA defendants are often small, rural municipalities"); *Primeco Personal Communications, Ltd. Partnership* v. *Mequon*, 352 F. 3d 1147, 1152 (CA7 2003) (Posner, J.) (similar).

Respondent's only response to the attorney's-fees point is that it is a "policy argumen[t]," properly left to Congress. Brief for Respondent 35-36. That response assumes, however, that Congress's refusal to attach attorney's fees to the remedy that it created in the TCA does not *itself* represent a congressional choice. *Sea Clammers* and *Smith* adopt the opposite assumption--that limitations upon the remedy contained in the statute are deliberate and are not to be evaded through §1983. See *Smith*, 468 U. S., at 1011-1012, and n. 5; *Sea Clammers*, 453 U. S., at 14, 20.

Respondent disputes that a §1983 action to enforce §332(c)(7)(B) would enjoy a longer statute of limitations than an action under §332(c)(7)(B)(v). He argues that the rule adopted in *Wilson* v. *Garcia*, 471 U. S. 261 (1985), that §1983 claims are governed by the state-law statute of limitations for personal-injury torts, does not apply to §1983 actions to enforce statutes that themselves contain a statute of limitations; in such cases, he argues, the limitations period in the federal statute displaces the otherwise applicable state statute of limitations. This contention cannot be reconciled with our decision in *Wilson*, which expressly rejected the proposition that the limitations period for a §1983 claim depends on the nature of the underlying right being asserted. See *id.*, at 271-275. We concluded instead that 42 U. S. C. §1988 is "a directive to select, in each State, the one most appropriate statute of limitations for *all* §1983 claims." 488 U. S. 235, 240-241 (1989) ("42 U. S. C. §1988 requires courts to borrow and apply to *all §1983 claims* the one most analogous state statute of limitations" (emphasis added)). We acknowledged that "a few §1983 claims are based on statutory rights," *Wilson*, *supra*, at

278, but carved out no exception for them.

Respondent also argues that, if 28 U. S. C. §1658 (2000 ed., Supp. II), rather than *Wilson*, applies to his §1983 action, see n. 4, *supra*, §1658's 4-year statute of limitations is inapplicable. This is so, he claims, because §332(c)(7)(B)(v)'s requirement that actions be filed within 30 days falls within §1658's prefatory clause, "Except as otherwise provided by law."[6] We think not. The language of §332(c)(7)(B)(v) that imposes the limitations period ("within 30 days after such action or failure to act") is inextricably linked to--indeed, is embedded within--the language that creates the right of action ("may . . . commence an action in any court of competent jurisdiction"). It cannot possibly be regarded as a statute of limitations generally applicable to *any* action to enforce the rights created by §332(c)(7)(B). Cf. *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, 483 U. S. 143, 168 (1987) (*Scalia*, J., concurring in judgment) ("Federal statutes of limitations . . . are almost invariably tied to specific causes of action"). Respondent's argument thus reduces to a suggestion that we "borrow" §332(c)(7)(B)(v)'s statute of limitations and attach it to §1983 actions asserting violations of §332(c)(7)(B). Section 1658's "[e]xcept as otherwise provided by law" clause does not support this suggestion.

C

The Ninth Circuit based its conclusion that Congress intended to permit plaintiffs to proceed under §1983, in part, on the TCA's so-called "saving clause," TCA §601(c)(1), 110 Stat. 143, note following 47 U. S. C. §152. 354 F. 3d, at 1099-1100. That provision reads as follows:

> "(1) *No implied effect*--This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments."

The Court of Appeals took this to be an express statement of Congress's intent *not* to preclude an action under §1983, reasoning that to do so would be to " 'impair' " the operation of that section. 354 F. 3d, at 1100.

We do not think this an apt assessment of what "impair[ment]" consists of. Construing §332(c)(7), as we do, to create rights that may be enforced only through the statute's express remedy, leaves the pre-TCA operation of §1983 entirely unaffected. Indeed, the crux of our holding is that §332(c)(7) has no effect on §1983 whatsoever: The rights §332(c)(7) created may not be enforced under §1983 and, conversely, the claims available under §1983 prior to the enactment of the TCA continue to be available after its enactment. The saving clause of the TCA does not require a court to go farther and permit enforcement under §1983 of the TCA's substantive standards. To apply to the present case what we said with regard to a different statute: "The right [Abrams] claims under [§332(c)(7)] did not even

arguably exist before the passage of [the TCA]. The only question here, therefore, is whether the rights created by [the TCA] may be asserted within the *remedial* framework of [§1983]." *Great American Fed. Sav. & Loan Assn.* v. *Novotny,* 442 U. S. 366, 376-377 (1979).

This interpretation of the saving clause is consistent with *Sea Clammers.* Saving clauses attached to the statutes at issue in that case provided that the statutes should not be interpreted to " 'restrict any right which any person . . . may have under any statute or common law to seek enforcement of any . . . standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).' 33 U. S. C. §1365(e)." 453 U. S., at 7, n. 10; see also *id.*, at 8, n. 11. We refused to read those clauses to "preserve" a §1983 action, holding that they did not "refer ... to a suit for redress of a violation of th[e] statutes [at issue] ... ." *Id.*, at 20-21, n. 31.

***

Enforcement of §332(c)(7) through §1983 would distort the scheme of expedited judicial review and limited remedies created by §332(c)(7)(B)(v). We therefore hold that the TCA--by providing a judicial remedy different from §1983 in §332(c)(7) itself--precluded resort to §1983. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

CITY OF RANCHO PALOS VERDES, CALIFORNIA, *et al.*, PETITIONERS *v.* MARK J. ABRAMS

on writ of certiorari to the united states court of appeals for the ninth circuit

[March 22, 2005]

Justice Breyer, with whom *Justice O'Connor, Justice Souter* and *Justice Ginsburg* join, concurring.

I agree with the Court. It wisely rejects the Government's proposed rule that the availability of a private judicial remedy "*conclusively establishes* ... a congressional intent to preclude [Rev. Stat. §1979, 42 U. S. C.] §1983 relief." *Ante*, at 8 (emphasis added). The statute books are too many, federal laws too diverse, and their purposes too complex, for any legal formula to provide more than general guidance. Cf. *Gonzaga Univ.* v. *Doe*, 536 U. S. 273, 291 (2002) (*Breyer*, J., concurring in judgment). The Court today provides general guidance in the form of an "ordinary inference" that when Congress creates a specific judicial remedy, it does so to the exclusion of §1983. *Ante*, at 8. I would add that context, not just literal text, will often lead a court to Congress' intent in respect to a particular statute. Cf. *ibid.* (referring to "implicit" textual indications).

Context here, for example, makes clear that Congress saw a national problem, namely an "inconsistent and, at times, conflicting patchwork" of state and local siting requirements, which threatened "the deployment" of a national wireless communication system. H. R. Rep. No. 104-204, pt. 1, p. 94 (1995). Congress initially considered a single national solution, namely a Federal Communications Commission wireless tower siting policy that would pre-empt state and local authority. *Ibid.;* see also H. R. Conf. Rep. No. 104-458, p. 207 (1996). But Congress ultimately rejected the national approach and substituted a system based on cooperative federalism. *Id.*, at 207-208. State and local authorities would remain free to make siting decisions. They would do so, however, subject to minimum federal standards--both substantive and procedural--as well as federal judicial review.

The statute requires local zoning boards, for example, to address permit applications "within a reasonable period of time;" the boards must maintain a "written record" and give reasons for denials "in writing." 47 U. S. C. §§332(c)(7)(B)(ii), (iii). Those "adversely affected" by "final action" of a state or local government (including their "failure to act") may obtain judicial review provided they file their review action within 30 days. §332(c)(7)(B)(v). The reviewing court must "hear and decide such action on an expedited basis." *Ibid*. And the court must determine, among other things, whether a zoning board's decision denying a permit is supported by "substantial evidence." §332(c)(7)(B)(iii).

This procedural and judicial review scheme resembles that governing many federal agency decisions. See H. R. Conf. Rep. No. 104-458, at 208 ("The phrase 'substantial evidence contained in a written record' is the traditional standard used for judicial review of agency actions"). Section 1983 suits, however, differ considerably from ordinary review of agency action. The former involve plenary judicial evaluation of asserted rights deprivations; the latter involves deferential consideration of matters within an agency's expertise. And, in my view, to permit §1983 actions here would undermine the compromise--between purely federal and purely local siting policies--that the statute reflects.

For these reasons, and for those set forth by the Court, I agree that Congress, in this statute, intended its judicial remedy as an exclusive remedy. In particular, Congress intended that remedy to foreclose--not to supplement--§1983 relief.

CITY OF RANCHO PALOS VERDES, CALIFORNIA, *et al.*, PETITIONERS *v.* MARK J. ABRAMS

on writ of certiorari to the united states court of appeals for the ninth circuit

[March 22, 2005]

Justice Stevens, concurring in the judgment.

When a federal statute creates a new right but fails to specify whether plaintiffs may or may not recover damages or attorney's fees, we must fill the gap in the statute's text by examining all relevant evidence that sheds light on the intent of the enacting Congress. The inquiry varies from statute to statute. Sometimes the question is whether, despite its silence, Congress intended us to recognize an implied cause of action. See, *e.g., Cannon* v. *University of Chicago*, 441 U. S. 677 (1979). Sometimes we ask whether, despite its silence, Congress intended us to enforce the pre-existing remedy provided in Rev. Stat. §1979, 42 U. S. C. §1983. See *Maine* v. *Thiboutot*, 448 U. S. 1, 4 (1980). And still other times, despite Congress' inclusion of specific clauses designed specifically to preserve pre-existing remedies, we have nevertheless concluded that Congress impliedly foreclosed the §1983 remedy. See *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1, 13 (1981). Whenever we perform this gap-filling task, it is appropriate not only to study the text and structure of the statutory scheme, but also to examine its legislative history. See, *e.g., id.,* at 17-18; *Smith* v. *Robinson*, 468 U. S. 992, 1009 (1984); *Cannon*, 441 U. S., at 694.

In this case the statute's text, structure, and history all provide convincing evidence that Congress intended the Telecommunications Act of 1996 (TCA) to operate as a comprehensive and exclusive remedial scheme. The structure of the statute appears fundamentally incompatible with the private remedy offered by §1983.*[*] Moreover, there is not a shred of evidence in the legislative history suggesting that, despite this structure, Congress intended plaintiffs to be able to recover damages and attorney's fees. Thus, petitioners have made "the *difficult showing* that allowing §1983 actions to go forward in these circumstances 'would be inconsistent with Congress' carefully tailored scheme.' " *Blessing* v. *Freestone*, 520 U. S. 329, 346 (1997) (emphasis added) (quoting *Golden State Transit Corp.* v. *Los Angeles*, 493 U. S. 103, 107 (1989)). I therefore join the judgment of the Court without reservation.

Two flaws in the Court's approach, however, persuade me to write separately. First, I do not believe that the Court has properly acknowledged the strength of our normal presumption that Congress intended to preserve, rather than preclude, the availability of §1983 as a remedy for the enforcement of federal statutory rights. Title 42 U. S. C. §1983 was "intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights." *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 700-701 (1978). "We do not lightly conclude that Congress intended to preclude reliance on §1983 as a remedy ... . Since 1871, when it was passed by Congress, §1983 has stood as an independent safeguard against deprivations of federal constitutional and statutory rights." *Smith*, 279 U. S. 418, 452 (1979) (statutory scheme must be "sufficiently comprehensive and effective to raise a clear inference that Congress intended to foreclose a §1983 cause of action"). While I find it easy to conclude that petitioners have met that heavy burden here, there will be many instances in which §1983 will be available even though Congress has not explicitly so provided in the text of the statute in question. See, *e.g., id.,* at 424-425; *Blessing*, 520 U. S., at 346-348.

Second, the Court incorrectly assumes that the legislative history of the statute is totally irrelevant.

This is contrary to nearly every case we have decided in this area of law, all of which have surveyed, or at least acknowledged, the available legislative history or lack thereof. See, *e.g., Wright*, 479 U. S., at 424-426 (citing legislative history); *Smith*, 468 U. S., at 1009-1010 (same); *Sea Clammers*, 453 U. S., at 17-18 (noting that one of the relevant factors in the Court's inquiry "include[s] the legislative history"); *Cannon*, 441 U. S., at 694 (same).

Additionally, as a general matter of statutory interpretation, Congress' failure to discuss an issue during prolonged legislative deliberations may itself be probative. As T*he* C*hief* J*ustice* has cogently observed: "In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night." *Harrison* v. *PPG Industries, Inc.*, 446 U. S. 578, 602 (1980) (dissenting opinion). The Court has endorsed the view that Congress' silence on questions such as this one "can be likened to the dog that did not bark." *Chisom* v. *Roemer*, 501 U. S. 380, 396, n. 23 (1991) (citing A. Doyle, Silver Blaze, in The Complete Sherlock Holmes 335 (1927)). Congressional silence is surely probative in this case because, despite the fact that awards of damages and attorney's fees could have potentially disastrous consequences for the likely defendants in most private actions under the TCA, see *Primeco Personal Communications* v. *Mequon*, 352 F. 3d 1147, 1152 (CA7 2003), nowhere in the course of Congress' lengthy deliberations is there any hint that Congress wanted damages or attorney's fees to be available. That silence reinforces every other clue that we can glean from the statute's text and structure.

For these reasons, I concur in the Court's judgment.

FOOTNOTES

Footnote 1

The City's approval specified a maximum height of 40 feet, but, because of an administrative error, the permit itself authorized respondent to construct a tower 12.5 feet taller. 354 F. 3d 1094, 1095 (CA9 2004).

Footnote 2

This does not contravene the canon against implied repeal, see *Posadas* v. *National City Bank,* 296 U. S. 497, 503 (1936), because we have held that canon inapplicable to a statute that creates no rights but merely provides a civil cause of action to remedy "some otherwise defined federal right," *Great American Fed. Sav. & Loan Assn.* v. *Novotny,* 442 U. S. 366, 376 (1979) (dealing with a provision related to §1983, 42 U. S. C. §1985(3)). In such a case, "we are not faced . . . with a question of implied repeal," but with whether the rights created by a later statute "may be asserted within the *remedial* framework"

of the earlier one. *Great American Fed. Sav. & Loan Assn.*, 442 U. S., at 376-377.

Footnote 3

Compare *Primeco Personal Communications, Ltd. Partnership* v. *Mequon*, 352 F. 3d 1147, 1152-1153 (CA7 2003) (damages are presumptively available), with *Omnipoint Communications MB Operations, LLC* v. *Lincoln*, 107 F. Supp. 2d 108, 120-121 (D. Mass. 2000) ("[T]he majority of district courts ... have held that the appropriate remedy for a violation of the TCA is a mandatory injunction").

Footnote 4

Absent express provision to the contrary, litigants must bear their own costs. *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U. S. 240, 249-250 (1975). The Communications Act of 1934 authorizes the award of attorney's fees in a number of provisions, but not in §332(c)(7)(B)(v). See, *e.g.*, 47 U. S. C. §§206, 325(e)(10), 551(f)(2)(C), 605(e)(3)(B)(iii).

Footnote 5

The statute of limitations for a §1983 claim is generally the applicable state-law period for personal-injury torts. *Wilson* v. *Garcia*, 471 U. S. 261, 275, 276 (1985); see also *Owens* v. *Okure,* 488 U. S. 235, 240-241 (1989). On this basis, the applicable limitations period for respondent's §1983 action would presumably be one year. See *Silva* v. *Crain*, 169 F. 3d 608, 610 (CA9 1999) (citing Cal. Civ. Proc. Code Ann. §340(3) (West 1999)). It may be, however, that this limitations period does not apply to respondent's §1983 claim. In 1990, Congress enacted 28 U. S. C. §1658(a) (2000 ed., Supp. II), which provides a 4-year, catchall limitations period applicable to "civil action[s] arising under an Act of Congress enacted after" December 1, 1990. In *Jones* v. *R. R. Donnelley & Sons Co.*, 541 U. S. 369 (2004), we held that this 4-year limitations period applies to all claims "made possible by a post-1990 [congressional] enactment." *Id.*, at 382. Since the claim here rests upon violation of the post-1990 TCA, §1658 would seem to apply.

Footnote 6

Title 28 U. S. C. §1658(a) provides as follows:

"Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues."

FOOTNOTES

* *01-28-20 City Council Meeting* *06-229*

Footnote *

The evidence supporting this conclusion is substantial. It includes, *inter alia*, the fact that the private remedy specified in 47 U. S. C. §332(c)(7)(B)(v) requires all enforcement actions to be brought in any court of competent jurisdiction "within 30 days after such action or failure to act." Once a plaintiff brings such an action, the statute requires the court both to "hear and decide" the case "on an expedited basis." *Ibid.* As the Court properly notes, *ante,* at 9-10, the TCA's streamlined and expedited scheme for resolving telecommunication zoning disputes is fundamentally incompatible with the applicable limitations periods that generally govern §1983 litigation, see, *e.g., Wilson* v. *Garcia*, 471 U. S. 261 (1985), as well as the deliberate pace with which civil rights litigation generally proceeds. See, *e.g.,* H. R. Conf. Rep. No. 104-458, p. 208-209 (1996) (expressing the intent of the congressional Conference that zoning decisions should be "rendered in a reasonable period of time" and that Congress expected courts to "act expeditiously in deciding such cases" that may arise from disputed decisions). Like the Court, I am not persuaded that the statutory requirements can simply be mapped onto the existing structure of §1983, and there is nothing in the legislative history to suggest that Congress would have wanted us to do so. For these reasons, among others, I believe it is clear that Congress intended §332(c)(7) to operate as the exclusive remedy by which plaintiffs can obtain judicial relief for violations of the TCA.

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IN THE SUPREME COURT OF CALIFORNIA

T-MOBILE WEST LLC et al.,
Plaintiffs and Appellants,
v.
CITY AND COUNTY OF SAN FRANCISCO et al.,
Defendants and Respondents.

S238001

First Appellate District, Division Five
A144252

San Francisco City and County Superior Court
CGC-11-510703

April 4, 2019

Justice Corrigan authored the opinion of the court, in which Chief Justice Cantil-Sakauye and Justices Chin, Liu, Cuéllar, Kruger, and Groban concurred.

T-MOBILE WEST LLC v. CITY AND COUNTY OF SAN FRANCISCO

S238001

Opinion of the Court by Corrigan, J.

By ordinance the City and County of San Francisco (the City) requires wireless telephone service companies to obtain permits to install and maintain lines and equipment in public rights-of-way. Some permits will not issue unless the application conforms to the City's established aesthetic guidelines. Plaintiffs assert a facial challenge urging that (1) the ordinance is preempted by state law and (2) even if not preempted, the ordinance violates a state statute. The trial court and the Court of Appeal rejected both arguments. We do likewise.

I. BACKGROUND

Plaintiffs are telecommunications companies. They install and operate wireless equipment throughout the City, including on utility poles located along public roads and highways.[1] In January 2011, the City adopted ordinance No.

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[1] The plaintiffs named in the operative complaint were T-Mobile West Corporation, NextG Networks of California, Inc., and ExteNet Systems (California) LLC. T-Mobile West Corporation has also appeared in this litigation as T-Mobile West LLC. NextG Networks of California, Inc. has also appeared as Crown Castle NG West LLC and Crown Castle NG West Inc. (*T-Mobile West LLC v. City and County of San Francisco* (2016) 3 Cal.App.5th 334, 340, fn. 3 (*T-Mobile West*).)

12-11 (the Ordinance),[2] which requires "any Person seeking to construct, install, or maintain a Personal Wireless Service Facility in the Public Rights-of-Way to obtain" a permit. (S.F. Pub. Works Code, art. 25, § 1500, subd. (a).) In adopting the Ordinance, the board of supervisors noted that the City "is widely recognized to be one of the world's most beautiful cities," which is vital to its tourist industry and an important reason that residents and businesses locate there. Due to growing demand, requests from the wireless industry to place equipment on utility poles had increased. The board opined that the City needed to regulate the placement of this equipment to prevent installation in ways or locations "that will diminish the City's beauty." The board acknowledged that telephone corporations have a right, under state law, "to use the public rights-of-way to install and maintain 'telephone lines' and related facilities required to provide telephone service." But it asserted that local governments may "enact laws that limit the intrusive effect of these lines and facilities."

The Ordinance specifies areas designated for heightened aesthetic review. (See S.F. Pub. Works Code, art. 25, § 1502.) These include historic districts and areas that have " 'good' " or " 'excellent' " views or are adjacent to parks or open spaces.

Not all plaintiffs install and operate the same equipment, but there is no dispute that they are all " 'telephone corporation[s],' " as that term is defined by Public Utilities Code section 234, nor that all of the equipment in question fits within the definition of " 'telephone line' " in Public Utilities Code section 233. All unspecified statutory references are to the Public Utilities Code.

[2] The Ordinance was codified as article 25 of the San Francisco Public Works Code.

(*Ibid*.) The Ordinance establishes various standards of aesthetic compatibility for wireless equipment. In historic districts, for example, installation may only be approved if the City's planning department determines that it would not "significantly degrade the aesthetic attributes that were the basis for the special designation" of the building or district. (S.F. Pub. Works Code, art. 25, § 1502; see also *id*., §§ 1508, 1509, 1510.) In "view" districts, proposed installation may not "significantly impair" the protected views.[3] (S.F. Pub. Works Code, art. 25, § 1502.)

Plaintiffs sought declaratory and injunctive relief. The operative complaint alleged five causes of action, only one of which is at issue.[4] It alleges the Ordinance and implementing regulations are preempted by section 7901 and violate section 7901.1. Under section 7901, "telephone corporations may construct . . . telephone lines along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt

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[3] The Court of Appeal discussed other provisions of a previous enactment of the Ordinance that are not in issue here. (*T-Mobile West*, *supra*, 3 Cal.App.5th at pp. 340-341.) We review the current version of the Ordinance. (*Kash Enterprises, Inc. v. City of Los Angeles* (1977) 19 Cal.3d 294, 306, fn. 6.)

[4] Plaintiffs' first, second, fourth, and fifth causes of action are not before us. The first cause of action was resolved in plaintiffs' favor by summary adjudication. The second was dismissed by plaintiffs before trial. The fourth was resolved in City's favor by summary adjudication. And the fifth was resolved in plaintiffs' favor after trial.

the navigation of the waters."[5] According to plaintiffs, section 7901 preempted the Ordinance to the extent it allowed the City to condition permit approval on aesthetic considerations.

Section 7901.1 sets out the Legislature's intent, "consistent with Section 7901, that municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed." (§ 7901.1, subd. (a).) But section 7901.1 also provides that, to be considered reasonable, the control exercised "shall, at a minimum, be applied to all entities in an equivalent manner." (§ 7901.1, subd. (b).) Plaintiffs alleged the Ordinance violated subdivision (b) of section 7901.1 by treating wireless providers differently from other telephone corporations.

The trial court ruled that section 7901 did not preempt the challenged portions of the Ordinance and rejected plaintiffs' claim that it violated section 7901.1. The Court of Appeal affirmed. (*T-Mobile West*, *supra*, 3 Cal.App.5th at pp. 339, 359.)

II. DISCUSSION

A. Section 7901 Does Not Preempt the Ordinance

1. Preemption Principles

Under the California Constitution, cities and counties "may make and enforce within [their] limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal. Const., art. XI, § 7.) General laws are those that apply statewide and deal with matters of statewide

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[5] This case does not involve the construction or installation of lines or equipment across state waters. Thus, we limit our discussion to lines installed along public roads and highways, which we refer to collectively as public roads.

concern. (*Eastlick v. City of Los Angeles* (1947) 29 Cal.2d 661, 665.) The "inherent local police power includes broad authority to determine, for purposes of the public health, safety, and welfare, the appropriate uses of land within a local jurisdiction's borders." (*City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.* (2013) 56 Cal.4th 729, 738 (*City of Riverside*); see also *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1151 (*Big Creek Lumber*).) The local police power generally includes the authority to establish aesthetic conditions for land use. (*Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 886; *Disney v. City of Concord* (2011) 194 Cal.App.4th 1410, 1416.)

"[L]ocal legislation that conflicts with state law is void." (*City of Riverside*, *supra*, 56 Cal.4th at p. 743, citing *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897.) A conflict exists when the local legislation " ' " 'duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.' " ' " (*Sherwin-Williams*, at p. 897.) Local legislation duplicates general law if both enactments are coextensive. (*Ibid.*, citing *In re Portnoy* (1942) 21 Cal.2d 237, 240.) Local legislation is contradictory when it is inimical to general law. (*Sherwin-Williams*, at p. 898, citing *Ex parte Daniels* (1920) 183 Cal. 636, 641-648.) State law fully occupies a field "when the Legislature 'expressly manifest[s]' its intent to occupy the legal area or when the Legislature 'impliedly' occupies the field." (*O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1068 (*O'Connell*), citing *Sherwin-Williams*, at p. 898.)

The party claiming preemption has the burden of proof. (*Big Creek Lumber*, *supra*, 38 Cal.4th at p. 1149.) "[W]hen local government regulates in an area over which it traditionally has

exercised control, such as the location of particular land uses, California courts will presume" the regulation is not preempted unless there is a clear indication of preemptive intent. (*Ibid*., citing *IT Corp. v. Solano County Bd. of Supervisors* (1991) 1 Cal.4th 81, 93.) Ruling on a facial challenge to a local ordinance, the court considers the text of the measure itself, not its application to any particular circumstances or individual. (*San Francisco Apartment Assn. v. City and County of San Francisco* (2016) 3 Cal.App.5th 463, 487, citing *Pieri v. City and County of San Francisco* (2006) 137 Cal.App.4th 886, 894, which in turn cites *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.)[6]

2. Analysis

Section 7901 provides that telephone corporations may construct lines and erect equipment along public roads in ways and locations that do not "incommode the public use of the road." We review the statute's language to determine the scope of the rights it grants to telephone corporations and whether, by

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[6] There is some uncertainty regarding the standard for facial constitutional challenges to statutes and local ordinances. (*Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 218.) Some cases have held that legislation is invalid if it conflicts in the generality or great majority of cases. (*Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1126.) Others have articulated a stricter standard, holding that legislation is invalid only if it presents a total and fatal conflict with applicable constitutional prohibitions. (*Ibid*.; see also *Tobe v. City of Santa Ana*, *supra*, 9 Cal.4th at p. 1084.) We need not settle on a precise formulation of the applicable standard because, as explained below, we find no inherent conflict between the Ordinance and section 7901. Thus, plaintiffs' claim fails under any articulated standard.

granting those rights, the Legislature intended to preempt local regulation based on aesthetic considerations. These questions of law are subject to de novo review. (*Bruns v. E-Commerce Exchange, Inc.* (2011) 51 Cal.4th 717, 724; *Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1089, fn. 10.)

The parties agree that section 7901 grants telephone corporations a statewide franchise to engage in the telecommunications business.[7] (See *Western Union Tel. Co. v. Visalia* (1906) 149 Cal. 744, 750 (*Visalia*).) Thus, a local government cannot insist that a telephone corporation obtain a *local* franchise to operate within its jurisdiction. (See *Visalia*, at p. 751; see also *Pac. Tel. & Tel. Co. v. City & County of S. F.* (1959) 51 Cal.2d 766, 771 (*Pacific Telephone I*).) The parties also agree that the franchise rights conferred are limited by the prohibition against incommoding the public use of roads, and that local governments have authority to prevent those impacts.

Plaintiffs argue section 7901 grants them more than the mere right to operate. In their view, section 7901 grants them the right to construct lines and erect equipment along public roads so long as they do not obstruct the path of travel. The necessary corollary to this right is that local governments cannot prevent the construction of lines and equipment unless the installation of the facilities will obstruct the path of travel. Plaintiffs urge that the Legislature enacted section 7901 to promote technological advancement and ensure a functioning, statewide telecommunications system. In light of those

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[7] In this context, a franchise is a "government-conferred right or privilege to engage in specific business or to exercise corporate powers." (Black's Law Dict. (10th ed. 2014) p. 772, col. 2.)

objectives, they contend that their right to construct telephone lines must be construed broadly, and local authority limited to preventing roadway obstructions.

Preliminarily, plaintiffs' argument appears to rest on the premise that the City only has the power to regulate telephone line construction based on aesthetic considerations if section 7901's incommode clause can be read to accommodate that power. That premise is flawed. As mentioned, the City has inherent local police power to determine the appropriate uses of land within its jurisdiction. That power includes the authority to establish aesthetic conditions for land use. Under our preemption cases, the question is not whether the incommode clause can be read to permit the City's exercise of power under the Ordinance. Rather, it is whether section 7901 divests the City of that power.

We also disagree with plaintiffs' contention that section 7901's incommode clause limits their right to construct lines only if the installed lines and equipment would obstruct the path of travel. Contrary to plaintiffs' argument, the incommode clause need not be read so narrowly. As the Court of Appeal noted, the word " 'incommode' " means " 'to give inconvenience or distress to: disturb.' " (*T-Mobile West*, *supra*, 3 Cal.App.5th at p. 351, citing Merriam-Webster Online Dict., available at <http://www.merriam-webster.com/dictionary/incommode> [as of April 3, 2019].)[8] The Court of Appeal also quoted the definition of "incommode" from the 1828 version of Webster's Dictionary. Under that definition, "incommode" means " '[t]o

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[8] All Internet citations in this opinion are archived by year, docket number, and case name at <http://www.courts.ca.gov/38324.htm>.

give inconvenience to; to give trouble to; to disturb or molest in the quiet enjoyment of something, or in the facility of acquisition.' " (*T-Mobile West*, *supra*, 3 Cal.App.5th at p. 351, citing Webster's Dict. 1828—online ed., available at <http://www.webstersdictionary1828.com/Dictionary/incommode> [as of April 3, 2019].) For our purposes, it is sufficient to state that the meaning of incommode has not changed meaningfully since section 7901's enactment.[9] Obstructing the path of travel is one way that telephone lines could disturb or give inconvenience to public road use. But travel is not the sole use of public roads; other uses may be incommoded beyond the obstruction of travel. (*T-Mobile West*, at pp. 355-356.) For example, lines or equipment might generate noise, cause negative health consequences, or create safety concerns. All these impacts could disturb public road use, or disturb its quiet enjoyment.

Plaintiffs assert the case law supports their statutory construction. For example, *City of Petaluma v. Pac. Tel. & Tel. Co.* (1955) 44 Cal.2d 284 (*Petaluma*) stated that the "franchise tendered by [section 7901] . . . [is] superior to and free from any grant made by a subordinate legislative body." (*Id.* at p. 287; see also *Pacific Telephone I*, *supra*, 51 Cal.2d at p. 770; *County of Inyo v. Hess* (1921) 53 Cal.App. 415, 425 (*County of Inyo*).)

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[9] The predecessor of section 7901, Civil Code section 536, was first enacted in 1872 as part of the original Civil Code. (*Anderson v. Time Warner Telecom of California* (2005) 129 Cal.App.4th 411, 419, citing *Sunset Tel. and Tel. Co. v. Pasadena* (1911) 161 Cal. 265, 273.) Civil Code section 536 contained the "incommode" language, as did its predecessor, which was adopted as part of the Statutes of California in 1850. (Stats. 1850, ch. 128, § 150, p. 369.)

Similarly, *Pac. Tel. & Tel. Co. v. City of Los Angeles* (1955) 44 Cal.2d 272 (*City of Los Angeles*), held that the "authority to grant a franchise to engage in the telephone business resides in the state, and the city is without power to require a telephone company to obtain such a franchise unless the right to do so has been delegated to it by the state." (*Id.* at pp. 279-280.)

But these cases do not go as far as plaintiffs suggest. Each addressed the question whether a telephone corporation can be required to obtain a local franchise to operate. (See *Pacific Telephone I*, *supra*, 51 Cal.2d at p. 767; *Petaluma*, *supra*, 44 Cal.2d at p. 285; *City of Los Angeles*, *supra*, 44 Cal. 2d at p. 276; *County of Inyo*, *supra*, 53 Cal.App. at p. 425.) None considered the distinct question whether a local government can condition permit approval on aesthetic or other considerations that arise under the local police power. A permit is, of course, different from a franchise. The distinction may be best understood by considering the effect of the denial of either. The denial of a franchise would completely bar a telephone corporation from operating within a city. The denial of a permit, on the other hand, would simply prevent construction of lines in the proposed manner at the proposed location.

A few published decisions have tangentially addressed the scope of the inherent local police power to regulate the manner and location of telephone line installations. Those cases cut against plaintiffs' proposed construction.

In *Pacific Tel. & Tel. Co. v. City & County of San Francisco* (1961) 197 Cal.App.2d 133 (*Pacific Telephone II*), the City argued it could require a telephone corporation to obtain a local franchise to operate within its jurisdiction because the power to grant franchises fell within its police power. (*Id.* at p. 152.) The

court rejected the City's argument, reasoning that the phrase " 'police power' has two meanings, 'a comprehensive one embracing in substance the whole field of state authority and the other a narrower one including only state power to deal with the health, safety and morals of the people.' " (*Ibid.*) "Where a corporation has a state franchise to use a city's streets, the city derives its rights to regulate the particular location and manner of installation of the franchise holder's facilities from the narrower sense of the police power. Thus, because of the state concern in communications, the state has retained to itself the broader police *power of granting franchises*, leaving to the municipalities the narrower police *power of controlling location and manner of installation*." (*Ibid.*, italics added.)

This court, too, has distinguished the power to grant franchises from the power to regulate the location and manner of installation by permit. In *Visalia*, *supra*, 149 Cal. 744, the city adopted an ordinance that (i) authorized a telephone company to erect telegraph poles and wires on city streets, (ii) approved the location of poles and wires then in use, (iii) prohibited poles and wires from interfering with travel on city streets, and (iv) required all poles to be of a uniform height. (*Id.* at pp. 747-748.) The city asserted its ordinance operated to grant the company a " 'franchise,' " and then attempted to assess a tax on the franchise. (*Id.* at p. 745.) The company challenged the assessment. It argued that, because the ordinance did not create a franchise, the tax assessment was invalid. (*Id.* at pp. 745-746.) We concluded the ordinance did not create a local franchise. (*Id.* at p. 750.) By virtue of its state franchise, "the appellant had the right, of which the city could not deprive it, to construct and operate its lines along the streets of the city." (*Ibid.*) "[N]evertheless it could not maintain its poles and wires

in such a manner as to unreasonably obstruct and interfere with ordinary travel; and the city had the authority, under its police power, to so regulate the manner of plaintiff's placing and maintaining its poles and wires *as to prevent unreasonable obstruction of travel*." (*Id.* at pp. 750-751, italics added.) "[T]he ordinance in question was not intended to be anything more . . . than the exercise of this authority to regulate." (*Id.* at p. 751)[10]

Plaintiffs argue the italicized language above shows that local regulatory authority is limited to preventing travel obstructions. But the quoted language is merely descriptive, not prescriptive. *Visalia* involved an ordinance that specifically prohibited interference with travel on city streets, and the court was simply describing the ordinance before it, not establishing the bounds of local government regulatory authority. Moreover, the *Visalia* court did not question the propriety of the ordinance's requirement that all poles be a uniform height, nor suggest that requirement was related to preventing obstructions to travel. Thus, *Visalia* does not support the conclusion that section 7901 was meant to restrict local government power in the manner plaintiffs suggest. The "right of telephone corporations to construct telephone lines in public rights-of-way is not absolute." (*City of Huntington Beach v. Public Utilities Com.* (2013) 214 Cal.App.4th 566, 590 (*City of Huntington Beach*).) Instead, it is a " 'limited right to use the highways . . . only to the extent necessary for the furnishing of services to the

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[10] *Visalia* interpreted a predecessor statute, Civil Code section 536, which was repealed in 1951 and reenacted as section 7901. (Stats. 1951, ch. 764, pp. 2025, 2194, 2258 [reenacting Civ. Code, former § 536 as Pub. Util. Code, § 7901].)

public.' " (*Ibid*., quoting *County of L. A. v. Southern Cal. Tel. Co.* (1948) 32 Cal.2d 378, 387; see also *Pacific Tel. & Tel. Co. v. Redevelopment Agency* (1977) 75 Cal.App.3d 957, 963.)[11]

Having delineated the right granted by section 7901, we now turn to its preemptive sweep. Because the location and manner of line installation are areas over which local governments traditionally exercise control (*Visalia*, *supra*, 149 Cal. at pp. 750-751), we presume the ordinance is not preempted absent a clear indication of preemptive intent. (*Big Creek Lumber*, *supra*, 38 Cal.4th at p. 1149.) Plaintiffs put forth a number of preemption theories. They argue the Ordinance is contradictory to section 7901. At oral argument, they asserted the Legislature occupied the field with section 7901, the terms of which indicate that a paramount state concern will not tolerate additional local action. And in their briefs, many of plaintiffs' arguments were focused on what has been labeled, in the federal context, as obstacle preemption.

"The 'contradictory and inimical' form of preemption does not apply unless the ordinance directly requires what the state

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[11] The Ninth Circuit has addressed this issue twice, coming to a different conclusion each time. In *Sprint PCS Assets v. City of Palos Verdes Estates* (9th Cir. 2009) 583 F.3d 716, the Ninth Circuit found no conflict between section 7901 and a local ordinance conditioning permit approval on aesthetic considerations. (*Palos Verdes Estates*, at pp. 721-723.) In an unpublished decision issued three years earlier, the Ninth Circuit had reached the opposite conclusion. (*Sprint PCS v. La Cañada Flintridge* (9th Cir. 2006) 182 Fed.Appx. 688, 689.) Due to its unpublished status, the *La Cañada Flintridge* decision carries no precedential value. (*T-Mobile West*, *supra*, 3 Cal.App.5th at p. 355, citing *Bowen v. Ziasun Technologies, Inc.* (2004) 116 Cal.App.4th 777, 787, fn. 6.)

statute forbids or prohibits what the state enactment demands." (*City of Riverside*, *supra*, 56 Cal.4th at p. 743, citing *Big Creek Lumber*, *supra*, 38 Cal.4th at p. 1161.) "[N]o inimical conflict will be found where it is reasonably possible to comply with both the state and local laws." (*City of Riverside*, at p. 743.) As noted, section 7901 grants telephone corporations the right to install lines on public roads without obtaining a local franchise. The Ordinance does not require plaintiffs to obtain a local franchise to operate within the City. Nor does it allow certain companies to use public roads while excluding others. Any wireless provider may construct telephone lines on the City's public roads so long as it obtains a permit, which may sometimes be conditioned on aesthetic approval. Because section 7901 says nothing about the aesthetics or appearance of telephone lines, the Ordinance is not inimical to the statute.

The argument that the Legislature occupied the field by implication likewise fails. Field preemption generally exists where the Legislature has comprehensively regulated in an area, leaving no room for additional local action. (See, e.g., *American Financial Services Assn. v. City of Oakland* (2005) 34 Cal.4th 1239, 1252-1257; *O'Connell*, *supra*, 41 Cal.4th 1061, 1068-1074.) Unlike the statutory schemes addressed in *American Financial* and *O'Connell*, section 7901 does not comprehensively regulate telephone line installation or provide a general regulatory scheme. On the contrary, section 7901 consists of a single sentence. Moreover, although the granting of telephone franchises has been deemed a matter of statewide concern (*Pacific Telephone I*, *supra*, 51 Cal.2d at p. 774; *Pacific Telephone II*, *supra*, 197 Cal.App.2d at p. 152), the power to regulate the location and manner of line installation is generally a matter left to local regulation. The City is not attempting to

regulate in an area over which the state has traditionally exercised control. Instead, this is an area of regulation in which there are " 'significant local interest[s] to be served that may differ from one locality to another.' " (*Big Creek Lumber*, *supra*, 38 Cal.4th at p. 1149.)

City of Riverside, *supra*, 56 Cal.4th 729, is instructive. There, the question was whether state statutes designed to enhance patient and caregiver access to medical marijuana preempted a local zoning law banning dispensaries within a city's limits. (*Id*. at pp. 737, 739-740.) An early enactment had declared that physicians could not be punished for recommending medical marijuana and that state statutes prohibiting possession and cultivation of marijuana would not apply to patients or caregivers. (*Id*. at p. 744.) A subsequent enactment established a program for issuing medical marijuana identification cards and provided that a cardholder could not be arrested for possession or cultivation in permitted amounts. (*Id*. at p. 745.) We concluded that the "narrow reach of these statutes" (*ibid*.) showed they did not "expressly or impliedly preempt [the city's] zoning provisions" (*id*. at p. 752).

Preemption was not implied because the Legislature had not tried "to fully occupy the field of medical marijuana regulation as a matter of statewide concern, or to partially occupy this field under circumstances indicating that further local regulation will not be tolerated." (*City of Riverside*, *supra*, 56 Cal.4th at p. 755.) While state statutes took "limited steps toward recognizing marijuana as a medicine," they described "no comprehensive scheme or system for authorizing, controlling, or regulating the processing and distribution of marijuana for medical purposes, such that no room remains for local action." (*Ibid*.) Moreover, there were significant local

interests that could vary by jurisdiction, giving rise to a presumption against preemption. (*Ibid.*)

Similarly, here, the Legislature has not adopted a comprehensive regulatory scheme. Instead, it has taken the limited step of guaranteeing that telephone corporations need not secure a local franchise to operate in the state or to construct local lines and equipment. Moreover, the statute leaves room for additional local action and there are significant local interests relating to road use that may vary by jurisdiction.

Finally, plaintiffs' briefing raises arguments that sound in the theory of obstacle preemption. Under that theory, a local law would be displaced if it hinders the accomplishment of the purposes behind a state law. This court has never said explicitly whether state preemption principles are coextensive with the developed federal conception of obstacle preemption. (See, e.g., *Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal.4th 853, 867-868; cf. *City of Riverside*, *supra*, 56 Cal.4th at pp. 763-765 (conc. opn. of Liu, J.).) But assuming for the sake of argument that the theory applies, we conclude there is no obstacle preemption here.

The gist of plaintiffs' argument is that section 7901's purpose is to encourage technological advancement in the state's telecommunications networks and that, because enforcement of the Ordinance *could* hinder that purpose, the Ordinance is preempted. But no legislation pursues its objectives at all costs. (*Pension Ben. Guar. Corp. v. LTV Corp.* (1990) 496 U.S. 633, 646-647.) Moreover, the Legislature made clear that the goal of technological advancement is not paramount to all others by including the incommode clause in section 7901, thereby leaving room for local regulation of telephone line installation.

Finally, we think it appropriate to consider the Public Utilities Commission's (PUC) understanding of the statutory scheme. In recognition of its expertise, we have consistently accorded deference to the PUC's views concerning utilities regulation. The PUC's "interpretation of the Public Utility Code 'should not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language.' " (*Southern California Edison Co. v. Peevey* (2003) 31 Cal.4th 781, 796, quoting *Greyhound Lines, Inc. v. Public Utilities Com.* (1968) 68 Cal.2d 406, 410-411.) Here, the PUC has made determinations about the scope of permissible regulation that are on point.

The state Constitution vests principal regulatory authority over utilities with the PUC, but carves out an ongoing area of municipal control. (Cal. Const., art. XII, § 8.) A company seeking to build under section 7901 must approach the PUC and obtain a certificate of public necessity. (§ 1001; see *City of Huntington Beach*, *supra*, 214 Cal.App.4th at p. 585.) The certificate is not alone sufficient; a utility will still be subject to local control in carrying out the construction. Municipalities may surrender to the PUC regulation of a utility's relations with its customers (§ 2901), but they are forbidden from yielding to the PUC their police powers to protect the public from the adverse impacts of utilities operations (§ 2902).

Consistent with these statutes, the PUC's default policy is one of deference to municipalities in matters concerning the design and location of wireless facilities. In a 1996 opinion adopting the general order governing wireless facility construction, the PUC states the general order "recognize[s] that primary authority regarding cell siting issues should continue to be deferred to local authorities. . . . The [PUC's] role continues to be that of the agency of last resort, intervening only

when a utility contends that local actions impede statewide goals . . . ." (*Re Siting and Environmental Review of Cellular Mobile Radiotelephone Utility Facilities* (1996) 66 Cal.P.U.C.2d 257, 260; see also *Re Competition for Local Exchange Service* (1998) 82 Cal.P.U.C.2d 510, 544.)[12] The order itself "acknowledges that local citizens and local government are often in a better position than the [PUC] to measure local impact and to identify alternative sites. Accordingly, the [PUC] will generally defer to local governments to regulate the location and design of cell sites . . . ." (PUC, General order No. 159-A (1996) p. 3 (General Order 159A), available at <http://docs.cpuc.ca.gov/PUBLISHED/Graphics/611.PDF> [as of April 3, 2019].)

The exception to this default policy is telling: the PUC reserves the right to preempt local decisions about specific sites "when there is a clear conflict with the [PUC's] goals and/or statewide interests." (General Order 159A, *supra*, at p. 3.) In other words, generally the PUC will not object to municipalities dictating alternate locations based on local impacts,[13] but it will step in if statewide goals such as "high quality, reliable and widespread cellular services to state residents" are threatened.

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[12] In its 1996 opinion adopting general order No. 159-A, the PUC left implicit the portions of the statutory scheme it was applying. In its 1998 opinion, the PUC clarified the respective regulatory spheres in response to arguments based on sections 2902, 7901, 7901.1 and the constitutional provisions allocating authority to cities and the PUC. (See *Re Competition for Local Exchange Service*, *supra*, 82 Cal.P.U.C.2d at pp. 543–544.)

[13] Among the PUC's express priorities regarding wireless facility construction is that "the public health, safety, welfare, and zoning concerns of local government are addressed." (General Order 159A, *supra*, at p. 3.)

(General Order 159A, at p. 3.) Contrary to plaintiffs' view of the respective spheres of state and local authority, the PUC's approach does not restrict municipalities to judging only whether a requested permit would impede traffic. Instead, the PUC accords local governments the full scope of their ordinary police powers unless the exercise of those powers would undermine state policies.

Plaintiffs argue our construction of section 7901, and a decision upholding the City's authority to enforce the Ordinance, will "hinder the roll-out of advanced services needed to upgrade networks [and] promote universal broadband" and will "stymie the deployment of 5G networks, leaving California unable to meet the growing need for wireless capacity created by the proliferation of . . . connected devices." This argument is premised on a hypothetical future harm that is not cognizable in a facial challenge. (*Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180; see also *Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 Cal.4th 251, 267.)

In sum, neither the plain language of section 7901 nor the manner in which it has been interpreted by courts and the PUC supports plaintiffs' argument that the Legislature intended to preempt local regulation based on aesthetic considerations. The statute and the ordinance can operate in harmony. Section 7901 ensures that telephone companies are not required to obtain a local franchise, while the Ordinance ensures that lines and equipment will not unreasonably incommode public road use.[14]

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[14] We dispose here only of plaintiffs' facial challenge and express no opinion as to the Ordinance's application. We note, however, that plaintiffs seeking to challenge specific

B. The Ordinance Does Not Violate Section 7901.1

Plaintiffs next contend that, even if not preempted, the Ordinance violates section 7901.1 by singling out wireless telephone corporations for regulation. Section 7901.1 provides in relevant part that, consistent with section 7901, municipalities may "exercise reasonable control as to the time, place, and manner" in which roads are "*accessed*," and that the control must "*be applied to all entities in an equivalent manner*." (§ 7901, subds. (a), (b), italics added.)

Before trial, the parties stipulated to the following facts. First, that the City requires all utility and telephone corporations, both wireless and non-wireless, to obtain temporary occupancy permits to "access" public rights-of-way during the *initial* construction and installation of equipment facilities. These permits are not subject to aesthetic review. Second, that the City requires only wireless telephone corporations to obtain site-specific permits, conditioned on aesthetic approval, for the *ongoing* occupation and maintenance

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applications have both state and federal remedies. Under state law, a utility could seek an order from the PUC preempting a city's decision. (General Order 159A, *supra*, at p. 6.) Thus, cities are prohibited from using their powers to frustrate the larger intent of section 7901. (*Pacific Telephone II*, *supra*, 197 Cal.App.2d at p. 146.) Under federal law, Congress generally has left in place local authority over "the placement, construction, and modification of personal wireless service facilities" (47 U.S.C. § 332(c)(7)(A)), but it has carved out several exceptions. Among these, a city may not unduly delay decisions (47 U.S.C. § 332(c)(7)(B)(ii)) and may not adopt regulations so onerous as to "prohibit or have the effect of prohibiting the provision of wireless services" (47 U.S.C. § 332(c)(7)(B)(i)(II)). If a city does so, a wireless company may sue. (*Sprint PCS Assets v. City of Palos Verdes Estates*, *supra*, 583 F.3d at p. 725.)

of equipment facilities in public rights-of-way. The trial court and the Court of Appeal held that section 7901.1 only applies to *temporary* access to public rights-of-way, during initial construction and installation. Because the parties had stipulated that the City treats all companies equally in that respect, the lower courts found no violation of section 7901.1.

Plaintiffs argue the plain language of section 7901.1 does not limit its application to temporary access to public rights-of-way. Rather, the introductory phrase, "consistent with section 7901," demonstrates that section 7901.1 applies to both short- and long-term access. Plaintiffs also suggest that the legislative history of section 7901.1 supports their position, and that the lower courts' interpretation of section 7901.1 "results in an incoherent approach to municipal authority."

Plaintiffs' arguments are unpersuasive. Section 7901.1 allows cities to control the time, place, and manner in which roads are "accessed." (§ 7901.1, subd. (a).) As the competing arguments demonstrate, the "plain meaning of the word 'accessed' is ambiguous." (*T-Mobile West*, *supra*, 3 Cal.App.5th at p. 358.) It could refer only to short-term access, during the initial installation and construction of a telephone equipment facility. But it could also refer to the longer term occupation of public rights-of-way with telephone equipment. (*Ibid.*) Though it would be odd for a statute authorizing local control over *permanent* occupations to specifically allow for control over the "time" of such occupations, the statute's plain language does not render plaintiffs' construction totally implausible.

However, the legislative history shows that section 7901.1 only deals with temporary access to public rights-of-way. "This bill is intended to bolster the cities['] abilities with regard to

construction management . . . ." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 621 (1995–1996 Reg. Sess.) as amended May 3, 1995, p. 3, italics added.) Before section 7901.1's enactment, telephone companies had been taking the "extreme" position, based on their statewide franchises, that "cities [had] absolutely no ability to control construction." (Assem. Com. on Utilities and Commerce, Rep. on Sen. Bill No. 621 (1995–1996 Reg. Sess.) as amended July 7, 1995, p. 2.) Section 7901.1 was enacted to "send a message to telephone corporations that cities have authority to manage their construction, without jeopardizing the telephone [corporations'] statewide franchise." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 621 (1995–1996 Reg. Sess.) as amended May 3, 1995, p. 3.) Under section 7901.1, cities would be able to "plan maintenance programs, protect public safety, minimize public inconvenience, and ensure adherence to sound construction practices." (Assem. Com. on Utilities and Commerce, Rep. on Sen. Bill No. 621 (1995–1996 Reg. Sess.) as amended July 7, 1995, p. 2.)

To accept plaintiffs' construction of section 7901.1, we would have to ignore this legislative history. (*T-Mobile West*, *supra*, 3 Cal.App.5th at p. 358.) Contrary to plaintiffs' argument, construing section 7901.1 in this manner does not render the scheme incoherent. It is eminently reasonable that a local government may: (1) control the time, place, and manner of temporary access to public roads during construction of equipment facilities; and (2) regulate other, longer term impacts that might incommode public road use under section 7901. Thus, we hold that section 7901.1 only applies to temporary access during construction and installation of telephone lines

and equipment. Because the City treats all entities similarly in that regard, there is no section 7901.1 violation.

III. DISPOSITION

The judgment of the Court of Appeal is affirmed.

CORRIGAN, J.

We Concur:

CANTIL-SAKAUYE, C. J.
CHIN, J.
LIU, J.
CUÉLLAR, J.
KRUGER, J.
GROBAN, J.

See next page for addresses and telephone numbers for counsel who argued in Supreme Court.

Name of Opinion T-Mobile West LLC v. City and County of San Francisco

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Unpublished Opinion
Original Appeal
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Date Filed: April 4, 2019

Court: Superior
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Judge: James J. McBride

Counsel:

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 15, 2019 Decided August 9, 2019

No. 18-1129

UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA, INDIVIDUALLY AND ON BEHALF OF ALL OTHER NATIVE AMERICAN INDIAN TRIBES AND TRIBAL ORGANIZATIONS, ET AL.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
RESPONDENTS

NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS, ET AL.,
INTERVENORS

Consolidated with 18-1135, 18-1148, 18-1159, 18-1184

On Petitions for Review of an Order of
the Federal Communications Commission

Stephen Díaz Gavin argued the cause for petitioners United Keetoowah Band of Cherokee Indians in Oklahoma, et al., and supporting intervenors. With him on the briefs were *J. Scott Sypolt*, *Joel D. Bertocchi*, *Joseph H. Webster*, *F. Michael*

Willis, *Andrew Jay Schwartzman*, *James T. Graves*, and *Elizabeth S. Merritt*. *Angela J. Campbell* entered an appearance.

Sharon Buccino argued the cause for petitioner Natural Resources Defense Council and intervenor Edward B. Myers. With her on the briefs was *Edward B. Myers*.

Natalie A. Landreth argued the cause for petitioners Blackfeet Tribe, et al. With her on the briefs were *Wesley J. Furlong*, *Joel West Williams*, *Troy A. Eid*, *Jennifer H. Weddle*, and *Heather D. Thompson*.

Jacob M. Lewis, Associate General Counsel, Federal Communications Commission, argued the cause for respondents. With him on the brief were *Jeffrey Bossert Clark*, Assistant Attorney General, U.S. Department of Justice, *Eric A. Grant*, Deputy Assistant Attorney General, *Andrew C. Mergen* and *Allen M. Brabender*, Attorneys, *Thomas M. Johnson Jr.*, General Counsel, Federal Communications Commission, *David M. Gossett*, Deputy General Counsel, and *C. Grey Pash Jr.*, Counsel. *Jonathan H. Laskin* and *Robert B. Nicholson*, Attorneys, U.S. Department of Justice, and *Richard K. Welch*, Deputy Associate General Counsel, Federal Communications Commission, entered appearances.

Joshua Turner argued the cause for intervenors in support of respondents. With him on the brief were *Christopher J. Wright* and *E. Austin Bonner*.

Before: TATEL and PILLARD, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* PILLARD.

PILLARD, *Circuit Judge*: Cellular wireless services, including telephone and other forms of wireless data transmission, depend on facilities that transmit their radio signals on bands of electromagnetic spectrum. The Federal Communications Commission (FCC or Commission) has exclusive control over the spectrum, and wireless providers must obtain licenses from the FCC to transmit. Wireless service in the United States has mostly depended on large, "macrocell" radio towers to transmit cell signal, but companies offering the next generation of wireless service—known as 5G—are in the process of shifting to transmission via hundreds of thousands of densely spaced small wireless facilities, or "small cells." As part of an effort to expedite the rollout of 5G service, the Commission has removed some regulatory requirements for the construction of wireless facilities. These petitions challenge one of the FCC's orders paring back such regulations, *In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment (Second Report & Order)* (*Order*), FCC 18-30, 2018 WL 1559856 (F.C.C.) (Mar. 30, 2018).

The *Order* exempted most small cell construction from two kinds of previously required review: historic-preservation review under the National Historic Preservation Act (NHPA) and environmental review under the National Environmental Policy Act (NEPA). Together, these reviews assess the effects of new construction on, among other things, sites of religious and cultural importance to federally recognized Indian Tribes. The *Order* also effectively reduced Tribes' role in reviewing proposed construction of macrocell towers and other wireless facilities that remain subject to cultural and environmental review.

Three groups of petitioners challenge the *Order* as violating the NHPA, NEPA, and the Administrative Procedure

Act on several grounds: that its elimination of historic-preservation and environmental review of small cell construction was arbitrary and capricious, an unjustified policy reversal, and contrary to the NHPA and NEPA; that the changes to Tribes' role in reviewing new construction was arbitrary and capricious; that the Commission arbitrarily and capriciously failed to engage in meaningful consultations with Tribes in promulgating the *Order*; and that the *Order* itself required NEPA review.

We grant in part the petitions for review because the *Order* does not justify the Commission's determination that it was not in the public interest to require review of small cell deployments. In particular, the Commission failed to justify its confidence that small cell deployments pose little to no cognizable religious, cultural, or environmental risk, particularly given the vast number of proposed deployments and the reality that the *Order* will principally affect small cells that require new construction. The Commission accordingly did not, pursuant to its public interest authority, 47 U.S.C. § 319(d), adequately address possible harms of deregulation and benefits of environmental and historic-preservation review. The *Order*'*s* deregulation of small cells is thus arbitrary and capricious. We do not reach the alternative objections to the elimination of review on small cell construction. We deny the petitions for review on the remaining grounds.

BACKGROUND

I. Statutory and Regulatory Background

A. National Historic Preservation Act (NHPA)

Congress enacted the NHPA to "foster conditions under which our modern society and our historic property can exist

in productive harmony" and "contribute to the preservation of nonfederally owned historic property and give maximum encouragement to organizations and individuals undertaking preservation by private means." 54 U.S.C. § 300101(1), (4). As part of that mission, NHPA's Section 106 requires federal agencies to "take into account the effect of" their "undertaking[s] on any historic property." *Id.* § 306108.

Both "historic property" and "undertaking" have specific meanings under the statute. Historic properties include myriad monuments, buildings, and sites of historic importance, including "[p]roperty of traditional religious and cultural importance to an Indian tribe." *Id.* §§ 302706, 300308. Insofar as Tribal heritage is concerned, the Section 106 process requires federal agencies to "consult with any Indian tribe . . . that attaches religious and cultural significance to" a historic property potentially affected by a federal undertaking. *Id.* §§ 302706, 306102. To count as "historic," such properties need not be on Tribal land; in fact, they "are commonly located outside Tribal lands and may include Tribal burial grounds, land vistas, and other sites that Tribal Nations . . . regard as sacred or otherwise culturally significant." *Order* ¶ 97. Only a federal "undertaking," not a state or purely private one, triggers the Section 106 Tribal consultation process. A federal "undertaking," as relevant here, is "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including . . . those requiring a Federal permit, license, or approval." 54 U.S.C. § 300320. We have construed the statute to mean that, for an action to be a federal undertaking, "only a 'Federal permit, license or approval' is required," not necessarily federal funding. *CTIA-Wireless Ass'n v. FCC*, 466 F.3d 105, 112 (D.C. Cir. 2006).

The Section 106 process requires that an agency "consider the impacts of its undertaking" and consult various parties, not

that it necessarily "engage in any particular preservation activities." *Id.* at 107 (quoting *Davis v. Latschar*, 202 F.3d 359, 370 (D.C. Cir. 2000)). The NHPA established an independent agency, the Advisory Council on Historic Preservation (Advisory Council), 54 U.S.C. § 304101, which is responsible for promulgating regulations "to govern the implementation of" Section 106, *id.* § 304108(a). Agencies must consult with the Advisory Council, State Historic Preservation Officers, and Tribal Historic Preservation Officers, the last of which adopt the responsibilities of State Historic Preservation Officers on Tribal lands. 54 U.S.C. §§ 302303, 302702; 36 C.F.R. §§ 800.3(c), 800.16(v)-(w) (defining State and Tribal Historic Preservation Officers).

The Advisory Council's regulations authorize the use of alternatives to the ordinary Section 106 procedures, called "programmatic agreements." 36 C.F.R. § 800.14(b). The Commission develops programmatic agreements in consultation with the Advisory Council, Tribes, and other interested parties, "to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings" in certain circumstances, such as when "effects on historic properties are similar and repetitive" or "effects on historic properties cannot be fully determined prior to approval of an undertaking." *Id.* § 800.14(1)(i)-(ii). Tribes' views must be taken into account where the agreement "has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe." *Id.* § 800.14(b)(1)(i), (f). For instance, the Commission has consulted with Tribes to use programmatic agreements to exclude from individualized review entire categories of undertakings that are unlikely to affect historic properties. *See In re Nationwide Programmatic Agreement Regarding the Section 106 [NHPA] Review Process* (*Section 106 Agreement*), 20 FCC Rcd. 1073, 1075 ¶ 2 (2004).

B. National Environmental Policy Act (NEPA)

Congress enacted NEPA to "encourage productive and enjoyable harmony between man and his environment" and "promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man," among other purposes. 42 U.S.C. § 4321. Like the NHPA, NEPA mandates a review process that "does not dictate particular decisional outcomes, but 'merely prohibits uninformed—rather than unwise—agency action.'" *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 37 (D.C. Cir. 2015) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989)).

All "major Federal actions significantly affecting the quality of the human environment" trigger environmental review under NEPA, just as federal "undertakings" trigger historic preservation review under the NHPA. 42 U.S.C. § 4332(C). Major federal actions "include[] actions . . . which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18. Under the Commission's procedures implementing NEPA, if an action may significantly affect the environment, applicants must conduct a preliminary Environmental Assessment to help the Commission determine whether "the proposal will have a significant environmental impact upon the quality of the human environment," and so perhaps necessitate a more detailed Environmental Impact Statement. 47 C.F.R. § 1.1308; *see also* 40 C.F.R. § 1508.9. If, after reviewing the Environmental Assessment, the Commission determines that the action will not have a significant environmental impact, it will make a "finding of no significant impact" and process the application "without further documentation of environmental effect." 47 C.F.R. § 1.1308(d).

NEPA also has an analogue to the NHPA's Advisory Council. In enacting NEPA, Congress established the Council on Environmental Quality, in the Executive Office of the President, to oversee implementation of NEPA across the entire federal government. 42 U.S.C. §§ 4342, 4344. With the endorsement of the Council on Environmental Quality and by following a series of mandated procedures, agencies can establish "categorical exclusions" for federal actions that require neither an Environmental Assessment nor an Environmental Impact Statement. 40 C.F.R. § 1508.4. Categorical exclusions are appropriate for "a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency." *Id.* "Categorical exclusions are not exemptions or waivers of NEPA review; they are simply one type of NEPA review." Council on Environmental Quality, *Memorandum for Heads of Federal Dep'ts and Agencies: Establishing, Applying & Revising Categorical Exclusions under [NEPA]* (*Categorical Exclusion Memo*) 2 (2010).

C. Legal Framework for Wireless Infrastructure

The Communications Act of 1934 established the FCC to make available a "rapid, efficient . . . wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151. In licensing use of the spectrum, the Commission is tasked with promoting "the development and rapid deployment of new technologies, products and services for the benefit of the public . . . without administrative or judicial delays," *id.* § 309, and "maintain[ing] the control of the United States over all the channels of radio transmission," *id.* § 301.

The Commission generally does not require construction permits before private parties can build wireless facilities. Congress largely eliminated the FCC's site-specific construction permits in 1982, and the Commission has since required construction permits only where it finds that the public interest would be served by such permitting. *See* Pub. L. 97-259, 96 Stat. 1087, § 119 (1982) (codified at 47 U.S.C. § 319(d)). It has not made such a finding for the wireless facilities at issue here.

The FCC does, however, require licensing of the spectrum used by wireless small cells. It does so by issuing geographic area licenses, which allow wireless providers to operate on certain frequency bands in a wide geographic area. *See* 47 U.S.C. § 309(j). Those licenses authorize using spectrum rather than building wireless facilities, but they necessarily contemplate facility construction. They have coverage requirements—for instance, one type of geographic area license required licensees to provide service to at least 40% of the population in their geographic service area by June 2013. *See* 47 C.F.R. § 27.14(h). If they fail to meet the coverage requirements, they can be stripped of authority to operate for the license's full term or serve part of its geographic area, and they "may be subject to enforcement action, including forfeitures." *Id.* The Commission also exercises continuing authority to inspect radio installations to ascertain their compliance with any and all applicable laws, whether or not the licensee itself constructed those installations. *See* 47 U.S.C. § 303(n); 47 C.F.R. § 1.9020(c)(5).

The Commission has not identified any period since the enactment of the NHPA (in 1966) and NEPA (in 1970) when it did not require historic-preservation and environmental review of wireless facilities. After Congress eliminated the construction permit requirement, the Commission for a time

required NEPA and NHPA review of facilities before it granted their service licenses. *See, e.g.*, *In re Amendment of Envtl. Rules in Response to New Regulations Issued by [CEQ]*, FCC 85-626, 1986 WL 292182, at *5 ¶ 18 (F.C.C.) (Mar. 26, 1986) (requiring review "during the period prior to grant of a station license"); *id.* at *8 App'x ¶ 7 (requiring NEPA review on "[f]acilities that will affect districts, sites, buildings, structures or objects . . . that are listed in the National Register of Historic Places or are eligible for listing," which includes property of religious or cultural significance to Indian Tribes, 54 U.S.C. § 302706(a)). In 1990, the Commission shifted review from the licensing stage to the construction stage by establishing a "limited approval authority" over construction of wireless facilities. *In re Amendment of Envtl. Rules* (*1990 Order*), 5 FCC Rcd. 2942 (1990). Limited approval authority required that, "where construction of a Commission-regulated radio communications facility is permitted without prior Commission authorization (*i.e.*, without a construction permit), the licensee must nonetheless comply with historic preservation and environmental review procedures." *Order* ¶ 51; *see also* 47 C.F.R. § 1.1312. The authority was "limited" in that it allowed "the Commission [to] exercise[] control over deployment solely to conduct federal historic and environmental review." Resp't Br. 12. The Commission emphasized that shifting review to the pre-construction stage served a practical function: Before it had established its limited approval authority, the FCC's rules "provide[d] that any required submission of [Environmental Assessments] and any required Commission environmental review take place at the licensing stage rather than prior to construction," with the result that "[a]pplicants who ha[d] already constructed their facilities" could "subsequently be denied licenses on environmental grounds." *1990 Order* 2942 ¶ 3. The Commission explained that it continued to require review "to ensure that the Commission fully complies with Federal

environmental laws in connection with facilities that do not require pre-construction authorization." *Id.* ¶ 4. It announced the changes as "necessary to ensure that the Commission addresses environmental issues early enough in the licensing process to ensure that it fully meets its obligations under Federal environmental laws," including NEPA and the NHPA. *Id.* at 2943 ¶ 9 & n.16.

The Commission has never required individualized review of each separate facility, however. A long series of regulations, programmatic agreements, and categorical exclusions has aggregated facilities for joint consideration and focused NHPA and NEPA review on those deployments most likely to have cultural or environmental effects. For instance, most collocations—deployments on existing structures—are excluded from individualized review under NHPA programmatic agreements and NEPA categorical exclusions. *See In re Implementation of the National Environmental Policy Act of 1969* (*Implementation of NEPA*), 49 F.C.C.2d 1313, 1319-20 (1974); *Nationwide Programmatic Agreement for the Collocation of Wireless Antennas* (*Collocation Agreement*), 47 C.F.R. pt.1, app. B (2001); *Section 106 Agreement*, 20 FCC Rcd. at 1075 ¶ 2; *Nationwide Programmatic Agreement for Review Under the National Historic Preservation Act*, 70 Fed. Reg. 556 (2005); *In re Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies* (*Improving Wireless Facilities Siting Policies*), 29 FCC Rcd. 12865, 12870 ¶ 11 (2014); 47 C.F.R. § 1.1320(b)(4). Categorical exclusions go through notice and comment, 40 C.F.R. § 1507.3; include impact findings, *Categorical Exclusion Memo* 9; require the Council on Environmental Quality to approve them as consistent with its regulations and NEPA, 40 C.F.R. § 1507.3(a); and reserve rights to interested parties to request further review in the event that atypical adverse effects do occur, 47 C.F.R. § 1.1307(c), (d). At the same time, they

achieve enormous efficiencies in the review processes for classes of actions or undertakings anticipated to have minimal or no adverse cultural or environmental effects.

Since 2004, the FCC has been conducting NHPA review in accordance with a broad programmatic agreement, the *Section 106 Agreement*, 20 FCC Rcd. 1073. Interested parties developed that agreement to "tailor the Section 106 review in the communications context in order to improve compliance and streamline the review process for construction of towers and other Commission undertakings, while at the same time advancing and preserving the goal of the NHPA to protect historic properties, including historic properties to which federally recognized Indian tribes . . . attach religious and cultural significance." *Id.* at 1074-75 ¶ 1. In the *Section 106 Agreement*, the Commission adopted "procedures for participation of federally recognized Indian tribes," among other changes. *Id.* at 1075 ¶ 2. It also formalized the use of the electronic Tower Construction Notification System, which notifies Tribes of proposed wireless construction in areas they have identified as containing properties of religious and cultural significance, and allows them to give applicants information on the potential effects of proposed construction. *Id.* at 1106-10 ¶¶ 89-100.

II. Order Under Review

The challenged *Order* eliminated NHPA and NEPA review on small cells that meet certain size and other specifications, based on the Commission's conclusion that such review was not statutorily required and would impede the advance of 5G networks, and that its costs outweighed any benefits. *See Order* ¶¶ 36-45. The *Order* also altered Tribal involvement in those Section 106 reviews that are still conducted on wireless facilities that were not encompassed in

the small cell exemption. *See id.* ¶¶ 96-130. Two of the five Commissioners dissented. *See Order*, Dissenting Statement of Comm'r Mignon L. Clyburn; Dissenting Statement of Comm'r Jessica Rosenworcel.

We consolidated five timely petitions for review of the *Order* into this action. They challenge the Commission's exclusion of small cell construction from NHPA and NEPA review, its changes to Tribal involvement in Section 106 review, and its promulgation of the *Order* itself. Three groups of petitioners and intervenors, each designated here by the name of its lead petitioner, challenge the *Order*. United Keetoowah Band of Cherokee Indians (Keetoowah) represents a group of Tribes and historic preservation organizations. Blackfeet Tribe (Blackfeet) represents another group of Tribes and the Native American Rights Fund. The Natural Resources Defense Council (NRDC) represents itself and Maryland citizen Edward B. Myers. Two wireless industry groups (jointly, CTIA) intervened to defend the order alongside the FCC.

ANALYSIS

We set aside an agency order only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Agencies' obligation to engage in "reasoned decisionmaking" means that "[n]ot only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015) (quoting *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998)). Although "a court is not to substitute its judgment for that of the agency," the arbitrary and capricious standard demands that the agency "examine the relevant data and articulate a satisfactory

explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). An agency action is arbitrary and capricious where the agency has "entirely failed to consider an important aspect of the problem" or "offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.*

The FCC is entitled to deference to its reasonable interpretations of ambiguous provisions of the Communications Act. *See Chevron, USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844-45 (1984). We owe no deference to the FCC's interpretations of the NHPA or NEPA, which are primarily administered by the Advisory Council, *see McMillan Park Comm. v. Nat'l Capital Planning Comm'n*, 968 F.2d 1283, 1287-88 (D.C. Cir. 1992), and the Council on Environmental Quality, *see Grand Canyon Tr. v. FAA*, 290 F.3d 339, 341 (D.C. Cir. 2002) (as amended Aug. 27, 2002), respectively.

I. Eliminating NHPA and NEPA Review on Small Cells

The *Order* did not follow the processes for a programmatic agreement under the NHPA, a categorical exclusion from NEPA, or any other wholesale or aggregated form of review, but simply eliminated NHPA and NEPA review on most small cells by removing them from the FCC's limited approval authority. Small cells had not previously been defined or regulated separately from macrocell towers. The Commission defines the small cells that its *Order* deregulates as wireless facilities that are not on Tribal lands, do not require antenna structure registration because they could not constitute a

menace to air navigation, do not result in human exposure to radiofrequency radiation in excess of applicable safety standards, and that are "small" per the following conditions:

> (i) The facilities are mounted on structures 50 feet or less in height including their antennas . . . or the facilities are mounted on structures no more than 10 percent taller than other adjacent structures, or the facilities do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater;
>
> (ii) Each antenna associated with the deployment, excluding the associated equipment . . . is no more than three cubic feet in volume;
>
> (iii) All other wireless equipment associated with the structure, including the wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than 28 cubic feet in volume.

47 C.F.R. § 1.1312(e)(2). Small cells that meet those requirements are now outside the purview of the Commission's limited approval authority, the mechanism by which it has required NHPA and NEPA review since 1990.

The Commission deregulated small cells as part of a broader effort to reduce regulations that the FCC says "are unnecessarily impeding deployment of wireless broadband networks" on which 5G service depends. *Order* ¶ 3. "Within the next few years," the Commission explained, "5G networks . . . will make possible once-unimaginable advances, such as

self-driving cars and growth of the Internet of Things," *i.e.* physical objects controllable over the internet. *Id.* ¶ 1. 5G networks "will increasingly need to rely on network densification," which entails "the deployment of far more numerous, smaller, lower-powered base stations or nodes that are much more densely spaced." *Id.* According to the Commission, rapid proliferation of hundreds of thousands of small cells would be hindered by the significant time and cost of NHPA and NEPA reviews, even as the benefits of such review—which it characterized as already minimal—would be negligible because small cells are "inherently unlikely to trigger environmental and historic preservation concerns." *Id.* ¶ 92; *see also id.* ¶¶ 9, 11-16. It noted that the FCC's baseline approach to environmental and historic-preservation review, which requires facility-specific review unless a programmatic agreement or categorical exclusion applies, "was developed when all or nearly all deployments involved large macrocell facilities and accordingly failed to consider both the relatively diminutive size of small wireless facilities and the proliferation of these facilities necessary for deployment of advanced wireless technologies." *Id.* ¶ 9.

In the *Order*, the Commission asserts that federal law does not independently require such review. The only basis for treating small cell construction as either a federal undertaking triggering NHPA review or a major federal action triggering NEPA review was, the Commission says, the limited approval authority the Commission exercised over that construction—which the *Order* eliminated. *See Order* ¶¶ 58-59. The Commission reasons that removing small cell construction from its limited approval authority removes the "sufficient degree of federal involvement" necessary to render an undertaking or action "federal." *Id.* ¶ 58. It now says its power to exercise limited approval authority over construction derives exclusively from its "public interest authority" under the

Communications Act, *see Order* ¶¶ 39, 53, 61, rather than from "its obligations under Federal environmental laws," *1990 Order* at 2943 ¶ 9. In this context, the "public interest authority" refers to the FCC's power to require pre-construction permits for wireless facilities if it "determines that the public interest, convenience, and necessity would be served by requiring such permits." 47 U.S.C. § 319(d). While the Commission has never made such a determination for the category of facilities at issue here, it has previously interpreted the public interest authority "as allowing the Commission to require covered entities [not requiring preconstruction permits] to nonetheless comply with environmental and historic preservation processing requirements." *Order* ¶ 53. In the *Order*, the Commission made a new determination that it was not in the public interest to require NHPA and NEPA review on small cells, so simply removed them from its limited approval authority.

Petitioners all argue that the FCC unlawfully excluded small cells from NHPA and NEPA review. They contend first that removing small cells from the FCC's limited approval authority was arbitrary and capricious. *See* 5 U.S.C. § 706(2)(A). Keetoowah and the NRDC argue that the Commission failed to adequately consider the harms of massive deployment and to justify its decision to completely exempt small cells from review. Additionally, all petitioners argue that the NHPA and NEPA mandate review of small cell construction. They assert that the geographic licenses the Commission grants, which allow wireless companies to operate on spectrum, constitute sufficient federal control over wireless facility construction to make the construction a federal undertaking and a major federal action triggering review under those statutes. Keetoowah also contends that the exclusion violates the Administrative Procedure Act on various other grounds, including that it is an unjustified policy reversal. If

petitioners prevail on any one or more of those grounds, we must vacate the *Order*'s deregulation of small cells and remand to the FCC.

The Commission failed to justify its determination that it is not in the public interest to require review of small cell deployments. We therefore grant the petitions in part because the *Order*'s deregulation of small cells is arbitrary and capricious. The Commission did not adequately address the harms of deregulation or justify its portrayal of those harms as negligible. In light of its mischaracterization of small cells' footprint, the scale of the deployment it anticipates, the many expedients already in place for low-impact wireless construction, and the Commission's decades-long history of carefully tailored review, the FCC's characterization of the *Order* as consistent with its longstanding policy was not "logical and rational." *Michigan v. EPA*, 135 S. Ct. at 2706. Finally, the Commission did not satisfactorily consider the benefits of review.

First, the Commission inadequately justified its portrayal of deregulation's harms as negligible. The FCC partly based its public-interest conclusion on a picture of small cells that the record does not support. It described small cells as "materially different from the deployment of macrocells in terms of . . . the lower likelihood of impact on surrounding areas." *Order* ¶ 41. In its brief, the Commission sums up its explanation of the difference: "small cells are primarily pizza-box sized, lower-powered antennas that can be placed on existing structures." Resp't Br. 3; *see also Order* ¶¶ 66, 92. It likened small cells to small household items that operate on radiofrequency such as "consumer signal boosters [and] Wi-Fi routers," which do not undergo review. *Order* ¶ 66. Small cells are, to be sure, quite different from macrocells in many ways, but the Commission fails to address that small cells are typically *mounted* on much

bigger structures, and the *Order* is not limited to deployments on structures that already exist or are independently subject to review. Small cells deregulated under the *Order* can be "mounted on structures 50 feet or less in height including their antennas" or "mounted on structures no more than 10 percent taller than other adjacent structures." 47 C.F.R. § 1.1312(e)(i). That makes them crucially different from the consumer signal boosters and Wi-Fi routers to which the FCC compares them.

The scale of the deployment the FCC seeks to facilitate, particularly given its exemption of small cells that require new construction, makes it impossible on this record to credit the claim that small cell deregulation will "leave little to no environmental footprint." *Order* ¶ 41. The Commission anticipates that the needed "densification of small deployments over large geographic areas," *id.*, could require 800,000 deployments by 2026, FCC, *Declaratory Ruling & Third Report & Order*, FCC 18-133 ¶ 126 (Sept. 26, 2018). Even if only twenty percent of small cells required new construction—as one wireless company estimates and the FCC highlights in its brief, *see* Resp't Br. 54—that could entail as many as 160,000 densely spaced 50-foot towers (or 198-foot towers, as long as they are located near 180-foot adjacent structures). The Commission does not grapple with that possibility. Instead, it highlights the small cells that can be collocated without addressing the many thousands that cannot be.

As Keetoowah points out, the FCC "offers no analysis of the footprint of" the new towers on which small cells can be mounted, "what equipment will be used, what ongoing maintenance or security will be provided and how often towers will be updated or rebuilt." Keetoowah Br. 15-16. Deployment of new small cells requires not only new construction but also wired infrastructure, such as electricity hookups, communications cables, and wired "backhaul,"

which connects the new antenna to the core network. *See, e.g.*, *Comment of Sprint*, Joint Appendix (J.A.) 380 (describing process of deploying small cells); *Comment of the Cities of Bos., Mass.*, *et al.*, J.A. 705-06 (describing the equipment associated with small cells), NRDC Br. Ex. A, Decl. of Warren Betts ¶¶ 11-12 (describing concerns about disruption "by the laying of cables and wires, by the maintenance they require, [and] by the sound of the maintenance vehicles" in otherwise tranquil areas, and concerns "that trees may be cut down or damaged by the construction of small cells"). Construction, connection, and maintenance may entail excavation and clearing of land. The Tribal Historic Preservation Officer for the Seminole Tribe of Florida expressed concern about effects of anticipated "additional related infrastructure, such as fencing, security, and access for periodic maintenance and troubleshooting." Keetoowah Br. Add. 114, Decl. of Paul Backhouse, ¶ 28. While the Commission asserted that "deployment of small wireless facilities commonly (although not always) involves previously disturbed ground," it eliminated review of small cells that will involve new ground disturbance without responding to concerns about such disturbance. *Order* ¶ 92; *see also, e.g.*, *Comment of the Nat'l Cong. of Am. Indians*, *et al.* (NCAI), J.A. 430-31 (expressing concern about small cells that require ground disturbance); *Comment of the Cities of Bos., Mass.*, *et al.*, J.A. 707 ("No explanation is offered by the Commission for its exclusion of any ground disturbance related conditions" in the draft *Order*).

The Commission also failed to assess the harms that can attend deployments that do not require new construction, particularly the cumulative harms from densification. While "Tribal Nations are most concerned with federal undertakings that disturb the ground and turn up dirt," even "[c]ollocations can affect cultural and historical properties th[r]ough disturbing view sheds" because "[t]he cultural and spiritual

traditions of Tribal Nations across the United States frequently involve the uninterrupted view of a particular landscape, mountain range, or other view shed." *Comment of NCAI*, J.A. 50. The FCC did not respond to historic-preservation commenters warning "that permanent, direct adverse effects will be more likely with small wireless facilities as in many cases they are proposed for installation on or in historic buildings," and "these multi-site deployments have a greater potential to cause cumulative effects to historic properties, cluttering historic districts with multiple towers, antennae, and utility enclosures." *Comment of Tex. Historical Comm'n*, J.A. 794; *see also, e.g.*, *Ex Parte Commc'n of Thlopthlocco Tribal Town Tribal Historic Pres. Officer*, J.A. 690 (noting that the Commission did not discuss "the issue of multiple collocations on the same pole which cumulatively would exceed the volume restriction and would create an adverse impact"); *Comment of Ark. State Historic Pres. Officer*, J.A. 751 ("[A]lthough individual small cells are unlikely to adversely impact individual historic properties or districts, the FCC doesn't address how the large scale, nationwide deployment of 5G and small cells facilities will cumulatively impact cultural and natural resources."). The Commission noted that all facilities remain subject to its limits on radiofrequency exposure, *Order* ¶ 45, but failed to address concerns that it was speeding densification "without completing its investigation of . . . health effects of low-intensity radiofrequency radiation," which it is currently reassessing. *Comment of BioInitiative Working Grp.*, J.A. 235.

The FCC does not reconcile its assertion that planned small cell densification does not warrant review because it will "leave little to no environmental footprint" with the *Order*'s principal deregulatory effect of eliminating review of precisely the new construction and other deployments that the Commission previously considered likely to pose cultural and

environmental risks. The Commission already had in place NEPA categorical exclusions and NHPA programmatic agreements covering most collocations—as well as other kinds of deployments unlikely to have cultural and environmental impacts. What the new *Order* accomplishes, then, is to sweep away the review the Commission had concluded should not be relinquished.

Since the 1970s, the Commission has explained that most collocations on existing towers or buildings are not "major" federal actions and therefore are not subject to NEPA review. *Implementation of NEPA*, 49 F.C.C.2d at 1319-20; 47 C.F.R. §§ 1.1301-1.1319. The FCC's NEPA regulations limit environmental review to a small subset of actions likely to have significant environmental effects, *see* 47 C.F.R. § 1.1307, as well as those actions found through Section 106 review to have adverse effects on historic properties, *see id.* § 1.1307(a)(4). Before it promulgated the challenged rule, the Commission had further shrunk the category of actions that receive individualized NHPA or NEPA review by adopting programmatic agreements and categorical exclusions. In chronological order, it excluded most collocations from individualized review, *see Collocation Agreement*, 47 C.F.R. Pt.1, App. B; adopted "categories of undertakings that are excluded from the Section 106 process because they are unlikely by their nature to have an impact upon historic properties," *Section 106 Agreement*, 20 FCC Rcd. at 1075 ¶ 2; excluded from individualized review new categories of wireless construction and modification unlikely to have historic preservation effects, *see Nationwide Programmatic Agreement for Review Under the National Historic Preservation Act*, 70 Fed. Reg. at 558; and, most recently, expanded NHPA and NEPA exclusions for collocations, *see Improving Wireless Facilities Siting Policies*, 29 FCC Rcd. at 12870 ¶ 11. In sum, the FCC had already streamlined and

minimized review of vast numbers of minor actions, focusing attention only on subcategories of deployments likely to have cultural or environmental effects.

Second, in sweeping away wholesale the review it had preserved for the small cell deployments most likely to be disruptive, the *Order* is not, as the FCC asserts, "consistent with the Commission's treatment of small wireless facility deployments in other contexts," but directly contrary to it. *Order* ¶ 42. We observe by way of example the Commission's assertion that "under the Collocation [Agreement], the Commission already excludes" from NHPA review "many facilities that meet size limits similar to those" of small cells. *Id.* As the Commission sees it, the *Order* thus "builds upon the insight underlying these existing rules that small wireless facilities pose little or no risk of adverse environmental or historic preservation effects." *Id.* But the *Collocation Agreement* exclusion was defined not just by size, but by other characteristics that minimized the likelihood of cultural harm. The section of the *Collocation Agreement* the FCC cites in fact only excludes from individualized NHPA review "small wireless antennas and associated equipment on building and non-tower structures that are outside of historic districts and are not historic properties," which include property of religious and cultural importance to Tribes. *Collocation Agreement*, 47 C.F.R. Pt.1, App. B § VI (formatting altered); *see also* 54 U.S.C. §§ 300308, 302706. A different section of the *Collocation Agreement*, which did exempt certain collocations of small antennas in historic districts or on historic properties, likewise included numerous conditions to minimize effects on historic properties. An antenna could only be collocated on a historic property if, for example, "a member of the public, an Indian Tribe, a [State Historic Preservation Office] or the [Advisory] Council" had not complained "that the collocation ha[d] an adverse effect on one or more historic properties,"

Collocation Agreement, 47 C.F.R. Pt.1, App. B § VII(A)(6), and if the antenna was installed "using stealth techniques that match or complement the structure on which or within which it is deployed," *id.* § VII(A)(2)(c), and "in a way that does not damage historic materials and permits removal of such facilities without damaging historic materials," *id.* § VII(A)(4), among other conditions. After the *Order*, none of those limiting conditions applies. The insight of the *Collocation Agreement* was not that small cells by their nature "pose little or no risk of adverse environmental or historic preservation effects," *Order* ¶ 42, but that small cells under certain carefully defined conditions pose little such risk.

Similarly, the FCC explains its "conclusion that, as a class, the nature of small wireless facility deployments appears to render them inherently unlikely to trigger environmental and historic preservation concerns" by reference to limiting criteria that it chose *not* to place on its small cell exemption. *Id.* ¶ 92. It notes, for example, that "deployment of small wireless facilities commonly (although not always) involves previously disturbed ground, where fewer concerns generally arise than on undisturbed ground," and reiterates that "use of existing structures, where feasible, can both promote efficiency and avoid adverse impacts on the human environment." *Id.* But the Commission decided not to limit the *Order*'s exemption only to facilities sited on previously disturbed ground, or those that are collocated on existing structures. It therefore fails to justify its conclusion that small cells "as a class" and by their "nature" are "inherently unlikely" to trigger concerns.

By ignoring the extent to which it had already streamlined review, the Commission also overstated the burdens of review. It said it could not "simply turn a blind eye to the reality that the mechanical application of [limited approval authority] requirements to each of [the] small deployments" necessary for

5G "would increase the burden of review both to regulated entities and the Commission by multiples of tens or hundreds." *Id.* ¶ 65. As the preceding discussion of the *Collocation Agreement* illustrates, however, the FCC was not indiscriminately or "mechanic[ally]" requiring full NHPA and NEPA review for each individual small cell. The Commission fails to explain why the categorical exclusions and programmatic agreements in place did not already minimize unnecessary costs while preserving review for deployments with greater potential cultural and environmental impacts.

Third, given that only the most vulnerable cases were still subject to individualized NHPA or NEPA review, the Commission did not adequately address either the possible benefits of retaining review, or the potential for further streamlining review without eliminating it altogether. It dismissed the benefits of historic-preservation and environmental review in a two-sentence paragraph, describing most of the comments that highlight those benefits as "generalized" and the comments that point to specific benefits as "few." *Id.* ¶ 78. Characterizing a concern as "generalized" without addressing that concern does not meet the standard of "reasoned decisionmaking." *Michigan v. EPA*, 135 S. Ct. at 2706.

The Commission found that adverse effects are rare, but it considered neither the importance of the sites review does save, nor how that rarity depends on the very review it eliminates, which forestalled adverse effects that otherwise would have occurred. The FCC cited comments suggesting that only 0.3 or 0.4% of requests for Tribal review result in findings of adverse effects or possible adverse effects. *Order* ¶ 79. Based on the estimate of 800,000 small cell deployments, that could mean 3,200 adverse effects. The *Order* displayed no consideration of the importance of the 3,200 Tribal sites that might be saved

through review except to describe that benefit as "*de minimis* both individually and in the aggregate." *Id.* As counsel for petitioner Blackfeet Tribe said at oral argument: "They may think that's infinitesimal. To us, it means the world." Oral Argument at 1:16:16-20. The Commission also did not address comments that "no adverse effects in 99% of tower deployments shows that the current system is working" because "[o]ften, after an applicant enters a location into" the Tower Construction Notification System, a Tribal representative "will notify the applicant of an issue and the applicant will choose a new location or resolve that effect," which "gets counted as having no adverse effect." *Comment of Nat'l Ass'n of Tribal Historic Pres. Officers*, J.A. 661. Other commenters agreed that "[t]he lack of significant impact should be a testament to the value of the review process in these instances, not negate its necessity." *Comment of Tex. Historical Comm'n*, J.A. 794 ("In our experience, the vast majority of adverse effects for cell projects are resolved through sensitive design modifications, including stealth measures, modifying how equipment is attached if directly mounted to a historic building or structure, or relocation to an alternate site further removed from historic properties.").

Similarly, the Commission dismissed the point that its own oversight deters adverse effects by describing comments to that effect as "generalized, and undercut by our conclusion that, as a class, the nature of small wireless facility deployments appears to render them inherently unlikely to trigger environmental and historic preservation concerns." *Order* ¶ 92. For the reasons already explained, the FCC's conclusion that small cells are inherently unlikely to trigger concerns is arbitrary and capricious, and describing comments as "generalized" does not excuse the agency of its obligation to consider those comments as part of reasoned decisionmaking.

We hold that the *Order*'s deregulation of small cells is arbitrary and capricious because its public-interest analysis did not meet the standard of reasoned decisionmaking. We therefore decide neither the alternative grounds for holding that the *Order* is arbitrary and capricious or otherwise violated the Administrative Procedure Act, nor the claim that small cell construction is a federal undertaking and a major federal action requiring NHPA and NEPA review.

II. Tribal Involvement in Section 106 Review

The *Order* also made three changes to Tribal involvement in the Section 106 review not eliminated by the *Order*, such as review of macrocells and small wireless facilities on Tribal land. The first two changes relate to two types of Tribal involvement that the Commission and the Advisory Council distinguish from one another: (a) government-to-government consultation between the agency and the Tribes, in which Tribes function in their governmental capacity, and (b) the "identification and evaluation phase of the Section 106 process when the agency or applicant is carrying out its duty to identify historic properties that may be significant to an Indian tribe." Advisory Council, *Consultation with Indian Tribes in the Section 106 Review Process: A Handbook* (*Section 106 Handbook*), J.A. 1015; *see also* FCC, *Voluntary Best Practices for Expediting the Process of Communications Tower and Antenna Siting Review Pursuant to Section 106 of the NHPA*, J.A. 933; *Order* ¶¶ 118-19.

Section 106 review comprises "four steps": "initiation, identification, assessment [or evaluation], and resolution." *Section 106 Handbook*, J.A. 1018. Government-to-government consultation is a background requirement of Section 106 review at every stage. *See id.* at J.A. 1014, 1018; Advisory Council, *Fees in the Section 106 Review Process*,

J.A. 913; 36 C.F.R. § 800.2(c)(2)(ii)(A) (consultation requires giving the interested Tribe "a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, . . . articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects"). In the identification and evaluation period, however, applicants have often paid for expertise and assistance from Tribes acting "in a role similar to that of a consultant or contractor" such as by providing "specific information and documentation regarding the location, nature, and condition of individual sites" or even conducting surveys. *Section 106 Handbook*, J.A. 1015. The *Order* explains that identification and evaluation involves "activities undertaken after the initial determination that historic properties are likely to be located in the site vicinity," and that it includes "monitoring and other activities directed toward completing the identification of historic properties as well as assessing and mitigating the project's impacts on those properties." *Order* ¶ 124.

The "initial determination" falls into the government-to-government consultation category. *See Section 106 Handbook*, J.A. 1021 (explaining that initiating contact with Tribes is part of the Commission's "responsibilities to conduct government-to-government Consultation"). In practice, however, Tribes have been allowing applicants to contact them directly, in lieu of government-to-government consultation, to help make the initial determination. *See Section 106 Agreement*, 20 FCC Rcd. at 1108 ¶¶ 95-96; Keetoowah Br. 37. The *Section 106 Agreement* "expresses the ambition that this initial contact will lead to voluntary direct discussions through which applicants and tribes . . . will resolve questions involving the presence of relevant historic properties and effects on such properties to the tribe['s] . . . satisfaction without Commission involvement." 20 FCC Rcd. at 1108 ¶ 97. But "if an applicant and an Indian

tribe . . . disagree regarding whether an undertaking will have an adverse effect on a historic property of religious and cultural significance, or if the tribe . . . does not respond to the applicant's inquiries," the Commission steps in to consult and ultimately "make a decision regarding the proposed undertaking." *Id.*

The Advisory Council explains that "[t]hese two tribal roles"—government-to-government consultation, and assistance with identification and evaluation—"are not treated the same when it comes to compensation, although the line between them may not be sharp." Advisory Council, *Fees in the Section 106 Review Process*, J.A. 913. Advisory Council guidance states that "agencies are strongly encouraged to use available resources to help overcome financial impediments to effective tribal participation in the Section 106 process" and applicants are likewise "encouraged to use available resources to facilitate and support tribal participation." Advisory Council, *Section 106 Handbook*, J.A. 1015. At the same time, it says that agencies and applicants should not expect to pay fees for government-to-government consultation, which "give[s] the Indian tribe an opportunity to get its interests and concerns before the agency," Advisory Council, *Fees in the Section 106 Review Process*, J.A. 913, but "should reasonably expect to pay" fees for the identification and evaluation, which puts Tribes in a "consultant or contractor" role, Advisory Council, *Section 106 Handbook*, J.A. 1015. It notes, however, that "this encouragement is not a legal mandate; nor does any portion of the NHPA or the [Advisory Council's] regulations require an agency or an applicant to pay for any form of tribal involvement." *Id.*

First, apparently because applicants had been consistently paying upfront fees, *see* Keetoowah Br. 37, the *Order* made clear that applicants' payment of upfront fees to Tribes is

voluntary. *See Order* ¶ 116. Upfront fees are payments made to Tribes for the initial determination whether the Tribe actually has religiously or culturally significant properties that might be affected by a proposed construction. *See id.* ¶ 116. Applicants contact Tribes for that initial determination when Tribes have noted that properties in the general area of proposed construction may have religious or cultural significance for them. *Id.* When an applicant follows up "to ascertain whether there are in fact such properties that may be affected," some Tribes have requested upfront fees before they will respond. *Id.* As the *Order* describes the practice, the upfront fees "do not compensate Tribal Nations for fulfilling specific requests for information and documentation, or for fulfilling specific requests to conduct surveys," but are "more in the nature of a processing fee" to "obtain a response" to an applicant's initial Tower Construction Notification contact with a Tribal Nation. *Id*. ¶ 119.

Second, while the *Order* approved of fees for identifying and evaluating properties that may be significant to Tribes, as opposed to upfront fees, *see id.* ¶ 123, it also authorized applicants to consult with non-Tribal parties in the identification and evaluation phase, *see id.* ¶¶ 124-45. The Commission found that, if an applicant asks a Tribe to perform work to aid it in documenting, surveying, or analyzing potentially historic properties, "the applicant should expect to negotiate a fee for that work" and, if the parties are "unable to agree on a fee, the applicant may seek other means to fulfill its obligations." *Id.* ¶ 125. "The agency or applicant is free to refuse just as it may refuse to pay for an archeological consultant, but the agency still retains the duties of obtaining the necessary information for the identification [and evaluation] of historic properties . . . through reasonable means." *Id*. (quoting Advisory Council, *Section 106 Handbook*, J.A. 1015).

Third, the *Order* shortened from 60 to 45 days the timeline for Tribes to respond to notifications on the Tower Construction Notification System, eliminated the requirement that applicants make a second attempt to contact Tribes, and shortened from 20 to 15 days the timeline for Tribal response to Commission contact. *Id.* ¶¶ 110-11.

Keetoowah and Blackfeet challenge those three changes as arbitrary and capricious and inconsistent with the NHPA. Keetoowah complains that the *Order* "encourages applicants, which have until this point voluntarily paid fees, to refuse paying Tribes" upfront fees, Keetoowah Br. 37; that "FCC implementation goes far beyond the terms of the Order by refusing to even allow Tribes to request voluntary fees through" the Tower Construction Notification System, *id.* at 37-38; that letting applications proceed where Tribes refuse to participate without compensation or are not hired as consultants violates the Commission's legal obligation to consult with Tribes, *id.* at 38; and that the shortened timelines are unreasonable, *id.* at 40. Blackfeet asserts that the Commission lacks "the authority to prohibit tribes from collecting fees" because only the Advisory Council may promulgate regulations implementing Section 106. Blackfeet Br. 16.

None of those challenges is availing. The clarification that applicants are not required to pay upfront fees is consistent with the Advisory Council's preexisting guidance and does not violate the Commission's duty to consult with Tribes. The *Order* permissibly authorizes applicants to contract with non-Tribal parties in the identification-and-evaluation phase because it stipulates that contractors must be "properly qualified," which we understand does not authorize hiring other contractors in any circumstance in which only Tribes are

qualified. *Order* ¶ 128. The shortened timeline for Tribal response is reasonable and sufficiently explained.

A. Upfront Fees

The *Order* permissibly confirms that upfront fees for Tribes to comment on proposed deployments are voluntary. Unchallenged Advisory Council regulations already make clear that fees are voluntary, so the *Order*'s reiteration of the same point is not arbitrary and capricious. While applicants have apparently been uniformly paying upfront fees for Section 106 review, no party asserts that they have been required to do so. *See* Keetoowah Reply Br. 20. The Advisory Council has been explicit that no "portion of the NHPA or the [Advisory Council's] regulations require an agency or an applicant to pay for any form of tribal involvement." Advisory Council, *Section 106 Handbook*, J.A. 1015; *see also* Advisory Council, *Fees in the Section 106 Review Process*, J.A. 913 (neither the NHPA nor Advisory Council regulations "requires Federal agencies to pay for any aspect of tribal [or] other consulting party participation in the Section 106 process"). Blackfeet's complaint that "[t]he FCC does not have the authority to prohibit tribes from collecting fees" and that the *Order* is impermissibly "implementing and administering Section 106 through regulation" is misplaced. The challenged *Order* contains no such prohibition, but does no more than recognize and reiterate the Advisory Council's existing rule.

The Commission has a non-delegable duty to consult with Tribes about the effect of federal undertakings on property significant to the Tribes, which Tribes can invoke or waive as they choose. The NHPA mandates that, "[i]n carrying out its responsibilities under [Section 106], a Federal agency shall consult with any Indian tribe . . . that attaches religious and cultural significance to property." 54 U.S.C. § 302706(b). The

Advisory Council has explained that "federal agencies cannot unilaterally delegate their tribal consultation responsibilities to an applicant," but can only delegate if "expressly authorized by the Indian tribe to do so." Advisory Council, *Limitations on the Delegation of Authority by Federal Agencies to Initiate Tribal Consultation under Section 106 of the National Historic Preservation Act* (*Limitations on Section 106 Delegation*) 1 (2011), https://go.usa.gov/xyWGq. The Commission has also recognized that its "fiduciary responsibility and duty of consultation [to Tribes] rest with the Commission as an agency of the federal government, not with licensees, applicants, or other third parties." *Section 106 Agreement*, 20 FCC Rcd. at 1106 ¶ 91.

Keetoowah says its challenge is not to the "FCC's clarification that fees are voluntary," but to "the Order's determination that FCC will process applications without tribal input if tribes insist on charging applicants for their reviews." Keetoowah Reply Br. 19-20. That determination, Keetoowah asserts, violates the Commission's "statutory obligation to consult with tribes." *Id.* at 19. Under the *Section 106 Agreement*, Tribes can and do permit applicants to contact them to request review of proposed construction—essentially agreeing to accept that contact in satisfaction of the Commission's responsibility to consult with Tribes directly. 20 FCC Rcd. at 1108 ¶ 96; *see also* Keetoowah Br. 37; *Comment of the Seminole Tribe of Florida*, J.A. 743 ("[T]ribes participate in review . . . on a voluntary basis" as a substitute for "direct Section 106 consultation with the FCC.") But Tribes can request "the federal agency to reenter the consultation process at any time . . . since the federal agency remains responsible for government-to-government consultation." *Limitations on Section 106 Delegation* 2. Keetoowah implies that Tribes have only agreed to accept direct contact from applicants under the condition that

applicants pay for Tribes' responses—meaning that if Tribes refuse to respond without being paid upfront fees, they will not have waived the Commission's responsibility to consult with them directly. Without having fulfilled its legal obligation to consult, Keetoowah contends, the Commission cannot permit applicants to go ahead with construction.

Keetoowah overlooks the fact that when a Tribe refuses to review an application without being paid, the *Order* requires the Commission to step in to ask the Tribe for a response before allowing applicants to construct. Tribes' refusal to respond triggers a process in which applicants can refer the matter to the Commission, the Commission must contact Tribes directly, and Tribes have 15 days from Commission contact to respond. *See Order* ¶ 111. Only if the Tribe does not timely respond to the Commission are "the applicant's pre-construction obligations . . . discharged with respect to that Tribal Nation." *Id.* The Tribe is guaranteed the opportunity to consult as a sovereign—a capacity in which it need not be paid—and the Commission cannot force an unwilling Tribe to respond. Therefore, if a Tribe refuses to respond when the Commission requests its views on an application, the Commission has discharged its obligation of direct Commission-to-Tribe consultation. *See id.* ¶ 111. Apart from the shortened timeframe, discussed below, Keetoowah has not offered any reason the Commission's contacting Tribes directly with a request to consult that the Tribe rejects does not satisfy the Commission's consultation obligation.

Finally, the objection that the Commission is prohibiting Tribes from requesting voluntary fees on the Tower Construction Notification System, Keetoowah Br. 38-40, is not properly before us. That prohibition does not appear in the *Order* itself but seems to originate with a later decision of Commission staff. *See* Resp't Br. 64 n.19.

B. Non-Tribal Consultation

The *Order* states that applicants need not contract with Tribes to identify which properties have historic or cultural significance to Tribes and determine how to assess or mitigate adverse effects of construction. *Order* ¶¶ 124-25, 128-29. Keetoowah argues that allowing applicants to contract with non-Tribal parties is arbitrary and capricious because "only Tribes are qualified to perform" such services "based on their unique, often sacred, knowledge." Keetoowah Br. 23. Because the *Order* stipulates that contractors must be "properly qualified," we reject the arbitrary-and-capricious claim. *Order* ¶ 128.

Advisory Council regulations require the agency to "make a reasonable and good faith effort to carry out appropriate identification efforts" under Section 106. 36 C.F.R. § 800.4(b)(1). The *Order* explains that "the applicant is not bound to any particular method of gathering information," *Order* ¶ 125, but it stipulates that contractors must be "properly qualified," *id.* ¶ 128. The "reasonable and good faith efforts" standard together with the *Order*'s mandate that parties be "properly qualified" may sometimes require applicants to hire Tribes—for instance, where Tribes have "unique" and "sacred" knowledge of historic properties. Advisory Council guidance supports that notion, explaining that "unless an archeologist has been specifically authorized by a tribe to speak on its behalf on the subject, it should not be assumed that the archaeologist possesses the appropriate expertise to determine what properties are or are not of significance to an Indian tribe." *Section 106 Handbook*, J.A. 1022. The *Order* itself suggests that applicants should try to hire Tribes first: "[I]f an applicant asks a Tribal Nation" to perform identification and evaluation of historic properties, "the applicant should expect to negotiate a fee for that work," but if the Tribe and applicant "are unable

to agree on a fee, the applicant may seek other means to fulfill its obligations." *Order* ¶ 125. We cannot say, *ex ante*, how often as a practical matter applicants might find qualified non-Tribal contractors or whether, as applied, the law will ordinarily require hiring Tribes. If a Tribe believes an applicant has hired an unqualified contractor, that issue can be litigated when it arises.

C. Timeline Changes

Keetoowah's one-paragraph challenge to the *Order*'s shortening the timeline for Tribal response to Tower Construction Notification System notifications provides no basis on which to hold the shortened timeline arbitrary and capricious. Keetoowah Br. 40. Its sole objection is that Tribes "operate with limited staff and budget, making the shortening of Tribal review time unreasonable." *Id.* The Commission acted within its discretion and "considered the relevant factors and articulate[d] a rational connection between the facts found and the choice made." *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1241 (D.C. Cir. 2007) (quoting *BellSouth Telecomms., Inc. v. FCC*, 469 F.3d 1052, 1056 (D.C. Cir. 2006) (alteration in original)). It reasonably justified the decision as a compromise between industry requests for even shorter timelines to address delays, and Tribes' need for adequate time to review submissions. *See Order* ¶¶ 112 n.262, 113.

III. Promulgation of the *Order* Itself

All petitioners argue that the promulgation of the *Order* itself violated the law. Keetoowah and Blackfeet argue that the Commission violated its duty to consult with Tribes, as established by the Tribes' sovereign status and the government-to-government relationship recognized in Article I, Section 8 of the Constitution, the NHPA, and the Commission's regulations. *See* Keetoowah Br. 40-42; Blackfeet Br. 20-21.

The NRDC argues that the *Order* itself was a major federal action that required NEPA review. *See* NRDC Br. 10-11. Because the *Order* documents extensive consultation with Tribes, we reject the first contention. We lack jurisdiction to consider the second because the NRDC forfeited it by failing to raise it to the Commission.

As for the Tribes' contention that the *Order* is invalid because the Commission did not meet its obligations to consult with Tribes, the Commission responds that it extensively consulted with Tribes, and that in any event its consultation obligation is not judicially enforceable. Resp't Br. 69-74. We conclude that the Commission fulfilled its obligation to consult. The Commission presented abundant evidence that it "consulted" Tribes in the ordinary sense of the word, and the Tribes have offered no other concrete standard by which to judge the Commission's efforts.

On this record, we cannot say that the Commission failed to consult with Tribes in its meetings and other communications, which began in 2016 and continued through early 2018. *See Order* ¶¶ 19, 34. The Commission documented extensive meetings it held with Tribes before it issued the *Order*. *See Order* ¶¶ 19-35. Under Advisory Council regulations, "[c]onsultation means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process." 36 C.F.R. § 800.16(f); *see also* 54 U.S.C. § 302706(b). The dictionary definition of consulting is "seek[ing] advice or information of." *Consult*, *American Heritage Dict.* (5th ed. 2019). Keetoowah complains that the FCC's efforts were "listening sessions, briefings, conference calls, and delivery of remarks by a Commissioner" rather than "consultations," and presents evidence that Tribes did not view these meetings as

consultations. Keetoowah Br. 44. But it offers no standard by which to judge which consultations were "listening sessions" or whether a "listening session" or a conference call qualifies as a consultation. The only case Keetoowah cites interpreting an agency's failure to consult is inapposite: there, an agency official "acknowledged at trial" that the contested decision "had already been made prior to" the first meeting between Tribal members and agency officials discussing the decision. *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 710 (8th Cir. 1979). No evidence in this record suggests the Commission had already determined the *Order*'s substance before meeting with Tribes—and the series of communications and meeting commenced even before the Commission issued the Notice of Proposed Rulemaking. *See Order* ¶ 19. The Commission appeared to "seek[], discuss[], and consider[] the views of" the Tribes, even if it did not ultimately adopt those views.

The NRDC argues that promulgating the *Order* was itself a major federal action that required NEPA review. *See* NRDC Br. 10-11. But, as intervenor CTIA points out, the NRDC forfeited that argument by failing to make it to the Commission, *see* CTIA Br. 38, and we lack jurisdiction to review a claim that was not raised there. *Free Access & Broad. Telemedia, LLC v. FCC*, 865 F.3d 615, 619 (D.C. Cir. 2017). While the NRDC points to its own and others' comments "urg[ing] the Commission to conduct a NEPA analysis," NRDC Reply Br. 3, none of those comments said the Commission was required to perform a NEPA analysis *of the Order*. The NRDC cites its own comment "that if the FCC sought to exclude an entire category of wireless facilities from NEPA, it was required to establish a categorical exclusion." *Id.* (citing J.A. 787-90). But the NRDC did not there contend, as it now does, that the *Order* is a major federal action. Rather, the NRDC's argument was that the federal character of the

geographic area license meant that the Commission could not entirely exempt wireless facility construction from NEPA review, J.A. 790—the same statutory argument it made here—and that the proper approach to exempting federal "activities that by their nature do not have significant impacts on the environment is with a categorical exclusion," J.A. 789. Whether the licenses or construction are federal, the basis of the NRDC's argument, is irrelevant to the question whether the *Order* overall is a major federal action that requires NEPA review. One of the other two comments it cites asserted that the proposed rule failed to comply with NEPA, but again, not because the *Order* required NEPA analysis—rather because the issuance of licenses constitutes a major federal action. *See Comment of the Nat'l Trust for Historic Pres.*, J.A. 770. The third comment urged the Commission to consider the cumulative effects of radiofrequency exposure, but did not even mention NEPA. *See Comment of BioInitiative Working Grp.*, J.A. 235-38. The argument that the *Order* required independent NEPA review was never fairly before the Commission.

CONCLUSION

We grant the petitions to vacate the *Order*'s removal of small cells from its limited approval authority and remand to the FCC. We deny the petitions to vacate the *Order*'s changes to Tribal involvement in Section 106 review and to vacate the *Order* in its entirety.

So ordered.

CASE: DPMN 2017-70219
APPLICANT: Verizon Wireless
REQUEST: To allow the construction of a Wireless Communications Facility (WCF) consisting of 12 panel antennas in a tower extension to enclosed associated above-ground equipment at an existing self-storage facility.
LOCATION: 1634 Newbury Road
CHAIR: Geoff Ware

APPEAL TO THE THOUSAND OAKS COMMUNITY DEVELOPMENT DEPARTMENT OF THE ADMINISTRATIVE DECISION (AUGUST 15, 2019) APPROVING THE CONSTRUCTION OF ADDITIONS TO A WIRELESS COMMUNICATIONS FACILITY TO BE LOCATED AT 1634 NEWBURY ROAD; THIS APPEAL HAS BEEN FILED WITHIN THE 10 BUSINESS DAYS ADMINISTRATIVE REQUIREMENT AND THE $1,444 APPEAL FEE IS PAID CONCURRENTLY WITH THIS FILING

1. The location of the proposed WCF would deny access for residents disabled by Electromagnetic Sensitivity to Critical Spaces in the City, being within approximately 300 feet of numerous important city vendors such as shopping, medical and basic amenities, including, but not limited to: "Newbury Park Veterinary Clinic," "Smile by Dr K" orthodontist, the classic Thousand Oaks recreational landmark "Chili's Grill and Bar," and "In-N-Out Burger," used by many residents for lunch and dinner food supplies in the same manner as a delicatessen or lunch counter. All these and the other amenities in this shopping center would be made unavailable to those residents disabled by Electromagnetic Sensitivity, **a disability recognized by the United States Access Board** exercising its authority under the Americans with Disabilities Act of 1990 (as amended). Such a loss of access to Critical Spaces because of a disability is, without limitation, in violation of the 1968 Fair Housing Act (*Fair Housing*) 42USC 3604(f)(1),(2), as the disabled must be given equal opportunity to use and enjoy a dwelling as well as public and common use areas (Burton v Wilmington Parking Authority 365 U.S. 715(1961)).

2. Paige Nielsen asked to be shown copies of the maps demonstrating the areas of Thousand Oaks which are not currently served by Verizon Wireless and for which the subject WCF is claimed to be required. Further, the Chair was twice informed that residents had gone to the site of the proposed WCF and that they were already able to transmit and receive information with telecommunications networks from that location using a cellphone (Clerk's audio transcript of the August 15 hearing at 40:56 and 55:01).
The requested documents were not produced, and the City panel provided no justification for its refusal to provide publicly available documents. This is, at the very least, inconsistent with California Government Code Section 6250, et. seq.

More importantly, this refusal to provide a necessary tool for the assertion of rights under the ADA and *Fair Housing* is in direct violation of both acts, as the maps should have been provided, and considered forthwith, so that the Disabled class could participate in a meaningful and interactive dialogue towards a readily achievable solution for the placement of the WCF facility in question. This is a violation of, inter alia, *Fair Housing* 42USC 3604(f)(3).

3. This appeal notes that Dr Kramer was apparently not making his advice based on independent measurements, but was, at least in part, basing his opinion on material supplied by Verizon Wireless to the City. Such a methodology has been called into question. Specifically, Judge Miller, in the United States District Court for the Southern District of California has opined that such methodology is unreliable, and not in compliance with *Daubert*, stating "Kramer's conclusions about possible alternative sites were based solely on a comparison of the documents provided him by ATT and his physically visiting potential alternative sites. **Consequently, the reliability of Kramer's conclusions are seriously compromised, and the court accords the**

conclusions virtually no weight at all." (AT&T Wireless Services of California LLC v. City of Carlsbad, 308 F. Supp.2d 1148)

Simply put, Dr. Kramer's method of evaluation was deemed unreliable and was not accepted by a Federal Circuit Court. The Chair should not have accepted Dr Kramer's opinion based on such an analysis and the Chair's decision was a material error which must be corrected.

4. This appeal notes that Dr Kramer's statement to the hearing "ADA does not recognize RF as a ADA covered event" was incomplete and potentially misleading (see the Clerk's audio transcript at 1:14:28).
In fact, the United States Access Board *"recognizes that multiple chemical sensitivities and electromagnetic sensitivities may be considered disabilities under the ADA if they so severely impair the neurological, respiratory or other functions of an individual that it substantially limits one or more of the individual's major life activities"* (see Exhibit A, page 2)

There are two evident mischaracterizations in Dr Kramer's statement. "RF" is not a term that ADA nor the complainant defined, and "covered event" is incoherent with reference to a disability.

Further, the case Dr Kramer quotes to support his assertion, "Firstenburg vs Santa Fe New Mexico", was reversed on appeal to the 10th Circuit Court of Appeals (10th Cir.2012(696F. 3D1018)), (Attached hereto as Exhibit B), which remanded the case back to state and local instrumentalities for resolution, as intended by the TCA (see item 7 below).
The Chair's acceptance of this evidentiary support as part of its approval is a material error and is subject to legal challenge. .

5. Resident X, whose identity will be protected herein as provided by the ADA, detailed how Electromagnetic Sensitivity has limited her daily life as a result of cell towers recently built near her home, while Resident Y and Resident Z had to leave early, as the WiFi in the City's conference room was making them ill. However, they reportedly left written cards explaining how Electromagnetic Sensitivity was limiting their life activities.

Further, we note that the ADA (Title II) requires the representations of Residents X,Y and Z to be taken by the Chair without challenge. It is not apparent that either the Chair or his advisors are licensed medical practitioners, nor are they professionally published on matters of Public Health or Disability in any Medical Journal.

On 4th April 2019 the Supreme Court of California reminded Cities that they possess, and must responsibly use, the sole police power for Health and Safety of their residents.
(T-Mobile Est LLC v. City and County of San Francisco, CA Supreme Court 238001)(see also EXHIBIT-D page 9, et. al.)

The Chair was thus obliged to consider the evident disabilities of these residents before making his decision(s) about the Health and Safety of this WCF placement.

6. We note that on 9th August 2019, the **DC Circuit Court of Appeals** struck down the manner in which the FCC had issued preemption of local Environmental authority in its recent regulations as "***arbitrary and capricious***" (D.C. Case 18-1129) re (FCC 18-30, 2018 WL 1559856 (F.C.C.) (Mar. 30, 2018). The Court specifically noted the "BioInitiative Working Group" comments on "radiofrequency exposure" as relevant in any Environmental analysis.

7. Dr Kramer advised the Chair that residents' complaints should "really be directed at members of Congress." But Congress has already dictated a system of "Cooperative Federalism" which preserves dual regulatory authority for state and local siting decisions, subject to only minimal Federal limitations. **The United States Supreme Court said about the TCA**: "*Congress ultimately*

rejected the national approach and substituted a system based on cooperative federalism .. State and local authorities would remain free to make siting decisions. They would do so, however, subject to minimum federal standards--both substantive and procedural--as well as federal judicial review." (US Supreme Court *544 U.S. 113 (2005), 03-1601, City of Rancho Palos Verdes v. Abrams*)(Attached as Exhibit C), see also TCA 332(c)7, and TCA section 255.

The Chair should not have accepted Dr. Kramer's summary.

8. The City demanded a fee of $1444 to be lodged with this appeal. This excessive surcharge on the assertion of rights is a violation of, without limitation, the Americans with Disabilities Act, and demand is hereby made for that fee to be refunded immediately.

9. We demand that the Chair's apparent decision to approve this WCF be reversed.
For some time now, the City has been approving new and modified WCF structures under an umbrella terminology of "FCC Guidelines." During that time these WCF have become more powerful and more complex, and the body of "Guidelines" has apparently been greatly expanded. The City has even begun to talk about FCC "laws," yet the FCC's mission is not to issue "laws" but to issue ***regulations***, to clarify its own interpretation of the TCA. The City is meanwhile responsible for also ensuring its actions do not contravene the bodies of law within *Fair Housing* and the ADA, and must bring its actions into compliance with all three.

In April this year the Supreme Court of California rejected an attempt by T-Mobile to force WCF upon the City of San Francisco, reminding T-Mobile that a City has the sole police power for the 'Health and Safety' of its residents, and also the responsibility to enforce that 'Health and Safety'.

The US Supreme Court has described the interaction of responsibility between the TCA, ADA and *Fair Housing* with the term "Cooperative Federalism" and clarified that it is up to the City to meet that standard. This City can no longer solely rely on any concept of "FCC Guidelines." The DC Circuit Court of Appeals has even found it necessary to strike down FCC regulations attempting Environmental over-ride as "***arbitrary and capricious.***"

There is zero probability that Congress intended for 3% of the population to sicken and suffer disability so that densification and conversion to 4G, 5Ge and 5G could be implemented. Congress intended that a solution would be found so that the TCA can co-exist with Fair Housing and ADA. That solution was carefully enumerated by the US Supreme Court and TCA section 255.

The City must overturn the Planning approval(s) which were granted for this WCF without accommodation for residents already suffering from the Disability of Electromagnetic Sensitivity due to harm from the deployment of "4G" in our City, and, in the words of the acts themselves, initiate a meaningful and interactive dialogue to identify a readily achievable solution for the placement of the 4G individual WCF facilities which is in compliance with ***all*** applicable law.

Further, the City must immediately produce all public records requested, including coverage maps, as specifically identified at the hearing and in this appeal.

Sincerely,

Professor Trevor G Marshall, ME, PhD,
Thousand Oaks Resident,
Director, Autoimmunity Research Foundation,
Fellow, European Association for Predictive, Preventive and Personalised Medicine (Brussels)
Life Senior Member I.E.E.E.
Member ARRL

Sarah Fasig

From: Barbara Archer
Sent: Monday, October 28, 2019 8:29 AM
To: 'David Kalb'; City Council Members; Planning Commission
Subject: RE: Public Comments on wireless upgrade ordinance

Dear Mr. Kalb,

Thank you for writing to the City Council and the Planning Commission about your support for 5G. All members of the council and the commission have received your email, and I am just acknowledging it on their behalf.

We appreciate your engagement on this issue.

Best regards,

Barbara

Barbara Archer
Communications and Customer Service Manager
(office) 530-747-5884
(mobile) 530-400-3418
City of Davis
City Manager's Office
23 Russell Blvd, Suite 1, Davis, CA 95616

CityOfDavis.org

From: David Kalb
Sent: Saturday, October 26, 2019 10:46 AM
To: City Council Members ; Planning Commission
Subject: Public Comments on wireless upgrade ordinance

Greetings city council and planning commission members.

I'll keep this short.

I FAVOR the city upgrade to 5G.

Some well - meaning ☹citizens put a two-page flyer at my front door. It was full of conspiracy theories which reminded me of those of the anti-vax and anti-fluoride folks. For example, one of their over-dramatic points is opposing cell "death" towers. I DON'T BUY ANY OF IT.

I favor moving ahead with technology and support the city's efforts to upgrade our cell service

Thank you

David Kalb
414 Heron Place
Davis, 95616

Sarah Fasig

From: David Kalb <davidkalb414@gmail.com>
Sent: Saturday, October 26, 2019 10:46 AM
To: City Council Members; Planning Commission
Subject: Public Comments on wireless upgrade ordinance

Greetings city council and planning commission members.

I'll keep this short.

I FAVOR the city upgrade to 5G.

Some well - meaning ☹citizens put a two-page flyer at my front door. It was full of conspiracy theories which reminded me of those of the anti-vax and anti-fluoride folks. For example, one of their over-dramatic points is opposing cell "death" towers. I DON'T BUY ANY OF IT.

I favor moving ahead with technology and support the city's efforts to upgrade our cell service

Thank you

David Kalb
414 Heron Place
Davis, 95616

Sarah Fasig

From: Mark Graham <Mark@keepcellantennasawayfromourelkgrovehomes.org>
Sent: Tuesday, October 29, 2019 1:24 PM
To: Planning Commission
Cc: City Council Members; Lena Pu; 5GAwarenessNow; e.windheim@startmail.com; Paul McGavin
Subject: Cell antenna policy

CAUTION: External email. Please verify sender before opening attachments or clicking on links.

October 29, 2019

Planning Commissioners and Council Members of the City of Davis,

Please add this to your file on the City's upcoming policy on cell antennas. This is intended to be a public record. Some cities (not understanding the California Public Records Act) require a notice like this before they will consider an email to the City to be considered a public record.

During the October 23 Planning Commission meeting, which I attended, Commissioner Rutherford proposed that the City hold what I would call a community workshop to receive input from residents and whoever else the City would invite on the broad and complicated subject of cell antenna policy.

Did you know that the City of Elk Grove held such an event on November 28, 2018? It was a special City Council meeting. It was scheduled for 2 1/2 hours, I think, and lasted 4 hours. Every Council Member said they learned from the event and that it was time well spent. I recommend that the City of Davis hold such a meeting - and that you learn from the mistakes that the City of Elk Grove made in its community workshop. On November 28, 2018:

The staff (City Attorney and Public Works) presented information.

The City gave me 20 minutes to present information opposing the use of cell antennas in the city, especially in residential neighborhoods.

https://scientists4wiredtech.com/elk-grove/

The City had hired a so called "expert", who unfortunately was NOT an expert in anything related to biology or biological or health effects of EMF. He got 20 minutes to speak. He had a major conflict of interest in that he had worked for AT&T in 2018 in Sacramento and San Francisco, among other cities. AT&T / Cingular had filed an application for a zoning code amendment. Worse yet, I found out on January 31, 2019 in a meeting with our City Manager and City Attorney that AT&T had paid the City $3,000, which it did not have to pay according to our municipal code related to its application, and the City used that money to hire this "expert". It is a scandal, more so because neither the "expert" nor the Mayor nor anybody on the City Council even mentioned during the community workshop that this "expert" has worked for AT&T. He should have mentioned it. He should have been required to mention it. The Mayor, who introduced him, should have mentioned it. Later at least one Council Member told me that he considered the "expert's" presentation to be tainted because he has this conflict of interest.

http://www.keepcellantennasawayfromourelkgrovehomes.org/att-payment-of-3000/

Now that you are aware of that you are able to avoid making that same mistake.

As I predicted to the City Council this "expert" gave a very biased and one side presentation on the subject of health effects of cell antenna radiation. He badly misrepresented both the overall body of scientific studies on the subject and the one item that he focused on, excluding all the other studies that have been published (thousands of them) and the many declarations and statements and appeals that the scientists who have had their studies published have issued to regulatory bodies all over the world, including the World Health Organization, and to the people of the world. He omitted all of them. While we are at it one such appeal is the International EMF Scientist Appeal. Please read it. It is relatively short

https://www.emfscientist.org/

The "expert" focused all of his attention on health effects on the Standard from IEEE called C95.1-2005. The IEEE has updated its standard this year so C95.1-2019, but they unsurprisingly did not change any of their recommendations or "safe" limits. The big misrepresentation is that the "expert" failed to mention the Purpose and the Scope of the Standard, both of which are stated on page 1. The Purpose and the Scope of C95.1-2019 are the same; to protect against what IEEE calls "established adverse health effects" of RF radiation. He never mentioned that. IEEE has identified ONLY five health effects that it says are "established adverse health effects". This is pure nonsense and a major, deliberate omission by IEEE, whose purpose after all is "the advancement of technology."

The IEEE Standard C95.1-2019, which is the basis for the FCC guidelines, is only intended to protect against what they call "established adverse health effects"? IEEE has a very narrow and subjective definition of that term, that includes 5 and only 5 health effects. Their list of THE 5 "established adverse health effects" doe not include:

- headaches
- insomnia
- tinnitus
- heart palpitations
- fatigue
- immune system, endocrine system, and nervous system disorders
- cancer
- structural and functional changes of the reproductive system
- and so on

The following quotations from the IEEE Standard C95.1-2019 show that it is only intended to protect against "established adverse health effects". The first two quotations are on page 1 of the Standard.

"1. Overview
1.1 Scope

This standard specifies exposure criteria and limits to protect against established adverse health effects in humans associated with exposure to electric, magnetic, and electromagnetic fields in the frequency range of 0 Hz to 300 GHz.[1,2] "

"1.2 Purpose

The purpose of this standard is to provide science-based exposure criteria to protect against established adverse health effects in humans associated with exposure to electric, magnetic, and electromagnetic fields; induced and contact currents; and contact voltages, over the frequency range of 0 Hz to 300 GHz.[3]"

IEEE has shortened its definition of "established adverse health effect". The new (2019) definition is:

established adverse health effect: An effect detrimental to the health of an individual due to exposure to an electric, magnetic, or electromagnetic field, or to induced or contact currents, with the following characteristics:
a) It is supported by the weight of the evidence of that effect in studies published in the scientific literature.
b) The effect has been demonstrated by independent laboratories.
c) There is consensus in the scientific community that the effect occurs for the specified exposure conditions.
See also: adverse health effect

The current version identifies five such effects, not in the definition of that term but on page 15.

> The following short-term reactions associated with electrostimulation at frequencies below 100 kHz for CW exposures have been established:
>
> 1) aversive or painful stimulation of sensory or motor neurons;
>
> 2) muscle excitation that can lead to injury while performing potentially hazardous activities;
>
> 3) excitation of neurons or direct alteration of synaptic activity within the brain;
>
> 4) cardiac excitation; and
>
> 5) adverse health effects associated with induced potentials or forces on rapidly moving charges within the body, such as in blood flow.

By "CW exposures" they mean "continuous-wave (CW) fields".

In other words according to the IEEE if a person is exposed to cell antenna electromagnetic radiation (or from any other source) and he or she develops one or more of the health effects I listed at the top of this section (starting with headaches, insomnia, tinnitus, etc.) but does not develop any of these 5 “established adverse health effects” it is fine. It is not a problem as far as IEEE is concerned. You could get cancer from EMF and die and IEEE does not consider that a problem. They consider that their Standard has done its job. Their Standard has succeeded! Why? Look at the Purpose and the Scope of the Standard. It was not intended to protect against cancer, headaches, insomnia, tinnitus, etc. It was ONLY intended to protect against their list of 5 “established adverse health effects.”
The FCC maximum permissible exposure guidelines are a direct copy of the IEEE Standard. That means that all the flaws and huge errors in the Standard are also flaws and errors in the FCC EMF guidelines. When a person, whether an attorney or city council member or industry representative, claims that you will be “safe” as long as the equipment complies with the FCC EMF limits that is not true. That is a false statement. Either they do not know any better or they are lying to you. Call them on that immediately and demand an explanation that takes this whole discussion into account. They will not be able to provide it to you.

Back to the community workshop there were also public comments and finally a discussion by the City Council in which it gave very broad and vague direction to the staff as to what it wanted in a new cell antenna ordinance. The Council failed to address ANY of the many important issues and details. Nor did the Council ever address them. Rather, it voted on the staff's proposed zoning code amendment on the FIRST night it met to discuss it. It was also apparent at that meeting, on August 28, 2019, that the Council Members had not read the staff report cover to cover OR the recommendations that community members including me had made on the proposed zoning code amendment. Overall the City did a couple of things right and omitted many things it should have included. The most significant thing the City Council did right was to prohibit cell antennas immediately adjacent to or across the street from a residential front yard. I will describe that later on in this message.

The single biggest mistake the City of Elk Grove made, both its Planning Commission and its City Council, thanks to our misguided City Attorney, was to believe, without questioning or exploring the issue, that the City could not do anything to protect the health and safety of residents from cell antenna electromagnetic radiation, which is hazardous to human health. Our City Attorney, Jon Hobbs, did not identify any case law to support his position, nor did our Planning Commission or City Council ask him to. The Telecommunications Act of 1996 has been the law for 23 years. There have been countless federal court cases and opinions regarding the regulatory powers of a city in light of the Act, including in the U.S. Court of Appeals for the 9th Circuit.

The key thing is this: **ANY action the City takes to limit the number of cell antennas or their proximity to homes in Davis will have the effect of limiting the environmental and health effects of cell antenna radiation.** For example, the City can prohibit cell antennas I residential zones, or it can require a minimum distance of 1,500' between a cell antenna and the nearest home, or it can prohibit cell antennas immediately adjacent to or across the street from a residential front yard. You have the power to do all of those things. In fact other California cities have already done all of those things. None of those involves regulating cell antennas "on the basis of the environmental effects of radio frequency emissions", which is the partial federal preemption of city regulatory authority in the TCA.

During my public comments to the Planning Commission of the City of Davis on October 23 I told you that the question of a city's regulatory power over cell antennas is one of the most misrepresented and misunderstood legal issues in the entire law. The telecommunications companies (AT&T, Verizon, etc.) have done a very effective but immoral and reprehensible job of misrepresenting this law to cities all across California and the entire U.S. They have succeeded in deceiving and misleading so many cities into believing that the city does not have the power to do anything to protect residents from environmental or health effects of cell antenna radiation. THAT IS NOT TRUE! You owe it to yourselves and to every resident of the City of Davis to investigate this thoroughly, to ask for specific and applicable case law, to ask the cities that have already amended their zoning codes so as to provide protection from EMF to their residents, and to fully explore the City's regulatory power. I recommend in particular two questions:

#1 What does it mean to regulated cell antennas "on the basis of the environmental effects of radio frequency emissions . . . ."? That is a deliberately vague and ambiguous statement. It does NOT mean, despite what AT&T and Verizon tell you, that the City cannot do anything to protect residents' health. Find out what this really means including the legal basis, meaning the case law. Do not accept the off the cuff interpretation of anybody, including your own City Attorney. There are 23 years of case law on this and NONE of it, that I am aware of, says the City lacks the power to regulate in ways that limit the environmental and health effects of RF emissions from cell antennas. None of it.

What you should know about federal preemption is that there is direct and implied preemption. Direct is what the federal law directly says is preempted. Implied is what is implied by, and follows logically from, the direct preemption. Other than that there is no federal preemption.

The TCA of 1996 provides only a partial federal preemption of the City's regulatory power over cell antennas. Please be aware of 47 U.S.C. 332 (c)(7)(A) which says,

‘‘(7) PRESERVATION OF LOCAL ZONING AUTHORITY.— ‘‘(A) GENERAL AUTHORITY.—Except as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

https://www.congress.gov/104/plaws/publ104/PLAW-104publ104.pdf

A key federal court opinion interpreting TCA was (*MetroPCS, Inc. v. City & County of San Francisco* (9th Cir. 2005) 400 F.3d 715, which interpreted the TCA to say that a City has the power to require applications to demonstrate that a given proposed cell antenna will close a significant gap in coverage and will do so using the least intrusive means.

#2 What can the City do to regulate in ways that will limit the number of cell antennas or their proximity to homes in Davis?

Your staff, especially your City Attorney, should focus on this. What can the City do? Your staff should, at bare minimum, investigate closely the ordinances passed by the cities of Petaluma, Los Altos, Mill Valley, Sonoma, Calabasas, and others that have created a new cell antenna policy with the purpose of protecting residents' health from a known and admitted (by the wireless companies, in their insurance documents for their customers) pollutant.

I mentioned earlier some of the things you can do. I will say it again because it's extremely important.

ANY action the City takes to limit the number of cell antennas or their proximity to homes in Davis will have the effect of limiting the environmental and health effects of cell antenna radiation. For example, the City can prohibit cell antennas I residential zones, or it can require a minimum distance of 1,500' between a cell antenna and the nearest home, or it can prohibit cell antennas immediately adjacent to or across the street from a residential front yard. Other California cities have already done each of these things.

The City can set aesthetic requirements, even according to the FCC Order 18-133. (Paragraph 88, page 45) Depending on what those aesthetics requirements are they may limit the number of cell antennas and / or their proximity to homes. The City can regulate cell antennas and does not even need to identify the "basis" of a given regulation. The City has broad regulatory power, which the TCA specifically does not touch (cited earlier). That can be the basis of any city regulation of cell antennas, and need not be stated. The simple requirement of a permit (of any kind) before a company can install and operate a cell antenna limits the number of cell antennas and their proximity to homes. It is obviously well within a city's regulatory power. That is just one example of several.

The City can regulate cell antennas "on the basis of" the expected reduction in house values that cell antennas will cause.

http://www.keepcellantennasawayfromourelkgrovehomes.org/house-values-and-cell-antennas/

Regulate the **operation** of cell antennas

Speaking of operation this is another key city regulatory power. The City can regulate the operation of cell antennas. Such regulation is not preempted by the TCA. To see this you should carefully examine the 1995 draft of the TCA as well as the conference reports on the Congress. On the following page search for the word "operation" and you will find the comparison of the 1995 draft and the final version of the TCA.

http://mystreetmychoice.com/press.html#tca

What does this mean for the City of Davis? It means you can regulate the operation of cell antennas ON ANY BASIS and such regulation can go a long way to protecting residents from health effects of cel antenna radiation. For example you could establish a limit of 150 microwatts per square meter of power density from any cell antenna or combination of them at any time. 150 microwatts per square meter is way more than is needed for a 4G or 5G cell antenna network to work. Ask your staff to investigate this and whether or not they recommend it, especially if they do NOT recommend it, ask your staff to fully present the issue including the legal basis (as discussed here) and the pros and cons of such a regulation. You owe it to yourselves and to every resident of Davis to do this.

Range of a 5G cell antenna

Another key fact that the City of Davis should acknowledge and consider when creating its new cell antenna policy is that, according to Verizon CEO Lowell McAdam, the range of a 5G cell antenna is over 2,000'. We have know for years that a 4G cell tower or antenna can reach for miles.

http://www.keepcellantennasawayfromourelkgrovehomes.org/range-of-a-5g-cell-antenna/

Here is a partial transcript of that interview.

5:29 The CNBC interviewer asks Verizon CEO Lowell McAdam, “Can you get through trees? Can you get through leaves? Can you actually get somewhere were you don’t need cell sites ev, you know 25 feet from my house?”

5:38 McAdam says: “Yeah well those were some of what I call the myths of millimeter wave, because no one thought that was good, and by the way we’re the only ones that have it now so it’s to their advantage to say it’s no good.”

“When we went out in these 11 markets, we tested for well over a year so we could see every part of foliage, every storm that went through. We have now busted the myth that it has to be line-of-sight. It does not. We busted the myth that foliage will shut it down. I mean that was back in the days when a pine needle would stop it. That does not happen.

And these thing, the 200 feet from a home? We’re now designing the network for over 2,000 feet from transmitter to receiver, which has a huge impact on our capital need going forward. So those myths have disappeared.”

https://youtu.be/31gpCcbklHw?t=315

The Elk Grove City Council did a somewhat good job on August 28, 2019 when it passed ordinance 19-2019 amending our zoning code, part of our municipal code, regarding the permitting of cell antennas. The best part of that ordinance was the one that says they can't put a cell antenna immediately adjacent to or across the street from a residential front yard.

Title 23, Chapter 94.050 A.6.b. says, "No small cell wireless communication facility shall be located immediately adjacent to, nor immediately across the street from, a front yard of any residential dwelling."

The reason this is only somewhat good is that the City created a loophole that the wireless companies can use to circumvent the front yard rule. Section 23.94.050 A.6. contains a convoluted and confusing (and confused) loophole that says the front yard rule will not apply if the rule, as applied to any specific proposed cell antenna

location, "will materially inhibit personal wireless service as to a particular small cell wireless communication facility." This is unnecessary. The last 9 words should be omitted. This is the work of City Attorney Jonathan Hobbs, attempting to make the Elk Grove zoning code comply with the FCC Order 18-133, which talks about "materially inhibiting" cell phone service. However that order does not say what this new section of code says. Also, as I have told the City Council and staff this caveat, this loophole will apply in every case, to every proposed cell antenna, because obviously when the City denies a cell antenna permit application they have materially inhibited cell phone service to that antenna. They do not get this.
The City should have incorporated location preferences into our new zoning code as several California cities have done.

What is your opinion of all of this? Thank you for reading all the way to the end. I believe that there are some Planning Commissioners and City Council Members in Davis who take this issue and their roles seriously enough that they will read this message all the way to the end. In my opinion every one of you should. I welcome your comments and questions

Sincerely,

Mark Graham
Keep Cell Antennas Away From Our Elk Grove Homes
http://www.keepcellantennasawayfromourelkgrovehomes.org/
Sent from my hard wired computer

Sarah Fasig

From: SafeTech Forward <safetechforward@gmail.com>
Sent: Thursday, October 31, 2019 11:13 AM
To: Planning Commission
Subject: Oct. 23rd Meeting- Expert Resources For Review

Hello Davis Planning Commission,

I hope this finds you all well.

I was able to view your meeting on October 23rd 2019 regarding 5G small cell infrastructure.

I appreciated the discussion and hope that you will follow up on the areas that remained unanswered and in need of more clarity and information.

With this in mind, I wanted to provide you with more professional information regarding 5G, wireless in relationship to public health and safety from my collegues below. They are the world's leading EMF scientist, medical and tech experts in this area and those who have explicitly studied and researched the effects of RF and EMF for decades.

I direct Safe Tech Forward in Michigan and I work in collaboration with these experts at the local, state, national and international levels to educate policy makers, legislatures and the general public on the demonstrated bio-effects of non -ionizing RF. My professional background is elementary education with a specialty in behavior and mental health. This was the initial impetus for my research into this issue and my work to establish of safer technologies and safer tech practices as exposures to RF, has been demonstrated to have both physical and neuropsychiatric implications.

It is the belief of these experts that 5G/RF/EMF/wireless is the public health issue of our times. They are coming forth now very diligently from all over the world because of what they view as an impending public health crisis and the lack of response to the studies/research and growing data regarding RF/EMF at non-ionizing levels showing biological harm- by our regulatory agencies. Many have come out of their retirement to educate and see it as their responsibility given that the research they have done on RF over the years has been publicly funded.

Below are expert testimonies, expert educational videos and reports that you will find helpful and informative as you learn more this issue. They are well worth your time in viewing as you make these important decisions for your community. There are literally thousands of pieces of expert resources on this issue so I have just selected just a few for your review as an overview. Also, if you would like to be in touch with any of the experts I have shared for further discussion on the issue, please let me know and I will make arrangements.

Thanks very much,

Pamela Wallace

Director Of Safe Tech Forward
SafeTechForward@gmail.com
248-651-4439

Educational Resources:

Frank Clegg- Former President of Microsoft Canada- Safety, 5G/Wireless:

https://www.youtube.com/watch?v=xSP2exnmJXg&feature=youtu.be

Dr. Paul Heroux' Professor of Toxicology and Electromagnetism, McGill University. Testimony Illinois legislature at 11 minutes:
https://www.youtube.com/watch?v=ylzo3OAQ5z0#action=share

Dr. Sharon Goldberg MD- Bio effects of RF, testimony, Michigan legislature:
https://www.youtube.com/watch?v=CK0AliMe-KA&t=33s

Dr. Ollie Johansson- Associate Professor and Head of the Department of Neuroscience, Karolinska Institute. 3rd International Forum of Protection from Electromagnetic Environmental Pollution

www.youtube.com/watch?v=_jGKa6ZbXLg&feature=youtu.be&fbclid=IwAR1Z https El8NFBxUoglw-onyDSwafYxuJlz5Sc_TYVBn_HnvnS65OK8SK72c3bI

Dr. Anthony Miller MD, FRCP-Professor Emeritus, Dalla Lana School Of Public Health, University Of Toronto. 5G, Cell Phone Radiation and Cancer: https://www.youtube.com/watch?v=1PLrvYzCB10&fbclid=IwAR2fgfnK1JGjYJhtMlbFyufc5oAz1hb2FFdcc_4KiFWFicpUmFnc5RhDgTw

Dr. Martin Paul- Professor Emeritus Of Biochemistry and Basic Medical Sciences, Washington State University. Science Direct- Microwave Frequency Electromagnetic Fields (EMF's) Produce Widespread Neuropsychiatric Effects Including Depression: https://www.sciencedirect.com/science/article/pii/S0891061815000599

US Naval Medical Institute Report- RF Bio-Effects

https://www.magdahavas.com/wp-content/uploads/2011/06/Glaser_1972_shortened.pdf

Cancer and Fighter Pilots: https://americanmilitarynews.com/2019/08/we-are-dropping-like-flies-ex-fighter-pilots-push-for-earlier-cancer-screenings/

Environmental Health Trust- Dr. Devra Davis. World's largest data base on bio effects of non- ionizing RF radiation.

https://ehtrust.org/

Bio Initiative Report Conclusions- RF Bio-Effects: https://bioinitiative.org/conclusions/

Harvard Report On FCC as a Captured Agency: https://ethics.harvard.edu/files/center-for-ethics/files/capturedagency_alster.pdf

Sarah Fasig

From: Lauren Ayers <lauren.yolocounty@gmail.com>

Sent: Tuesday, November 12, 2019 11:53 AM
To: Brett Lee; Gloria Partida; Will Arnold; Dan Carson; Lucas Frerichs; Herman Boschken; Cheryl Essex; Stephen Mikesell; David Robertson; Greg Rowe; Darryl Rutherford; Stephen Streeter; Emily Shandy
Cc: CMOWeb; Kelly Stachowicz; Ashley Feeney; Sherri Metzker; Clerk Web; Bob Clarke; Jason Best; Nancy Stephenson
Subject: Non-health reasons to oppose 5G

Hello Davis City Council & Planning Commission,

This article shows the motivation of Big Wireless to do everything in its power to force acceptance of 5G because it will be so profitable: https://www.huffpost.com/entry/open-letter-to-the-california-about-sb-649-youre_b_59b591a2e4b0c50640cd6877

Although Bruce Kushnick explains his assertions and gives citations, he's still concise enough to not bog his readers down.

While the article is 2 years old, it is still accurate and explains other aspects of 5G besides the health and environmental issues, such as:

1. **The State Wireline Utility Customers Are Paying Billions to Fund the Wireless Subsidiary.**

2. **This Proposed Bill Is a Con and It Is Based on "Model Legislation" Created by AT&T Et Al. and ALEC, the American Legislative Exchange Council.**

3. **California has been Deceived Over and Over about Broadband and Tech Deployments**

4. **Local Prices Went Up 138% Since 2008; Ancillary Services Up 525% to 1891%**

5. **The State Has Not Done an Audit of the Companies, Claims It Can't Analise Cross Subsidies.**

6. **How Much Money has been Collected in the Name of Broadband in California?**

7. **AT&T California Is the State Telecommunications Utility Which Is Being Dismantled by the Separate Subsidiaries – Illegally.**

8. 'Shut Off the Copper' and Replace It with Inferior Wireless because It Makes Them More Money

9. **Investigate How an ALEC Bill Ended Up in California**

10. **5G Is the Broadband Carrot of the Month: What Is the Truth about Wireless Service?**

Thank you,

Lauren Ayers, 530 321-4662

Sarah Fasig

From: Barbara Archer
Sent: Thursday, November 7, 2019 5:15 PM
To: 'Sherri Burnett'; City Council Members; Planning Commission
Subject: RE: 5G Cell Towers

Follow Up Flag: Follow up
Flag Status: Completed

Dear Sherri,

Thank you for taking time to share your comments about 5G and antennas with our City Council members. All members of the council have received your email, and I am just acknowledging it on their behalf. You are welcome to share your views at public comment at an upcoming City Council meeting. You may sign up for e-notifications on our website (button on the far right of home page at cityofdavis.org) for agendas and the City also publishes the agenda in the Enterprise. Meetings take place at Community Chambers, City Hall, 23 Russell Blvd. usually starting at 6:30 p.m. every other Tuesday, but please check the schedule to be certain of meeting dates.

We appreciate your engagement on this issue.

Best regards,

Barbara

Barbara Archer
Communications and Customer Service Manager
(office) 530-747-5884
(mobile) 530-400-3418
City of Davis
City Manager's Office
23 Russell Blvd, Suite 1, Davis, CA 95616

CityOfDavis.org

From: Sherri Burnett
Sent: Wednesday, November 06, 2019 8:03 PM
To: City Council Members ; Planning Commission
Subject: 5G Cell Towers

I oppose the rollout of 5G cell antennas and towers in Davis. The first reason is there is not adequate research nor timeline to establish the safety of this technology. Secondly, there is a adverse economic impact on residential and some commercial real estate transactions near tower sites. Until these issues are completely addressed, I do not support this rollout.

Thank you,

Sherri Burnett
1012 Miller Drive

Sarah Fasig

From: Rena Nayyar <renanayyar@hotmail.com>
Sent: Monday, November 4, 2019 8:16 PM
To: Planning Commission
Subject: 5G comments from meeting on 10/23

Hi,
Thank you for your efforts to hear the public comments on 5G at Wednesday's meeting (10/23/19). I had a few comments I hope you will consider and suggestions at the end. I have done my best to be informed and accurate but find it is a complex issue so please bear with me.

-I had asked Lena Pu to take my 3 minutes for a more detailed presentation. I have tried to independently research the WiFi issue, including with the help of a reference librarian at Shields Library, but didn't have the time to prepare. You almost didn't allow her to continue. Next time please clarify the process in advance. Maybe I should have stood in line and given her my time explicitly. It is important to know who speaks for who. I agree that some people were inappropriate and they did NOT speak for me.

-I hope you believe that our community has options. You can inform citizens of the health effects and federal limitations. There is also the issue of climate change and all this supports an unsustainable energy-intensive lifestyle. With the US using such a high percentage of the world's energy, there may not even be enough solar panels etc to compensate. Educate the citizens to balance tech use and save energy, and 5G wouldn't be necessary. Then why would companies compromise their profits to put in antennas people weren't using? Even 4G and below have major consequences.

-The 3 industry representatives offered flawed reasoning and need to be fact checked. They spoke after the citizens so no one could respond. Also, one of you said we could email you details, but then any citizens watching the meeting would miss that. So-

-Raj (correct full name?) said the science was spread between all outcomes, indicating randomness rather than confirmed health risks. This isn't what I found when I looked. Google hits showing it's safe had serious misinformation and vague "studies show that" etc but no actual citations. When I find actual studies there as well as using databases at UCD (public computers exist) I find serious health risks. So either we should use the precautionary principle if we don't think there is enough information, or we should use science based decision making to protect the public from this radiation. If our local government is prevented from doing this, we should join other cities in lawsuits.

He also mentioned that some fire stations in San Jose don't have 5G antennas because these structures would get in the way of maneuvering rather than for safety concerns. Someone needs to fact check this.

-The woman asked that you delay to devise an agreement more useful to the industry. Please remember the role of local government is to represent and protect citizens not industry. Her statements were a major affront to the idea of our local democracy.

-The other man pulled at heartstrings by saying kids need 5G for safety without providing any evidence. My experience as a teacher (I only represent myself NOT the district) differs. After the lock-down several years ago (that was in the Davis Enterprise) we heard that cell phones could compromise the investigation. We already take cell phones away from students regularly. There is increasing documentation that teen use of cell phones is having adverse effects and already strangers can know where they are.

No one demonstrated a need for 5G. We would already have enough capability if we find more balance. The statement that there is no easy map to use to see coverage is ridiculous. If as stated they would need to show the need for service in places they want to put antennas, such maps would be essential. And the lawyer who spoke at the meeting clearly only caters to the industry.

I think the best way to proceed is to recommend to the city that we hire a lawyer specializing in the public interest to look at the stricter resolutions in the other cities and then guide us through the legal issues to do the same, and to possibly join in lawsuits.

Thank you for delaying the vote and for your thoughtful comments at the meeting.
Rena Nayyar, Davis

Sarah Fasig

From: Nadine Pieroni <drnadinepieroni@gmail.com>
Sent: Sunday, November 3, 2019 7:03 PM
To: Planning Commission
Subject: 5G/4G CPMRA technology

CAUTION: External email. Please verify sender before opening attachments or clicking on links.

Dear Planning Commission:

I would like to express my opposition to this technology in my neighborhood. There should be third party studies to prove its safety before neighborhoods are exposed to 5G technology.

Sincerely,

Nadine Pieroni
432 Heron Place
Davis, Ca

Sarah Fasig

From: Katherine McBride <kmcbride21@gmail.com>
Sent: Thursday, October 24, 2019 8:40 PM
To: Planning Commission
Subject: Comments on 5G from Katherine McBride
Attachments: Davis Planning Commission comment 10_23_19 Katherine McBride.docx

My name is Katherine McBride. I'm a Davis resident. I'm skeptical of 5G out of health, safety and privacy concerns. I'm speaking on behalf of those who are unaware of this this agenda or the gravity of this issue. This technology's being rolled out without pre-testing for short or long-term health effects.

5G is broadcast over varying frequencies, some never before used for Internet. These high frequency millimeter waves emitting radio frequency radiation don't travel far. 5G poorly penetrates buildings, so it will take at least 10 times the cell system "hives," mounted to street lights throughout the city, as well as indoor systems. They will be placed on existing infrastructure, lampposts, and under manholes as well as in houses, shops and hospitals. Continuous exposure in close proximity to people's homes and workplaces may pose serious risks because on top of the increased number of 5G transmitter, thousands of connections (to refrigerators, washing machines, surveillance cameras, self-driving cars, buses, drones, etc.) will be parts of the Internet of Things. This could intrude into people's privacy by revealing their location to those who want to know where and when someone travels and what everyone does with electronic devices.

These high-frequency millimeter waves give off the same dose of radiation as airport scanners. These same millimeter waves have been used by the US Army as a crowd control dispersal weapon called Active Denial Systems. The combination of the new 5G microwave technology along with smart meters might just become an all-in-one weapons and surveillance system.

5G technology is not only bad for humans, it can harm plant and animal life as well. Thousands of bees have been mysteriously found dead next to 5G towers in Sierra Madre, CA. And in Ripon, CA parents of at least eight children with various cancers are convinced it was caused by the cell phone tower next to their school, so Sprint shut it down.

Hundreds of peer reviewed scientific studies from around the world have linked this non-ionizing form of electromagnetic radiation to cancer, DNA damage, infertility, learning and memory deficits, neurological disorders, and negative impacts on general well-being in humans. In September 2017, more than 180 scientists and doctors from 36 countries sent out an 11-page appeal to the EU, warning about the dangers of 5G. The scientists urged the EU to follow Resolution 1815 of the Council of Europe, asking for an independent task force to reassess the health effects.

The cities of Brussels and Geneva have blocked trials and banned upgrades to 5G out of this concern. As 5G technology rolls out across America, cities such as Mill Valley, CA have banned the use of 5G cell towers over concern that they cause cancer. The city voted unanimously to ban the installation of new cell towers carrying the deadly technology, following a massive outpouring of concern from members of the public. We have an opportunity in Davis to do the same. We ask for a moratorium on the rollout of 5G until potential hazards for human health and environment have been fully investigated by scientists independent from industry.

Thank you.

--
Katherine McBride
(408) 505-1913
Davis, CA 95616

Sarah Fasig

From: James Thorne <jhthorne@ucdavis.edu>
Sent: Wednesday, October 23, 2019 6:03 PM
To: citycouncilmembers@cityofdavis.ord; Planning Commission
Subject: No4G/5G in my neighborhood or Davis!

Dear City Council,

I'm writing to object to the installation of Close Proximity Microwave Antennas in Davis, and in my part of Davis particularly (Central). Our wireless and cell phone service is sufficient and I don't want the exposure to additional microwave, particularly for my kids.

If the council decides to vote this in anyway, I think the companies that install it should be forced to sign acceptance of liability for any future health-related problems that may arise, for the entire length of time that the service is operating, and for the lifetime of people exposed to the additional radiation loading.

Please don't use Davis as an experiment for this technology. The tradeoff in terms of wireless connectivity is not worth it!

Thank you

James Thorne
1039 Miller Drive
Davis CA 95616

Better Safe than Sorry

Hazards of 5G Antennas on Utility Poles

From Lauren Ayers, contact: lauren.yolocounty@gmail.com, ***530 321-4662***

References for little-known facts about EMFs (electromagnetic fields), with excerpts. Please note the color coded mentions of **symptoms** of 5G harm and the incredible neglect of **safety**.

Why do so few people know the downsides of WiFi, cell phones, cell towers, routers, and especially 5G? Regulatory agencies have been captured, while state and national elected officials decide to 'go along' with Big Telecom due to election campaign donations. **5G activists want you to join the 90+ local governments (cities or counties) suing the FCC for neglecting the public's interest (pp 4, 12).**

http://www.waldorftoday.com/2013/07/student-science-experiment-finds-plants-wont-grow-near-wi-fi-router/

Student Science Experiment Finds Plants Won't Grow Near WiFi Router

Five ninth-grade young women from Denmark recently created a science experiment that is causing a stir in the scientific community.

It started with an observation and a question. The girls noticed that if they slept with their mobile phones near their heads at night, they often had difficulty concentrating at school the next day. They wanted to test the effect of a cellphone's radiation on humans, but their school, Hjallerup School in Denmark, did not have the equipment to handle such an experiment. So the girls designed an experiment that would test the effect of cellphone radiation on a plant instead.

Garden cress herbs away from Wi-Fi (left) and near a signal (right). (Photo: Kim Horsevad/Hjallerup Skole)

https://ecfsapi.fcc.gov/file/10308361407065/5%20G%20Wireless%20Future-SCCMA%20Bulletin_FEb%202017_pdf.pdf
Only 4 pages!

A 5G Wireless Future: Will it give us a Smart Nation or an Unhealthy One?

Dr. Cindy Russell, M.D.
Jan-Feb 2017 edition of the ***Bulletin*** of the **Santa Clara County Medical Association**

Excerpt:
The most recent and compelling evidence has come from the 2016 National Institutes of Health, National Toxicology Program. Called "The NTP Toxicology and Carcinogenicity Cell Phone Radiation Study," the 10-year, $25 million research revealed conclusively that there was a harmful effect from cell phone microwave radiation. (124,125) The frequencies are similar to other wireless devices we commonly use. The studies were robust, collaborative, well controlled and with double the number of rats required to reveal a significant effect, if present. https://ntp.niehs.nih.gov/ntp/about_ntp/trpanel/2018/march/tr595peerdraft.pdf

The 139 references are posted here:
http://www.sccma-mcms.org/Portals/19/assets/docs/17ZZ-PDF.pdf

https://www.counterpunch.org/2019/05/03/is-5g-worth-the-risks/

Senator Blumenthal says over 300,000 5G antennas will be installed.

In testimony taken by Senator Blumenthal of Connecticut, the FCC admitted it has not conducted any **safety** studies on 5G.

A snappy **2-minute video** produced by **Investigate Europe**

The 5G Revolution

https://youtu.be/JKaoLxw0qJI

https://ehtrust.org/wp-content/uploads/5G_What-You-Need-to-Know.pdf

Only 2 pages

What You Need to Know about 5G Wireless and "Small" Cell

From Britain's Environmental Health Trust

http://electromagnetichealth.org/wp-content/uploads/2018/05/Wires.pdf
156 pages

Re-Inventing Wires: The Future of Landlines and Networks

Timothy Schoechle, PhD, Senior Research Fellow
National Institute for Science, Law and Public Policy

Excerpt:
This report asserts that first and foremost the public needs publicly-owned and -controlled wired infrastructure that is inherently more future-proof, more reliable, more sustainable, more energy efficient, safer, and more essential to many other services. Wireless networks and services, compared to wired access, are inherently more complex, more costly, more unstable (subject to frequent revision and "upgrades"), and more constrained in what they can deliver.

Forward by insider Frank M. Clegg, past president of Microcsoft Canada

Excerpt:
This paper sets the record straight and fills our current information vacuum, offering consumers, business leaders, and policy makers the critical facts they need to rethink a more intelligent and secure future with reliable, secure, wired communications more resilient to storm, flood, and fire, and reducing the enormous carbon footprint from the present wireless approach.

https://www.marinij.com/2018/10/04/fairfax-to-study-fiber-optic-broadband-amid-protest-against-5g/

Fairfax to study fiber-optic broadband amid protest against 5G

Adrian Rodriguez, arodriguez@marinij.com, *Marin Independent Journal,* October 4, 2018

Amid a countywide public outcry, Fairfax officials vowed to explore broadband options that avoid the installation of "small cell" antennas, which protesters say are a health and **safety** hazard.

http://tinyurl.com/y9kr78hv

Professor Olle Johansson of the Karolinska Institute says that compared with EMF radiation penetration of just ten years ago, humans now are receiving "a quintillion" times more, or numerically, that's a one with 18 zeros after it: 1,000,000,000,000,000,000!

https://www.newsweek.com/can-cell-phone-tower-cause-cancer-children-1362314

4th Ripon Child Diagnosed with Cancer, Parents Want Cell Tower Removed

By Anna Gibbs, Newsweek, 3-13-19

Parents in Ripon, California say a cell phone tower in a local schoolyard is to blame for the cancer diagnoses of four students in the last three years.

https://www.westonaprice.org/health-topics/microwave-radiation-coming-lamppost-near/

Microwave Radiation Coming to a Lamppost Near You

Merinda Teller, MPH, PhD, in the **Weston A. Price Foundation** quarterly journal ***Wise Traditions***, 12-1-17

Ecosystem Effects of 5G

Pervasive 5G antennas will have costly impacts on agriculture and the environment. International scientists have expressed alarm about the documented effects of microwave radiation on bees, other pollinators and plants.[36] Because of their size, bees will be especially vulnerable to millimeter wave radiation. Radiofrequency fields in the MHz range also "disrupt insect and bird orientation."[36] As for plants, agri-environmental researchers state that they "form the building blocks of all ecosystems. Disruption to their pollination and subsequent reproduction [may] result in similar declines in plant diversity and knock-on effects to the animals and birds that rely on them."[37]

https://ehtrust.org/key-issues/cell-phoneswireless/5g-internet-everything/20-quick-facts-what-you-need-to-know-about-5g-wireless-and-small-cells/

We have **2-5 million sweat ducts** in our skin which, being full of water, are **especially reactive** to electromagnetic frequencies (EMFs)

https://www.counterpunch.org/2019/05/03/is-5g-worth-the-risks/

Is 5G Worth the Risks?

by Iishana Artra

Pulsed electromagnetic frequencies have also been shown to cause neurological **symptoms**: depression, anxiety, headaches, muscle pain, attention deficits, insomnia, dizziness, tinnitus, skin tingling, loss of appetite, and nausea. https://www.aaemonline.org/emf_rf_position.php

Lloyd Burrell, **ElectricSense**

….A study published in 1975 by **Allan Frey**, a Stanford University biophysicist/ neuroscientist demonstrated that cell phone radiation can open up the blood-brain barrier— the BBB is what protects the brain from toxins. Dr. Frey explains, "after my work appeared and others supported some of it, effectively everything in the US on these topics was shut down."

DeBaun, D. and DeBaun, R. (2017). Radiation Nation: The Fallout of Modern Technology — Your Complete Guide to EMF Protection & Safety: The Proven Health Risks of Electromagnetic Radiation (EMF) & What to Do Protect Yourself & Family. Icaro Publishing.

http://www.sccma-mcms.org/Portals/19/5g-Article.pdf

In a 1981 NASA report, "Electromagnetic Field Interactions: Observed Effects and Theories" microwave sickness was also described. The **symptoms** recorded were headaches, eyestrain, fatigue, dizziness, disturbed sleep at night, sleepiness in daytime, moodiness, irritability, unsociability, hypochondriac reactions, feelings of fear, nervous tension, mental depression, memory impairment, pulling sensation in the scalp and brow, loss of hair, pain in muscles and heart region, breathing difficulties, increased perspiration of extremities. (63)

http://www.electronicsilentspring.com/march-2018-newsletter/

An Electronic Silent Spring

March, 2018 Newsletter from Katie Singer

The industry says we're ready for the **Internet of Things** (IoT), wherein videos take only a few seconds to download, and everything is chipped. Diapers and pill bottles can message your smartphone when your baby's diaper needs changing or your prescription needs a refill…. The industry projects that the average Westerner will own 26 IoT-connected devices within a few years.

….the **1996 Telecommunications Act**'s Section 704 *[states that]* no health or environmental concern may interfere with the placement of a cellular antenna."

Options for the public good

To create affordable, more secure, and healthier Internet access, municipalities like Chatanooga, Tennessee and Longmont, Colorado have organized to deliver fiber optics-to-the-premises as a public utility. Fort Collins, Colorado just passed a bill to do so. San Francisco, Boulder, Traverse City and others are working on it.

Dr. Tim Schoechle advocates for it in his new book, ***Re-Inventing Wires: The Future of Landlines and Networks***. **Satoko Kishimoto** and **Olivier Petitjean**'s 2017 book, ***Reclaiming Public Services***, reports 835 examples of (re)municipalization of public services worldwide.

https://youtu.be/p-aNRQNRtaI

EKG Proof That "Smart" Meters Affect the Human Heart

7-minute video

Citizen Scientist Warren Woodward hooks himself to an EKG monitor near a smart meter, but he doesn't know when the smart meter is on or off. He's not on medication, no heart condition. Yet when the smart meter transmits, the EKG shows disruption. He says there should be a **safety** recall.

https://www.marinij.com/2018/11/01/marin-supervisors-decide-to-join-legal-challenge-to-5g-rollout/

After Marin County's contentious 5G public comment period, the Board of Supervisors announced they are joining 20 other counties and cities [now it's over 90] in a legal challenge. "We have heard considerable concern from members of the community about the … FCC's industry-centric regulations," said Damon Connolly, president of the Board of Supervisors.

https://www.youtube.com/watch?v=F0NEaPTu9oI&t=182s

Jeromy Johnson TED Talk

17 minutes

After this Silicon Valley engineer became electromagnetically sensitive, he investigated our attachment to technology and the consequent health and **safety** hazards.

https://www.theguardian.com/technology/2018/jul/14/mobile-phones-cancer-inconvenient-truths

The Inconvenient Truth about Cancer and Mobile Phones

This article for ***The Nation*** was written by Mark Hersgaard and Mark Dowie.

[Before] **Tom Wheeler** [was] chair of the FCC [Ajit Pai is now chair], he was the president of Telecom's lobbying organization, **Cellular Telecommunications and Internet Association** (CTIA) [when he hired] **George Carlo**, PhD, an epidemiologist with a law degree, who had conducted

3 studies for other controversial industries. In a study funded by Dow Corning, Carlo declared that breast implants posed only minimal health risks. With chemical industry funding, he had concluded that low levels of dioxin, the chemical behind the Agent Orange scandal, were not dangerous. In 1995, Carlo began directing the industry-financed Wireless Technology Research project (WTR), whose eventual budget of $28.5m made it the best-funded investigation of mobile **safety** to date.

[Oddly, however], Carlo told a private meeting of the CTIA's board of directors, whose members included the CEOs or top officials of the industry's 32 leading companies, including Apple, AT&T and Motorola…. to do the right thing: give consumers "the information they need to make an informed judgment about how much of this unknown risk they wish to assume", especially since some in the industry had "repeatedly and falsely claimed that wireless phones are safe for all consumers including children." The very next day, a livid Wheeler began publicly trashing Carlo to the media.

A closer look reveals the industry's sleight of hand. When Henry Lai, a professor of bioengineering at the University of Washington… categorized the studies according to their funding sources... 67% of the independently funded studies found a biological effect, while a mere 28% of the industry-funded studies did. Lai's findings were replicated by a 2007 analysis in ***Environmental Health Perspectives*** https://www.theguardian.com/technology/2018/jul/14/mobile-phones-cancer-inconvenient-truths , which concluded that industry-funded studies were two and a half times less likely than independent studies to find health effects.

https://ehtrust.org/france-new-national-law-bans-wifi-nursery-school/

On January 29, 2015, the **French National Assembly made history** by passing a new national law to reduce exposures to wireless radiation electromagnetic fields. Here are 9 of the 14 requirements:

1. WiFi banned in nursery schools.
2. National radiofrequency agency established.
3. WiFi routers turned off in elementary schools except when needed.
4. Cell phone ads must recommend phones be held ***away*** from the head.
5. Government report to be prepared on electro-hypersensitivity.
6. Cell tower emissions will be limited where the public is exposed.
7. Every town will have a map of cell towers and cell antennas.
8. WiFi hotspots will be labeled with a pictogram.
9. Minimize cell phone exposure for children under 14.

https://www.researchgate.net/publication/270882964_Environmental_Refugees_-_Electrohypersensitives_EHS_in_the_digital_world_-_a_disabled_population_deprived_of_home_work_and_basic_rights

Environmental Refugees --Electrohypersensitivity (EHS) in the digital world-- a disabled population, deprived of home, work and basic rights.

Yael Stein, Mbong Eta Ngole (Save the Children International), Guarav Aggarwal, Joel M Moskowitz
Conference: UNESCO Chair in Bioethics 10th Conference – Bioethics, Medical Ethics, &Health Law

ABSTRACT

Hypersensitive reaction to electromagnetic fields (EMF) was known as Microwave Disease, in radar and electrical workers in the 1940s. Today, ordinary people encounter electrohypersensitivity (EHS) to various forms of EMF, ranging from low EMF to microwave radiation, also known as radiofrequency waves. As cities apply city-wide Wi-Fi and Wi-Max, and schools expand Wi-Fi to younger ages – those with EHS are deprived of the basic human rights to housing, work and public safety. When exposed to cellphones, routers, Wi-Fi, cell towers, smart meters, baby monitors or other cordless electronic devices, those with EHS experience diverse **symptoms**: physical pain including headaches, paraesthesia, cardiac irregularities, chest pressure, impaired thinking, fidgetiness, skin rashes and sleep disturbance. Many are unable to work and must quit their jobs in order to save their health.

https://bioinitiative.org/conclusions/

Unfortunately, the technical jargon of this 1,557-page report interferes with comprehension. However a layperson can skim the references to see that nearly all are from peer-reviewed journals, and the 8 pages of Conclusions convey the importance of safe standards.

Bio Initiative 2012

A Rationale for Biologically-Based Exposure Standards for Electromagnetic Radiation

Conclusions

Overall, these 1800 or so studies report these **symptoms**: abnormal gene transcription (Section 5); genotoxicity and single-and double-strand DNA damage (Section 6); stress proteins because of the fractal RF-antenna like nature of DNA (Section 7); chromatin condensation and loss of DNA repair capacity in human stem cells (Sections 6 and 15); reduction in free-radical scavengers – particularly melatonin (Sections 5, 9, 13, 14, 15, 16 and 17); neurotoxicity in humans and animals (Section 9), carcinogenicity in humans (Sections 11, 12, 13, 14, 15, 16 and 17); serious impacts on human and animal sperm morphology and function (Section 18); effects on offspring behavior (Section 18, 19 and 20); and effects on brain and cranial bone development in the offspring of animals that are exposed to cell phone radiation during pregnancy (Sections 5 and 18).

https://youtu.be/aLxeBuz0suM

Worldwide Protests Against 5G and Cell Towers

16-minute video

Demonstrations (some quite amusing, others inspiring) in Switzerland, Poland, Italy, Sweden, Belgium, India, Canada, Spain, Peru, Ireland, United Kingdom, the USA. Followed by some scientists' commenting on the hazards.

http://www.5gappeal.eu/scientists-and-doctors-warn-of-potential-serious-health-effects-of-5g/

Harmful effects of RF-EMF exposure are already proven

Over 230 scientists from more than 40 countries have expressed their "serious concerns" regarding the ubiquitous and increasing exposure to EMF generated by electric and wireless devices already before the additional 5G roll-out…. **Effects** include increased cancer risk, cellular stress, increase in harmful free radicals, genetic damages, structural and functional changes of the reproductive system, learning and memory deficits, neurological disorders….

https://www.projectcensored.org/4-how-big-wireless-convinced-us-cell-phones-and-wi-fi-are-safe/

Project Censored— How Big Wireless Convinced Us Cell Phones and Wi-Fi are Safe

October 2, 2018

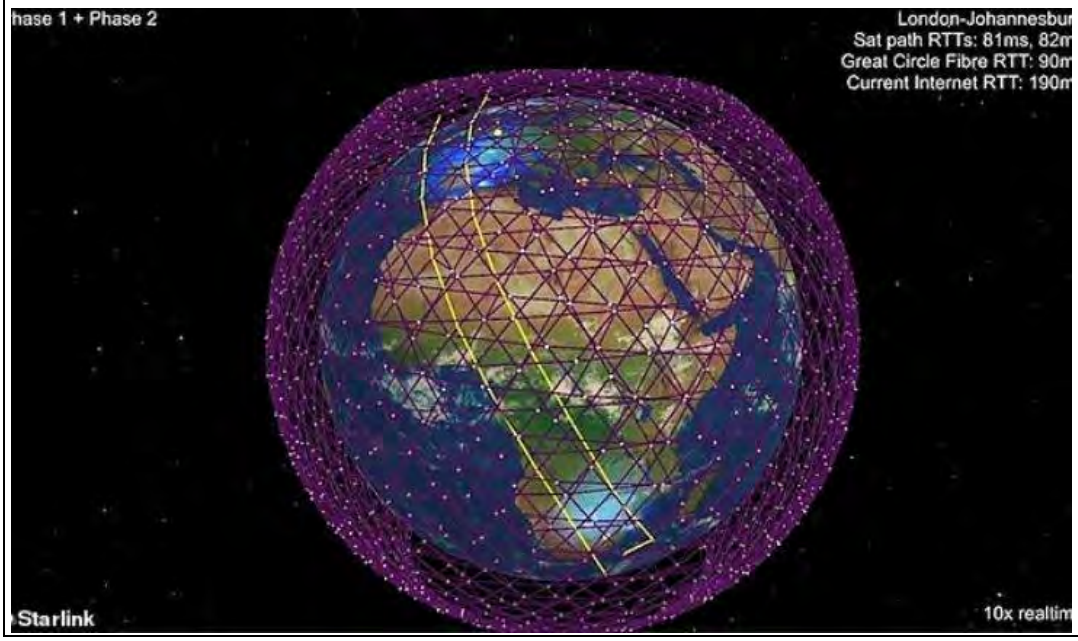
https://www.collective-evolution.com/2019/06/21/news-elon-musks-spacex-begins-launching-4425-satellites-into-low-orbit-for-starlink/

SpaceX Begins Launching 4,425 New Satellites into Low Orbit for StarLink

Elon Musk's SpaceX has already begun launching satellites into space, which are set to provide 5G-like internet to the world.

….Telecom companies around the world aim to install millions of cell towers on electric utility poles, public buildings, schools, bus stop shelters, in public parks, and anywhere else they want– including national parks and on federally owned land.

…. The total number [of satellites] expected to be put into low and high orbit over the coming years will be about 20,000 across all companies. SpaceX will top out at 12,000



Magda Havas, PhD, volunteers a lot of time explaining the problems of WiFi. She introduces the issue by comparing this invisible problem to other hazards we all know about:

> Any parent who doesn't want their child exposed to wireless frequencies at school should have that choice. Now schools are smoke-free zones but once the teachers' lunch room was full of smoke. Nowadays, many schools are peanut-free because peanuts can be so dangerous for kids with peanut allergy. The reaction to WiFi is not as dramatic, but over time it is just as life-threatening, and to a much greater number of students….
>
> With so many students online so much of the school day, there is significantly slower downloading. Ethernet could be employed *[instead]* and it is faster and doesn't cost much. Or kids could go to the computer lab for research and bring back the info to their work area, so they are no sitting in a river of EMFs for 6 hours a day.

Here are some key excerpts from her open letter to parents, teachers, school boards**:**
https://www.magdahavas.com/wp-content/uploads/2012/05/Wi-Fi-Open-Letter2012.pdf

Children's Sensitivity

Children are more sensitive to environmental contaminants and that includes microwave radiation. The Stewart Report (2000) recommended that children not use cell phones except for emergencies. The cell phone exposes your head to microwave radiation. A wireless computer (Wi-Fi) exposes your entire upper body and if you have the computer on your lap it exposes your reproductive organs as well…. That does not mean that students cannot go on the Internet. It simply means that access to the Internet needs to be through wires rather than through the air (wireless, Wi-Fi).

REMOVAL OF WI-FI: Most people do not want to live near either cell phone antennas or Wi-Fi antennas because of health concerns. Yet when Wi-Fi (wireless routers) are used inside buildings it is similar to the antenna being inside the building rather than outside and is potentially much worse with respect to exposure since you are closer to the source of emission.

- Libraries in France are removing Wi-Fi because of concern from both the scientific community and their employees and patrons.

- The Vancouver School Board (VSB) passed a resolution in January 2005 that prohibits construction of cellular antennas within 1000 feet (305 m) from school property. Page 7
- Palm Beach, Florida, Los Angeles, California, and New Zealand have all prohibited cell phone base stations and antennas near schools due to **safety** concerns. The decision not to place cell antennas near schools is based on the likelihood that children are more susceptible to this form of radiation.… The safest route is to have wired internet access rather than wireless. While this is the more costly alternative in the short-term it is the least costly alternative in the long run if we factor in the cost of ill health of both teachers and students.

https://www.sciencedirect.com/science/article/pii/S0048969719301718

Effects of RF-EMF on honey bee queen development and mating success

https://s3.amazonaws.com/nghl-ntge/ntge-1707.pdf This is free access, but I soon saw the value and bought my own copy online.

Nicolas Pineault's concise, clear, primer for achieving EMF sanity.

The Non-Tinfoil Guide to EMFs— How to Fix Our Stupid Use of Technology

EMFs are all on one big spectrum. Some parts of that spectrum are benign (visible sunlight, for instance), other parts are lethal (ionizing radiation).

This FREE, comprehensible eBook explains the four types of EMFs (electromagnetic frequencies):

Radio Frequency	(**RF**)	Cordless phones, 4G, smart meters, WiFi, microwave ovens, Bluetooth
Magnetic Fields	(**MF**)	High voltage power lines, faulty house wiring, chargers
Electric Fields	(**EF**)	Household wiring, power strips, lamps & lighting—
Dirty Electricity	(**DE**)	Fluorescent bulbs, solar panel inverters, dimmer switches

Since 1996, Telecom companies in the US are protected by the **Telecommunications Act** [**TCA**]— which was obtained after the industry spent around $50 million in lobbying efforts.[40] Telecom companies cannot be held accountable if a cell phone antenna or tower ever causes negative health effects— they have **total legal immunity over health effects**, and no one can prevent them from placing new antennas where they want. *(**Section 704** of the TCA)* Page 23

Electricity expert Dave Stetzer has studied how high levels of Dirty Electricity … can affect the health of cows in a major way. Along with other experts in electrical engineering and animal health, he concluded that "cows' behavior, health, and milk production were negatively responsive to harmonic distortions of 'dirty electricity'."[88] ... reducing the levels of dirty electricity … a quarter of a mile away from one dairy increased production by 10 pounds, on average, per cow per day.[89]

The intermittent, pulsing exposure [to RF] showed a stronger effect than continuous exposure…. Up to 10x stronger in 3G cell phones compared to the older 2G networks…. The DNA in rat brains continued to break down for hours after exposure ended…. Excessive DNA damage can cause [these] **effects** … cancer, premature aging, neurodegenerative diseases, reduced fertility, reduced immunity, heart disease or metabolic syndrome. Page 44

EMFs affect certain channels in cell membranes that are called voltage-gated calcium channels (**VGCC**s) which lets excess calcium into the cell, [with results] like autism, type 3 diabetes, and heart disease. Page 45

https://sanfrancisco.cbslocal.com/2018/01/25/consumerwatch-5g-cellphone-towers-signal-renewed-concerns-over-impacts-on-health/

The **International Association of Firefighters** began opposing cell towers on fire stations after many experienced health problems from EMFs. "These firefighters developed symptoms," says Dr.

Gunnar Heuser who conducted a pilot study on firefighters at a station with cell towers, [such as] … memory [loss], intermittent confusion, weakness." (See also http://www.iaff.org/hs/resi/celltowerfinal.htm) Page 8 [Due to their 48-hour shifts, firefighters' cell tower exposure is a natural experiment.]

Heuser says brain scans suggest even low-level RF can cause cell damage and he worries about more vulnerable groups like kids. "We found abnormal brain function in all of the firefighters we examined"…. So, following lobbying by firefighters, Assemblyman Quirk and his co-author exempted fire stations from their bill, making them one place cell companies couldn't put a tower.

https://ehtrust.org/american-academy-pediatrics-issues-new-recommendations-reduce-exposure-cell-phones/

American Academy of Pediatrics Issues New Recommendations for Cell Phones

Nation's largest group of children's doctors responds to new government study linking cell phone radiation to cancer.

http://science.time.com/2013/08/14/power-drain-the-digital-cloud-is-using-more-energy-than-you-think/

The Surprisingly Large Energy Footprint of the Digital Economy

Bryan Walsh, Time

Which uses more electricity: the iPhone in your pocket, or the refrigerator humming in your kitchen? Hard as it might be to believe, the answer is probably the iPhone.

Physicians for Safe Technology https://mdsafetech.org/5g-telecommunications-science/

No Testing, No Regulation, No Safety Guidelines

There has been no premarket testing of this [5G] technology or the mix of frequencies we will be exposed to. There are no protective regulations to assure monitoring of radiation levels for each antenna or a registry to document reported health effects…. Effects on our most vulnerable populations i.e. children, pregnant women, the elderly and those with chronic diseases, have not been taken into account.

Debunking the New York Times

https://zero5g.com/2019/the-miseducation-of-america-on-5g-the-new-york-times-gets-it-spectacularly-wrong/

The Miseducation of America on 5G:

The New York Times Gets It Spectacularly Wrong

Devra Davis, 7-22-19

Summary: The ten corrections in this rebuttal to William Broad's *New York Times* feature article, "**The Health Hazard that Isn't**" (https://www.nytimes.com/2019/07/16/science/5g-cellphones-wireless-cancer.html), range from an inaccurate graph to saying the skin blocks microwaves (it doesn't). The reporter quotes experts employed in the industry to assure us that it's safe, while ignoring voluminous research from independent scientists to the contrary. This is merely a Telecom PR release, proof below.

~ ~

The Gray Lady Didn't Do Her Homework
Instead She Began an Illicit Affair with Verizon

January 2019 report on the 2019 Consumer Electronics Show on the Verizon website. The whole video can be found here: https://www.verizon.com/about/news/hans-vestberg-keynotes-2019-consumer-electronics-show

At minute 15, Mark Thompson, CEO of ***New York Times***, announced, "We're so excited about … the collaboration we're announcing today between the Times and Verizon." He adds a few minutes later, "I can't think of any company we would rather be partnering with than Verizon." Why is Ms.

NYT rationalizing her fling with Verizon instead of covering the thousands of studies showing the harm to users from microwave energy? Because profits matter more than integrity. Page 9

http://emfsafetynetwork.org/new-tri-fold-brochure-what-are-emfs/

What are EMFs? *Share this 3-color, 3-column flyer with your friends and neighbors.*

This group educates and empowers with science and solutions to reduce electromagnetic frequencies. They improve lives and get environmental justice by changing public policy.

https://ehtrust.org/key-issues/cell-phoneswireless/telecom-insurance-companies-warn-liability-risk-go-key-issues/

What AT&T tells *shareholders* . . . but *not* the rest of us:

"Unfavorable litigation or governmental investigation results could require us to pay significant amounts…

As we deploy newer technologies, especially in the wireless area, we also face current and potential litigation relating to alleged adverse health effects on customers or employees who use such technologies including, for example, wireless handsets.

Getting Informed about 5G

By Katie Singer
Published in the Summer edition of the Weston A. Price Foundation's quarterly journal:
https://www.westonaprice.org/health-topics/getting-informed-about-5g/

Katie wrote ***Electronic Silent Spring*** and most recently is focused on 5G.

Here's a summary of this 7-page article that, hopefully, encourages you to read it:

- From the first cell phones to now, when setting **safety** standards, the FCC has never considered ***any*** non-thermal research (i.e. electromagnetic— EMF— effects), despite the fact that we are electrical creatures from our individual cells to our very complex brains.
- Fiber optics vs. wireless transmission: telecom uses fiber optics (which is both more efficient and entirely safe) to move data to cell towers, but then, in order to complete the delivery to consumers, they use wireless transmission because that's taxed much less than wired, due to ALEC-written model legislation. (Thanks, Koch brothers, for funding the corporate-friendly, consumer-**un**friendly American Legislative Exchange Council!)
- As of January 2019, half the states passed these ALEC regulations, which severely limit states' and municipalities' rights to use NEPA (the 1970 National Environmental Policy Act) to limit cell antenna locations, and which eliminates the normal requirements for neighborhood notifications and public hearings about installation of telecom equipment. Governor Brown vetoed that bill here in California.
- Plus, the fees that Telecom pays for using the public Right of Way (utility poles) were set very low, which local governments cannot renegotiate, so the infrastructure that taxpayers provide by default will build Telecom's profits even further.
- Brussels, Geneva, and other European cities have halted 5G due to health concerns.
- What people can do to minimize their families' EMF exposure.

Singer's central two points are that we can finally get state and local oversight of 5G by:

1. Passage of **House Rule (HR) 530**, would invalidate the FCC (Federal Communications Commission) plan to speed up the deployment of 5G small cells throughout the US. Introduced to Congress by California Representatives Anna Eshoo, who represents Silicon Valley, there are now 49 co-sponsors. **Ask your Congressperson to co-sponsor it too**.
   https://mdsafetech.org/2019/01/22/congresswomen-eshoo-and-speier-introduce-hr-530-to-block-fcc-cell-tower-preemption/

2. Stopping the fiber optic build-out that is essential to Telecom's 5G plans. About half of American cities have already approved this build-out, but the ones which have not yet agreed can Page 10 **block 5G** by preventing this fiber optic upgrade that 5G must have, and demand proof of **safety** before 5G can be used. This will set up a natural experiment that will show if there's a difference in health between places with 5G and the ones without.

https://www.ncbi.nlm.nih.gov/pubmed/28392066
Environ Int. 2017 Jul;104:122-131. doi: 10.1016/j.envint.2017.03.024. Epub 2017 Apr 7.

Maternal cell phone use during pregnancy and child behavioral problems

Birks, L., et al

Maternal cell phone use during pregnancy may be associated with **symptoms** such as an increased risk for behavioral problems, particularly hyperactivity/inattention problems, in the offspring.

https://www.techdirt.com/articles/20190128/12533441477/fcc-accused-colluding-with-big-carriers-5g-policy.shtml

FCC Accused of Colluding with Big Carriers on 5G Policy

Karl Bode, ***TechDirt***, 2-4-19

….But cities like Philadelphia https://ecfsapi.fcc.gov/file/10933871320476/City%20of%20Philadelphia%20Comment%20to%20Deaf%20Declaratory%20Ruling%20and%20Third%20Report%20and%20Order%20(WT%20Docket%20No.%2017-79%20and%20WC%20Docket%20No.%2017-84.pdf, numerous small counties *[Yolo County and our four cities could emulate this letter: https://ecfsapi.fcc.gov/file/10919689409608/Broadband_Deployment_Ltr_to_FCC_09192018.pdf]*, and consumer groups disagree with the FCC, stating that the FCC's policy changes were little more than a hand out to large carriers, with the price caps barely covering local government costs …. In some instances, the FCC's new order invalidated existing contracts local governments.

….While the FCC's decision was already being criticized as an over-reach, that controversy just got much louder. This week, the heads of the **House Energy and Commerce Committee,** and the **Subcommittee on Communications and Technology** (**Frank Pallone** and **Mike Doyle**) fired off a letter to the FCC https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/FCC%20Ltr%201.24.19.pdf effectively accusing the agency of colluding with carriers to help ensure the industry's favored policies had a better shot surviving a court challenge.

https://www.eastbayexpress.com/oakland/the-next-generation-of-cell-towers-has-a-next-generation-of-deregulation/Content?oid=26891565

The Next Generation of Cell Towers Has a Next Generation of Deregulation

A 2018 FCC rule that weakened the power of cities to regulate 5G networks could end the ability of cities to even notify their residents about forthcoming installations.

By Erin Banks Rusby, ***East Bay Express***, 7-10-19

….Chris Hoofnagle, a law professor and director of the UC Berkeley's Center for Law and Technology, said that while he was not familiar with the order it sounded typical of a strategy known as **preemption** — the power that the federal government has to override the power of local jurisdictions on issues of commerce.

https://www.businessreport.com/newsletters/5g-cell-tower-ordinance-rewrite-now-expected-to-go-before-council-in-september

5G Cell Tower Ordinance Rewrite

Annie Ourso Landry, *Greater Baton Rouge Business Report*, 8-28-19

…. Cities across the U.S. are pushing back against the FCC rules, arguing they infringe upon local authority to zone and regulate infrastructure like small cell towers. **Over 90 cities and**

counties have joined together in a lawsuit, currently before the Ninth Circuit Court of Appeals, saying the FCC has overstepped its authority, *The Wall Street Journal* reports.
https://www.wsj.com/articles/cities-are-saying-no-to-5g-citing-health-aestheticsand-fcc-bullying-11566619391 Page 11

Gary Patureau, who heads up the 5G cell tower task force, says … "The FCC ***does*** allow you to consider **property value**." [Property values can drop up to 20% when cell antennas are installed.]
https://ehtrust.org/cell-phone-towers-lower-property-values-documentation-research/

https://whatcomwatch.org/index.php/article/what-is-5g-and-why-should-you-care/

What Is 5G and Why Should You Care?

Leslie Shankman, *Whatcom Watch*, June 2019

….**Arthur Firstenberg**, author and activist who founded the **Cellular Phone Task Force**, is a leading voice in matters related to electromagnetic frequencies (EMFs)…. Firstenberg equates going from 4G to 5G to going from "blankets to bullets." ….He explains that the most important fact to understand about 5G is called "phased array." In order to connect so many things to the internet to make them "Smart" and do what we want them to do, a much greater bandwidth is needed. However, the greater the bandwidth, the shorter the waves. https://scientists4wiredtech.com/what-are-4g-5g/5g-wavelengths-from-blankets-to-bullets/

….To support and direct these short waves, there need to be cellular base stations placed very closely together, about 500 feet apart along every street. Since the boxes must blast their signals in order to get them inside homes and buildings, the only way to do this economically is with phased arrays and focused beams that are aimed directly at their targets. Think — there will be transmitting cellular base stations everywhere; on utility poles, on bus stops, on buildings including hospitals and schools, to achieve the needed close proximity.

….On January 15, 2019, Congresswoman Eshoo introduced **H.R. 530**, the **Accelerating Wireless Broadband Development by Empowering Local Communities Act of 2019**. This legislation addresses overturning the new limiting FCC regulations which constrict local authority. (26) On April 15, 2019, Oregon Congressman Peter Defazio sent a letter to Ajit Pai asking the FCC to answer three specific questions regarding 5G **safety** and also asking for agency-wide transparency for the American public.

https://www.benton.org/blog/your-communitys-role-future-5g Robbie McBeath, September 21, 2018

Your Community's Role in the Future of 5G

But many municipal groups … [say this] federal overreach could harm public safety and local governments' ability to collect vital revenue…. The **National League of Cities** is also opposed….

The National Association of Counties is objecting too, says spokesman Brian Namey. "…the FCC would effectively hinder local governments' fulfillment of **public health and safety** responsibilities during the construction, modification or installation of broadcasting facilities." **U.S. Conference of Mayors** complained that the FCC itself estimated its streamlining "threatens future revenues to local (and state) governments by billions of dollars over the next decade."

….Debbie Goldman, the **Communications Workers of America**'s representative on the FCC's Broadband Deployment Advisory Committee's Model Code for Municipalities Working Group, filed a letter on September 18 to express concern with the FCC's draft order. "The draft order is … ignoring the views of critical stakeholders," she wrote.

http://www.stayonthetruth.com/resources/Norm_Alster/capturedagency_alster.pdf

Captured Agency:

How the FCC Is Dominated by the Industries It Presumably Regulates

Norm Alster, 6-29-15, Harvard's Safra Center for Ethics

Executive summary by Lauren Ayers of the 62-page report (editorial tightening indicated by gray text instead of black). For more info, contact Lauren at: 530 321-4662, lauren.yolocounty@gmail.com

Page 4-5

Chapter One: The Corrupted Network

President Obama overlooked Tom Wheeler's lobbyist past to nominate him as FCC chairman in 2013. Wheeler had, after all, raised more than $700,000 for Obama's presidential campaigns. Previously Wheeler led the two most powerful industry lobbying groups: **CTIA** (the Cellular Telecommunications Industry Association) and **NCTA** (the National Cable and Telecommunications

Page 6

Meanwhile, the cable industry's NCTA employs former FCC chairman Michael Powell as its president and CEO. Cozy, isn't it?

Page 10

Chapter Two: Just Don't Bring Up Health

It all begins with passage of the **Telecommunications Act of 1996**, as "the most lobbied bill in history." Congressional staffers who helped lobbyists write the new law did not go unrewarded. Thirteen of fifteen staffers later became lobbyists themselves.[9] The FCC never tested any electromagnetic effects. Furthermore, they only did rudimentary tests to make sure ***heat*** from cell phones didn't raise a user's temperature.

Page 12

The Cellular Telecommunications Industry Association's proud moment was reproduced in the Alster report:

July 24, 2013

CTIA Blog

But our position as the world's leader was no accident. It started with the Clinton Administration that had the foresight to place a "light regulatory touch" on the wireless industry, which was in its infancy at the time. That light touch has continued through multiple Administrations.

Page 15

The rating agency A.M. Best, which advises insurers, had RF Radiation at the top of its list of "emerging technology-based risks," stating that "cellular antennas act at close range essentially as open microwave ovens, and can cause eye damage, sterility and cognitive impairments."[24]

Alster's team surveyed 200 people's knowledge of the FCC. Only 3 people knew that this statement is true: "The U.S. Congress forbids local communities from considering health effects when deciding whether to issue zoning permits for wireless antennae."

Page 56

On a scale of 1 to 100, the FCC had a trust level of 46. But if the tripling of brain tumor risk is proven true, that number falls all the way to 25. And if "lobbying and campaign contributions" have kept the government from acknowledging wireless hazards, participants' trust drops again, to 20.

Pages 17-18

Chapter Three: Wireless Bullies and the Tobacco Analogy

Many survey participants claim they would change behavior— reduce wireless use, restore landline service, protect their children— if health dangers of wireless are found to be true.

Page 21

Until recently it was impossible to gain any real sense of brain tumor risk from wireless since brain tumors often take 20 or more years to develop. The *International Journal of Oncology* published Hardell and Carlberg's study showing that those who used cell phones the most had nearly three times the glioma incidence.[35] Page 13

Page 26

Chapter Four: You Don't Need Wires to Tie People Up

The industry has managed to make the entire world dependent on its products. Even tobacco never had so many hooked users.

Page 28

Motorola lined up V.A. scientist Jerry Phillips, who found that sometimes DNA damage increased with exposure.[50] Phillips received a phone call from Motorola telling him that his study wasn't ready for publication. Phillips went ahead and published his findings in 1998. But since then, Phillips' industry funding has dried up. He said, "There is no government money to do research because government is controlled by industry."[51]

Chapter Five: Telecom Is Rich, Yet Still Expects Handouts

Page 33

Dr. Hardell, professor of Oncology and Cancer Epidemiology at the University Hospital in Orebro, Sweden, says administrators should "ban wireless use in schools and pre-school" because there are much safer wired alternatives, "You don't need Wi-Fi."[60] Studying the introduction of computers into North Carolina homes, Duke University researchers Vigdor and Ladd found that academic performance actually declined, and students in the lowest income families declined the most. [61, 62]

Page 35

Kentaro Toyama, co-founder of Microsoft's research lab in India, and mentor for at least a dozen school projects concluded: "The value of technology has been over-hyped and over-sold." He said that the total costs of ownership— including maintenance, training, and repair— typically run to five or ten times the initial cost….Technology by itself never has any kind of positive impact."[65] But that hasn't kept the FCC from spending scores of billions subsidizing technology for the very groups least likely to benefit from it.

Chapter Six: The Cable Connection

Page 41

As the late 90s approached, the Internet was no longer an infant industry. Still, the exemption from access charges was extended, a key factor in boosting usage and siphoning advertisers from print media,[75] accelerating their decline. Meanwhile, a Supreme Court-sanctioned exemption from collecting sales tax[76] was the death knell for many smaller mom and pop local businesses.

https://www.telecompaper.com/news/uke-head-say-polish-radiation-standards-impede-5g-development--1307141 (full article requires free subscription)

The U.S. allows **100 times greater** exposure to radio frequency (RF) radiation from cell towers than some other countries. Our exposure limit is **10 watts** per square meter, which was developed to prevent acute heating effects.... Poland's exposure limit is **0.1 watts** per square meter— 100 times less exposure than the U.S. permits. — Joel Moskowitz, **UC Berkeley School of Public Health**

https://pacificsun.com/sleeper-cells/

Sleeper Cells

North Bay activists warn of serious health impacts associated with 5G devices

Stephanie Hiller, *Pacific Sun*, 9-12-19

Last September the Federal Communications Commission (FCC) adopted new regulations to remove barriers to 5G deployment, exempting installation from environmental review, a move that prompted the backlash. The city of **Fairfax** and the **County of Marin** joined more than 25 West Coast cities in legal actions to challenge the FCC's preemption. The court challenges bore some fruit. Last month, Oklahoma's United Keetoowah Band of Cherokee Indians won an order overruling the FCC's attempt to prevent local environmental and historical reviews....

5G is quite different than the generations that preceded it. It uses a different type of microwave, with a higher frequency that enables faster transmission of information and optimizes new autonomous gadgets that talk to one another....

Epidemiologist **Devra Davis** is the director of the environmental think tank **Environmental Health Trust**. She's written that 5G tech has the power to **disrupt the flight patterns of bees and birds**, and could also disrupt aircraft navigation. CBS news reported last May that the tech could interfere with weather forecasting....

"There is no doubt that 5G will affect health," says **Dafna Tachover**, citing the results of a $25 million study undertaken by the **National Toxicology Program** in 2017, which found a link between cumulative exposure to electromagnetic radiation and two rare types of brain cancer and DNA breaks…. Tachover was the Director of Information Technology for the **Israeli Defense Force** (IDF) when she says she developed symptoms of electromagnetic sensitivity.

Petaluma's ordinance is the strongest in the North Bay. It prohibits small–cell installation on city–owned poles, allows towers on electrical utility poles only in mixed–use commercial zones, (not in residential areas) and decrees a 1,500-foot setback from any two towers....

"The industry claims that the guidelines give them more freedom," Assistant city attorney in Petaluma Lisa Tannenbaum says, "but a suit in the 9th Circuit Court claims that the location of poles is beyond the jurisdiction of FCC. The FCC is responsible for regulating communications." Resolution of this suit is expected by the end of the year....

If the Ninth Circuit Court of Appeals acknowledges the FCC does not control local infrastructure, that could support the fight for local control. In the meantime, the FCC's attempt to usurp local control prompted legislation to restore municipal authority by **Sen. Dianne Feinstein** (**S. 2012**) and **U.S. Rep. Anna Eshoo** (**HR. 530**).

Anti–5G Novato attorney Harry Lehmann notes, "If cities have the courage, they can stop this." "It's now established that this radiation is carcinogenic and harmful to health," he says. "Cities that go along with the industry people are in direct conflict with their civic responsibilities."

I Do Solemnly Swear

In California, the oath of office for city council members and county supervisors states:

> I do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of California, and that I will faithfully discharge the duties of the office of city council member according to the best of my ability.

Which means local elected representatives are obliged to care about health, no matter what the FCC says, because our California State Constitution begins with these two sentences:

All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining **safety**, happiness, and privacy. Page 15.

Sarah Fasig

From: Sarah Fasig
Sent: Wednesday, October 23, 2019 5:37 PM
To: Sherri Metzker
Subject: FW: Re discussion of 5G at tonight's Planning Commission
Attachments: 5G – References, provided by Lauren Ayers, 10-7-19.docx

From: Lauren Ayers
Sent: Wednesday, October 23, 2019 4:41 PM
To: Herman Boschken ; Cheryl Essex ; Stephen Mikesell ; David Robertson ; Greg Rowe ; Darryl Rutherford ; Stephen Streeter ; Emily Shandy
Cc: CMOWeb ; Kelly Stachowicz ; Ashley Feeney ; Clerk Web
Subject: Re discussion of 5G at tonight's Planning Commission

Hello Civic Minded Davis Residents,

As a volunteer who greatly appreciates your volunteer work for the city of Davis, I put hours of work into searching for legitimate information about ways 5G is hazardous and, behond that, ways taxpayers are being required to subsidize the high profits of Big Telecom and merchandisers like Amazon, as well as data collectors like Facebook and Google.

There are about 50 brief excerpts in these 15 pages, with links to each one so that you can see for yourself what it says and the qualifications of the authors.

Please include this collection of references in the public records.

Knowledge is power, and better safe than sorry.

Lauren Ayers
Past resident of Davis for 9 years
P.O. Box 62
Guinda, CA 95637

530 321-4662
lauren.yolocounty@gmail.com

Sarah Fasig

From: Barbara Archer
Sent: Monday, November 18, 2019 11:04 AM
To: City Council Members; Planning Commission
Subject: FW: Your slides on Local Regulation of Wireless Telecommunications Facilities under the FCC Report & Order

Follow Up Flag: Follow up
Flag Status: Flagged

Dear Councilmembers and Planning Commission members,

I was asked by the writer of this email to forward it on to you.

Best,

Barbara

Barbara Archer
Communications and Customer Service Manager
(office) 530-747-5884
(mobile) 530-400-3418
City of Davis
City Manager's Office
23 Russell Blvd, Suite 1, Davis, CA 95616

CityOfDavis.org

From: Mark Graham
Sent: Saturday, November 16, 2019 11:44 AM
To: Barbara Archer ; ikhalsa@rwglaw.com
Subject: Your slides on Local Regulation of Wireless Telecommunications Facilities under the FCC Report & Order

November 16, 2019

Ms. Barbara Archer,

Please forward this message to each member of the City of Davis Planning Commission and City Council. Thank you.

Ms. Inder Khalsa,

I read your slide presentation to the City of Davis on "Local Regulation of Wireless Telecommunications Facilities under the FCC Report & Order" dated September 24 and I offer a few comments.
Related to your slide presentation and my comments on them I am asking you to provide certain information to the Planning Commission and City Council, which I will describe.

http://documents.cityofdavis.org/Media/Default/Documents/PDF/CityCouncil/CouncilMeetings/Agendas/20190924/08-Wireless-Telecommunications-Informational-Presentation.pdf

With all due respect I believe you have made a couple of mistakes in your slides.

#1 Slide 13, which says that the City, "Cannot 'incommode' wireless providers." That's not what the law says. You quoted Public Utilities Code Section 7901 on slide 12 and then misstated it on slide 13. It is the wireless companies that cannot "incommode" the public use of the road or highway . . . . , not the City.

#2 You have failed to explain what this means:

"No State or local government or instrumentality thereof
may regulate the placement, construction, and
modification of personal wireless service facilities on the
basis of the environmental effects of radio frequency
emissions to the extent that such facilities comply with the
[FCC's] regulations concerning such emissions."

Slide 8, quoting 47 U.S.C. § 332(c)(7)(B)(iv).

What does this mean?! That was one of the 2 questions I told the Davis Planning Commission when I spoke to them during public comments last month that they needed to ask you. The other question was, "What CAN the City do?", which I will also address.

Many city attorneys fail to explain to their Councils and Planning Commissions what 47 U.S.C. § 332(c)(7)(B)(iv) means. They are taking the easy way out and failing their cities. It is not self explanatory by any means. It is a vague and ambiguous statement. Our City Attorney in Elk Grove, Jonathan Hobbs, failed to explain it to either the Elk Grove Planning Commission or the Elk Grove City Council, both of which went through the entire policy making process with NO explanation from our City Attorney as to what it means. It was a major and significant oversight; major because this is THE key provision in the Telecommunications Act of 1996 as far as partially preempting local government regulatory authority, and significant because ALL of the Elk Grove Planning Commissioners and City Council members took it to mean that the City lacked the power to do anything to protect residents' health from cell antenna electromagnetic radiation (EMR) and consequently they refused to even consider ANY of the residents' recommendations that the City should do that, and how the City should do that. We had made many good recommendations and they categorically ignored all of them based on this mistaken belief.

In my opinion for you to explain what 47 U.S.C. § 332(c)(7)(B)(iv) means to a Planning Commission and a City Council and staff is front and center in terms of a city attorney's responsibility, just as a city attorney has a

responsibility to explain ANY law that partially preempts city regulatory power on any issue on which a city were about to make policy. I ask you to give the City of Davis Planning Commission and City Council a full explanation as soon as possible, both in writing and at an upcoming meeting.

Equally important and essential to the Council's and Commission's understanding of the City's legal power is an explanation of what the City CAN do in terms of regulating cell antennas. I ask you to brief the Council and Commission on this too, in writing and at a meeting.

In particular the City has the power, notwithstanding 47 U.S.C. § 332(c)(7)(B)(iv), to:

#1 Regulate cell antennas in all ways not specifically preempted by federal law.
47 U.S.C. § 332(c)(7)(A) says:

(7) Preservation of local zoning authority
(A) General authority
Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

#2 Regulate the operation of cell antennas on any basis, including on the basis of the environmental and health effects of radio frequency emissions from the cell antennas. Part of the operation of a cell antenna is its effective radiated power. I recommend that the City of Davis regulate the operation of cell antennas by limiting the effective radiated power of each cell antenna to 150 microwatts per square meter at all times and at locations where people are, such as in homes, in front yards, on the sidewalk or street, etc.
Regulation of the operation of cell antennas is not preempted, although in the 1995 draft of the Telecommunications Act it was going to be preempted. Congress omitted "operation" from the final version, which became the Telecommunications Act of 1996.

#3 Regulate cell antennas in ways that limit the number of cell antennas and their proximity to homes. There is no preemption of this. This is what the residents of the City of Davis have been asking for. There are many ways to do this. The simple requirement that the wireless carrier must obtain a permit of any kind from the City limits the number of cell antennas and their proximity to homes. Clearly the City has the power to do this. Nobody would disagree with this, even the FCC and wireless companies.

#4 Establish aesthetic standards for cell antennas. Even the FCC acknowledges this in FCC Order 18-133 (paragraphs 86-88, page 45). Please explain to the Council and Commission the full range of what aesthetics requirements the City can set.

#5 Regulate cell antennas in order to prevent (or "on the basis of") reduction in house values. It is well known that a cell tower near a home lowers the market value of the home. California real estate law requires sellers to disclose to potential buyers the presence of a cell tower and other hazards. Cell antennas are smaller than cell towers and so they have the same effect, but the effect (reduction in house values) is smaller. Protecting house values is a legitimate goal of the City.

#6 Regulate cell antennas without explicitly stating, in each case, the "basis" for the regulation. There is no requirement in state or federal law for a City to identify the basis of each and every regulation on cell antennas.

The case *T-Mobile West LLC. v. City and County of San Francisco, et. al.*

Please address the following case and its relevance and applicability to the City's regulatory power. On April 4, 2019, the California Supreme Court decided the case of *T-Mobile West LLC. v. City and County of San Francisco, et. al.*, Case No. S238001.
The Court decided that aesthetic considerations can include protecting residents against negative health consequences.
The Court decided that a city's broad police power includes the power to set aesthetic requirements.

Under the California Constitution, cities and counties "may make and enforce within [their] limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal. Const., art. XI, § 7.) General laws are those that apply statewide and deal with matters of statewide concern. (Eastlick v. City of Los Angeles (1947) 29 Cal.2d 661, 665.) The "inherent local police power includes broad authority to determine, for purposes of the public health, safety, and welfare, the appropriate uses of land within a local jurisdiction's borders." (City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc. (2013) 56 Cal.4th 729, 738 (City of Riverside); see also Big Creek Lumber Co. v. County of Santa Cruz (2006) 38 Cal.4th 1139, 1151 (Big Creek Lumber).) The local police power generally includes the authority to establish aesthetic conditions for land use. (Ehrlich v. City of Culver City (1996) 12 Cal.4th 854, 886; Disney v. City of Concord (2011) 194 Cal.App.4th 1410, 1416.)

(pages 4-5)

The Court also decided that aesthetic requirements can affect negative health consequences.

We also disagree with plaintiffs' contention that section 7901's incommode clause limits their right to construct lines only if the installed lines and equipment would obstruct the path of travel. Contrary to plaintiffs' argument, the incommode clause need not be read so narrowly. As the Court of Appeal noted, the word " 'incommode' " means " 'to give inconvenience or distress to: disturb.' " (T-Mobile West, supra, 3 Cal.App.5th at p. 351, citing Merriam-Webster Online Dict., available at <http://www.merriam-webster.com/dictionary/incommode> [as of April 3, 2019].)8 The Court of Appeal also quoted the definition of "incommode" from the 1828 version of Webster's Dictionary. Under that definition, "incommode" means " '[t]o give inconvenience to; to give trouble to; to disturb or molest in the quiet enjoyment of something, or in the facility of acquisition.' " (T-Mobile West, supra, 3 Cal.App.5th at p. 351, citing Webster's Dict. 1828—online ed., available at <http://www.webstersdictionary1828.com/Dictionary/incommode> [as of April 3, 2019].) For our purposes, it is sufficient to state that the meaning of incommode has not changed meaningfully since section 7901's enactment.9 Obstructing the path of travel is one way that telephone lines could disturb or give inconvenience to public road use. But travel is not the sole use

of public roads; other uses may be incommoded beyond the obstruction of travel. (T-Mobile West, at pp. 355-356.) For example, lines or equipment might generate noise, cause negative health consequences, or create safety concerns. All these impacts could disturb public road use, or disturb its quiet enjoyment.
(pages 8-9)
(emphasis added)

In other words the City can set aesthetics standards intended to protect against noise, negative health consequences, or safety concerns.

Please explain to the Council and Commission how this California Supreme Court decision applies to and affects the City's regulatory power over cell antennas in light of 47 U.S.C. § 332(c)(7)(B)(iv) and 47 U.S.C. § 332(c)(7)(A).

Planning for the possible (and probable) overturn of FCC Order 18-133

Last item. As you know many cities and municipal leagues have sued the FCC to overturn FCC Order 18-133. Rep. Anna Eshoo has also introduced H.R. 530, a bill that would rescind that Order. The Order significantly reduces local government's regulatory power over cell antennas. If the Court of Appeals overturns the Order, in whole or in part, or if H.R. 530 becomes law, local governments including the City of Davis will have greater regulatory power over cell antennas. You alluded to this in slides 13 and 15-19. In the event that either of those things happens I recommend that the City write into its zoning ordinance that all the requirements that are in the ordinance to comply with the Order are automatically terminated without further action by the City, and that the City write replacement provisions into the zoning ordinance that will take effect in such case.

Thank you.

Sincerely,

Mark Graham
Keep Cell Antennas Away From Our Elk Grove Homes
http://www.keepcellantennasawayfromourelkgrovehomes.org/
Sent from my hard wired computer

Local Regulation of Wireless Telecommunications Facilities under the FCC Report & Order

9.24.19 Inder Khalsa, City Attorney

FEDERAL LAWS REGARDING WIRELESS TELECOMMUNICATIONS

Federal Telecommunications Law

The Communications Act of 1934

- Established the Federal Communications Commission (FCC)
- Regulates interstate and foreign communications by wire or radio

Federal Telecommunications Law

The Communications Act of 1934

- 1934 to today: The FCC's prominence and significance has increased immensely as communications technology became integral to society
- FDR to Obama: Interstate communication increased, Obama calls for #BetterBroadband

Telecommunications Act of 1996

The Federal Telecommunications Act of 1996

- Purpose: "to provide for a pro-competitive, **de-regulatory** national policy framework designed to accelerate rapidly **private sector** deployment of advanced information technologies and services to all Americans by opening all telecommunications markets to **competition**...."
  - (H.R. REP. NO. 104-458 (1996)).

Federal Preemption of Local Zoning Control

Zoning regulations must not "prohibit or have the effect of prohibiting the provisions of personal wireless services."

47 U.S.C. § 332(c)(7)(B)(i)

- Cannot ban wireless services.
- Cannot have the effect of banning wireless services or "materially inhibit" the provision of service.
- Cannot prevent a service provider from closing a significant gap in its service coverage, densifying a network, or improving existing service.

Eligible Facilities/Collocation

Middle Class Tax Relief and Job Creation Act of 2012

- Section 6409(a)
- Interpreted by FCC in 2014 to allow "Eligible Facilities Requests" by right
- Collocation or "minor modification" to existing facility
- **No local discretion**

CONSIDERATION OF RADIO FREQUENCY (RF) EMISSIONS

Federal Telecommunications Act of 1996

"No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [FCC's] regulations concerning such emissions."

(47 U.S.C. § 332(c)(7)(B)(iv))

CONSIDERATION OF RADIO FREQUENCY (RF) EMISSIONS

Under Federal law, the City may NOT regulate wireless facilities, including small wireless facilities, based on concerns about the health impacts or environmental impacts of RF emissions.

City CAN require that all facilities meet FCC standards regarding RF emissions.

RECENT DEVELOPMENTS REGARDING RF STANDARDS

August 8, 2019:

- The Chair of the FCC announced a proposal to maintain the FCC's existing standards for RF emissions, which haven't been updated since 1996

August 9, 2019:

- The Washington, D.C. Court of Appeals vacated the FCC's decision to exempt small cells from National Environmental Protection Act (NEPA) review, urging the FCC to consider the potential cumulative impacts of small cell facilities on the environment
- *United Keetoowah Band of Cherokee Indians in Oklahoma v. F.C.C.*, 933 F.3d 728, 740–42 (D.C. Cir. 2019)


TELECOMMUNICATIONS IN THE RIGHT-OF-WAY

State Laws Regarding Telecommunications in the ROW

Public Utilities Code Section 7901

- "Telegraph or telephone corporations may construct lines … along and upon any public road or highway, … and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway ..."

Applies to wireless telecommunications facilities.
CPUC Decision 18-04-007 (April 26, 2018)

"Time, Place, and Manner"

- Cities can impose "time, place, and manner" restrictions on telephone companies using the right-of-way, including aesthetic restrictions.
- Cannot "incommode" wireless providers.
- Until recently, cities could also could exercise total ownership and control of city-owned facilities
- This changed in April 2019 with the effective date of the FCC Report and Order

SMALL CELL FACILITIES

FCC REPORT AND ORDER

Issued September 27, 2018; effective April 15, 2019

Established a new category: “Small wireless facilities”

Strictly limits local control over small wireless facilities, whether on private property or in the public right of way

PREEMPTION OF LOCAL REGULATIONS

Local regulations of small wireless facilities must be:

- Reasonable and related to aesthetics or interference with the right of way
- No more burdensome than regulations applied to other types of infrastructure deployments
- Objective (non-discretionary)
- Published in advance

NEW "SHOT CLOCK" DEADLINES

Local agencies must act on a small wireless facility application within:

60 days for collocation on an existing structure

90 days for facilities on a new structure

LIMITS ON LOCAL FEES

The Report and Order limits the imposition of fees for:

- Processing applications
- The use of the public right-of-way
- The privilege of attaching fixtures to City-owned property

City must document costs and establish "reasonable fees" or rely on "safe harbor fees."

PENDING LEGAL CHALLENGE TO THE REPORT AND ORDER

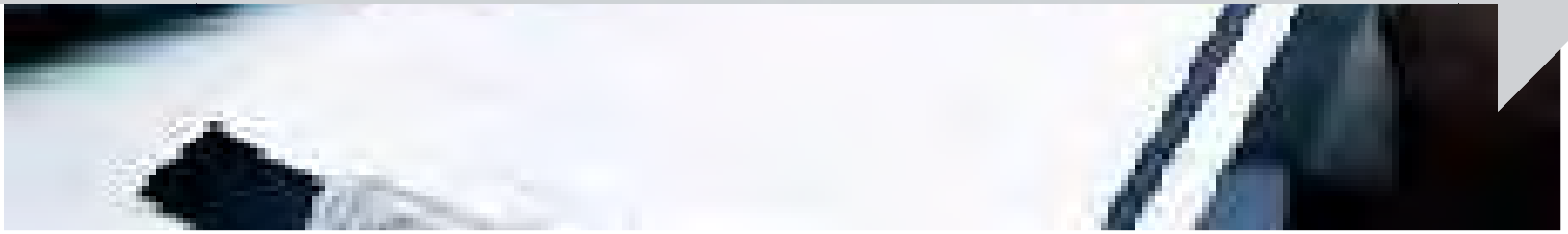
Numerous municipalities have filed legal challenges to the Report and Order

Cases have been consolidated in the 9th Circuit and briefed

No date scheduled for oral argument

Municipalities' motion to stay the effect of the Report and Order was denied

MASTER LICENSE AGREEMENT



DEVELOPED AS AN INTERIM MEASURE TO BE INTEGRATED AS A COMPONENT OF THE FUTURE WIRELESS TELECOMMUNICATIONS ORDINANCE

Allows City to approve small wireless facilities as required by Federal law with staff-adopted aesthetic guidelines before adoption of ordinance

Use of an agreement provides vehicle for requiring compliance with aesthetic requirements, building and fire codes, RF standards, indemnification of the City, etc.

Provides that the design/aesthetic standards in place at the time of application for a new facility apply

Provides that if the Report and Order is overturned in court, the City can increase rents on existing facilities.

Allows City to update its standards to reflect changes in technology and law

NEXT STEPS

AMENDED TELECOMMUNICATIONS ORDINANCE AND POLICY

Ordinance would create a new category for small cell facilities

Subject small cell facilities to a policy adopted by resolution (provides greatest flexibility to Council)

Ordinance anticipated to go to Planning Commission on October 9, 2019

Sarah Fasig

From: AHirsch <ahirsch@neighborhoodselect.org>
Sent: Wednesday, December 4, 2019 7:24 PM
To: Planning Commission
Cc: Ashley Feeney
Subject: 5G Conspiracy Group to speak at Planning commission
Attachments: flier davis scary radio waves Panic.jpg; WiFi and Children Health 2.jpg; Wifi and Children Health.jpg; NYTimes Russian Spreads 5G Cell Conspiracy Narrative.pdf

To: Planning Commission

re: Vote on WTF Ordinance Wednesday's meeting.

Please include in your Commission packet the article from NY Times on Russian English Speaking Media RT spreading Conspiracy theory on Health Effects of the new Cell Phone Towners...Note that the Russian as a country is installing 5G service even as they spread fear in the US.

I would also appreciate your sharing the below email that notes how the fear spread by this conspiracy theory already has killed two Davisites.

Alan Hirsch

From: AHirsch
Sent: Wednesday, December 4, 2019 7:14 PM
To: citycouncilmembers@cityofdavis.org
Cc: 'Ashley Feeney' ; 'Mike Webb'
Subject: 5G Conspiracy Group to speak at Planning commission

The Anti-Cell Tell Conspiracy folks will be this Wednesday's City Planning Commission Meeting.
They had over 45 people at their organizing meeting in the Blanchard room four weeks ago.

In their flier (attach) they claim the low energy 5G cell waves cause "all forms of cancer" and "Mental Illness" and 18 other malodies.

At their November meeting at the library, and the invited speaker Eric Windheim (Prez of EMF-Mitigation service company),
made claims that there were health risks were not just about 5G, but all electric appliance as suspect to causes health problems.
He claimed his parent got cancer from flourscent light bulbs. He said when they electrified town, human life spans declined.
(Mr Windheim also sells a service to mitigation the problem).

For Mr Windheim claim to be true when there is so little scientific comment before would require a massive international conspiracy of scientist and public health authorities and scientists. This "cover up" would require complicity of hundreds of thousands of people....a conspiracy of scientist on a size comparable imaged by climate

change denier....i.e. those who believe scientific community fear mongers about importance and impact of climate change.

One has to note that Mr. Windheim does not have an undergrad science, epidemiology or health degree. Yet he seem to endowed with this special knowledge about electricity and its health effects.

WILL OUR SCHOOL AND CHILDEN BE EFFECTED? (Echo of Anti-VAX movement).

I have also attached a hand out from that meeting that claims even basic WIFI service most of us have....especially endangers children.

One wonder if this idea take holds, like the anti-VAX movement, it could disrupt our school learning environment.

SPREADING FEAR CAN CAUSE DEATH

Such fear mongering preys on the most vulnerable among us...and makes us all vulnerable a these irresponsible ungrounded theory trigger mentally ill people.

Recall, that Officer Corona was shot by someone who believe radio waves were tormenting him. NO to mention the shooter.

Two deaths in Davis already from the false idea EMF triggers mental illness.

WHAT WE SHOULD DO:

I believe the city—and school board need to be proactive to address this conspiracy theory – that there is a massive science cover up of health effect of electro-magnetic waves.

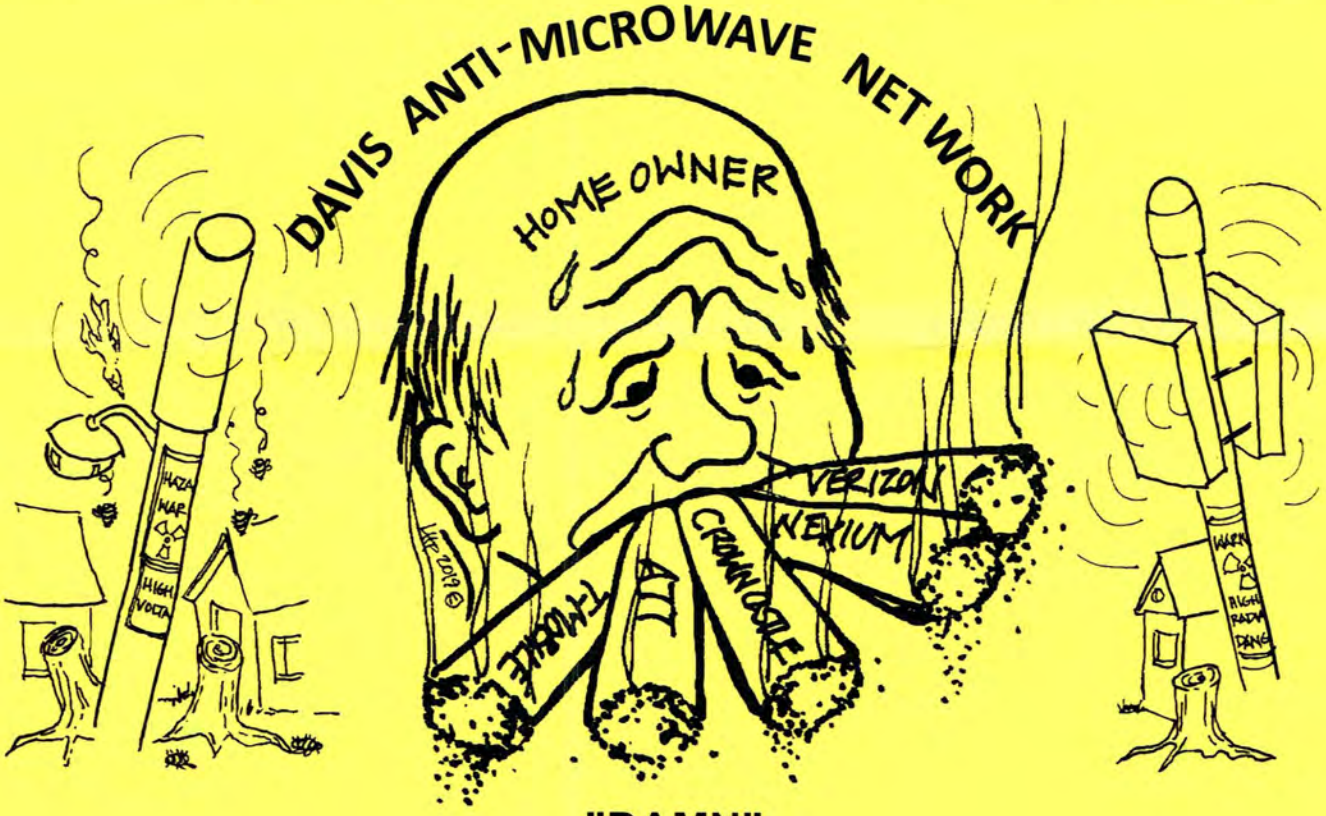
I suggest as a start you widely sharing this article from the NY Times what point that RT-- Russian Today – the Russian funded new sources is promoting this conspiracy theory in America even as Russian Government is installing 5G in that country would be a good start (Attached)

Alan H

Farmers Market 11/2/19

----------STOP 5G in DAVIS!!----------

Crown Castle & Nexius Wants to Deploy Cancer Causing Microwave Antennas in Your Front Yard!



5G/4G MICROWAVE RADIATION WILL INCREASE:

microwave sickness	numbness in extremities
ringing of the ears	sinus infections
brain fog	headaches
fatigue	sleeplessness
memory loss	anxiety
loss of concentration	depression
heart palpitations	suicide
digestive problems	immune dysfunction
cancers of all kinds	chronic illnesses
DNA breaks	chromosomal damage

Please join us for an informative gathering at the Davis Library Blanchard Room

November 6, Wednesday 5:30-7:30 pm

Joining us will be guest speaker, professional building biologist Eric Windheim @ WindheimEMFSolutions.com

mystreetmychoice.com/davis.html for more info: contact@damn.news

Schools

WiFi Radiation Research

www.WiFiFacts.com

Microwave radiation from sources such as WiFi may be harmful to your child's health.

- ☐ Sperm DNA damage (fragmentation)
- ☐ Permanent female egg DNA damage, possible
- ☐ Memory problems and brain "fog"
- ☐ Headaches and rapid heart rate
- ☐ Sleep disturbances
- ☐ Blood cell damage

(The above are supported by research, clinical cases, and experts' opinions.)

www.WiFiFacts.com

Red Blood Cell Damage

Red blood cell damage after only 70 minutes using a computer with WiFi turned ON.

Fairly Healthy Blood Cells

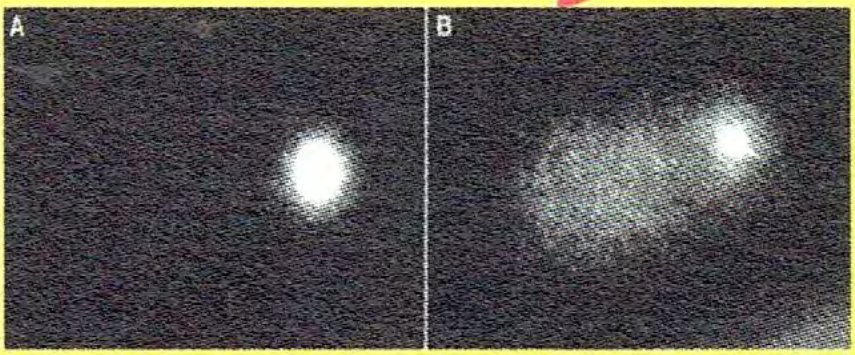
Very Unhealthy Blood Cells

Slides by Dr. Magda Havas, Trent University, Ontario, Canada

Sperm DNA Damage

Permanent damage to the DNA in girls' eggs, possible.
DNA damage (fragmentation) to male sperm & reduced movement from microwave radiation, such as WiFi.

(Slide from Dr. Magda Havas, Trent University, Canada)



Normal sperm DNA. Fragmented sperm DNA

(Biology of Reproduction, November 1, Vol. 59)

Go to www.WiFiFacts.com for latest research.

Your 5G Phone Won't Hurt You. But Russia Wants You to Think Otherwise.

RT America, a network known for sowing disinformation, has a new alarm: the coming '5G Apocalypse.'

A Russia Today anchor in Moscow preparing to go on air. The network's American version, RT America, has been exaggerating the health hazards posed by 5G networks, the next, most powerful generation of cell phone connectivity.

By William J. Broad May 12, 2019
https://www.nytimes.com/2019/05/12/science/5g-phone-safety-health-russia.html

The cellphones known as 5G, or fifth generation, represent the vanguard of a wireless era rich in interconnected cars, factories and cities. Whichever nation dominates the new technology will gain a competitive edge for much of this century, according to many analysts. But a television network a few blocks from the White House has been stirring concerns about a hidden flaw.

"Just a small one," a TV reporter told her viewers recently. "It might kill you."

The Russian network RT America aired the segment, titled "A Dangerous 'Experiment on Humanity,'" in covering what its guest experts call 5G's dire health threats. U.S. intelligence agencies identified the network as a principal meddler in the 2016 presidential election. Now, it is linking 5G signals to brain cancer, infertility, autism, heart tumors and Alzheimer's disease — claims that lack scientific support.

Yet even as RT America, the cat's paw of Russia's president, Vladimir Putin, has been doing its best to stoke the fears of American viewers, Mr. Putin, on Feb. 20, ordered the launch of Russian 5G networks in a tone evoking optimism rather than doom.

"We need to look forward," he said, according to Tass, the Russian news agency. "The challenge for the upcoming years is to organize universal access to high-speed internet, to start operation of the fifth-generation communication systems."

Analysts see RT's attack on 5G as geopolitically bold: It targets a new world of interconnected, futuristic technologies that would reach into consumers' homes, aid national security and spark innovative industries. Already, medical firms are linking up devices wirelessly to create new kinds of health treatments.

"It's economic warfare," Ryan Fox, chief operating officer of New Knowledge, a technology firm that tracks disinformation, said in an interview. "Russia doesn't have a good 5G play, so it tries to undermine and discredit ours."

5G is also a growing point of friction between Washington and Beijing, with each side lining up allies in what has become a major technology race. Moscow and Beijing are seen as possibly forming a 5G political bloc.

The Kremlin "would really enjoy getting democratic governments tied up in fights over 5G's environmental and health hazards," said Molly McKew, head of Fianna Strategies, a consulting firm in Washington, D.C., that seeks to counter Russian disinformation.

RT's assaults on 5G technology are rising in number and stridency as the American wireless industry begins to erect 5G systems. In March, Verizon said its service will soon reach 30 cities.

RT America aired its first program assailing 5G's health impacts last May, its only one in 2018. Already this year, it has run seven. The most recent, on April 14, reported that children exposed to signals from 5G cellphone towers would suffer cancer, nosebleeds and learning disabilities.

The network distributes its programming by cable, satellite and online streaming. It also posts individual stories on Facebook and YouTube. A declassified U.S. intelligence report, released early in 2017, said that RT videos on YouTube have averaged 1 million views per day, "the highest among news outlets."

Hundreds of blogs and websites appear to be picking up the network's 5G alarms, seldom if ever noting the Russian origins. Analysts call it a treacherous fog.

Anna Belkina, RT's head of communications in Moscow, defended the network's coverage of 5G. "Unlike many other media, we show the breadth of debate," she said in an email exchange.

Asked if Mr. Putin's promotion of 5G technology in Russia conflicted with the health alarms raised by RT America, she said the U.S. network focused on local 5G issues, not "the roll-out in Russia."

"Our American audience expects us to bring American concerns to the front, first and foremost," Ms. Belkina said.

Image

RT television vehicles outside St. Basil's Cathedral and the Kremlin in Moscow. The network has been called "the Kremlin's principal international propaganda outlet."Credit...Mladen Antonov/Agence France-Presse — Getty Images

The 5G Playbook

The Office of the Director of National Intelligence, in the 2017 report, described the network as "the Kremlin's principal international propaganda outlet." The report noted that RT's most popular video on Hillary Clinton during the 2016 election campaign stated that 100 percent of the Clintons' charity "Went to ... Themselves." The video was viewed more than 9 million times.

Later that year, the national security division of the Justice Department forced RT America, formerly Russia Today, to register as a foreign agent.

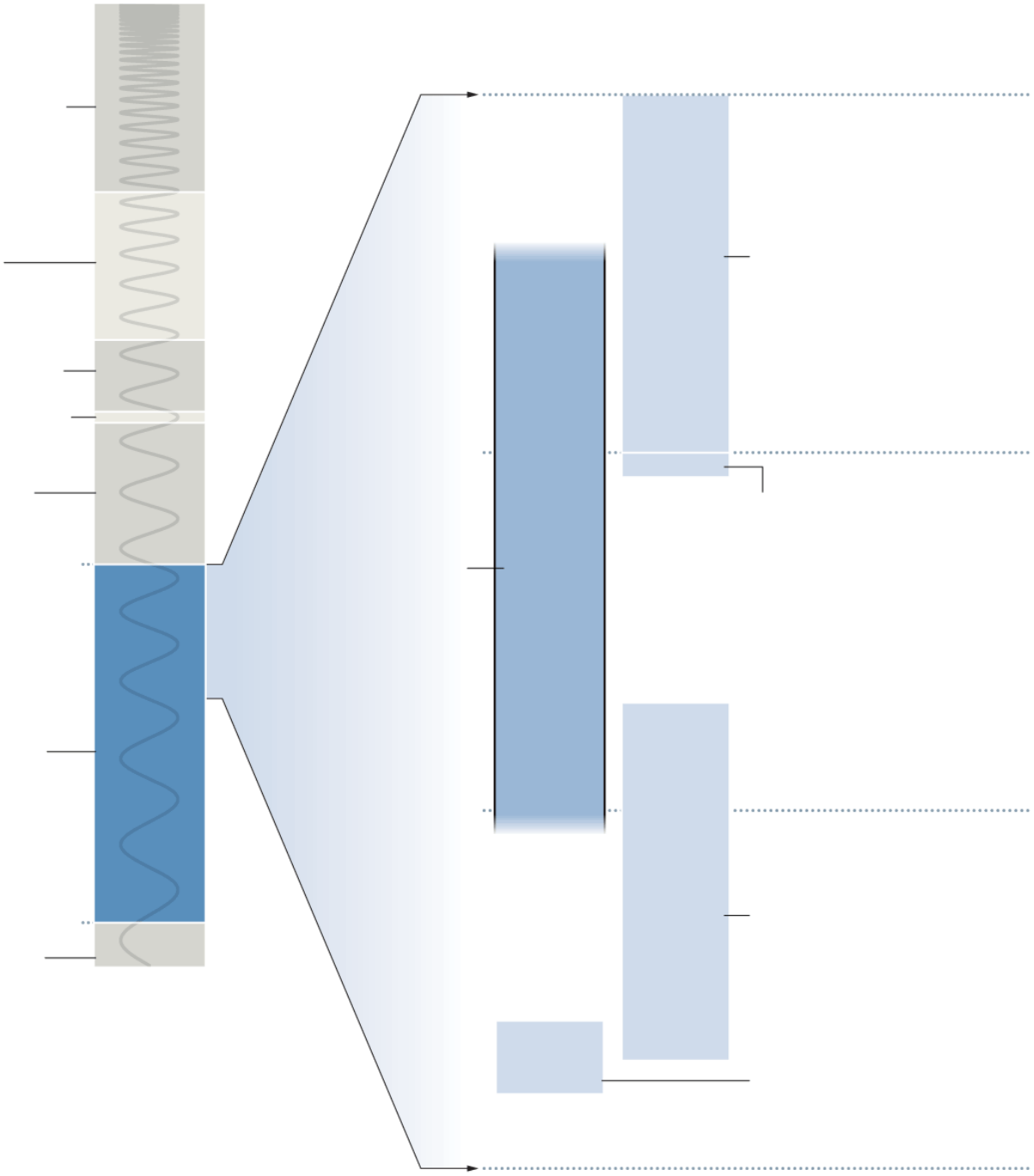
Moscow's goal, experts say, is to destabilize the West by undermining trust in democratic leaders, institutions and political life. To that end, the RT network amplifies voices of dissent, to sow discord and widen social divides. It gives the marginal a megaphone and traffics in false equivalence. Earlier campaigns took aim at fracking, vaccination and genetically modified organisms. One show called designer tomatoes "good-looking poison."

The network is now applying its playbook against 5G by selectively reporting the most sensational claims, and by giving a few marginal opponents of wireless technology a conspicuous new forum.

All cellphones use radio waves. RT America tends to refer to the signals as "radiations," seemingly associating them with the very strong rays at the far end of the electromagnetic spectrum, such as X-rays and ultraviolet rays, which in high doses can damage DNA and cause cancer.

5G's Place in the Spectrum

The newest generation of cellphones, 5G, will operate near the highest frequencies of the radio wave spectrum. Its range overlaps with other devices — including a novel class of health therapies used in Russia and China.



Electromagnetic spectrum

FREQUENCY

300 GHz
GAMMA RAYS
Novel EHF therapies
X-RAYS
ULTRAVIOLET
VISIBLE LIGHT
30 GHz
INFRARED
Airport scanners

300 GHz
5G

RADIO WAVE SPECTRUM
3 GHz
Existing cellphones

3 KHz

ULTRA LOW FREQUENCY
Broadcast television (UHF)
300 MHz

Sources: National Aeronautics and Space Administration, National Academies of Sciences, National Institute of Environmental Health Sciences, Congressional Research Service, Institute of Electrical and Electronics Engineers

By The New York Times

But the radio waves used in cellphone communication lie at the opposite end of the spectrum, between radio broadcasting frequencies and the rainbow colors of visible light.

The frequencies employed in 5G are higher than those of past cellphones, allowing more information to be relayed more rapidly. Many other devices are expected to follow, including robots, drones and cars that send traffic information to one another.

Wireless high-speed communication could transform the news industry, sports, shopping, entertainment, transportation, health care, city management and many levels of government. In January, The Times announced a joint venture with Verizon to build a 5G journalism lab.

Over the years, plenty of careful science has scrutinized wireless technology for potential health risks. Virtually all the data contradict the dire alarms, according to public officials, including those at the World Health Organization.

Opponents of 5G claim the technology's high frequencies will make the new phones and cell towers extraordinarily harmful. "The higher the frequency, the more dangerous it is to living organisms," a RT reporter told viewers recently.

The truth is exactly the opposite, scientists say. The higher the radio frequency, the less it penetrates human skin, lowering exposure of the body's internal organs, including the brain.

"5G emissions, if anything, should be safer than previous generations," said Dr. Marvin C. Ziskin, a medical doctor and emeritus professor of radiology and medical physics at the Temple University School of Medicine.

Health concerns were raised last year when a large federal study showed that 2G signals could produce brain cancer in male rats. But officials discounted a direct link to humans, saying people received smaller doses.

Nonetheless, RT has taken an active role in stirring up apprehension, casting the debut of 5G in biblical terms. The caption superimposed on a January show read, "5G Apocalypse." The anchor reported that doctors, scientists and environmental groups were now calling for its ban.

RT America taps the ranks of existing anti-cellular activists to wage its 5G campaign. Some have railed for decades against cellphones, power lines and other everyday sources of electromagnetic waves. Much of their work appears not in reputable science journals but little-known reports, publications and self-published tracts, at times with copious notes of dubious significance. They tend to cite each other's research.

It's unclear how many RT experts realize they are aiding a Russian network or that it acts as Mr. Putin's mouthpiece. At times, RT simply mines existing videotape and print materials, editing them to reflect its perspective. And the intelligence report noted that some network staffers fail to disclose their RT affiliation when conducting interviews.

Even so, private analysts see the 5G attacks as reaching perhaps millions of online viewers — terrifying some, infuriating others.

"RT successfully feeds the conspiracy-oriented ecosystem," said John Kelly, chief executive

of Graphika, a network analytics firm. “This effort is having a real impact. It’s bearing fruit.”

Image

Screengrabs taken from recent RT America episodes, clips of which are available on YouTube.Credit...RT, via YouTube

A “Firehose of Falsehood”

RT America began its assault last year with a news show captioned “Wireless Cancer.” The featured guest was Dr. David O. Carpenter, a prominent 5G critic.

Dr. Carpenter, 82, received his medical degree from Harvard in 1964 and has published hundreds of scientific papers. For decades, he has warned of cancer risks for people living near high-voltage power lines, although federal studies have failed to find credible evidence that would support his claims.

"The rollout of 5G is very frightening," Dr. Carpenter told RT America. "Nobody is going to be able to escape the radiation."

Dr. Carpenter's scariest alarms have been "widely dismissed by scientific bodies the world over," according to David Robert Grimes, a cancer researcher at the University of Oxford, and his colleague, Dorothy V. M. Bishop, also of Oxford. They challenged Dr. Carpenter in a journal article that ran months before the RT program aired, calling his main claims "scientifically discredited."

In an interview, Dr. Carpenter defended his work as having "served a major purpose" by revealing a global health threat. He said he was unaware that he had been featured on RT America. "I speak my mind to whomever I talk with," he said.

RT America's attacks on 5G have multiplied this year. On Jan. 14, the network aired "A Dangerous 'Experiment on Humanity,'" which again featured Dr. Carpenter. RT followed a day later with "How to Survive Dangers of 5G."

On Feb. 7, a segment claimed that "5G Tech is 'Crime under International Law.'" Its featured expert was Arthur Firstenberg, who once charged that a neighbor's wireless gear had hurt his health. He sued for $1.43 million in damages but lost after pressing his claim for five years.

President Vladimir V. Putin visits RT's studios in Moscow with editor-in-chief Margarita Simonyan in 2013. Credit...Yuri Kochetkov/Agence France-Presse — Getty Images

The drumbeat continued. "'Totally Insane': Telecomm Industry Ignores 5G Dangers," was the title of a segment that aired March 6.

A program on March 14 was aimed squarely at parents: "Could 5G Put More Kids at Risk for Cancer?" The RT reporter told of a California elementary school that recently churned with fear of radiation from a nearby cellphone tower, and how angry parents kept home 200 students.

Even as RT America has worked hard to damage 5G, the scientific establishment in Russia has embraced a contrary and questionable position: that the high frequencies of 5G communications are actually good for human health. It recommends their use for healing wounds, boosting the immune system and treating cancer. Millions of Russian patients are said to have undergone such high-frequency therapies.

Beauty clinics in Moscow use these high frequencies for skin regeneration, according to a scientific study. One company says the waves can remove wrinkles and fight hair loss.

A Rand study once called RT America's approach a "Firehose of Falsehood." For its part, Moscow has repeatedly denied allegations of meddling in the 2016 presidential election and has strongly defended RT's news coverage as socially constructive.

Likewise, RT America strongly defended its position on the potential health risks of 5G technology.

"Nothing I've seen says the book is closed," Rick Sanchez, an RT anchor on many of the 5G episodes, said in an interview. "I think there's lots of unanswered questions. Before we commit to something on this scale, shouldn't we consider if people could possibly be hurt?"

Mr. Fox, the operations chief of New Knowledge, the technology firm, said the network's aggressive spin on 5G suggests Moscow is less interested in serving the public than dulling Washington's edge in the global race for the digital future.

"It's information warfare," he said.

Additional reporting by Sophia Kishkovsky in Moscow.

I, Katherine McBride, attest and affirm that the following statements are true, accurate and within my personal knowledge.

I'm going to read excerpts from an article from Scientific American:

We Have No Reason to Believe 5G Is Safe

The technology is coming, but contrary to what some people say, there could be health risks

- By Joel M. Moskowitz on October 17, 2019

The telecommunications industry and their experts have accused many scientists who have researched the effects of cell phone radiation of "fear mongering" over the advent of wireless technology's 5G. Since much of our research is publicly-funded, we believe it is our ethical responsibility to inform the public about what the peer-reviewed scientific literature tells us about the health risks from wireless radiation.

More than 240 scientists who have published peer-reviewed research on the biologic and health effects of nonionizing electromagnetic fields (EMF) signed the International EMF Scientist Appeal, which calls for stronger exposure limits. The appeal makes the following assertions:

"Numerous recent scientific publications have shown that EMF affects living organisms at levels well below most international and national guidelines. Effects include increased cancer risk, cellular stress, increase in harmful free radicals, genetic damages, structural and functional changes of the reproductive system, learning and memory deficits, neurological disorders, and negative impacts on general well-being in humans. Damage goes well beyond the human race, as there is growing evidence of harmful effects to both plant and animal life."

The World Health Organization's International Agency for Research on Cancer (IARC) classified RFR as "possibly carcinogenic to humans" in 2011. Last year, a $30 million study conducted by the U.S. National Toxicology Program (NTP) found "clear evidence" that two years of exposure to cell phone RFR increased cancer in male rats and damaged DNA in rats and mice of both sexes. The Ramazzini Institute in Italy replicated the key finding of the NTP using a different carrier frequency and much weaker exposure to cell phone radiation over the life of the rats.

I have expressed no matter of mere concern, but solely matters of substance. I do not consent to the 5G rollout in Davis,

(ABOUT THE AUTHOR(S)

Joel M. Moskowitz

Joel M. Moskowitz, PhD, is director of the Center for Family and Community Health in the School of Public Health at the University of California, Berkeley. He has been translating and disseminating the research on wireless radiation health effects since 2009 after he and his colleagues published a review paper that found long-term cell phone users were at greater risk of brain tumors. His Electromagnetic Radiation Safety website has had more than two million page views since 2013. He is an unpaid advisor to the International EMF Scientist Appeal and Physicians for Safe Technology.)

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December 11, 2019

VIA EMAIL

Chair Stephen Streeter
Vice Chair Cheryl Essex
Commissioners Herman Boschken,
Stephen Mikesell, David Robertson,
Darryl Rutherford and Greg Rowe
Planning Commission
City of Davis
23 Russell Boulevard, Suite 2
Davis, California 95616

Re: Draft Policy, Small Cell Wireless Facilities
Commission Agenda Item 5(A), December 11, 2019

Dear Chair Streeter, Vice Chair Essex and Commissioners:

We write again on behalf of Verizon Wireless to provide comment on the draft policy regulating small cell wireless facilities (the "Draft Policy"). We have been asked to write this late letter to express Verizon Wireless's frustration that the five pages of legal concerns conveyed in our October 9, 2019 letter have resulted in a single change to the Draft Policy that does not resolve numerous issues with proposed standards.

We discussed various issues with City staff and the City Attorney's office during an October 22, 2019 conference call. For example, the requirement to locate small cells "as far as possible" from residences and schools is inexact and not objective, and it could prohibit small cells in broad areas in conflict with state and federal law. Draft Policy § 2.6(b). As with other jurisdictions, policies establishing setbacks from residences and schools are thinly-veiled regulation based on concern over the environmental effects of radio frequency emissions, illegal under federal law. 47 U.S.C. § 332(c)(7)(B)(iv).

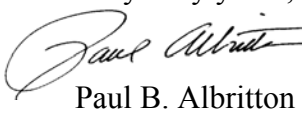
Despite Verizon Wireless's outreach to the City, the only significant change to the Draft Policy is one modified finding requiring compliance with all design standards, now revised to add: "…except for any design standard that the applicant has demonstrated with clear and convincing evidence in the written record would render the proposed facility technically infeasible." Policy § 2.4(b)(5). The City cannot rely on this exception to excuse standards that are infeasible or unreasonable, because it shifts the

burden to applicants to challenge the policy. However, the Federal Communication Commission's recent Small Cells Order requires that all aesthetic standards for small cells be "reasonable," "objective" and, notably, "published in advance."[1] To that end, the City should ensure that its location and design standards are reasonable and objective at the outset. The Small Cells Order requires clearly-stated, objective aesthetic standards to provide clarity for staff and wireless carriers alike, so applicants are not left to guess what the City may decide.[2] This allows for decisions within expedited "Shot Clock" timeframes.

Your staff report cites ordinances adopted by other cities such as Mill Valley and Sonoma that are particularly prohibitive. However, those ordinances clearly are written to discourage deployment of small cells, and they are unlikely to survive judicial review.

Verizon Wireless would be pleased to meet with City representatives to discuss needed network enhancements in Davis and workable regulations. We encourage the Commission to defer recommendation of the Draft Policy, and direct staff to work with industry representatives on revisions required to avoid conflict with state and federal law.

Very truly yours,



Paul B. Albritton

cc: Inder Khalsa, Esq.
Sherri Metzker

[1] *See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment,* Declaratory Ruling and Third Report and Order, FCC 18-133 (September 27, 2018), ¶ 86.
[2] *Id.,* ¶ 88.

Dear Planning Commissioners, for tonight's meeting, attached please find our follow-up letter prepared on behalf of Verizon Wireless regarding the proposed small cells policy.

We urge the Commission to defer recommendation of the policy, and direct staff to work with industry on needed revisions.

Thank you.

--
Paul Albritton
Mackenzie & Albritton LLP
155 Sansome Street, Suite 800
San Francisco, California 94104
(415) 288-4000
pa@mallp.com

CAUTION: External email. Please verify sender before opening attachments or clicking on links.

To City of Davis Planning Commissioners:
Herman Boschken
Cheryl Essex
Stephen Mikesell
David Robertson
Greg Rowe
Darryl Rutherford
Stephen Streeter
Emily Shandy

cc to City of Davis Council Members:
Mayor Brett Lee
Mayor Pro Tempore Gloria Partida
Council Member Will Arnold
Council Member Dan Carson
Council Member Lucas Frerichs

cc to City Staff:
Michael Webb, City Manager
Kelly Stachowicz, Assistant City Manager
Ashley Feeney, Assistant City Manager
Inder Khalsa, City Attorney*
Sherri Metzker, Principal Planner
Clerk web <clerkweb@cityofdavis.org>

[Clerical staff: Please submit this email and the attached PDF file into the public records under the agenda item Wireless Telecommunication Facilities Ordinance, slated for discussion by the Planning Commission at its December 11th meeting. Thank you.]

Wednesday, December 4, 2019

Subject: Robust Elements for Davis's Wireless Telecommunication Facilities Ordinance

Dear Planning Commissioners:

During the past month collaborator Pat Suyama and I reviewed ten city ordinances that regulate wireless telecommunication facilities. We chose ones that reportedly are relatively robust with regard to protecting the welfare and safety of a city and its residents.

All ten are for cities in California, and all but one were adopted within the past year to address the recent changes in federal telecommunications policy.

We prepared the attached eight-page document to help ensure that the current effort to

revise Davis's ordinance produces a result that (1) satisfies residents' stated desires for protection from unwanted radiofrequency radiation to the maximum extent legally possible, and (2) complies with federal and state laws and policies.

Our analysis of ordinances revealed that many cities are maintaining buffer zones to keep antenna facilities a significant distance away from residential dwellings. A few cities also maintain buffers for schools, hospitals, or park lands.

Such buffers are valuable and justifiable as a means of minimizing aesthetic impacts. They also help minimize the decline in residential property values that occurs when antennas are allowed in close proximity to neighborhoods.

We summarize what we discovered, and the main elements we suggest for Davis, in the first three pages of our document.

On pages four through seven of the document we list all the elements we found in the various robust city ordinances.

The eighth and final page provides links to each of the ten city ordinances we examined.

We are hoping you will conclude, as we have, that the Master License Agreement embedded in staff's proposed revision of Davis's ordinance is unacceptable, as it is based on a ministerial approach rather than the discretionary one that Davis has used in the past. Most, if not all, of the ten cities whose ordinances we reviewed have eschewed the ministerial approach and continue to retain their discretionary authority.

If you would like to know more about our analysis of city ordinances, please email or phone me.

Sincerely,

Larry Rollins
Davis, California

Email: almandine09@gmail.com
Telephone: (530) 758-5021

Attachment:
Robust elements for Davis.pdf

*Please note: I have been unable to find Ms. Khalsa's address at City website. —L.R.

CAUTION: External email. Please verify sender before opening attachments or clicking on links.

To City of Davis Planning Commissioners
Herman Boschken <hboschken@cityofdavis.org>
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cc to: City of Davis Council Members
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Mayor Pro Tempore Gloria Partida <gpartida@cityofdavis.org>
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Council Member Dan Carson <dcarson@cityofdavis.org>
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Ashley Feeney, Assistant City Manager <AFeeney@cityofdavis.org
Inder Khalsa, City Attorney (need email address)
Sherri Metzker, Principal Planner <smetzker@cityofdavis.org>
Clerk web <clerkweb@cityofdavis.org>

Re: Final version of report titled "Summary of Epidemiology Studies Evaluating the Biological and Health Effects of Living Near a Mobile Phone Base Station (Cell Tower)"
Monday, December 2, 2019

[Clerical staff: Please submit this email and the attached report into the public records under the agenda item Wireless Telecommunications Facilities Ordinance, slated for discussion by the Planning Commission at their December 11th meeting. Thank you.]

Dear Planning Commissioners:

The attached report, prepared by myself and Pat Suyama, provides significant information that we hope will help you as you study and evaluate Davis's options for revising its Wireless Telecommunications Facilities ordinance.

This is the final version (labeled version 1.0) of a report we gave you in draft form as hard copy a little over a month ago.

We have designed the report to be fairly self-explanatory. If you find you have questions about it or about related issues, please feel free to email or phone me.

Sincerely,

Larry Rollins. M.S., B.S.C.E.
Science Writer/Hydrologist/Environmental Engineer

1425 Drexel Drive
Davis, Calif. 95616

Email: almandine09@gmail.com
Telephone: (530) 758-5021

Attachment:
EAP Epidem Summary 20191202.pdf

CAUTION: External email. Please verify sender before opening attachments or clicking on links.

To: Sherri Metzker, Principal Planner <smetzker@cityofdavis.org>
City of Davis Community Development Department
23 Russell Blvd.
Davis, CA 95616

To City of Davis Planning Commissioners:
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To City of Davis Council Members:
Mayor Brett Lee <blee@cityofdavis.org>
Mayor Pro Tempore Gloria Partida <gpartida@cityofdavis.org>
Council Member Will Arnold <warnold@cityofdavis.org>
Council Member Dan Carson <dcarson@cityofdavis.org>
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cc: Michael Webb, City Manager <cmoweb@cityofdavis.org>
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Ashley Feeney, Assistant City Manager <AFeeney@cityofdavis.org
Clerk Web <clerkweb@cityofdavis.org>

Monday, October 21, 2019

[Please submit this email and the attached report into the public records. Thank you.]

Dear Planning Staff and Planning Commissioners:

The attached report provides important information about the levels of radio-frequency radiation existing in Davis at present. If possible, please read or at least review the report before the Planning Commission meeting this Wednesday evening.

Knowing the actual radiation levels in Davis and a bit about how to interpret those levels is a vital component of maintaining and improving the health and safety of Davis residents.

The maps in the report likely will help you determine the level of protection the City should provide residents in its wireless telecommunications ordinance.

The 40 or so wireless transmission facilities (cell towers) distributed throughout town appear to significantly contribute to the radiation measured.

As you'll see from the report and its various maps, the levels of radiation in Davis at present, though legal, measure above 1,000 microWatts per square meter in many areas. In other words, levels are high enough that various biological and health effects will likely become evident over months to years among residents in those areas.

The report includes a one-page table summarizing a few of the many known and scientifically proven biological and health effects. We are preparing a more comprehensive summary of effects and hope to provide it to you soon.

If you have any questions about the mapping project, please contact me.

Thank you.

Larry Rollins. M.S., B.S.C.E.
Science Writer/Hydrologist/Environmental Engineer

1425 Drexel Drive
Davis, Calif. 95616

Email: almandine09@gmail.com
Telephone: (530) 758-5021

Attachment:
RFR report Davis 2018.pdf

Elements to Include for a Very Robust WTF Ordinance for Davis

Provided to City of Davis Planning Commission, December 4, 2019 by
Electrosmog Awareness Project, Davis, Calif.
Larry Rollins, coordinator

• Require a buffer of 500 feet between any new antenna facility (including a "small cell") and any residential buildings—as did Petaluma and Suisun City—or stipulate an outright prohibition of antenna facilities in residential and multi-family zones—as did Calabasas, Fairfax, Los Altos, Mill Valley, and Sonoma.

• Require a buffer of 1,500 feet between any two new or existing wireless telecom facilities (including small cells)—as did 9 of the 10 cities we surveyed.

• Require a buffer of 500 feet between any new WTF (large or small) and any park, nature area, sensitive habitat, or historic area—as did Petaluma and Sebastopol—or establish an outright prohibition of WTFs in such areas—as did Los Altos.

• Require a buffer of 500 feet from schools, hospitals—as did Los Altos.

• Stipulate that every cell tower is considered the same (whether it's a small cell or a larger "macro" tower) and that each, therefore, needs a conditional use permit—as did Fairfax, Mill Valley, Sonoma, and Suisun City. Further, stipulate that if multiple facilities are requested as part of a batch, each shall be considered individually, requiring its own conditional use permit, and that each must go through the standard permitting process.

• Require an applicant to demonstrate that its facility complies fully with the Americans with Disabilities Act (ADA)—as did 8 of the 10 cities we surveyed.

• Require the applicant to prove that a significant gap in telecommunication coverage exists —as did 8 of the 10 cities we surveyed. Also, require that the least intrusive method of closing any such gap is being employed—as did 6 of the 10 cities.

Table 1A: Key Elements of Robust Ordinances

Restriction or Requirement	Where Enacted and When[1]				
	Calabasas	Fairfax	Los Altos	Mill Valley	Petaluma
Facilities prohibited in residential and multi-family zones	✔	✔	✔	✔	
500-foot buffer from residences					✔
500-foot buffer from schools, hospitals			✔		
Facilities prohibited in parks			✔		
500-foot buffer from parks, nature areas, sensitive habitats, historic areas					✔
1,500-foot buffer between facilities	✔	✔	✔	✔	✔
Review by independent expert	✔	✔		✔	✔
Must prove significant gap in coverage	✔	✔		✔	
Must use least intrusive method to close significant gap in coverage	✔	✔		✔	
Must comply with Americans with Disabilities Act	✔	✔	✔	✔	
Cannot incommode public right of way		✔		✔	
All facilities require conditional use permits		✔		✔	
Must notify property owners and residents within 500 feet of any proposed facility	✔				✔
Must conduct community meetings					
Must notify public of planning-commission hearing before any approval of facility	✔				✔
Public may appeal any approval of facility					

[1] *Calabasas in March, 2019; Fairfax in September, 2018; Los Altos in August, 2019; Mill Valley in September, 2018; Petaluma in August, 2019*

Table 1B: Key Elements of Robust Ordinances

Restriction or Requirement	Where Enacted and When[1]				
	Rancho Palos Verdes	San Anselmo	Sebastopol	Sonoma	Suisun City
Facilities prohibited in residential and multi-family zones				✔	
500-foot buffer from residences					✔
500-foot buffer from schools, hospitals					
Facilities prohibited in parks					
500-foot buffer from parks, nature areas, sensitive habitats, historic areas			✔		
1,500-foot buffer between facilities	✔		✔	✔	✔
Review by independent expert	✔	✔	✔		✔
Must prove significant gap in coverage	✔	✔	✔	✔	✔
Must use least intrusive method to close significant gap in coverage	✔	✔		✔	
Must comply with Americans with Disabilities Act	✔		✔	✔	✔
Cannot incommode public right of way				✔	✔
All facilities require conditional use permits				✔	✔
Must notify property owners and residents within 500 feet of any proposed facility		✔		✔	✔
Must conduct community meetings	✔	✔	✔	✔	
Must notify public of planning-commission hearing before any approval of facility			✔	✔	✔
Public may appeal any approval of facility		✔			✔

[1] *Rancho Palos Verdes in April, 2019; San Anselmo in September, 2018; Sebastopol in May, 2019; Sonoma in November, 2018; Suisun City in April, 2019*

Key Elements of Robust Local Wireless Telecommunication Ordinances

A city's goal should be to craft an updated wireless telecommunication ordinance that not only reflects current law with regard to siting of antenna facilities, including small cells, but also maintains as much local control and oversight as possible in order to protect the safety and welfare of city residents.

Many cities include at the beginning of the ordinance an introductory section stating the intent and purpose of the ordinance and reiterating the city's rights and responsibilities for protecting the health, welfare, and assets of residents, as well as stating the community's determination to preserve its visual character.

A sample of such a section is provided at the end of this document. It is from an ordinance adopted in July 2018 by Petaluma, California.

Below are some of the more robust requirements a city may choose to incorporate into its ordinance.

- **500-Foot Buffer for Residences**: A proposed wireless telecommunications facility (WTF), including any small cell facility, shall be located no closer than 500 feet to any residential dwelling.
- **500-Foot Buffer for Schools, Hospitals**: A proposed WTF, including any small cell, shall be located no closer than 500 feet to any school or hospital.
- **500-Foot Setback from Parks**: A proposed WTF, including any small cell, shall be located no closer than 500 feet to any park, nature preserve, or open-space area.
- **1,500-Foot Setback from other WTFs, including small cells**: Every effort shall be made to locate small cell installations no less than 1,500 feet away from the nearest other small cell or macro tower installation.
- **Prohibition Zones for Small Cells:** Prohibits small cell telecommunication facilities in residential zones and multi-family zoning districts.
- **Independent Expert.** The planning director is authorized to retain on behalf of the city an independent, qualified consultant to review any application for a permit for a proposed wireless telecommunications facility. The purpose of such a review is to evaluate technical aspects of the facility.
- **Significant Gap in Coverage:** Applicant must demonstrate that a significant gap in telecommunications coverage exists. This shall be done in writing, with appropriate supportive information or documentation.
- **Least Intrusive Methods:** Applicant must demonstrate, in writing, that the project uses the least intrusive method to fill any significant gap in coverage. Included: the rationale for selecting the proposed method and site; a detailed explanation of the coverage gap that the proposed use would serve; a description of how the proposed method is the least intrusive means for providing service; and a description of all existing structures or alternative sites evaluated for potential installation of the proposed facility, with an explanation of why they are not viable options.
- **Americans with Disabilities Act (ADA)**. All facilities shall be in compliance with the Americans with Disabilities Act (ADA). Additional text to further describe the intended scope of this requirement may be included.
- **Cannot Incommode Public Right-of-Way:** No one shall install, use, or maintain any facility that in whole or in part rests upon, in, or over any public right-of-way if such installation, or the use or maintenance of the facility, endangers the safety of people or interferes with the use of property. Also, when the site or location of a proposed facility is used for public utility purposes, public transportation purposes, or other governmental use, the facility may not unreasonably interfere with or impede the flow of pedestrian or vehicular traffic, including any legally parked or stopped vehicle, or the ingress into or egress from any residence or place of business. It also may not interfere with the use of poles, posts, traffic signs or signals, hydrants, mailboxes, permitted sidewalk dining, permitted street furniture, or other objects permitted at or near said location.

- **Conditional Use Permit:** Every proposed WTF, whether a small cell or a macro tower, requires and shall be subject to a conditional use permit issued by the city planning department.
- **Notification of all residents** within 500 feet of any proposed wireless telecommunication facility. Such notification shall be accomplished within a set number of days from when the application was submitted, such as 14 days.
- **Public notice** of any planning commission hearing(s) required as part of the process to apply for a conditional use permit. Such notice shall be provided in local newspapers and in local online news sources, as well as on the city's own website, no less than 14 days before the date of each hearing.

The following requirements are also common elements of local wireless telecommunication ordinances. Some are less robust alternatives to certain elements listed above.

- **Preferred Locations:** Designate the preferred locations for any new antenna facilities, such as industrial zones and, secondarily, commercial zones.
- **Disfavored Locations:** Every effort shall be made to avoid placement of small cell installations in close proximity to residential zones and mixed commercial-residential zones.
- **Order of Preference—Location.** Specify an order of preference for the location of small cell installations in the city. Typically the ranking, from most preferred to least preferred, is:
  1. Industrial zone
  2. Commercial zone
  3. Mixed Commercial-Residential zone
  4. Residential zone
- **Modification Clause:** This is a clause requiring that the ordinance be modified if a regulatory change, such as an overturn of the September, 2018, FCC Order, occurs.
- **Radiofrequency Compliance Report**: All applications for WTFs must include both a radiofrequency (RF) compliance report signed by a registered professional engineer and a supporting RF data sheet.
- **Require Mock-up**: Require full-size mock-up of proposed small cell facility, plus any pertinent related information, in order to adequately consider the potential aesthetic impacts of the design.
- **Visual Simulation**: Require construction drawings and a site survey, as well as an artist's rendering or photo simulations of the proposed design.
- **Drip Line of Tree:** No facility shall be permitted to be installed in the drip line of any heritage tree or any tree in the public right-of-way.
- **Community Meeting:** The applicant shall be required to hold a community meeting at least two weeks before the planning commission hearing on the use permit.
- **Fall Zone:** The proposed small cell installation shall have an adequate fall zone to minimize the possibility of damage or injury resulting from pole collapse or failure, and to avoid or minimize all other impacts upon any adjoining property
- **Undergrounding:** For any small cell wireless facility, hardware other than the antenna structure itself must be accommodated inside the pole or in an underground vault, flush to the ground, within three feet of the utility pole. Each installation shall have its own dedicated power source and analog electric meter.
- **No Speculative Equipment**. Prohibit the pre-approval of wireless equipment or other improvements the applicant may wish to install at some indeterminate future time.
- **Authorization from Property Owner:** If the proposed facility is to be located on or within the property of someone other than the owner of the facility, such as a street light pole or utility pole, the

applicant shall provide a written statement from the property owner(s) authorizing the placement of the facility.

- **Annual Recertification:** Each year, beginning one year after the permit was first issued, the permittee shall submit to the city an affidavit that lists all active small cell wireless installations it owns within the city by location, certifying that (1) each active small cell installation is covered by liability insurance in the amount of $2,000,000 per installation, naming the city as additional insured; and (2) each active installation has been inspected for safety and found to be in sound working condition and in compliance with all federal safety regulations concerning radiofrequency exposure limits.
- **Random Testing for RF Compliance:** The city shall have the right to employ a qualified radiofrequency (RF) engineer to conduct an annual random and unannounced test of the permittee's small cell wireless installations located within the city. The purpose of such tests is to certify compliance with all FCC radio-frequency emission limits regarding exposure to the general public. The reasonable cost of such tests shall be paid by the permittee.
- **Violation of Compliance:** If such independent tests reveal that any small cell installation owned or operated by permittee or its lessees is emitting RF radiation in excess of FCC exposure guidelines for the general public, the city shall notify the permittee and all residents living within 1,500 feet of the small cell installation(s) of the violation, and the permittee shall have 48 hours to bring the small cell installation(s) into compliance. Failure to bring the installation(s) into compliance shall result in the forfeiture of all or part of the compliance bond, and the city shall have the right to require the removal of such installation(s)
- **Transfer of Permit:** The permittee shall not transfer the permit to any person before the facility covered by the permit has been completely built, unless and until the transferee of the permit has submitted the required security instrument.
- **Non-acceptance of Applications:** When annual re-certification has not been properly submitted, or equipment no longer in use has not been removed within the required 30-day period, no further applications for small cell wireless installations will be accepted by the city until the annual re-certification has been submitted and all fees and fines paid.
- **Aesthetic Requirements:** Many such requirements may be used in an ordinance. The law firm Baller Stokes & Lide highlights the following aesthetic considerations that local governments can consider.
    - Painting of attachments to match mounting structures
    - Use of shrouds or other camouflage
    - Flush-mounting of antennas
    - Placement of equipment within a pole, rather than on the outside of the pole
    - Consistency with the character of historic neighborhoods
    - Minimum spacing between attachments
    - Maximum structure heights
    - Limitations on the use of small, decorative structures as mounting locations

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Sample Introductory Statement: Petaluma, California (2018-2019)

Purpose

The purpose and intent of this chapter is to provide a uniform and comprehensive set of standards for the development of telecommunication facilities and installation of antennas. The regulations contained herein are designed to protect and promote public health, safety, community welfare and the aesthetic quality of Petaluma as set forth within the goals, objectives and policies of the Petaluma general plan; while at the same time not unduly restricting the development of needed telecommunications facilities and important amateur radio installations and encouraging managed development of telecommunications infrastructure to insure Petaluma's role in the evolution of technology. It is also the stated intent of this chapter to provide a public forum to insure a balance between public concerns and private interest in establishing telecommunication and related facilities.

It is furthermore intended that, to all extent permitted by law, the city shall apply these regulations to specifically

accomplish the following:

A. Protect the visual character of the city from the potential adverse effects of telecommunication facility development and minor antenna installation;

B. Insure against the creation of visual blight within or along the city's scenic corridors and ridgelines;

C. Retain local responsibility for and control over the use of public rights-of-way to protect citizens and enhance the quality of their lives;

D. Protect the inhabitants of Petaluma from the possible adverse health effects associated with exposure to high levels of NIER (non-ionizing electromagnetic radiation);

E. Protect the environmental resources of Petaluma;

F. Insure that a competitive and broad range of telecommunications services and high quality telecommunications infrastructures are provided to serve the business community;

G. Create and preserve telecommunication facilities that will serve as an important and effective part of Petaluma's emergency response network;

H. Simplify and shorten the process for obtaining necessary permits for telecommunication facilities while at the same time protecting the legitimate interests of Petaluma citizens;

I. Provide for the charging of reasonable, competitively neutral, nondiscriminatory fees for use of the public right-of-way by telecommunication providers; and,

J. Provide for the maximization of access and usability of an internet web site for the city of Petaluma.

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Ten Relatively Robust City WTF Ordinances

Below are links to the Wireless Telecommunications Facility (WTF) ordinances for Calabasas and nine other cities in California, in effect as of the dates noted.

Calabasas, California—May 2012
https://www.cityofcalabasas.com/pdf/wireless/Wireless_Facility_Ordinance-w_CC_Changes052312.pdf

Fairfax, California—Urgency ordinance, September 2018
https://storage.googleapis.com/proudcity/fairfaxca/uploads/2018/10/Ord-819-URGENCYsmall-cell.pdf

Los Altos, California—August 2019
https://www.losaltosca.gov/sites/default/files/fileattachments/city_council/page/48421/resolution_no._2019-35.pdf

Mill Valley, California—September 2018
http://cityofmillvalley.granicus.com/MetaViewer.php?view_id=2&clip_id=1290&meta_id=59943

Petaluma, California—August 2019
https://petaluma.municipal.codes/Code/14.44

Rancho Palos Verdes, California—September 2019
https://library.municode.com/ca/rancho_palos_verdes/codes/code_of_ordinances?nodeId=TIT12STSIPUPL_CH12.18WITEFAPURI-W

San Anselmo, California—September 2018
https://www.townofsananselmo.org/DocumentCenter/View/23883/Wireless-Policy-in-effect-September-26-2018

Sebastopol, California—May 2019
https://www.ci.sebastopol.ca.us/getattachment/4371a3fe-b28f-4e19-a4b2-bedd0073ab92/Ordinance-Number-11-23-TELECOMMUNICATIONS-FACILITIES-AND-MINOR-ANTENNAS-Appvd-5-7-2019.pdf.aspx?lang=en-US&ext=.pdf

Sonoma, California—Urgency ordinance, November 2018
https://sonomacity.civicweb.net/document/17797

Suisun City, California—Urgency ordinance, April 2019
https://www.suisun.com/small-cells/

Radio Frequency Radiation (RFR) in 2018 in Four Residential Neighborhoods, Davis, California

Electrosmog Awareness Project, Davis, California

Larry Rollins, science writer
Pat Suyama, editor
James Trask, researcher

Version 1.1 October 3, 2019

Introduction

We measured radio frequency radiation (RFR) in four residential neighborhoods in Davis. Two of the neighborhoods are in east Davis, and two are in west-central Davis. Three of the four neighborhoods include a cell tower (wireless transmission facility).

Summary of Results—and Some Observations

- We discovered that most of the measured RFR is 3G or 4G cellular signals
- The highest value we recorded was 16,000 $\mu W/m^2$
- The lowest value we recorded was 2 $\mu W/m^2$
- The intensity of RFR within a few blocks of each cell tower exceeds 1,000 $\mu W/m^2$
- For comparison: RFR in nature, away from towns and cities, is 0.000001 $\mu W/m^2$
- "Full signal" (4 or 5 "bars" on a cell phone) can be achieved at 0.01 $\mu W/m^2$. Thus, wireless signals saturate these neighborhoods over 200x above "full signal".
- Conclusion: no gaps in cellular service exist within the measured neighborhoods

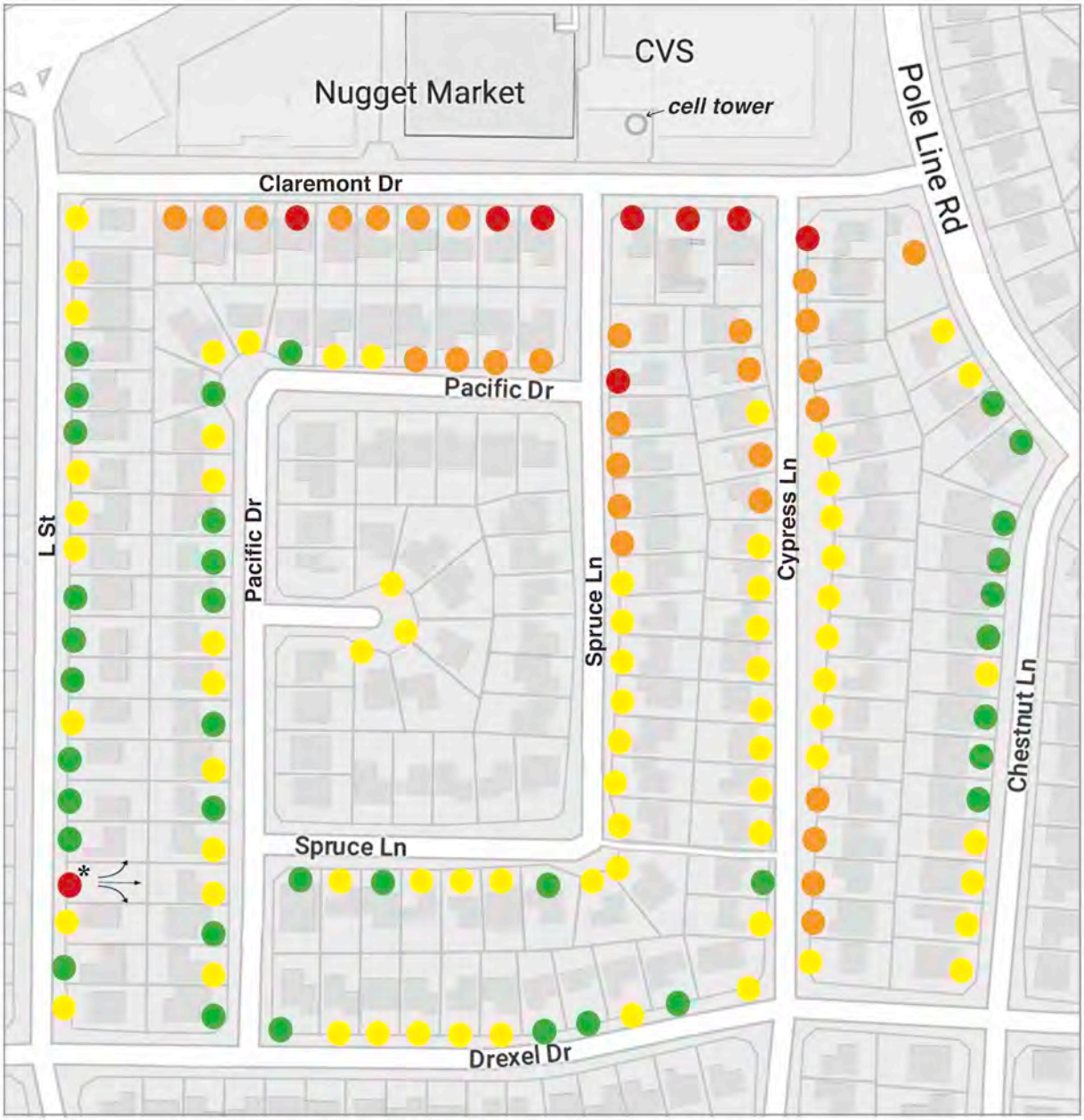
More Observations

- RFR at all sites was within the U.S. Federal Communication Commission's thermal-only safety guideline, which protects against shock or heating due to a short-term (6 to 30 minute) exposure.
- In the U.S., we have no safety guideline for low-intensity (nonthermal) long-term exposure.

Brief Guide Regarding Health Implications

- Epidemiology studies conducted in Germany, Austria, Spain, France, India, Brazil, and several other countries during the past 20 years suggest that neurophysiological effects can occur with long-term exposure (months to years) at RFR intensities as low as 100 $\mu W/m^2$
- Such effects include fatigue, difficulty sleeping, difficulty concentrating, poor short-term memory, headache, irritability, anxiety, depression, dizziness, nausea, visual problems, heart palpitations, digestive problems, tinnitus (ringing in the ears), and joint pain or other chronic pain.
- Those same studies suggest strongly that neurophysiological ailments are more likely with long-term exposures above 1,000 $\mu W/m^2$
- Recent animal studies and a few clinical studies link RFR to diabetes and to various neuro-degenerative diseases, including Alzheimer's Disease and Multiple Sclerosis (MS). Some of those studies suggest that patients need exposures at home of less than 10 $\mu W/m^2$ to get better.

Radio Frequency Radiation Along Sidewalk, Davis, California
Claremont Drive to Drexel Drive, April 2018



One-minute samples; frequency range 100 MHz to 8 GHz; data compiled by Larry Rollins, graphics by Pat Suyama

**Empty lot (no house); exposure here to "smart" meters on nearby houses.*

KEY: 1.0 to 10.0 μW/m² | 10.0 to 99.9 μW/m² | 100 to 999 μW/m² | ≥1,000 μW/m²

Radio Frequency Radiation in Backyards, Davis, California
Claremont Drive to Drexel Drive, 2018 (estimated)

Radio frequency radiation in backyards estimated based on location of P.G.&E. smart electric meters and spot measurements in the backyards of five residences; data compiled by Larry Rollins, graphic design by Pat Suyama.

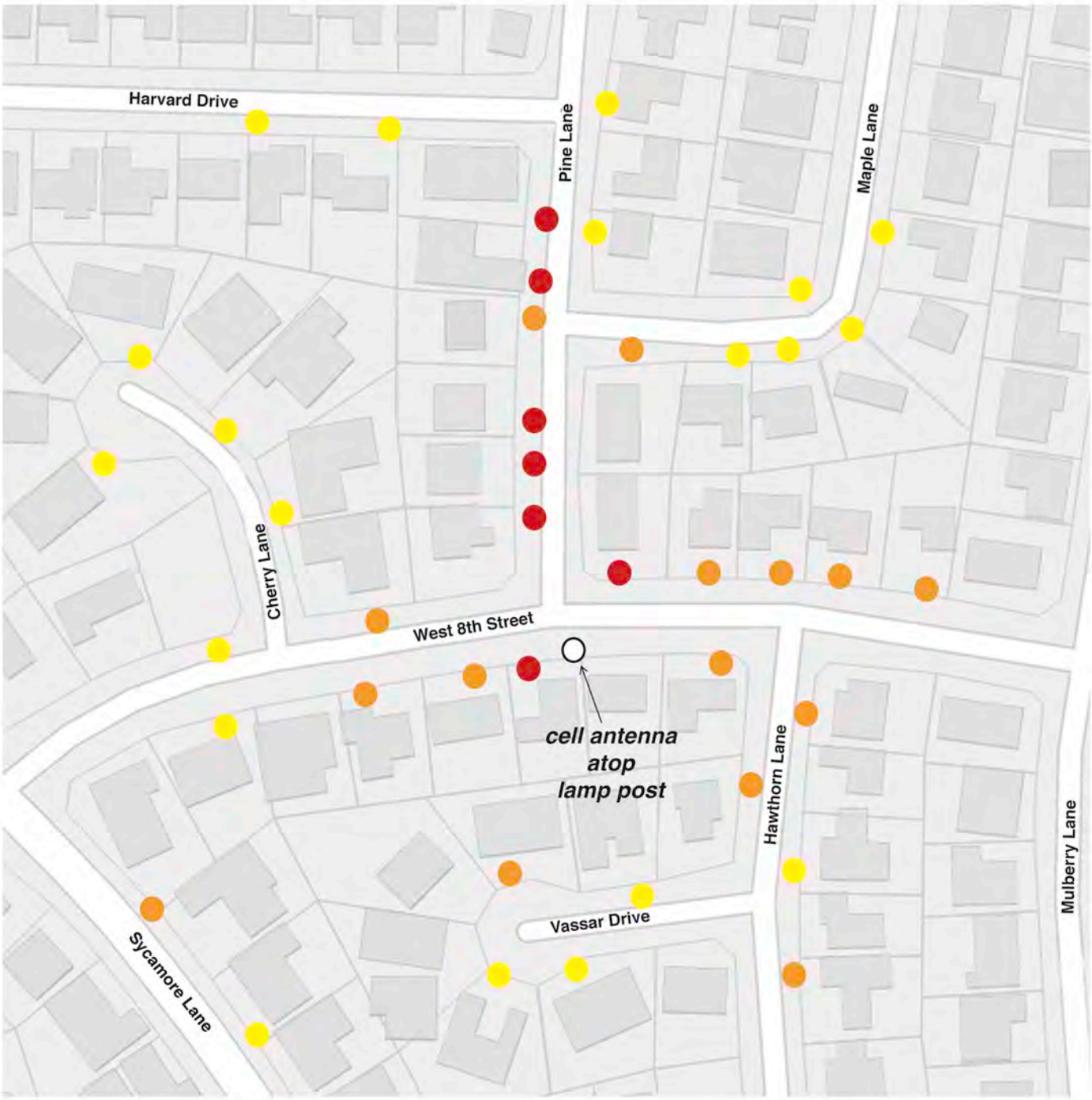
KEY: 1.0 to 10.0 μW/m² | 10.0 to 99.9 μW/m² | 100 to 999 μW/m² | ≥1,000 μW/m²

Radio Frequency Radiation Along Sidewalk, Davis, California
Drexel Drive to 8th Street, May 2018

One-minute samples; frequency range 100 MHz to 8 GHz; data Larry Rollins and James Trask, graphics Pat Suyama

KEY: 1.0 to 10.0 μW/m² | 10.0 to 99.9 μW/m² | 100 to 999 μW/m² | ≥1,000 μW/m²

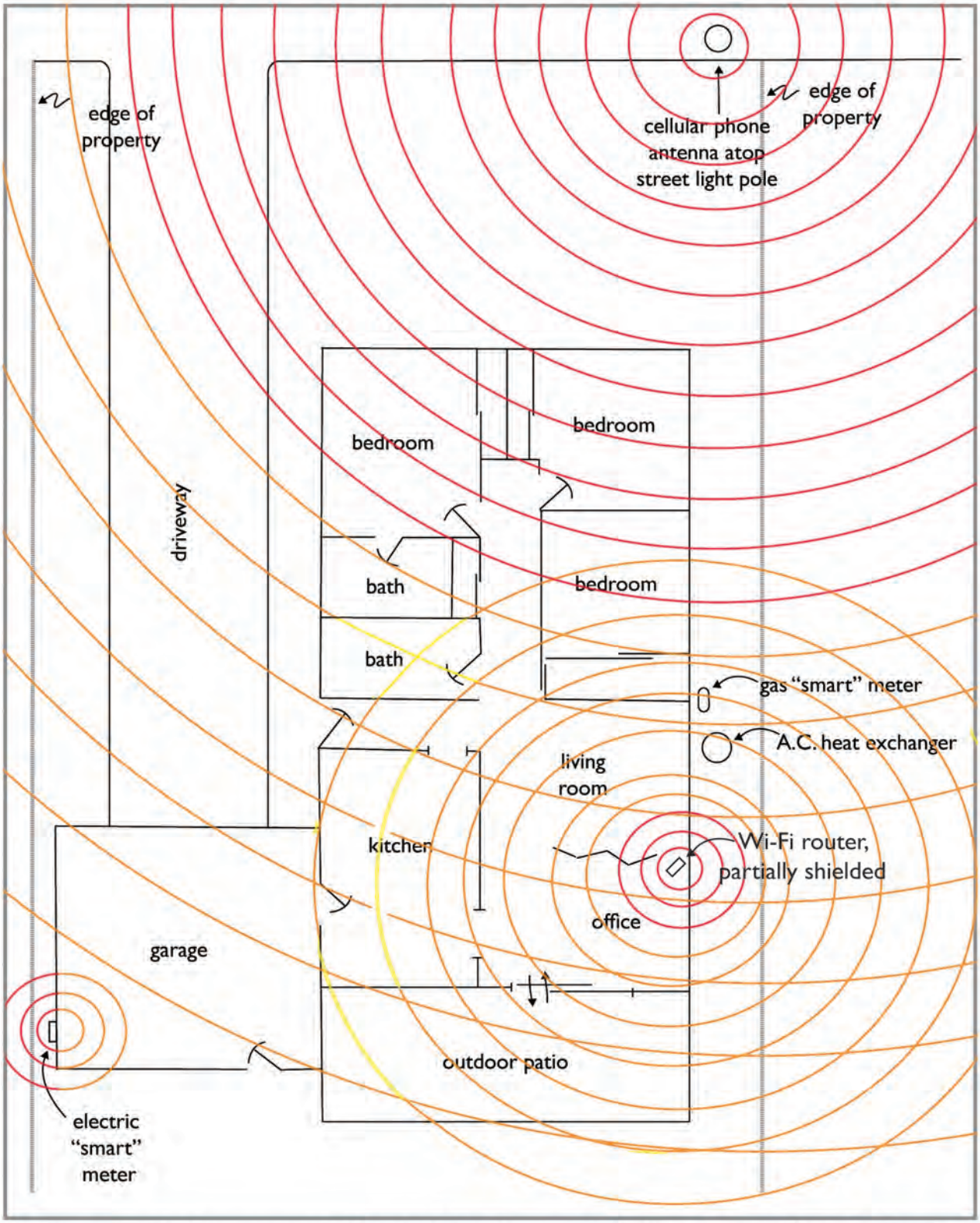
Radio Frequency Radiation Along Sidewalk, Davis, California
8th Street and Pine Lane, September 2018



One-minute samples; frequency range 100 MHz to 8 GHz; data Larry Rollins and James Trask, graphics Pat Suyama

KEY: 1.0 to 10.0 μW/m² | 10.0 to 99.9 μW/m² | 100 to 999 μW/m² | ≥1,000 μW/m²

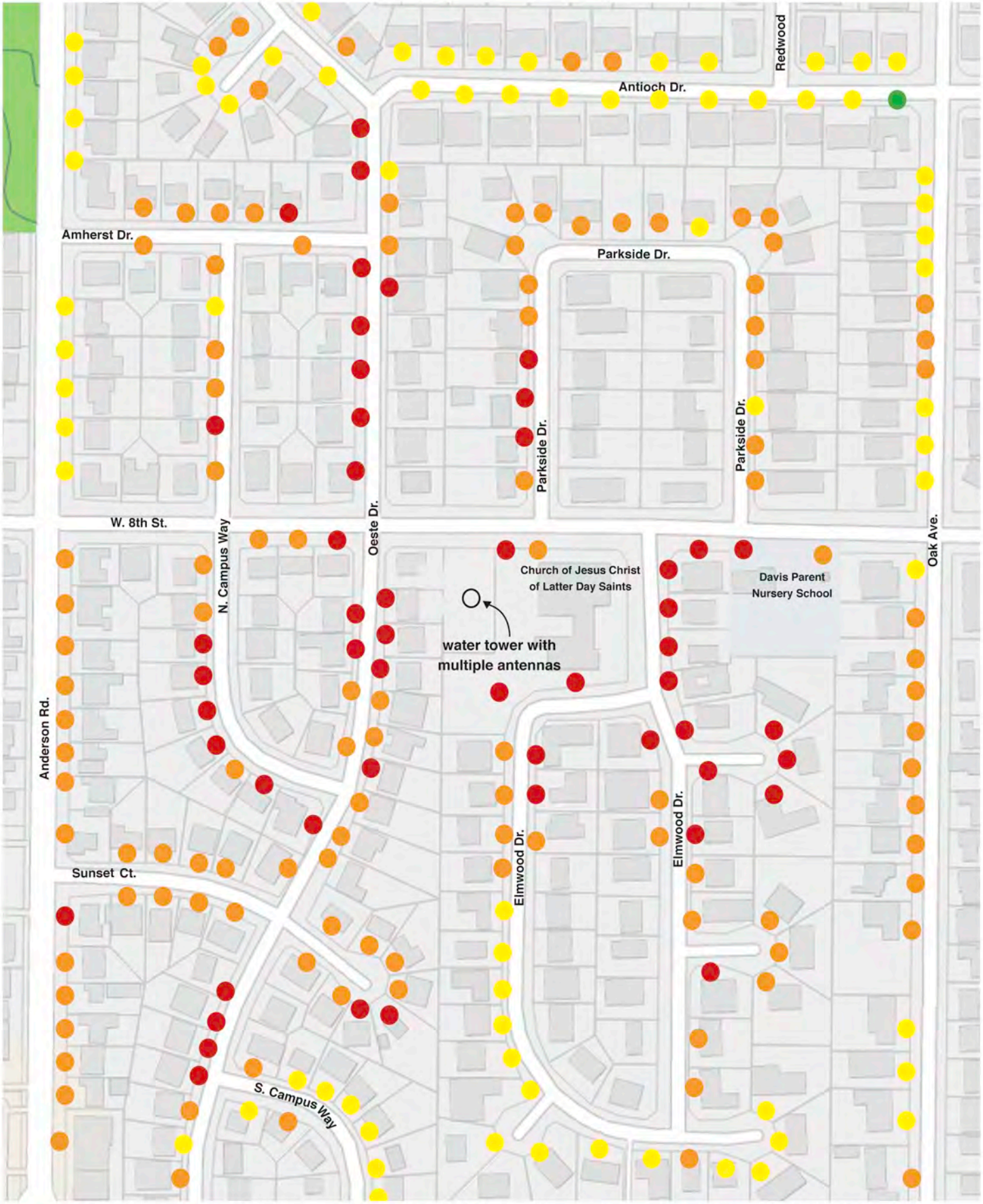
Microwave Radiation Inside House, Davis, California
8th Street and Pine Lane, May 2018



One-minute samples; frequency range 100 MHz to 8 GHz; data compiled by Larry Rollins, graphics by Pat Suyama

KEY: 1.0 to 10.0 μW/m² | 10.0 to 99.9 μW/m² | 100 to 999 μW/m² | ≥1,000 μW/m²

Radio Frequency Radiation, Davis, California: Water Tower, November 2018



One-minute samples; frequency range 100 MHz to 8 GHz; data James Trask and Larry Rollins, graphics Pat Suyama

KEY: 1.0 to 10.0 μW/m² | 10.0 to 99.9 μW/m² | 100 to 999 μW/m² | ≥1,000 μW/m²

Notes Regarding Radio Frequency Radiation (RFR) Measurements in 2018 in Four Residential Neighborhoods in Davis, California

October 3, 2019
Prepared for Electrosmog Awareness Project
by Larry Rollins, science writer, Davis, Calif.

General Comments

- We measured peak and average levels of total RFR along sidewalks
- We report on our maps peak levels measured during one-minute intervals
- Measurement instrument (two): Cornet ED-178S Electrosmog Meter
- Frequency range for this meter: 100 MHz to 8 GHz
- Sampling rate for the meter: 10,000 readings per second
- Sensitivity range: 0.5 to 1,800,000 $\mu W/m^2$
- We calibrated our meters against factory-certified meters accurate to ±3 dB. The results demonstrated that our meters are reliable for the frequencies and intensities we encounter in neighborhoods. Our meters typically report numbers lower than the certified meters do.

Map: Claremont Drive to Drexel Drive

- The lowest measurement here is 2 $\mu W/m^2$ (house on Drexel)
- The highest is about 7,000 $\mu W/m^2$ (near cell tower on Claremont)

Map of Backyards, Claremont to Drexel

- Much radiation in backyards is due to PG&E's "smart" electric meters
- Caption on map describes how we made this map

Map: Drexel Drive to Eighth Street

- The two red zones are due to "smart" electric meters
- The orange zones may be due to WiFi or meters at nearby houses

Map: Eighth Street and Pine Lane

- Highest readings 4,000 to 5,000 $\mu W/m^2$ (near cell antenna)
- Of four residents we know living near the antenna, two have multiple sclerosis, and two others have diabetes.

Map: House at Eighth and Pine

- RFR exposure in bedrooms closest to street (and antenna): 2,500 μW/m^2
- RFR in third bedroom (at center of house): about 1,500 μW/m^2
- RFR in living room, near WiFi router (shielded to cut signal): 700 μW/m^2
- The resident of this house has diabetes. She also has had joint pain, leg cramps, dizziness, fatigue, nausea, headache, and other symptoms of microwave illness. She now sleeps in the living room to minimize her symptoms (bedrooms unusable due to high RFR).

Map: Davis Water Tower

- This is the highest-radiation neighborhood we have measured so far
- Tower has two omnidirectional antennas on top and sector antennas on its sides
- Exposure to RFR at 53 houses here exceeds 1,000 μW/m^2
- Twelve (of the 53) houses receive more than 5,000 μW/m^2
- Of those twelve, five receive more than 10,000 μW/m^2 (maximum 16,000 μW/m^2)
- Extensive tree cover on many streets here helps shield some houses from RFR

PHOTOS

Cell tower (monopole) on Claremont Drive. Nugget Market at left, CVS building behind antenna.

Cell antenna atop city-owned street lamp at Eighth Street and Pine Lane.

Davis water tower on Eighth Street near Elmwood Drive, November 2018. Two omnidirectional whip antennas and several smaller antennas are located on top of the tower. Numerous panel-style (sector) antennas are located below the tank, on the tower's sides.

https://scientists4wiredtech.com/ninth-circuit-case-repeal-of-fcc-18-133/

Ninth Circuit Case 19-70144 et al. — Repeal of FCC 18-111 and FCC 18-133

Tenth Circuit **Case 18-9568** . . . was moved to the Ninth Circuit.
Ninth Circuit **Case 19-70144** (case opened on Jan 15, 2019; a consolidation of nine separate cases) — including Repeal of FCC 18-111 and FCC-18-133
Latest Relevant Documents of the Case(s)

2019-0307-Joint-Opposition-to-FCC-Motion-to-Hold-in-Abeyance

2018-1114-GWTCA-et-al-Small-Cell-Petition-For-Reconsideration

2019-0307-Joint-Opposition-to-FCC-Motion-to-Hold-in-Abeyance:

> "There is no evidence suggesting the September Order is anything other than the final result of its decision-making process. The FCC continues to publicly stand by the September Order as adopted. Commissioner Brendan Carr, who has been leading the FCC's infrastructure efforts, recently highlighted the September Order in a February 5, 2019 speech, asserting that the agency was "not going to slow down" in its infrastructure efforts, and that the September Order (which had at the time been effective for only 22 days, and then only in part) was already impacting local government practices and wireless deployment. There is no reason, therefore, to suppose that further delay will somehow actually resolve the issues raised in these appeals, or that the September Order on appeal here is anything other than the final administrative work."

https://youtu.be/4qfDJSzYqgs
6-minute video from CNBC
FCC Commissioner Brendan Carr on
Some of the Impacts of Densified 4G and 5G Infrastructure
But Only the Upsides, Not the Downsides, including Irreparable Harms from FCC 18-133

Tenth Circuit Motions for Stay of FCC 18-133,

The Wireless and Wireline Infrastructure Order

Updated on Jan 9, 2018 @ 1:40 pm ET

- 2018-1217-10th-Circuit-Case-18-9568-San-Jose-et-al-Motion-for-Stay-and-Appendix
- 2019-0101-10th-Circuit-Case-18-9568-Wireless-Industry-Opposition-to-Motion-For-Stay
- 2019-0102-10th-Circuit-Case-18-9568-FCC-Opposition-to-Motion-for-Stay
- 2019-0108-10th-Circuit-Case-18-9568-Joint-Reply-to-Opposition-to-Motion-for-Stay.
- Link to Bloomberg Law: "Challenge to FCC's 5G Network Order Moves to Ninth Circuit"
- Link to Appellate Case: 18-9568 Document: 010110109238 Date Filed: 01/10/2019
- Link to Appellate Case: 18-9563 Document: 010110109277 Date Filed: 01/10/2019

January 10, 2019: Appellate Case: 18-9568

Before McHUGH and MORITZ , Circuit Judges.

Petitioners are local governments and other entities with similar interests who seek a stay of an FCC order that is scheduled to take effect in part on Monday, January 14, 2019. The Supreme Court has explained that

> *"[a] stay is not a matter of right, even if irreparable injury might otherwise result. It is instead an exercise of judicial discretion, and [t]he propriety of its issue is dependent upon the*

circumstances of the particular case." Nken v. Holder , 556 U.S. 418, 433 (2009) (internal quotation marks and citation omitted).

"The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." Id. at 433-34.

When deciding whether to exercise our discretion to grant a stay, we consider the following four traditional stay factors:

1. Whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits;
2. Whether the applicant will be irreparably injured absent a stay;
3. Whether issuance of the stay will substantially injure the other parties interested in the proceeding; and
4. Where the public interest lies.

Id . at 434 (internal quotation marks omitted).

The Supreme Court has indicated that "[t]he first two factors of the traditional standard are the most critical." *Id.*

After reviewing all of the parties' submissions, we conclude **petitioners have failed to meet their burden of showing irreparable harm if a stay is not granted**. Accordingly, in the exercise of our discretion, we deny petitioners' motion for stay.

January 10, 2019: Appellate Case: 18-9563

Before BRISCOE, BACHARACH, and PHILLIPS, Circuit Judges

On September 27, 2018, the Federal Communications Commission issued an order entitled *Declaratory Ruling and Third Report and Order* (the "September Order"). FCC 18-133, 83 Fed. Reg. 51,867 (Oct. 15, 2018). The United States Judicial Panel on Multidistrict Litigation designated this circuit as the court in which to consolidate the various petitions for review of the September Order.

These matters are before us on a *Motion to Transfer*, filed by the petitioners in *City of San Jose, et al. v. F.C.C., et al.* , No. 18-9568. The San Jose Petitioners seek to transfer these matters, pursuant to 28 U.S.C. § 2112(a)(5), to the United States Court of Appeals for the Ninth Circuit where a first-in -time petition for review of an order issued by the FCC on August 3, 2018 is pending. *Third Report and Order and Declaratory Ruling*, FCC 18-111, 83 Fed. Reg. 46,812 (Sep. 14, 2018) (the "August Order"). The FCC and the United States filed a response opposing transfer and supplemental authority. Sprint Corporation, Verizon Communications, Inc., Puerto Rico Telephone Company, Inc., CTIA – The Wireless Association®, the Wireless Infrastructure Association, and the Competitive Carriers Association also filed a response opposing transfer. Finally, the San Jose Petitioners filed a reply in support of their motion.

After careful consideration, we conclude that the FCC's August Order and its September Order are the "same order" for purposes of § 2112(a). Accordingly, the motion to transfer is granted and these matters are transferred to the United States Court of Appeals for the Ninth Circuit.[1]

1. Four petitions for review of the September Order are presently pending before the United States Court of Appeals for the District of Columbia Circuit. See AT&T Services, Inc., v. FCC , No. 18-1294 (D.C. Cir. filed Oct. 25, 2018); American Public Power Ass'n v. FCC , No. 18-1305 (D.C. Cir. filed Nov. 15, 2018); City of Austin v. FCC , No. 18-1326 (D.C. Cir. filed Dec. 11, 2018); City of Eugene v. FCC , No. 18-1330 (D.C. Cir. filed Dec. 12, 2018). As these petitions are not before us, this order does not address them. ↩

The Current Case Numbers and Line Up

A. The Following Parties Are Represented by Best Best & Krieger LLP

Cities, counties or organizations are highlighted the first time they appear on the lists.

1. City of San Jose, California
2. City of Arcadia, California
3. City of Bellevue, Washington
4. City of Burien, Washington
5. City of Burlingame, California
6. Culver City, California
7. Town of Fairfax, California
8. City of Gig Harbor, Washington
9. City of Issaquah, Washington
10. City of Kirkland, Washington
11. City of Las Vegas, Nevada
12. City of Los Angeles, California
13. County of Los Angeles, California
14. City of Monterey, California
15. City of Ontario, California
16. City of Piedmont, California
17. City of Portland, Oregon
18. City of San Jacinto, California
19. City of Shafter, California
20. City of Yuma, Arizona
21. City of Albuquerque, New Mexico
22. **National League of Cities**
23. City of Brookhaven, Georgia
24. City of Baltimore, Maryland
25. City of Dubuque, Iowa
26. Town of Ocean City, Maryland
27. City of Emeryville, California
28. **Michigan Municipal League**
29. Town of Hillsborough, California
30. City of La Vista, Nebraska
31. City of Medina, Washington
32. City of Papillion, Nebraska
33. City of Plano, Texas
34. City of Rockville, Maryland
35. City of San Bruno, California
36. City of Santa Monica, California
37. City of Sugarland, Texas
38. **League of Nebraska Municipalities**
39. City of Austin, Texas
40. City of Ann Arbor, Michigan
41. County of Anne Arundel, Maryland
42. City of Atlanta, Georgia
43. City of Boston, Massachusetts
44. City of Chicago, Illinois
45. Clark County, Nevada
46. City of College Park, Maryland
47. City of Dallas, Texas
48. District of Columbia
49. City of Gaithersburg, Maryland

50. Howard County, Maryland
51. City of Lincoln, Nebraska
52. Montgomery County, Maryland
53. City of Myrtle Beach, South Carolina
54. City of Omaha, Nebraska
55. City of Philadelphia, Pennsylvania
56. City of Rye, New York
57. City of Scarsdale, New York
58. City of Seat Pleasant, Maryland
59. City of Takoma Park, Maryland
60. **Texas Coalition of Cities for Utility Issues**
61. Meridian Township, Michigan
62. Bloomfield Township, Michigan
63. **Michigan Townships Association**
64. **Michigan Coalition to Protect Public Rights-Of-Way**

B. National Association of Telecommunication Officers is represented by separate counsel

C. Advisors and City of New York is represented by separate counsel

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Case No. 19-70123

Case No. 19-70123 Petitioner

- Sprint Corporation

Case No. 19-70123 Intervenors

1. City of Bowie, Maryland
2. City of Eugene, Oregon
3. City of Huntsville, Alabama
4. City of Westminster, Maryland
5. County of Marin, California
6. City of Arcadia, California
7. Culver City, California
8. City of Bellevue, California
9. City of Burien, Washington
10. City of Burlingame, Washington
11. City of Gig Harbor, Washington
12. City of Issaquah, Washington
13. City of Kirkland, Washington
14. City of Las Vegas, Nevada
15. City of Los Angeles, California
16. City of Monterey, California
17. City of Ontario, California
18. City of Piedmont, California
19. City of Portland, Oregon
20. City of San Jacinto, California
21. City of San Jose, California
22. City of Shafter, California
23. City of Yuma, Arizona
24. County of Los Angeles, California
25. Town of Fairfax, California
26. City of New York.

Case No. 19-70124

No. 19-70124 Petitioner

- Verizon Communications, Inc.,

No. 19-70124 Intervenors

1. City of Arcadia, California
2. City of Bellevue, California
3. City of Burien, Washington
4. City of Burlingame, Washington
5. City of Gig Harbor, Washington
6. City of Issaquah, Washington
7. City of Kirkland, Washington
8. City of Las Vegas, Nevada
9. City of Los Angeles, California
10. City of Monterey, California
11. City of Ontario, California
12. City of Piedmont, California
13. City of Portland, Oregon
14. City of San Jacinto, California
15. City of San Jose, California
16. City of Shafter, California
17. City of Yuma, Arizona
18. County of Los Angeles, California
19. Culver City, California
20. City of New York
21. Town of Fairfax, California

Case No. 19-70125

No. 19-70125 Petitioner

- Puerto Rico Telephone Company, Inc.

No. 19-70125 Intervenors

1. City of Arcadia, California
2. City of Bellevue, California
3. City of Burien, Washington
4. City of Burlingame, Washington
5. City of Gig Harbor, Washington
6. City of Issaquah, Washington
7. City of Kirkland, Washington
8. City of Las Vegas, Nevada
9. City of Los Angeles, California
10. City of Monterey, California
11. City of Ontario, California
12. City of Piedmont, California
13. City of Portland, Oregon
14. City of San Jacinto, California
15. City of San Jose, California
16. City of Shafter, California
17. City of Yuma, Arizona
18. County of Los Angeles, California
19. Culver City, California

20. Town of Fairfax, California
21. City of New York

Case No. 19-70136

No. 19-70136 Petitioners

1. City of Seattle, Washington
2. City of Tacoma, Washington
3. King County, Washington
4. **League of Oregon Cities**
5. **League of California Cities**
6. **League of Arizona Cities and Towns**

No. 19-70136 Intervenors

1. City of Bakersfield, California
2. City of Coconut Creek, Florida
3. City of Lacey, Washington
4. City of Olympia, Washington
5. City of Rancho Palos Verdes, California
6. City of Tumwater, Washington
7. **Colorado Communications and Utility Alliance**
8. **Rainier Communications Commission**
9. County of Thurston, Washington
10. City of Arcadia, California
11. City of Bellevue, Washington
12. City of Burien, Washington
13. City of Burlingame, California
14. City of Gig Harbor, Washington
15. City of Issaquah, Washington
16. City of Kirkland, Washington
17. City of Las Vegas, Nevada
18. City of Los Angeles, California
19. City of Monterey, California
20. City of Ontario, California
21. City of Piedmont, California
22. City of Portland, Oregon
23. City of San Jacinto, California
24. City of San Jose, California
25. City of Shafter, California
26. City of Yuma, Arizona
27. County of Los Angeles, California
28. Culver City, California
29. Town of Fairfax, California
30. City of New York

Case No. 19-70144

Case No. 19-70144 Petitioners

1. City of San Jose, California
2. City of Arcadia, California
3. City of Bellevue, Washington
4. City of Burien, Washington

5. City of Burlingame, California
6. Culver City, California
7. Town of Fairfax, California
8. City of Gig Harbor, Washington
9. City of Issaquah, Washington
10. City of Kirkland, Washington
11. City of Las Vegas, Nevada
12. City of Los Angeles, California
13. County of Los Angeles, California
14. City of Monterey, California
15. City of Ontario, California
16. City of Piedmont, California
17. City of Portland, Oregon
18. City of San Jacinto, California
19. City of Shafter, California
20. City of Yuma, Arizona

Case No. 19-70144 Intervenors

1. CTIA—The Wireless Association
2. Competitive Carriers Association
3. Sprint Corporation
4. Verizon Communications, Inc.
5. City of New York
6. Wireless Infrastructure Association

Case No. 19-70145

Case No. 19-70145 Petitioner

- City and County of San Francisco

Case No. 19-70146

Case No. 19-70146 Petitioner

- City of Huntington Beach, California

Case No. 19-70146 Intervenors

1. City of Arcadia, California
2. City of Bellevue, Washington
3. City of Burien, Washington
4. City of Burlingame, California
5. City of Gig Harbor, Washington
6. City of Issaquah, Washington
7. City of Kirkland, Washington
8. City of Las Vegas, Nevada
9. City of Los Angeles, California
10. City of Monterey, California
11. City of Ontario, California
12. City of Piedmont, California
13. City of Portland, Oregon
14. City of San Jacinto, California
15. City of San Jose, California

16. City of Shafter, California
17. City of Yuma, Arizona
18. County of Los Angeles, California
19. Culver City, California
20. Town of Fairfax, California
21. City of New York

Case No. 19-70147

Case No. 19-70147 Petitioner

- Montgomery County, Maryland

Case No. 19-70326

Case No. 19-70326 Petitioner

- AT&T Services, Inc.

Case No. 19-70326 Intervenors

1. City of Baltimore, Maryland
2. City And County of San Francisco, California
3. Michigan Municipal League
4. City of Albuquerque, New Mexico
5. National League of Cities
6. City of Bakersfield, California
7. Town of Ocean City, Maryland
8. City of Brookhaven, Georgia
9. City of Coconut Creek, Florida
10. City of Dubuque, Iowa
11. City of Emeryville, California
12. City of Fresno, California
13. City of La Vista, Nebraska
14. City of Lacey, Washington
15. City of Medina, Washington
16. City of Olympia, Washington
17. City of Papillion, Nebraska
18. City of Plano, Texas
19. City of Rancho Palos Verdes, California
20. City of Rockville, Maryland
21. City of San Bruno, California
22. City of Santa Monica, California
23. City of Sugarland, Texas
24. City of Tumwater, Washington
25. City of Westminster, Maryland
26. Colorado Communications and Utility Alliance
27. Contra Costa County, California
28. County of Marin, California
29. **International City/County Management Association**
30. **International Municipal Lawyers Association**
31. League of Nebraska Municipalities
32. **National Association of Telecommunications Officers and Advisors**
    [NATOA promotes community interests in communications. A **national** trade **association** based in

Alexandria, VA, NATOA represents local government jurisdictions and consortiums, including elected and appointed officials and staff, who oversee communications and cable television franchising.]

33. Rainier Communications Commission
34. Thurston County, Washington
35. Town of Corte Madera, California
36. Town of Hillsborough, California
37. Town of Yarrow Point, Washington
38. City of Arcadia, California
39. City of Bellevue, Washington
40. City of Burien, Washington
41. City of Burlingame, California
42. City of Culver City, California
43. City of Gig Harbor, Washington
44. City of Issaquah, Washington
45. City of Kirkland, Washington
46. City of Las Vegas, Nevada
47. City of Los Angeles, California
48. City of Monterey, California
49. City of Ontario, California
50. City of Piedmont, California
51. City of Portland, Oregon
52. City of San Jacinto, California
53. City of San Jose, California
54. City of Shafter, California
55. City of Yuma, Arizona
56. County of Los Angeles, California
57. Town of Fairfax, California

Case No. 19-70339

Case No. 19-70339 Petitioner

- American Public Power Association

Case No. 19-70339 Intervenors

1. City of Albuquerque, New Mexico
2. National League of Cities
3. City of Brookhaven, Georgia
4. City of Baltimore, Maryland
5. City of Dubuque, Iowa
6. Town of Ocean City, Maryland
7. City of Emeryville, California
8. Michigan Municipal League
9. Town of Hillsborough, California
10. City of La Vista, Nebraska
11. City of Medina, Washington
12. City of Papillion, Nebraska
13. City of Plano, Texas
14. City of Rockville, Maryland
15. City of San Bruno, California
16. City of Santa Monica, California
17. City of Sugarland, Texas
18. League of Nebraska Municipalities
19. National Association of Telecommunications Officers and Advisors

20. City of Bakersfield, California
21. City of Fresno, California
22. City of Rancho Palos Verdes, California
23. City of Coconut Creek, Florida
24. City of Lacey, Washington
25. City of Olympia, Washington
26. City of Tumwater, Washington
27. Town of Yarrow Point, Washington
28. Thurston County, Washington
29. Colorado Communications and Utility Alliance
30. Rainier Communications Commission
31. City and County of San Francisco, California
32. County of Marin, California
33. Contra Costa County, California
34. Town of Corte Madera, California
35. City of Westminster, Maryland

Case No. 19-70341

Case No. 19-70341 Petitioners

1. City of Austin, Texas
2. City of Ann Arbor, Michigan
3. County of Anne Arundel, Maryland
4. City of Atlanta, Georgia
5. City of Boston, Massachusetts
6. City of Chicago, Illinois
7. Clark County, Nevada
8. City of College Park, Maryland
9. City of Dallas, Texas
10. District of Columbia
11. City of Gaithersburg, Maryland
12. Howard County, Maryland
13. City of Lincoln, Nebraska
14. Montgomery County, Maryland
15. City of Myrtle Beach, South Carolina
16. City of Omaha, Nebraska
17. City of Philadelphia, Pennsylvania
18. City of Rye, New York
19. City of Scarsdale, New York
20. City of Seat Pleasant, Maryland
21. City of Takoma Park, Maryland
22. Texas Coalition of Cities for Utility Issues
23. Meridian Township, Michigan
24. Bloomfield Township, Michigan
25. Michigan Townships Association
26. Michigan Coalition to Protect Public Rights-of-way

Case No. 19-70341 Intervenors

1. City of Albuquerque, New Mexico
2. National League of Cities
3. City of Brookhaven, Georgia
4. City of Baltimore, Maryland

5. City of Dubuque, Iowa
6. Town of Ocean City, Maryland
7. City of Emeryville, California
8. Michigan Municipal League
9. Town of Hillsborough, California
10. City of La Vista, Nebraska
11. City of Medina, Washington
12. City of Papillion, Nebraska
13. City of Plano, Texas
14. City of Rockville, Maryland
15. City of San Bruno, California
16. City of Santa Monica, California
17. City of Sugarland, Texas
18. League of Nebraska Municipalities
19. National Association of Telecommunications officers and Advisors
20. City of Bakersfield, California
21. City of Fresno, California
22. City of Rancho Palos Verdes, California
23. City of Coconut Creek, Florida
24. City of Lacey, Washington
25. City of Olympia, Washington
26. City of Tumwater, Washington
27. Town of Yarrow Point, Washington
28. Thurston County, Washington
29. Colorado Communications and Utility Alliance
30. Rainier Communications Commission
31. City and County of San Francisco, California
32. County of Marin, California
33. Contra Costa County, California
34. Town of Corte Madera, California
35. City of Westminster, Maryland

Case No. 19-70344

Case No. 19-70344 Petitioners

1. City of Eugene, Oregon
2. City of Huntsville, Alabama
3. City of Bowie, Maryland

Case No. 19-70344 Intervenors

1. City of Albuquerque, New Mexico
2. National League of Cities
3. City of Brookhaven, Georgia
4. City of Baltimore, Maryland
5. City of Dubuque, Iowa
6. Town of Ocean City, Maryland
7. City of Emeryville, California
8. Michigan Municipal League
9. Town of Hillsborough, California
10. City of La Vista, Nebraska
11. City of Medina, Washington
12. City of Papillion, Nebraska
13. City of Plano, Texas

14. City of Rockville, Maryland
15. City of San Bruno, California
16. City of Santa Monica, California
17. City of Sugarland, Texas
18. League of Nebraska Municipalities
19. National Association of Telecommunications officers and Advisors
20. City of Bakersfield, California
21. City of Fresno, California
22. City of Rancho Palos Verdes, California
23. City of Coconut Creek, Florida
24. City of Lacey, Washington
25. City of Olympia, Washington
26. City of Tumwater, Washington
27. Town of Yarrow Point, Washington
28. Thurston County, Washington
29. Colorado Communications and Utility Alliance
30. Rainier Communications Commission
31. City and County of San Francisco, California
32. County of Marin, California
33. Contra Costa County, California
34. Town of Corte Madera, California
35. City of Westminster, Maryland

Eric Windheim, BA, BBEC, EMRS
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Sacramento, Ca. 916-395-7336

June 3, 2019

XXXXX & XXXXXXX XXXXXXXXX
XXXX Pocket Road
Sacramento CA, 95831

Dear [redacted],

Preface: Our EMF testing is objective, informative and we are independent of industry and government. We detect and measure EMFs that others won't, due to policy, or can't, due lack of training or proper instruments and we show you the biologically precautionary and non-thermal risk levels reported in independently funded, peer reviewed reports that industry and government ignore.

The purpose of this letter & report is to provide you with my opinion about the levels, dangers and protective recommendations for the radio frequency radiation (RFR) exposure at the premises located at XXXX Pocket Road, Sacramento CA, 95831 the "Property"). I am pleased to provide you with my opinions on the matter.

By way of background, I am a Certified Building Biology Environmental Consultant (BBEC) and Certified Electromagnetic Radiation Specialist (EMRS) trained and certified by the International Institute for Building Biology and Ecology: https://hbelc.org/ . I have completed the "Radio Frequency Safety Officer Course" (RFSO) accredited by the Institute of Electrical and Electronics Engineers, Inc. (IEEE): https://www.ieee.org/education/certificates/index.html. My experience includes consulting to detect, measure, and determine biological risk levels in residential and low-rise commercial buildings and to provide written assessments, reports and effective solutions that reduce EMF exposure for homeowners, developers, medical doctors, municipalities, school districts, firefighter unions, housing corporations, real-estate development companies, large electrical and general building contractors and high-tech Semiconductor companies. Further, I have significant training in the use of precision instruments that measure all EMFs including radio frequency radiation (RFR). I have designed and supervised installation of highly effective RFR shielding systems of up to 40,000 square feet in shield size. Attached are my credentials, back ground and bio that provides a more detailed background about my education and experience: Exhibit 17.

I see clients in all stages of acute symptomology, pain, suffering, disfunction, injury and chronic health decline from RFR exposure ranging from mild headaches, fatigue, restless sleep, ringing in the ears,

cognitive disability to debilitating insomnia, endocrine disorders, blood pressure spikes, cardiac problems, emergency hospital visits, depression, suicidal thoughts and delusional psychosis. Many clients experience rapid or complete recovery when the RFR exposure is reduced, eliminated by removing the source of the RFR or by moving away from it. This is also observed in published studies from around the world (Exhibit 7). I find that immediate reduction or avoidance of RFR exposure is the key to symptom relief and recovery. Once you are traumatized by chronic RFR exposure, your health, mental, physical, social relations and financial stability can deteriorate significantly. Some clients never recover completely and they are never the same as they were before exposure.

I examined, measured and tested your Property on March 28 through April 1 2019 and also on April 7 2018. ***It was noted that there is a Verizon small cell omnidirectional cannister antenna on the top of the city owned lamp pole, SLT-[redacted], 60 feet from your second story bedroom window for the bedroom of your two young daughters.***

To obtain useful RFR sampling of data, I recorded RFR measurements at a number of points both inside and outside your home. During my tests there were no WIFI or cell phones operating in your home: all other sources of RFR were from nearby homes, distant cell towers and insignificant by comparison. *I deployed an HF-59B RFR meter built by Gigahertz Solutions and in the factory calibration period.* See (Exhibit 13) for methodology, meters and meter settings.

The highest and most hazardous RFR level was measured in your second story children's bedroom: 60 feet from the antenna. The RFR power density levels were up to 460,000 µW/m^2 which is 460x above the Extreme Concern level of SBM-2015 (Exhibit 1&4). The second story master bedroom, at the back of the house and farthest from the antenna, measured 16,000 µW/m^2 (Exhibit 4). The second story office bedroom measured 13,000 µW/m^2. Significantly, these levels are 460x, 16x, and 13x *above* the "Extreme Concern" level according to SBM-2015 for sleeping areas. (Exhibit 1 & 4).

These RFR levels indicate a very significant health hazard and danger based on current scientific principles of risk for acute symptoms, illness and long-term disease (Exhibits 5, 6, 11).

It is well documented that the health consequences resulting from such significant RFR exposure include, but are not limited to moderate to severe sleep problems, tinnitus, chronic fatigue, headaches, concentration, memory, learning and immune system problems, heart palpitations, nausea, joint pain, swelling of face and neck, eye problems, rashes, and cancer. In your case, the

levels of RFR exposure are extremely elevated and present a danger and hazard to both family members and visiting guests (Exhibits 5, 6, 11).

Contrary to information provided by the wireless industry, the Federal Communications Commission (FCC) and non-governmental organizations friendly to the wireless industry, there is very substantial evidence for adverse neurological symptoms and other non-thermal chronic health damage due to non-ionizing RFR radiation at levels several orders of magnitude lower than current FCC guidelines and actually much lower than you are being continuously exposed to in your own home (Exhibit 6B).

Please note that the FCC MPE public exposure thermal limit testing is not done on real live people but rather on liquid filled plastic manakins the size and shape of a 200-pound man or head alone.

It is very important to realize that the FCC MPE public exposure limit only provides protection from deep core body heating in excess of 1ºC (1.8ºF) as time averaged over 30 minutes and does not consider acute neurological symptoms, non-thermal or chronic health damage due to long term exposure to RFR at your measured power density levels and as reported in independently funded, peer-reviewed scientific papers from around the world. (Exhibits: 5, 6, 6B, 7, 8, 9, 10 & 11)

As Joel Moskowitz, PhD, Director of Public Health at UC Berkeley (Exhibit 16) has stated, *"Federal regulations protect the public only from the thermal (i.e., heating) risk due to short-term exposure to high intensity, cell tower radiation. The Federal regulations ignore the hundreds of studies that find harmful bio-effects from long-term exposure to non-thermal levels of cell phone radiation. The Telecommunications Act of 1996 does not allow communities to stop the sitting of cell towers for health reasons. Nevertheless, landlords may be liable for any harm caused by cell phone radiation emitted by towers situated on their property…"*

The City of Sacramento (COS) lamp pole *SLT-*[redacted], paid for with your tax dollars, is supporting the Verizon wireless transmission facility (WTF) that is radiating your private home and property thus making the COS a possible accessory to and facilitator of your toxic RFR exposure event. At the very least, the location of this Verizon wireless transmission facility (WTF) is a public nuisance similar to COS Health and Safety Codes 8.68, Noise and 8.72 Searchlights. Excess daytime noise, noise at nightime hours or searchlights beamed into a house can disrupt sleep, peace and tranquility and are prohibited by COS Health and Safety Codes. In the same manner the high intensity RFR beamed directly into your house from the WTF antenna, supported by the COS lamp pole, is a documentable

and probable cause of sleep disruption and many other acute neurological symptoms, pain, suffering, and injury from chronic RFR exposure at your measured RFR power density levels and lower.

It is my opinion that this Verizon antenna represents thoughtless site selection, lack of normal precaution and review, disregard for human health and safety, "public nuisance" and possibly "reckless endangerment" or "child endangerment" as defined by law (Exhibit 12).

Due to the extremely high RFR exposure measurements it appears that your children's second story bedroom is getting direct beam RFR rather than ancillary bottom lobe RFR from the antenna as is measured below and near the pole at much lower levels (Exhibit 3). According to the RFR Compliance Report (RFCR) supplied to me by the COS, this cell antenna is putting your children's bedroom window directly in, or very close to the center of the main RFR beam of the Verizon cell antenna radiation beam which can be likened to a focused searchlight beam aimed at your house, and most tragically, into the second story window and bedroom of your two young daughters. This Verizon WTF antenna should never have been deployed in-front of a two-story house at a distance of only 60 feet. Deficiencies in the RFCR will be covered below.

There is a direct relationship between distance from the cell tower and the incidence, variety and intensity of symptoms and higher mortality. Close to cell towers there are many neurological symptoms, injuries, disorders, cancers and higher death rates and further away there is much less (Exhibits 8-11). *"Significant Reduction in Clinical Symptoms After Transmitter Removal"* were found in the Japanese's study. (Exhibit 7). The RFR cell tower exposure in all of these studies is far less than you and your family are exposed to continuously: every night and day.

It is my understanding, based on our phone conversations, face to face meeting and your attached declarations (Exhibit 14) which states that the symptoms (none of which they had before) of your daughters and father commenced as soon as the Verizon antenna was operational, with the main symptoms listed being restless sleep, severe headaches, persistent cough, nightmares, night sweats, physical and mental discomfort, anxiety, clinical depression and panic attacks. I further understand that your father receives a headache within 45 minutes of arrival at your Property, feels worse whenever he is outside or opens the bedroom window and he feels better only after he leaves your Property. In my opinion, my findings of extremely high RFR power densities provide a clear explanation for the symptoms associated with "radio wave sickness" that are impossible for your families to avoid experiencing at your Property and your symptoms are a direct result of exposure to

the Extreme Concern levels of RFR produced by the Verizon small cell WTF.

The RF Compliance Report (RFCR), accepted by the COS, has critical deficiencies as listed below:

1. Failure to state the % of the FCC MPE or the actual RFR power density at the level of second story bedrooms at 60 feet distance. This is a critical deficiency. Ask for actual RFR power densities at 18' AGL at distances of 50', 100', 150', 200' 250', 300', 350', 400', 450' and 500'.
2. Down-tilt angle of the antenna(s) is not specified. Ask for this.
3. Vertical antenna beam width and beam angle is not clearly specified. Ask for this.

The RFCR states that RFR power density at 6' feet above ground and 20' from the pole could be as high 3,850,000 µW/m^2: I measured only 55,000 µW/m^2 at this location (Figure 2), which indicates several things:

1. This Verizon WTF has enormous reserves of radiating capacity not currently in use, but on tap for future use, due to the power and sizing of the RFR transmitters and antennas installed.
2. My current measurements of 55,000 µW/m^2 are about 1/70th of the RFCR stated maximum of 3,850,000 µW/m^2 at 6' above ground and 20' from the pole.
3. This WTF is currently operating at approximately 1/70th of its potential maximum capacity.
4. If this WTF increases its radiating output by 70X you very well could see the RFR power densities levels that exceed FCC MPE public limits inside your home.

This is exactly why you must obtain the calculated RFR power density level at your children's bedroom window in the form of an officially revised and newly dated RFCR.

You may be wondering, as I am also:

1. Why did the RFCR state FCC compliance measurements only at 6' AGL, 20' from the pole when RFR power density is clearly higher at chest level 40' from the pole and at second story windows 60' from the pole?
2. Why did the RFCR fail to list RFR power density at your second story bedroom window? Without this there is no basis for the FCC, the RFCR or the COS to make a positive assertion of safety from radiated RFR power levels that your family is perpetually exposed to.
3. How did this critical deficiency get past the COS, get permit approval and result in installation and operation of this WTF 60' in front of your second story children's bedroom?

4. Why is the COS allowing installation of WTFs with RFR transmission equipment having power and capacity that could greatly exceed FCC MPE legal limits inside your home?
5. Why was this WTF built with such excess potential power: is this to meet future demand?
6. When, if ever, would the FCC or the COS require RF power density measurements be calculated, or measured on site, at your children's second story bedroom window or bed?
7. Where is the independent, onsite compliance investigator and who is responsible for doing it?
8. How many other RFR Extreme Concern over exposure events, like yours, are occurring in Sacramento right now? How many more such events will be created in the future?

Based on my background, training and experience, it is my professional opinion that:

1. Your measured levels of RFR are highly toxic, hazardous and dangerous for all residents, guests and pets at your home. As demand for wireless service from this Verizon small cell antenna WTF increases so will your RFR exposure, variety of symptoms, intensity of symptoms and the number of people in your family that will become symptomatic. See Santini et al (France) (Exhibits 5-11).

2. The health symptoms that you report are consistent with exposure to Extreme Concern levels of non-ionizing RFR. Independently funded, peer reviewed studies worldwide show the same constellation of symptoms relative to cell tower proximity and RFR power density levels that are lower than your exposure. Close proximity shows a high incidence, severity and variety of neurobehavioral symptoms and distant proximity shows much less incidence, severity and less variety of symptoms. See Santini et al (France) in the attached (Exhibits 5-11).

3. It is impossible for your family or guests to avoid experiencing these reported symptoms so long as you live at this Property or the Verizon WTF is operational unless you invest in extensive and very expensive RFR shielding. Please note that when a person is exposed to such an extreme and continuous dose of RFR within the home, especially during the very critical sleep time, there is very little hope of relief or recovery as long as the exposure exists. People can't stay well, much less get well living in this level of RFR exposure. The enormous intensity and relentless 24 hour per day exposure to the RFR at this Property makes it a very urgent reason to avoid or stop additional exposure by rapid administrative or legal action with the COS, shielding your house walls, ceilings and windows or acquiring quality RFR bed canopies or by moving to a new home with far less RFR exposure.

4. The RFCR is critically deficient: it lists human exposure to RFR power density exposure only at 20 feet from the pole and at 6' above ground level where the RFR power density is very, very low compared to your second story children's bedroom window and bed which is in or close to the main RFR beam.. There is no RFR power density exposure stated for second story bedrooms at 60' from the Verizon small cell antenna WTF. This very serious omission in the RFCR that could have been revealed and corrected in a required due diligence review of the RFCR by COS before the building permit was issued and the Verizon small cell antenna WTF was allowed, by the COS, to be constructed and operational.

5. The Verizon small cell antenna and WTF is apparently now operating at about only 1/70th of its stated maximum design capacity and RFR power density could increase drastically by as much as 70 times higher as more Verizon subscribers and users demand more text, voice, video, wireless broadband and data service etc. during the coming months and years. It is very important to ask yourself how much longer can you and your family can endure this and what are you willing to do to effectively protect yourselves.

6. Effective and proven shielding solutions for drastically reducing your RFR cell tower radiation exposure *indoors* is available. See Exhibit 15 . If installed at your home the cost could be $12,000 to $20,000 and only protect residents when they are *indoors*. Wall and window RFR shielding on the front of your house will effectively reflect RFR back toward your front yard, driveway and walkway to your front door and actually raise RFR power density levels at those locations.

The opinions expressed in this report are made within a reasonable degree of professional certainty.

Sincerely,

Eric Windheim BA, EMRS, BBEC
Certified Electromagnetic Radiation Specialist
Certified Building Biology Environmental Consultant
Windheim EMF Solutions

Exhibit 1: 420,000 µW/m² measured at the window of girl's 2nd story bedroom is 420 times above the Extreme Concern level for sleeping areas per SBM-2015. Measurements were up to 460,000 µW/m² at this window. This is the highest RFR I have ever measured in a bedroom.

The Verizon small cell antenna can be seen at a 60' distance.

This children's bedroom has been vacated due to the following symptoms since the antenna went operational.

Children's symptoms:

1. Restless sleep
2. Headaches
3. Persistent cough

R[redacted] M[redacted]'s symptoms:

1. Severe headaches
2. Nightmares
3. Night Sweats
4. Physical & mental discomfort
5. Unable to sleep
6. Symptoms start when he arrives at the Property and stop after he leaves

Please see Exhibit 14 for sworn declarations of the above symptoms.

Sacramento City Codes: 8.68, Noise and 8.72, Searchlights would stop, and or, fine operators that were *causing such disruption of health, safety and human comfort.*

Figure 1: Verizon cell antenna viewed from children's bedroom

See link. http://www.qcode.us/codes/sacramento/view.php?topic=8&frames=on

A. Searchlights shall not be operated so as to constitute a traffic hazard or a nuisance.

B. Searchlights shall be operated so as to avoid directing the beam at any building.

It is my professional opinion that this Verizon small cell antenna, *is causing disruption of health, safety and human comfort* equal to or greater than excessive or untimely noise or directed searchlights and also is causing many more acute neurological symptoms (Exhibit 5).

Exhibit 2: RFR power density exposure increases with elevation above ground level.

Figure 2: Home viewed from across Pocket Road. RFR power density levels increase drastically with height above ground

Images at the right are the side view of vertical RFR beam distribution patterns of the Verizon small cell antennas in the RFCR. As you can see, most but not all RFR goes out horizontally and possibly down with antenna tilt (not specified in the RFCR). While very little RFR is directed down to the ground near the pole, that is where RFCR calculates the FCC MPE compliance. The second story children's bedroom is not considered by the RFCR: this is a glaring deficiency. The children's bedroom is in or very close to the main RFR beam at 460,000 µW/m^2 while the sidewalk is much lower at 55,000 µW/m^2 to 82,000 µW/m^2. The RFCR is severely deficient because it does not predict the RFR power density at nearby second story bedrooms where children sleep.

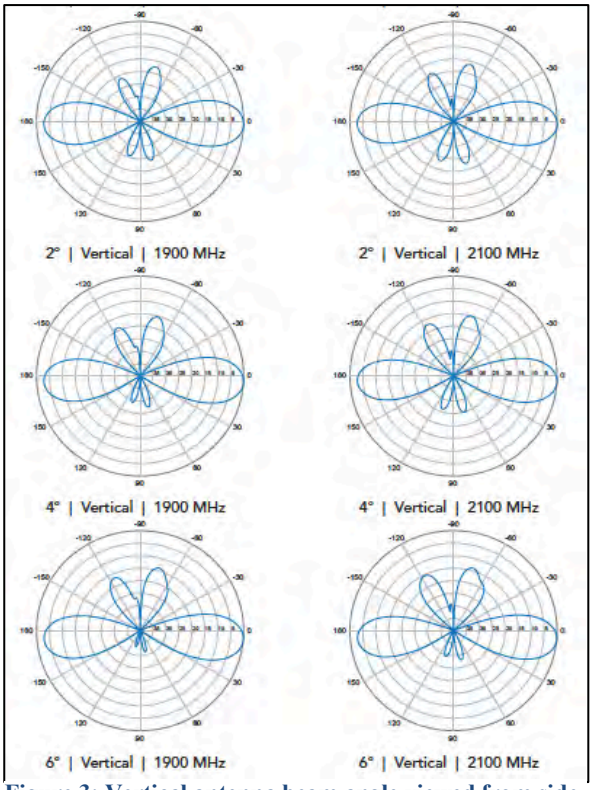


Figure 3: Vertical antenna beam angle viewed from side

Exhibit 3: RFR power density data log. 7 PM Saturday 3/30/19 to 8 AM Monday 4/1/18.

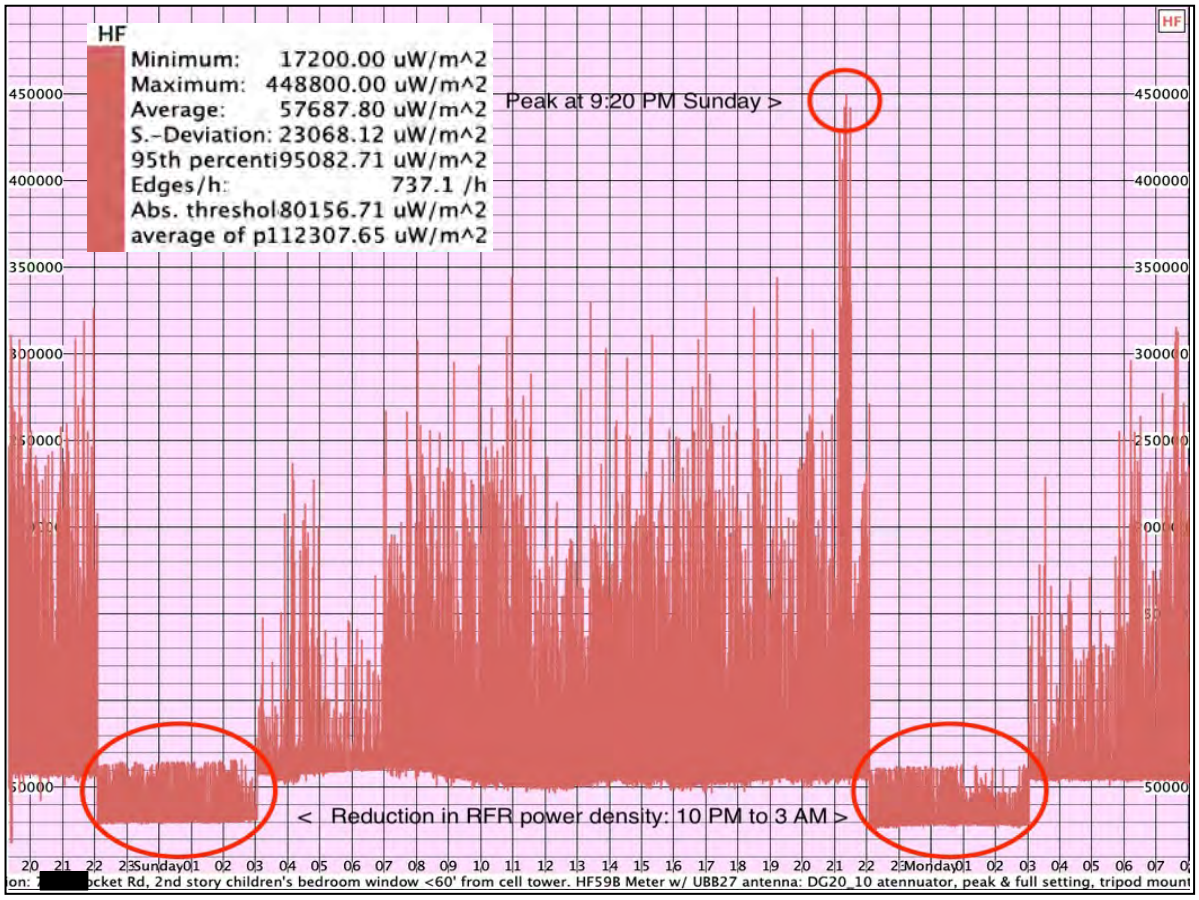


Figure 4: RFR power density data log at window

Data logging set up in children's second story bedroom. Verizon small cell antenna in picture is 60' away at sidewalk. RFR Power density increases with moment by moment user demand and the inevitable increase in user demand over months and years.

A data log is the best way to see the rise and fall of RFR power density over time: it can be likened to a seismograph chart revealing the intensity and duration of an earthquake. There are daily patterns of both high and low RFR traffic similar to traffic patterns on the freeway.

If this Verizon antenna continues to operate data logs can be taken at regular monthly and yearly intervals to show the increase RFR Power density resulting from increasing user demand. Verizon has stated that there is an ever-increasing demand for wireless service.

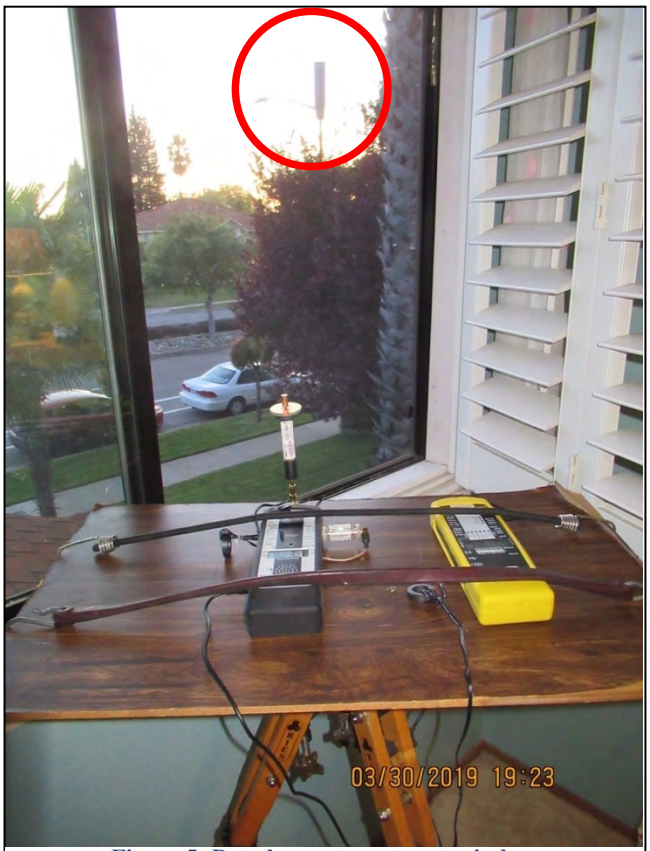
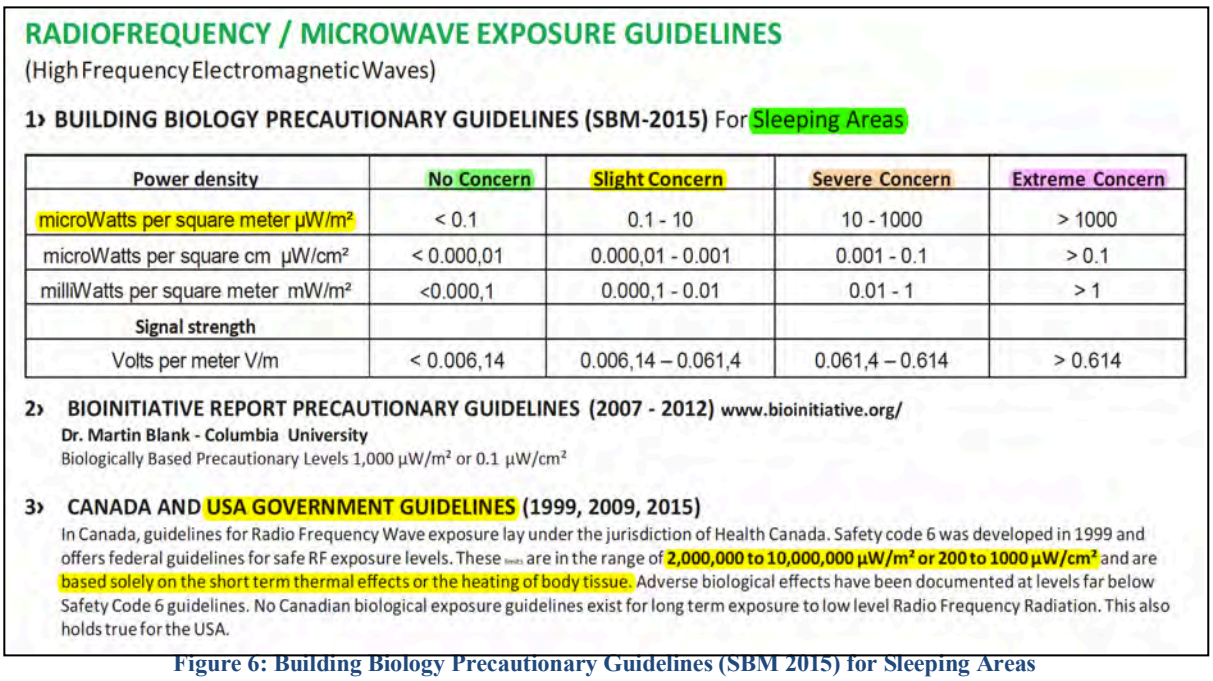


Figure 5: Data log meter setup at window

Exhibit 4: Table of locations and "Peak Hold" RFR power density levels measured and hazard levels per Building Biology Precautionary Guidelines (SBM-2015) for sleeping areas.

Location All measurements taken at chest level unless otherwise noted below.	**Wireless Radiation µW/m²** MicroWatts/Sq. Meter HF59B meter UBB27 Antenna <0.1 No Concern .1-10 Slight 10-1,000 Severe >1,000 Extreme	**Wireless Radiation µW/cm²** MicroWatts/Sq. Centimeter HF59B meter UBB27 Antenna <0.00001 No Concern .00001-.001 Slight .001-0.1 Severe >0.1 Extreme	**Wireless Radiation mW/cm²** MilliWatts/Sq. Centimeter HF59B meter UBB27 Antenna <0.00000001 No Concern .00000001-.000001 Slight .000001-.0001 Severe >.0001 Extreme	**Multiple of** Building Biology Precautionary Guideline SBM-2015 **Extreme Concern Level**
20' from pole, 6' above sidewalk	55,000	5.5	.0055	
40' from pole on Driveway at sidewalk	82,000	8.2	.0082	
Top of stairs indoors	38,000	3.8	.0038	
2nd story desk in office bedroom	13,000	1.3	.0013	13x
On Master bed 2nd story	16,000	1.6	.0016	16x
On Children's bed in 2nd story bedroom	176,000	17.6	.0176	176x
Children's 2nd story bedroom window	460,000	46	.046	460x
Living room 1st floor	5,700	.57	.00057	
Dining room 1st floor	5,800	.58	.00058	
Family room 1st floor	2,600	.26	.00026	
Kitchen table 1st floor	1,000	.1	.00010	

Table 1: Spot RFR power density measurements



RADIOFREQUENCY / MICROWAVE EXPOSURE GUIDELINES

(High Frequency Electromagnetic Waves)

1› BUILDING BIOLOGY PRECAUTIONARY GUIDELINES (SBM-2015) For Sleeping Areas

Power density	No Concern	Slight Concern	Severe Concern	Extreme Concern
microWatts per square meter µW/m²	< 0.1	0.1 - 10	10 - 1000	> 1000
microWatts per square cm µW/cm²	< 0.000,01	0.000,01 - 0.001	0.001 - 0.1	> 0.1
milliWatts per square meter mW/m²	<0.000,1	0.000,1 - 0.01	0.01 - 1	> 1
Signal strength				
Volts per meter V/m	< 0.006,14	0.006,14 – 0.061,4	0.061,4 – 0.614	> 0.614

2› BIOINITIATIVE REPORT PRECAUTIONARY GUIDELINES (2007 - 2012) www.bioinitiative.org/

Dr. Martin Blank - Columbia University

Biologically Based Precautionary Levels 1,000 µW/m² or 0.1 µW/cm²

3› CANADA AND USA GOVERNMENT GUIDELINES (1999, 2009, 2015)

In Canada, guidelines for Radio Frequency Wave exposure lay under the jurisdiction of Health Canada. Safety code 6 was developed in 1999 and offers federal guidelines for safe RF exposure levels. These are in the range of 2,000,000 to 10,000,000 µW/m² or 200 to 1000 µW/cm² and are based solely on the short term thermal effects or the heating of body tissue. Adverse biological effects have been documented at levels far below Safety Code 6 guidelines. No Canadian biological exposure guidelines exist for long term exposure to low level Radio Frequency Radiation. This also holds true for the USA.

Figure 6: Building Biology Precautionary Guidelines (SBM 2015) for Sleeping Areas

Exhibit 5: Neurobehavioral Symptoms near Cell Towers, Santini et al (France)

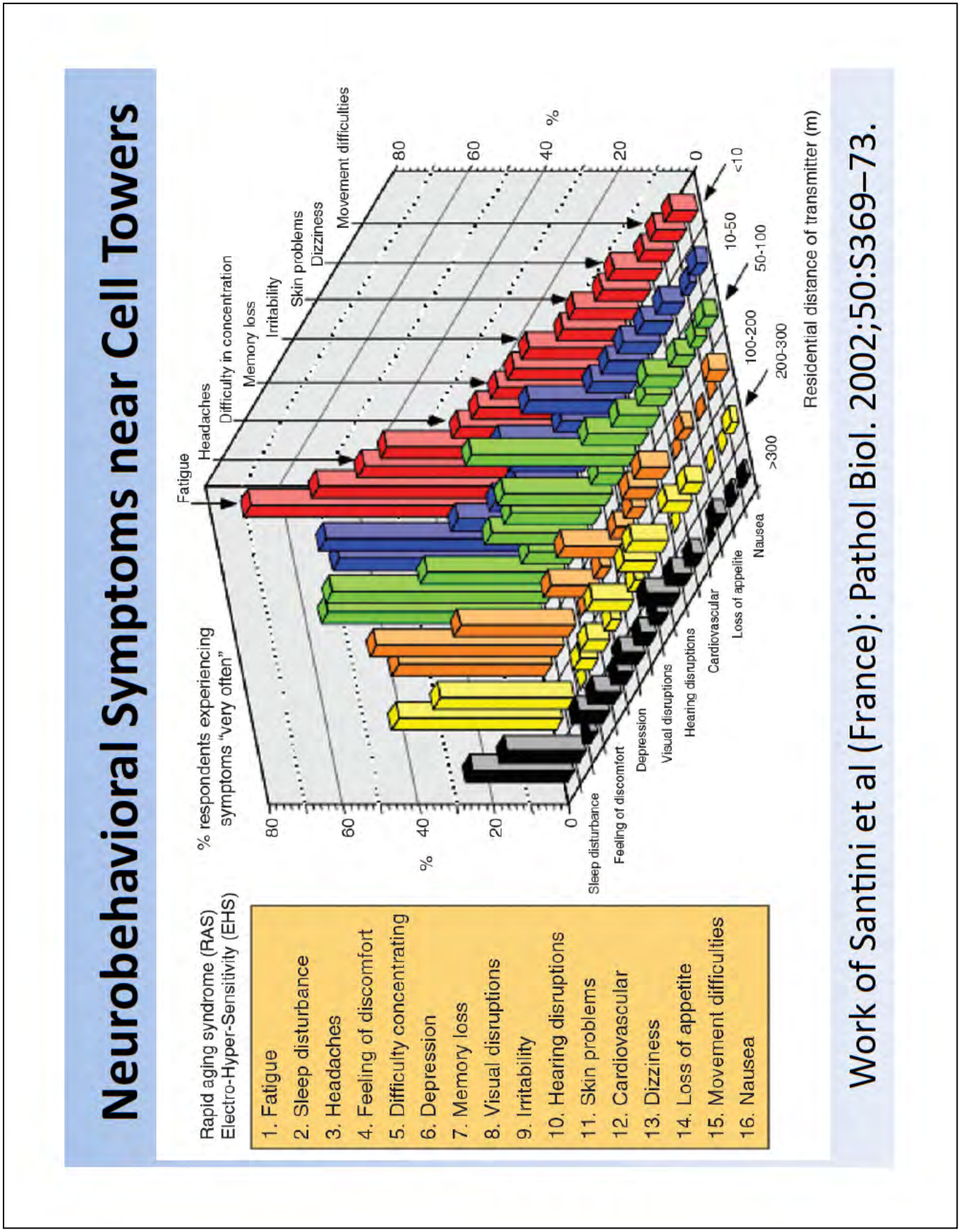


Exhibit 6: Bioiniative Report 2012: color charts of peer-reviewed studies correlating RFR power density levels to acute symptoms and chronic injury.

BioInitiative 2012

A Rationale for Biologically-based Exposure Standards for Low-Intensity Electromagnetic Radiation

BioInitiative Working Group 2012

Jitendra Behari, PhD, India
Paulraj Rajamani, PhD, India
Carlo V. Bellieni, MD, Italy
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Adamantia F. Fragopoulou, PhD, Greece
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Cite this report as: BioInitiative Working Group, Cindy Sage and David O. Carpenter, Editors.
BioInitiative Report: A Rationale for a Biologically-based Public Exposure Standard for Electromagnetic Radiation at www.bioinitiative.org, December 31, 2012

Reported Biological Effects from Radiofrequency Radiation at Low-Intensity Exposure
(Cell Tower, Wi-Fi, Wireless Laptop and 'Smart' Meter RF Intensities)

Power Density (Microwatts/centimeter2 - uW/cm2)		Reference
As low as (10^{-13}) or 100 femtowatts/cm2	Super-low intensity RFR effects at MW reasonant frequencies resulted in changes in genes; problems with chromatin conformation (DNA)	Belyaev, 1997
5 picowatts/cm2 (10^{-12})	Changed growth rates in yeast cells	Grundler, 1992
0.1 nanowatt/cm2 (10^{-10}) or 100 picowatts/cm2	Super-low intensity RFR effects at MW reasonant frequencies resulted in changes in genes; problems with chromatin condensation (DNA) intensities comparable to base stations	Belyaev, 1997
0.00034 uW/cm2	Chronic exposure to mobile phone pulsed RF significantly reduced sperm count,	Behari, 2006
0.0005 uW/cm2	RFR decreased cell proliferation at 960 MHz GSM 217 Hz for 30-min exposure	Velizarov, 1999
0.0006 - 0.0128 uW/cm2	Fatigue, depressive tendency, sleeping disorders, concentration difficulties, cardio- vascular problems reported with exposure to GSM 900/1800 MHz cell phone signal at base station level exposures.	Oberfeld, 2004
0.003 - 0.02 uW/cm2	In children and adolescents (8-17 yrs) short-term exposure caused headache, irritation, concentration difficulties in school.	Heinrich, 2010
0.003 to 0.05 uW/cm2	In children and adolescents (8-17 yrs) short-term exposure caused conduct problems in school (behavioral problems)	Thomas, 2010
0.005 uW/cm2	In adults (30-60 yrs) chronic exposure caused sleep disturbances, (but not significantly increased across the entire population)	Mohler, 2010
0.005 - 0.04 uW/cm2	Adults exposed to short-term cell phone radiation reported headaches, concentration difficulties (differences not significant, but elevated)	Thomas, 2008
0.006 - 0.01 uW/cm2	Chronic exposure to base station RF (whole-body) in humans showed increased stress hormones; dopamine levels substantially decreased; higher levels of adrenaline and nor-adrenaline; dose-response seen; produced chronic physiological stress in cells even after 1.5 years.	Buchner, 2012
0.01 - 0.11 uW/cm2	RFR from cell towers caused fatigue, headaches, sleeping problems	Navarro, 2003

Stress proteins, HSP, disrupted immune function	Brain tumors and blood-brain barrier
Reproduction/fertility effects	Sleep, neuron firing rate, EEG, memory, learning, behavior
Oxidative damage/ROS/DNA damage/DNA repair failure	Cancer (other than brain), cell proliferation
Disrupted calcium metabolism	Cardiac, heart muscle, blood-pressure, vascular effects

Reported Biological Effects from Radiofrequency Radiation at Low-Intensity Exposure
(Cell Tower, Wi-Fi, Wireless Laptop and 'Smart' Meter RF Intensities)

Power Density (Microwatts/centimeter2 - uW/cm2)		Reference
0.5 uW/cm2	Significant degeneration of seminiferous epithelium in mice at 2.45 GHz, 30-40 min.	Saunders, 1981
0.5 - 1.0 uW/cm2	Wi-FI level laptop exposure for 4-hr resulted in decrease in sperm viability, DNA fragmentation with sperm samples placed in petri dishes under a laptop connected via WI-FI to the internet.	Avendano, 2012
1.0 uW/cm2	RFR induced pathological leakage of the blood-brain barrier	Persson, 1997
1.0 uW/cm2	RFR caused significant effect on immune function in mice	Fesenko, 1999
1.0 uW/cm2	RFR affected function of the immune system	Novoselova, 1999
1.0 uW/cm2	Short-term (50 min) exposure in electrosensitive patients, caused loss of well-being after GSM and especially UMTS cell phone radiation exposure	Eltiti, 2007
1.3 - 5.7 uW/cm2	RFR associated with a doubling of leukemia in adults	Dolk, 1997
1.25 uW/cm2	RFR exposure affected kidney development in rats (in-utero exposure)	Pyrpasopoulou, 2004
1.5 uW/cm2	RFR reduced memory function in rats	Nittby, 2007
2 uW/cm2	RFR induced double-strand DNA damage in rat brain cells	Kesari, 2008
2.5 uW/cm2	RFR affected calcium concentrations in heart muscle cells	Wolke, 1996
2 - 4 uW/cm2	Altered cell membranes; acetycholine-induced ion channel disruption	D'Inzeo, 1988
4 uW/cm2	RFR caused changes in hippocampus (brain memory and learning)	Tattersall, 2001
4 - 15 uW/cm2	Memory impairment, slowed motor skills and retarded learning in children	Chiang, 1989
5 uW/cm2	RFR caused drop in NK lymphocytes (immune function decreased)	Boscolo, 2001
5.25 uW/cm2	20 minutes of RFR at cell tower frequencies induced cell stress response	Kwee, 2001
5 - 10 uW/cm2	RFR caused impaired nervous system activity	Dumansky, 1974
6 uW/cm2	RFR induced DNA damage in cells	Phillips, 1998

Stress proteins, HSP, disrupted immune function	Brain tumors and blood-brain barrier
Reproduction/fertility effects	Sleep, neuron firing rate, EEG, memory, learning, behavior
Oxidative damage/ROS/DNA damage/DNA repair failure	Cancer (other than brain), cell proliferation
Disrupted calcium metabolism	Cardiac, heart muscle, blood-pressure, vascular effects

Reported Biological Effects from Radiofrequency Radiation at Low-Intensity Exposure
(Cell Tower, Wi-Fi, Wireless Laptop and 'Smart' Meter RF Intensities)

Power Density (Microwatts/centimeter2 - uW/cm2)		Reference
8.75 uW/cm2	RFR at 900 MHz for 2-12 hours caused DNA breaks in leukemia cells	Marinelli, 2004
10 uW/cm2	Changes in behavior (avoidance) after 0.5 hour exposure to pulsed RFR	Navakatikian, 1994
10 - 100 uW/cm2	Increased risk in radar operators of cancer; very short latency period; dose response to exposure level of RFR reported.	Richter, 2000
12.5 uW/cm2	RFR caused calcium efflux in cells - can affect many critical cell functions	Dutta, 1989
13.5 uW/cm2	RFR affected human lymphocytes - induced stress response in cells	Sarimov, 2004
20 uW/cm2	Increase in serum cortisol (a stress hormone)	Mann, 1998
28.2 uW/cm2	RFR increased free radical production in rat cells	Yurekli, 2006
37.5 uW/cm2	Immune system effects - elevation of PFC count (antibody producing cells	Veyret, 1991
45 uW/cm2	Pulsed RFR affected serum testosterone levels in mice	Forgacs, 2006
50 uW/cm2	Cell phone RFR caused a pathological leakage of the blood-brain barrier in 1 hour	Salford, 2003
50 uW/cm2	An 18% reduction in REM sleep (important to memory and learning functions)	Mann, 1996
60 uW/cm2	RFR caused structural changes in cells of mouse embryos	Somozy, 1991
60 uW/cm2	Pulsed RFR affected immune function in white blood cells	Stankiewicz, 2006
60 uW/cm2	Cortex of the brain was activated by 15 minutes of 902 MHz cell phone	Lebedeva, 2000
65 uW/cm2	RFR affected genes related to cancer	Ivaschuk, 1999
92.5 uW/cm2	RFR caused genetic changes in human white blood cells	Belyaev, 2005
100 uW/cm2	Changes in immune function	Elekes, 1996
100 uW/cm2	A 24.3% drop in testosterone after 6 hours of CW RFR exposure	Navakatikian, 1994
120 uW/cm2	A pathological leakage in the blood-brain barrier with 915 MHz cell RF	Salford, 1994

Stress proteins, HSP, disrupted immune function	Brain tumors and blood-brain barrier
Reproduction/fertility effects	Sleep, neuron firing rate, EEG, memory, learning, behavior
Oxidative damage/ROS/DNA damage/DNA repair failure	Cancer (other than brain), cell proliferation
Disrupted calcium metabolism	Cardiac, heart muscle, blood-pressure, vascular effects

Reported Biological Effects from Radiofrequency Radiation at Low-Intensity Exposure
(Cell Tower, Wi-Fi, Wireless Laptop and 'Smart' Meter RF Intensities)

Power Density (Microwatts/centimeter2 - uW/cm2)		Reference
500 uW/cm2	Intestinal epithelial cells exposed to 2.45 GHz pulsed at 16 Hz showed changes in intercellular calcium.	Somozy, 1993
500 uW/cm2	A 24.6% drop in testosterone and 23.2% drop in insulin after 12 hrs of pulsed RFR exposure.	Navakatikian, 1994

STANDARDS		
530 - 600 uW/cm2	Limit for uncontrolled public exposure to 800-900 MHz	ANSI/IEEE and FCC
1000 uW/cm2	PCS STANDARD for public exposure (as of September 1,1997)	FCC, 1996
5000 uW/cm2	PCS STANDARD for occupational exposure (as of September 1, 1997)	FCC, 1996
BACKGROUND LEVELS		
0.003 uW/cm2	Background RF levels in US cities and suburbs in the 1990s	Mantiply, 1997
0.05 uW/cm2	Median ambient power density in cities in Sweden (30-2000 MHz)	Hamnierius, 2000
0.1 - 10 uW/cm2	Ambient power density within 100-200' of cell site in US (data from 2000)	Sage, 2000

Stress proteins, HSP, disrupted immune function	Brain tumors and blood-brain barrier
Reproduction/fertility effects	Sleep, neuron firing rate, EEG, memory, learning, behavior
Oxidative damage/ROS/DNA damage/DNA repair failure	Cancer (other than brain), cell proliferation
Disrupted calcium metabolism	Cardiac, heart muscle, blood-pressure, vascular effects

Exhibit 6B: Your Bedrooms RFR exposure levels relative to peer-reviewed studies.

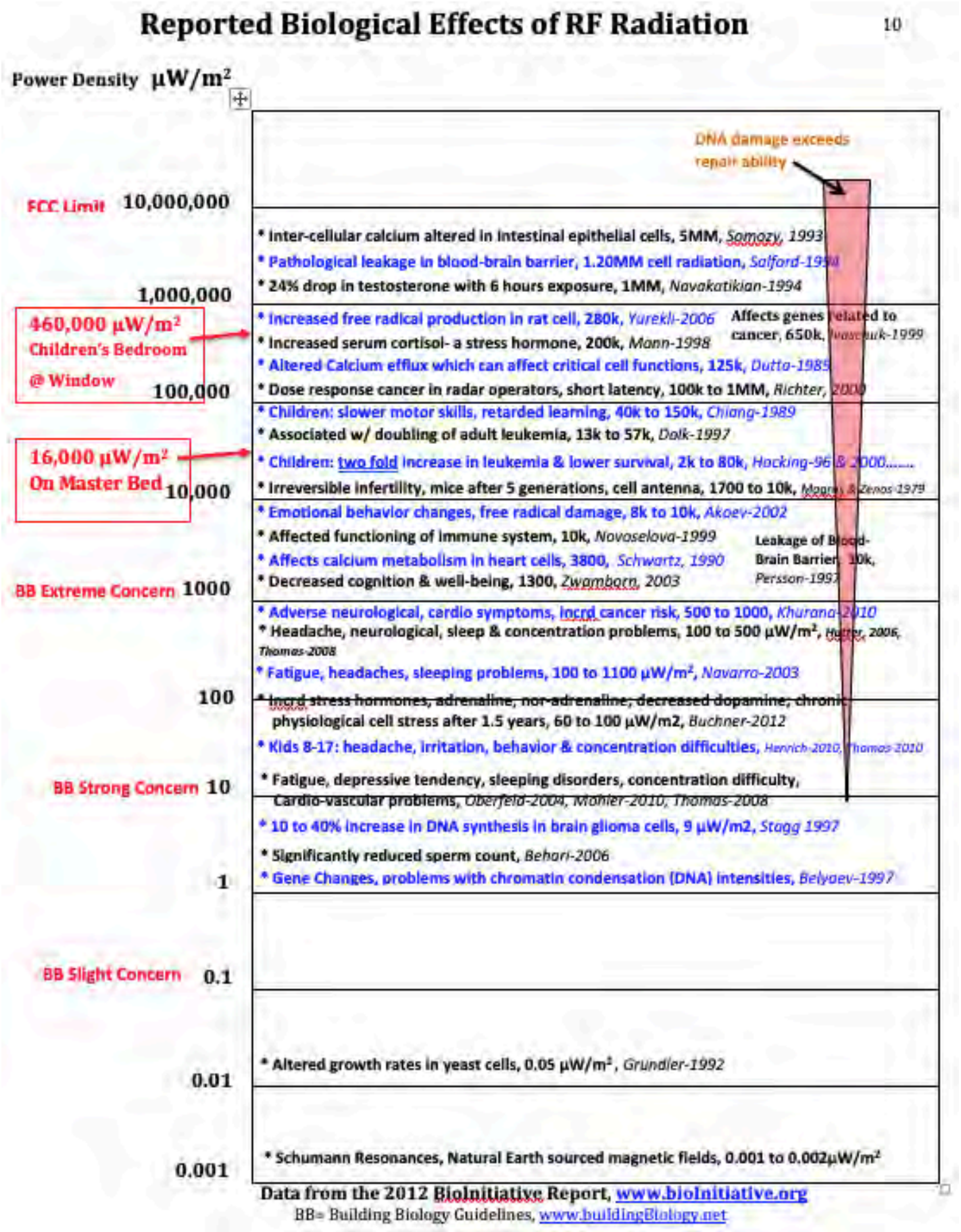


Exhibit 7: Shinjyo, T. & Shinjyo, A. (2014), Significant Reduction in Clinical Symptoms After Transmitter Removal - An Intervention Study. Environmental Medicine Society, 27 (4), pp. 294-301.

Figure 7: Rooftop cell antennas in study

Symptoms	Removal of the 800 MHz antennas Before	After	P-value
Tinnitus	13	4	<0.05
Myodesopsia	7	2	>0.05
Arthralgia, shoulder stiffness	7	1	<0.05
Headache	5	1	>0.05
Hypertension	4	1	>0.05
Nasal bleeding	4	0	>0.05
Tumours (lymphoma, tongue cancer, bladder cancer)	3	1	>0.05
Insomnia, sleep problems, sleep disturbances	3	1	>0.05
Dizziness, vertigo	3	1	>0.05
Eye pain, ocular infection, dry eyes	3	0	>0.05
Astigmatism, deteriorated eyesight	2	0	>0.05
Palpitation (tachycardia), arrhythmia	2	0	>0.05
Tremor	1	1	>0.05
Glaucoma	1	0	>0.05
Hearing loss	1	0	>0.05
Rhinitis (nasal discharge)	1	0	>0.05
Otitis media	1	0	>0.05
Invertebral disc hernia	1	0	>0.05
Numbness	1	0	>0.05
Skin problems	1	0	>0.05
Angina pectoris	1	0	>0.05
Complex regional pain syndrome (CRPS)	1	0	>0.05
Total	66	13	

Table 3: Health comparison before and after the removal of the 800 MHz antennas. The statistical evaluation was carried out using Fisher's exact test and the chi-square test.
Symptoms appearing during the operation of both the 800 MHz antennas and the 2 GHz antennas are printed in bold letters.

Figure 8: Rooftop cell antennas in study

Symptoms	Removal of the 2 GHz antennas Before	After	P-value
Fatigue, loss of motivation	21	0	<0.01
Eye pain, ocular infection, dry eyes	14	0	<0.01
Insomnia, sleep problems, sleep disturbances	11	2	<0.01
Dizziness, vertigo, Menière's disease	11	0	<0.01
Jitteriness	11	0	<0.01
Astigmatism, deteriorated eyesight	10	6	>0.05
Headache	9	1	<0.01
Impaired consciousness	8	0	<0.01
Arthralgia, shoulder stiffness	7	3	>0.05
Tinnitus	7	1	<0.05
Nasal bleeding	6	0	<0.05
Palpitation (tachycardia), arrhythmia	5	2	>0.05
Numbness	5	0	<0.05
Dyspnoea, shortness of breath	3	1	>0.05
Tumours (colon polyp, vocal chord polyp)	3	0	>0.05
Skin problems	3	0	>0.05
Memory loss	3	0	>0.05
Hyperthyroidism and hypothyroidism	2	2	>0.05
Lack of concentration	2	0	>0.05
Hypertension	2	0	>0.05
Mental confusion	2	0	>0.05
Rhinitis (nasal discharge)	2	0	>0.05
Gastritis	2	0	>0.05
Cataract	1	0	>0.05
Angina pectoris	1	0	>0.05
Facial nerve palsy	1	0	>0.05
Facial flushing	1	0	>0.05
Sweating	1	0	>0.05
Taste disorder	1	0	>0.05
Hearing loss	1	0	>0.05
Slurred speech	1	0	>0.05
Drowsiness	1	0	>0.05
Total	158	18	

Table 4: Comparison of the symptoms appearing during and after operation of the 2 GHz antennas. The statistical evaluation was carried out using Fisher's exact test and the chi-square test.
Symptoms appearing during the operation of both the 800 MHz antennas and the 2 GHz antennas are printed in bold letters.

Exhibit 8: Wolf R, Wolf D. Increased Incidence of cancer near a Cell-Phone Transmitter Station.

International Journal of Cancer Prevention (2004); 1(2): 1-19

Comments on Notice of Inquiry, ET Docket No. 13-84

Netanya, Israel (1997-1998)

New cell phone tower set up in city of Netanya, Israel, in July, 1996.

1500 watt, 850 MHz.

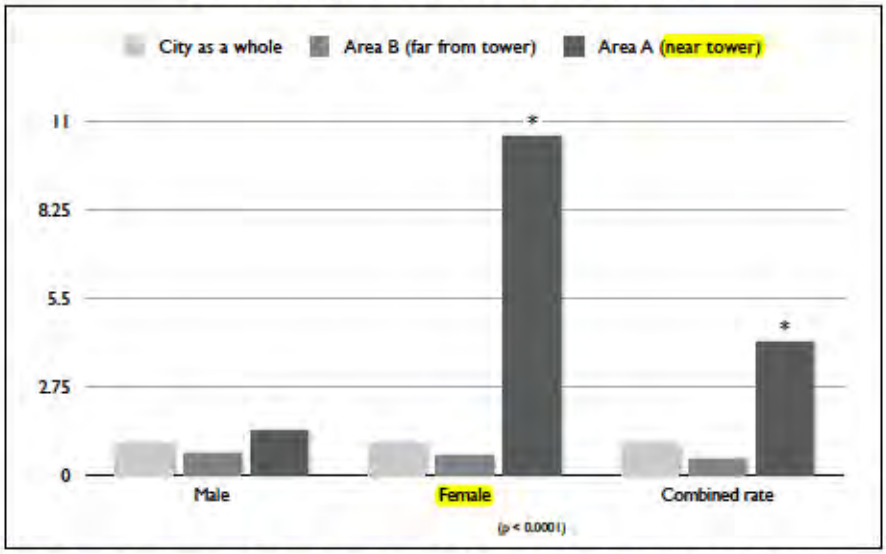
Power density in the whole exposed area was **far below 0.53 µw/cm2.**

This is 1000 times less than the FCC Guidelines of 600 µW/cm² for 850 MHz exposure.

Comparison of cancer rates during the second year of exposure, in 677 long-term residents near the tower, compared to 1,222 matched controls living in another area of the city.

Wolf R, Wolf D. Increased Incidence of Cancer Near a Cell-Phone Transmitter Station. *International Journal of Cancer Prevention* (2004); 1(2):1-19.

Netanya, Israel - Relative Cancer Risk



Relative risk of cancer in residents near a new cell phone tower in Netanya, Israel, during the second year of exposure.

Overall risk of cancer in Area A was 4.15 times higher than in the town as a whole.

For men in area A, the cancer rate was 1.4 times higher.

For women in area A, the cancer rate was 10.5 times higher ($p < 0.0001$)

[the probability of this beeing a random finding is one hundredth of 1%

Wolf R, Wolf D. Increased Incidence of Cancer Near a Cell-Phone Transmitter Station. *International Journal of Cancer Prevention* (2004); 1(2):1-19.

Exhibit 9: Comparison of cancer incidents in residents living within 400 meters of the cell phone tower, compared to residents living farther away. And compared to death rates for the province as a whole. See citation on image below.

Comments on Notice of Inquiry, ET Docket No. 13-84

Naila, Germany (1999-2004)

Town of ~ 1100 residents.
Cell tower installed in 1993.
Medical of 1000 residents reviewed for the years 1994-2004.
Comparison of cancer incidents in residents living within 400 meters of the cell phone tower,
compared to residents living farther away,
and compared to the death rates for the province as a whole.

Eger H, Hagen K, Lucas B, Vogel P, Voit H. The Influence of Being Physically Near to a Cell Phone Transmission Mast on the Incidence of Cancer. *Umwelt-Medizin-Gesellschaft* (2004); 17(4):1-7.

Cancer Incidence in Naila (1999-2004)

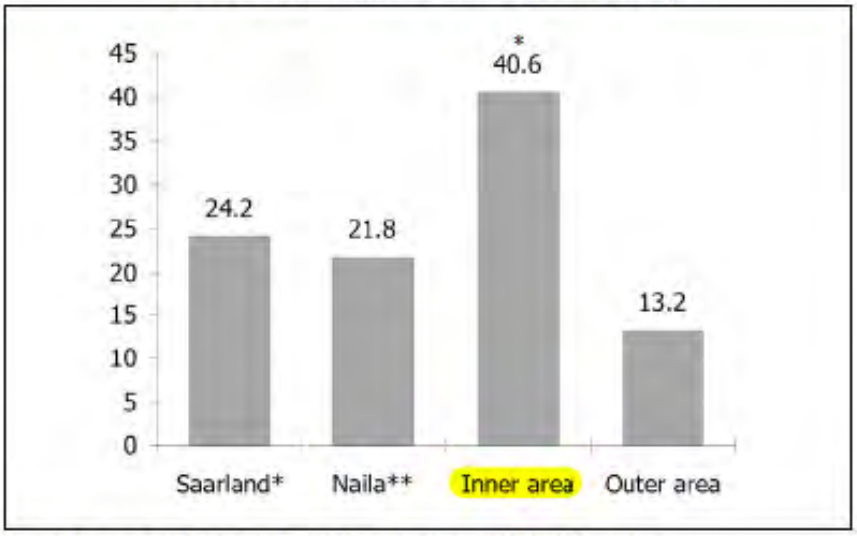


Fig. 3 : Number of new cancer cases 1999 to 2004, adjusted for age and gender, calculated for the 5,000 patient years

Y axis: Cancer incidence 1994 – 2004 (**new cases per 5000 patient years**).

* Saarland = predicted rate based on the cancer registry for the federal state of Saarland.
** Naila = incidence for the town as a whole.
Inner area = residence within 400 meters of the tower.
Outer area = remainder of community.

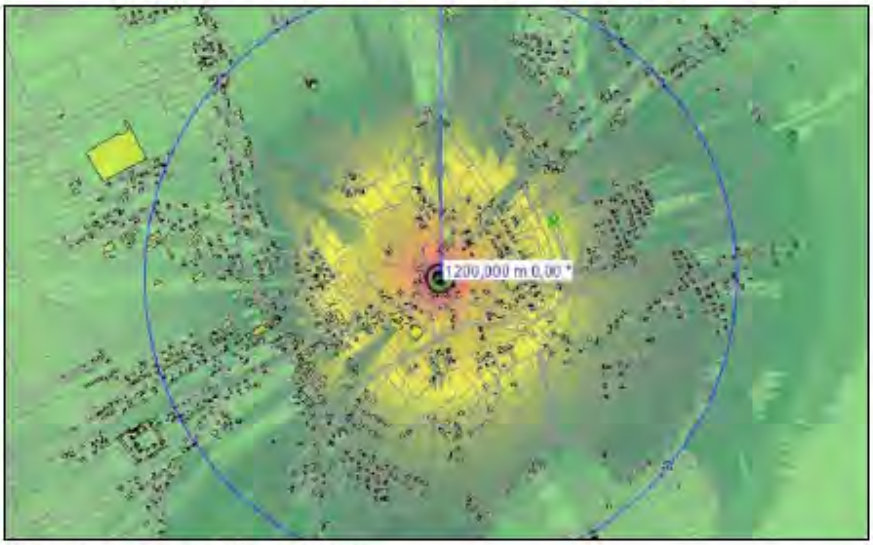
In the inner area, the risk of cancer incidence was three times as high after five or more years of exposure.
In addition, the **patients that live within 400 metres tend to develop the cancers at a younger age.**

Exhibit 10: Case control study of cancer patients living within 1200-meter radius of the cell tower.

See citation on image below.

Comments on Notice of Inquiry, ET Docket No. 13-84

Hausmannstätten & Vasoldsberg, Austria (1984-1997)

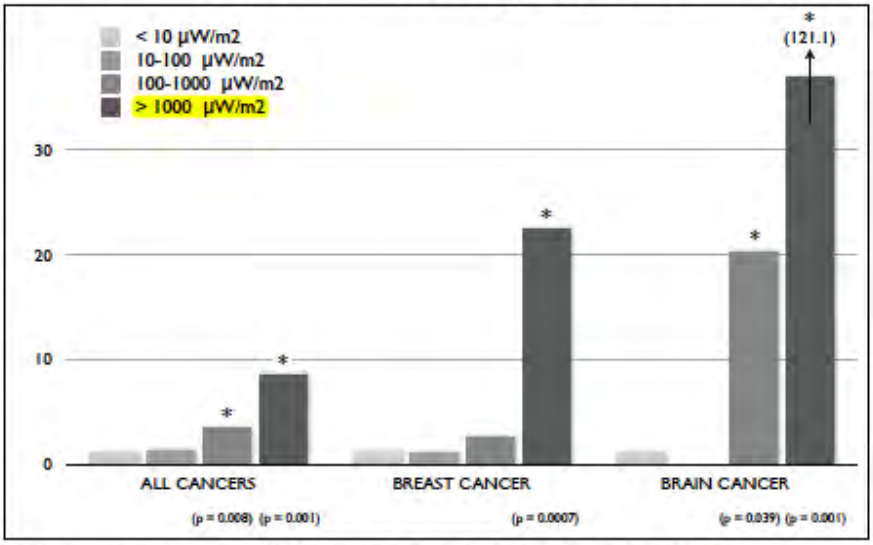


NMT 450 cell tower, operational from 1984–1997.

Case/control study of cancer patients living within 1200 meter radius of the tower.

Oberfeld G. Environmental Epidemiological Study of Cancer Incidence in the Municipalities of Hausmannstätten & Vasoldsberg (Austria). Provincial Government of Styria, Department 8B, Provincial Public Health Office, Graz, Austria (2008):1-10. http://www.emf-health.com/PDFreports/Austriastudy.pdf

Hausmannstätten & Vasoldsberg, Austria (1984-1997)



Odds ratio of cancer incidence — stratified by exposure levels (exterior to dwelling) in µW/m² .

Note: **FCC thermal safety guidelines ~ 6,000,000 µW/m²)**

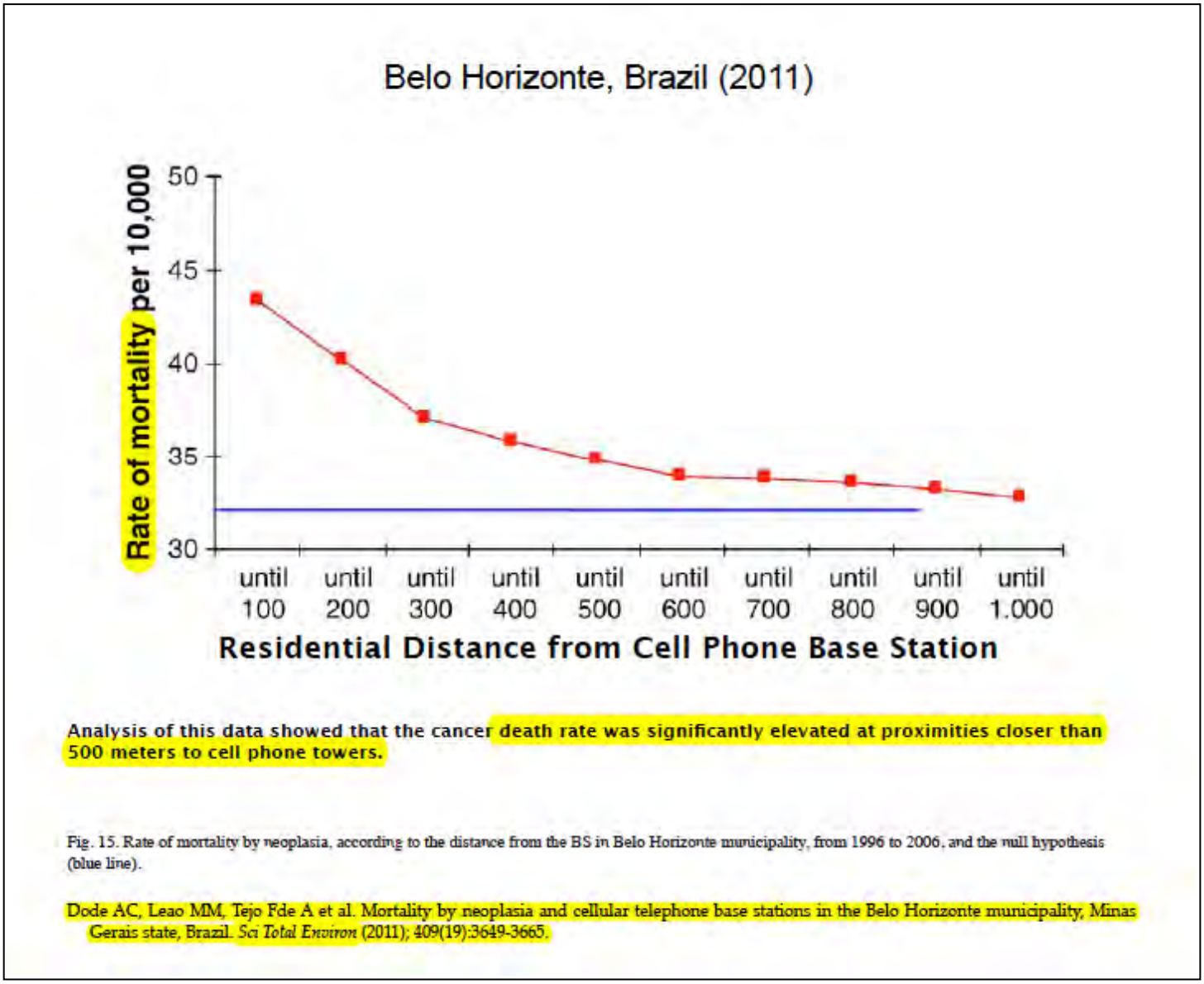
In the highest exposure category:

Breast cancer risk was 23 times higher,

Brain cancer risk was 121 times higher.

Oberfeld G. Environmental Epidemiological Study of Cancer Incidence in the Municipalities of Hausmannstätten & Vasoldsberg (Austria). Provincial Government of Styria, Department 8B, Provincial Public Health Office, Graz, Austria (2008):1-10. http://www.emf-health.com/PDFreports/Austriastudy.pdf

Exhibit 11: Analysis of this data showed that the cancer death rate was significantly elevated at proximities closer than 500 meters to the cell phone towers. See citation on image below.



Analysis of this data showed that the cancer death rate was significantly elevated at proximities closer than 500 meters to cell phone towers.

Fig. 15. Rate of mortality by neoplasia, according to the distance from the BS in Belo Horizonte municipality, from 1996 to 2006, and the null hypothesis (blue line).

Dode AC, Leao MM, Tejo Fde A et al. Mortality by neoplasia and cellular telephone base stations in the Belo Horizonte municipality, Minas Gerais state, Brazil. *Sci Total Environ* (2011); 409(19):3649-3665.

Exhibit 12: Relevant laws and ordinances.

I. Sacramento City Codes related to disruption of sleep, peace and tranquility.

Title 8 HEALTH AND SAFETY

Chapter 8.68 NOISE CONTROL http://www.qcode.us/codes/sacramento/view.php?topic=8-8_68&frames=on
Article I. General Provisions
Article II. Noise Standards
Article III. General Noise Regulations
Article IV. Administrative Procedures

Chapter 8.72 SEARCHLIGHTS http://www.qcode.us/codes/sacramento/view.php?topic=8-8_72&frames=on
8.72.010 Operating regulations.
8.72.020 Permit—Required.
8.72.030 Application.
8.72.040 Permit—Fees.
8.72.050 Permit—Revocation.
8.72.060 Insurance requirements.

II. California Child Endangerment Law California Penal Code 273a PC

https://www.shouselaw.com/domestic-violence273a.html

1. **Penal Code 273a** is California's criminal "**child endangerment**" law. It punishes someone who willfully exposes a child to pain, suffering, or danger.
Confusingly, "child endangerment" is sometimes referred to as "child abuse." But it should not be confused with Penal Code 273d, California's "child abuse" law.[1]

That law punishes someone who actually physically harms or abuses a child. But under Penal Code 273a, it is the ***possibility*** of serious danger that is being punished.

So, someone can be charged under PC273a even if the child does not actually suffer an injury. This is what distinguishes Penal Code 273a child endangerment from Penal Code 273d child abuse.

And because no actual injury is required under Penal Code 273a, it is all too frequently charged against innocent people.

What constitutes "child endangerment" in California?

Penal Code 273a can be charged against anyone (not just parents). Usually, the adult is someone who has a minor (a child under 18) in his or her care.

Specifically, child endangerment can be charged when an adult:

- Causes or permits a minor to suffer unjustifiable physical pain or mental suffering,
- Willfully causes or permits a minor to be injured, or
- Willfully causes or permits a minor to be placed in a dangerous situation.[2]

Exhibit 13: Measurement methodology, meters and meter settings

I deployed an HF-59B meter built by Gigahertz Solutions and in the factory calibration period. The meter was equipped with a Gigahertz Solutions UBB27 Omni-directional antenna and DG20_G10 attenuator that is able to capture a three-dimensional *quantification of the levels of radiation between 27 Megahertz (MHz) and 3,300 MHz (3.3 GHz). This meter measures the most common wireless frequencies such as radio and television stations and cell tower frequencies. The HF-59B meter is commonly used to obtain accurate, cumulative, RFR readings and is specially designed for Building Biologists and other EMF professionals.*

Peak, full signal and VBW standard meter settings were used for the data log in Exhibit 3.

Peak Hold, full signal and VBW standard meter settings were used to take spot readings at locations in Exhibit 4. Spot readings were 1-3 minutes in length.

My Gigahertz Solutions NFA1000 meter using NFASOFT software, which is also in the factory calibration period, recorded the data log (Exhibit 3).

Exhibit 14: Sworn declarations of symptoms, pain and suffering from residents and guests.

Declaration of [redacted]

I, [redacted] Father and legal guardian of [redacted] have personal knowledge of all facts set forth in this declaration and am competent to testify thereto if called upon to testify in a court of law. I hereby declare:

1. My name is [redacted], and I reside at [redacted]pad, Sacramento, California 95831 with my wife and two daughters.

2. In late December Verizon installed a cell antenna on top of a light pole, just 45 feet from our home.

3. About a month after the antenna was installed, both of my daughters developed cold/flu like symptoms with persistent cough. These problems persisted from late January until early April, roughly one week after installing shielding in the home and moving them into a back room away from the antenna, at which point their symptoms went away and have not returned.

4. In that time the children also experienced headaches and restless sleep, symptoms that they had NEVER experienced before the antenna was installed.

5. I have also experienced severe anxiety and sleep disturbances since the antenna was installed.

I declare under penalty of perjury under the laws of the State of California that the facts set forth above are true and correct to the best of my knowledge. This declaration was executed this 13th day of April, 2019 at Sacramento, California.

/s/ [redacted]

[redacted]

Declaration of [redacted]

I, [redacted] Grandfather of [redacted], have personal knowledge of all facts set forth in this declaration and am competent to testify thereto if called upon to testify in a court of law. I hereby declare:

- My name [redacted] I am 69 ½ years of age, and I reside at [redacted] 523.
- I believe the symptoms below are related to a Verizon antenna installed on a light pole directly in front of our son's house [redacted] Sacramento, CA 95831, where we stay when visiting overnight with our son and his family.
- Ever since Verizon installed the antenna, I have experienced severe headaches whenever I go to visit our son and family at their home. The headache typically begins 45 minutes after we arrive and does not go away until we leave for our home in Reno. The headaches are most persistent when we sleep in our granddaughter's room overnight, which is directly in line with the Verizon antenna outside their home. The headaches increase in intensity whenever we are outside or open the bedroom window.
- I have suffered from anxiety, clinical depression, and panic attacks that I believe to be a result of worrying about my family being harmed by the Verizon antenna outside their home. I have experienced anxiety/depression in the past, but it has recently gotten more frequent and more severe since the antenna was installed.
- Ever since the antenna was installed, while staying overnight, I have experienced my sleep patterns being drastically affected. I am unable to sleep through the night, experience physical and mental discomfort, and have nightmares and night sweats that I do not have while sleeping at our home in Reno.

I declare under penalty of perjury under the laws of the State of California that the facts set forth above are true and correct to the best of my knowledge. This declaration was executed on April 13th, 2019 in Sacramento, California.

[redacted]

Reno, Nevada 89523

Tele: [redacted]

Declaration of [redacted]

I, [redacted] have personal knowledge of all facts set forth in this declaration and am competent to testify thereto if called upon to testify in a court of law. I hereby declare:

1. My name is [redacted] and I reside at [redacted] Sacramento CA 95831.

2. I attribute the symptoms listed below to be a result of the Verizon antenna installed on a light pole directly in front of my Sister, Hannah McMahon's home at [redacted] Pocket Road, Sacramento, CA 95831.

3. Ever since Verizon installed the antenna, I experience intense headaches whenever I go to visit my Sister's home. The headache typically begins 30 minutes after I arrive and does not go away until I go to sleep for the night. The longer I stay, the more painful the headache. If we are outside or have the windows open the headache is more painful.

4. I have been experiencing anxiety, including panic attacks, that are a direct result of my family being harmed by the Verizon antenna outside their home. I have experienced anxiety in the past but it has definitely gotten more frequent and more severe since the antenna was installed.

I declare under penalty of perjury under the laws of the State of California that the facts set forth above are true and correct to the best of my knowledge. This declaration was executed this 11th day of April, 2019 at Sacramento, California.

/s/ [redacted]

Declaration of [redacted]

I, [redacted], have personal knowledge of all facts set forth in this declaration and am competent to testify thereto if called upon to testify in a court of law. I hereby declare:

1. My name is [redacted] and I reside at [redacted], Sacramento, California 95824.

2. On December 31, 2018 I stopped at the home of my niece [redacted] Pocket Road. I was there to leave her birthday gift off on the porch because her daughters were napping. When I returned to my car I looked up and noticed a cell antenna attached to the utility pole. I recognized the antenna because of the controversy surrounding the towers in Monterey and the newspaper coverage. I texted my niece while still parked in front of her home. She said that she had not noticed the antenna, but that it must have been installed recently. She said she was never warned about an antenna but was informed that Verizon would be working in the area.

3. On Friday, February 15, 2019, I visited [redacted] and her two young daughters, [redacted] who is five and [redacted] who is three. I arrived at approximately 2:30pm. We did the usual auntie/niece stuff; played board games, read stories and ate the chocolate I brought to snack on. I noticed that both of the girls had what seemed to be a cold or flu, and were much lower energy than usual. Hannah told me they had been sick for a little over two weeks, which was very, very unusual for them. I returned to my home at 6:00pm. Shortly after, while reading a book, I noticed a loud ringing in my ears and began to get what turned into a throbbing headache. Both symptoms continued over the weekend and into Monday. By Monday, both symptoms had dissipated.

4. On Friday, March 15, 2019 I returned to my niece's home to visit. I arrived about 5pm. On this visit I brought Abby and Hope an ice cream maker and we made ice cream with mini Oreo cookies. While waiting for the ice cream we read and played board games. Again, I noticed both [redacted] still had cold/flu like symptoms and were lethargic compared to their usual selves. I returned to my home about 8:45pm. Once again, I experienced the symptoms of ringing in my ears and a headache; the symptoms were gone by Monday.

5. On Friday, March 29, 2019, I returned to my niece's home for a visit. I arrived after work at approximately 5pm. We read and played board games as usual. The girls were still ill. I returned home at approximately 9pm. Once again, I experienced the symptoms of ringing in my ears and a headache; the symptoms were gone by Monday.

6. March 29th was my last visit. After each of my visits I experienced prolonged symptoms of ear ringing and intense headache. Since my last visit I have not experienced either symptom.

I declare under penalty of perjury under the laws of the State of California that the facts set forth above are true and correct to the best of my knowledge. This declaration was executed this 9th day of April, 2019 at Sacramento, California.

/s/ [redacted]

[redacted]

BED CANOPY - Wireless Protection

When there is a need to reduce radiation in the bedroom to the lowest possible level, a bed canopy is the best approach as it creates a 'faraday cage' around the entire sleeping area and shields up to 99.99% of radiation.

- Premium Sheer 100% natural cotton fabric
- Unmatched shielding characteristics
- OEKO-Tex Certified as a skin friendly textile and free from harmful substances
- Conductive threads are insulated so no exposed metal, no flaking and no need for grounding
- Canopy has 3 convenient overlapped openings (right, left and foot of bed) for easy entry and easy exit
- Used for shielding sleeping areas, or areas of similar size, from high frequency electromagnetic waves (microwaves)
- May relieve symptoms of electromagnetic hypersensitivity (EHS)
- Shielding Effectiveness 99.99% or 40 dB at 1000 MHz and 99% effective up to 10 GHz
- Fabric is designed and manufactured in Switzerland
- Effective shielding for cell towers, cordless phones, security systems, wireless computer gear and more
- Sheer fabric, easy to work with
- Easy care – Washable, with no loss in protection

The canopy is a long term solution as it can be taken with you if you ever relocate.

COST

Depending on the size, the canopies range in price from approx. $1600 (twin) to $2370 (king).

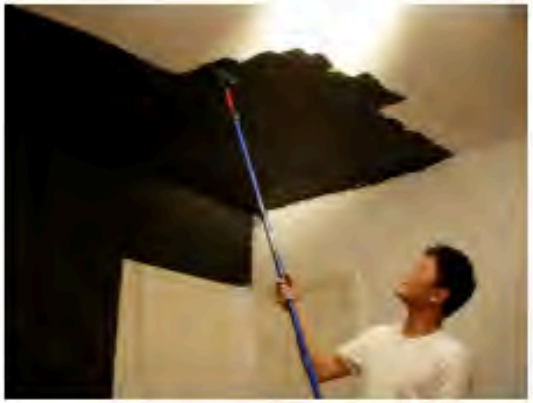
This price also includes a shielding bed-pad for *beneath* the bed (recommended/required for most bedrooms)

*some installation hardware required (wooden dowels, hanging hooks, etc.)

Shielding Products

Shielding Paint

- EMF shielding paint for interior application and exterior application
- Liquid water-based and low-emission (.02g/ litre)
- Excellent shielding qualities for protection against RF radiation, microwave and from low-frequency Electric Fields if grounded
- Apply as a prime coat and cover with interior paint or exterior paint
- Good adhesion on many surfaces and substrates such as latex paint, construction board, cement, plaster, polystyrene, masonry surfaces and more...



COST

1 litre = $83.00
5 litre = $295.00

1 litre covers approx. 81 sq. feet

Window Film

- RF shielding performance 99.99 %
- Low reflectivity maintains the original appearance of your glass
- Not noticeable from the inside or outside
- Provides security from breaking glass
- Excellent solar heat control blocking 55 % of total solar energy
- Lowers summer time cooling expenses
- Blocks +99 % of Ultraviolet "UV" rays
- Blocks +95 % of Infrared "IR" rays

COST

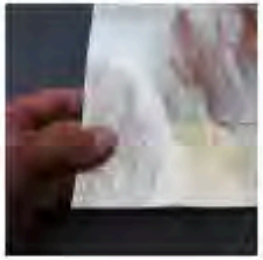
Sold per linear ft. in 4 or 5 ft widths
@ 5 ft increments

4 foot width = $53.00 / linear foot
5 foot width = $59.00 / linear foot

Aluminum Foil

Aluminum RF Shielding Foil is designed to block analogue and pulsed digital signals from exterior sources such as Microwave Transmitters, Cell Phone Towers, neighbours / neighbours Cordless Telephones, Wi-Fi signals, Smart Meters and more. The foil also offers an effective barrier against Low Frequency AC Electric Fields when grounded.

- Heavy Duty / Tear Proof
- Flexible and light weight
- Safe to handle and non-toxic



COST

125 foot roll
(4 ft. width)

$168 per roll

Exhibit 16: Joel M. Moskowitz PhD: See Links

https://www.saferemr.com/2015/04/cell-tower-health-effects.html
https://www.saferemr.com/2018/04/recent-research.html

Scientific and policy developments regarding the health effects of electromagnetic radiation exposure from cell phones, cell towers, Wi-Fi, Smart Meters, and other wireless technology, courtesy of:

Berkeley School of Public Health

Joel M. Moskowitz PhD

Director and Principal Investigator, Center for Family and Community Health

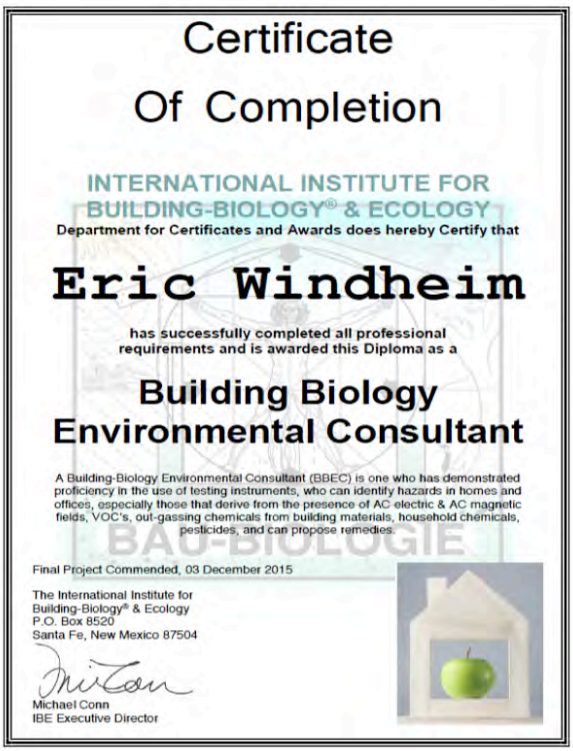
Education:

- Postdoctoral Fellow - Evaluation Research and Methodology, Northwestern University
- PhD - Social Psychology, UC Santa Barbara
- MA - Social Psychology, UC Santa Barbara
- BA - Mathematics, Rutgers University

Research Interests:

- Health promotion and disease prevention
- Tobacco control, smoking prevention and cessation
- Substance abuse prevention
- Evaluation research and behavioral surveillance methods
- Health effects of mobile phone use

Exhibit 17: Certifications, Bio and background of Eric Windheim



Certificate

Of Completion

INTERNATIONAL INSTITUTE FOR BUILDING-BIOLOGY® & ECOLOGY

Department for Certificates and Awards does hereby Certify that

Eric Windheim

has successfully completed all professional requirements and is awarded this Diploma as a

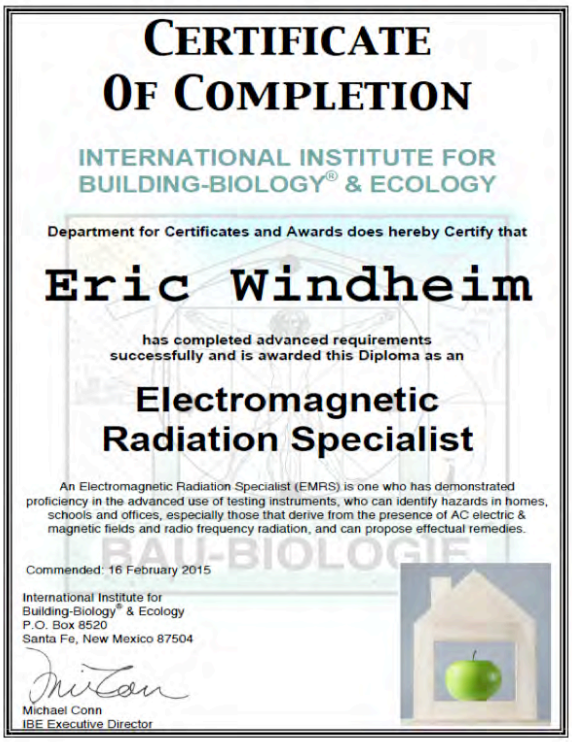
Building Biology Environmental Consultant

A Building-Biology Environmental Consultant (BBEC) is one who has demonstrated proficiency in the use of testing instruments, who can identify hazards in homes and offices, especially those that derive from the presence of AC electric & AC magnetic fields, VOC's, out-gassing chemicals from building materials, household chemicals, pesticides, and can propose remedies.

Final Project Commended, 03 December 2015

The International Institute for Building-Biology® & Ecology
P.O. Box 8520
Santa Fe, New Mexico 87504

Michael Conn
IBE Executive Director



CERTIFICATE OF COMPLETION

INTERNATIONAL INSTITUTE FOR BUILDING-BIOLOGY® & ECOLOGY

Department for Certificates and Awards does hereby Certify that

Eric Windheim

has completed advanced requirements successfully and is awarded this Diploma as an

Electromagnetic Radiation Specialist

An Electromagnetic Radiation Specialist (EMRS) is one who has demonstrated proficiency in the advanced use of testing instruments, who can identify hazards in homes, schools and offices, especially those that derive from the presence of AC electric & magnetic fields and radio frequency radiation, and can propose effectual remedies.

Commended: 16 February 2015

International Institute for Building-Biology® & Ecology
P.O. Box 8520
Santa Fe, New Mexico 87504

Michael Conn
IBE Executive Director

IEEE

CERTIFICATE OF COMPLETION

This is to certify that

Eric Windheim

has completed the course

Radio Frequency Safety Officer (RFSO) Course

8 March, 2018
Chandler, AZ, USA

2.4 Continuing Education Units; 24 Professional Development Hours

Vice President, IEEE Educational Activities

THE INSTITUTE OF ELECTRICAL AND ELECTRONICS ENGINEERS, INC. FOUNDED NEW YORK 1884

CEU
IEEE CONTINUING EDUCATION
New York State Sponsor Number 117
Florida Provider Number 0003849

Eric Windheim is the owner of Windheim Environmental Solutions, a California high technology and environmental health and wellness company that he founded in 1991. The company is located in the Sacramento area with clients worldwide. Windheim EMF Solutions specializes in electromagnetic radiation and provides inspection, assessment, measurement, risk assessment, abatement, and reduction of hazardous magnetic fields, electric fields, RFR wireless radiation, and “dirty electricity.” Clients can feel better instantly when effective EMF solutions are enacted.

Eric is a Certified Electromagnetic Radiation Specialist (EMRS) and an expert in EMF inspection, detection, measurement, risk assessment, EMF exposure reduction. He is certified to advise homeowners, homebuyers, architects, builders, inspectors, and engineers in the methods and practices that create and maintain a minimized presence of electromagnetic fields in homes and low-rise commercial buildings.

Eric is also a Certified Building Biology Environmental Consultant (BBEC), and has demonstrated proficiency in the use of testing instruments, and can identify hazards in homes and offices, especially those that derive from the presence of AC electric and AC magnetic fields, VOCs, out-gassing chemicals from building materials, household chemicals, and pesticides. He can propose solutions that provide a healthier indoor living environment that uses nature as its model.

Eric was trained and certified as an EMRS and BBEC by the International Institute for Building Biology and Ecology. The Institutes’ mission, now in its 31st year, is to help create healthy homes, schools, and workplaces, free of toxins in the indoor air and tap water, and electromagnetic pollutants.

Notable Accomplishments
- Founded & directed Sacramento Smart Meter Awareness action group which lead Sacramento Municipal Utility District, (SMUD) to allow removal of RFR transmitting Smart Meters and the retention or return of safer Analog electric meters that do not transmit RFR, 2013.
- Certified Building Biology Environmental Consultant (BBEC) 2015.
- Certified Electromagnetic Radiation Specialist (EMRS) 2015.
- Radio Frequency Safety Officer Course” (RFSO) accredited by the Institute of Electrical and Electronics Engineers, Inc. (IEEE) 2018.

Education
Eric graduated from the University of California at Santa Barbara with a BA in Geography and has studied Environmental Science, Earth Science, Geography, Geology, Hydrology, Remote Satellite Photo Interpretation, and Advanced Solar Engineering.

Professional Background
Eric specializes in EMF Assessment and exposure reduction, providing inspection, testing and remediation of microwave radiation, dirty electricity, and electric and magnetic fields. Prior to this he was the Director of Technical Services for the Sheet Metal and Air Conditioning Contractors National Association (SMACNA), Redwood Empire Chapter, providing education to HVAC contractors for California Title 24 Energy Regulation compliance. He worked for more than fourteen years in industrial machinery sales, residential and commercial solar energy system design, and sales with FAFCO Inc.

Learn More
For more information about Windheim EMF Solutions please contact us.

Phone: (916) 395-7336
Email: eric@windheimemfsolutions.com
Web: WindheimEMFSolutions.com

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   5. American Academy of Environmental Medicine Open Letter to the Superintendents of the School Districts of the United States; May 13, 2013
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   7. Dr. Christopher Portier, Fmr. Director of the US CDC, Calls for Invoking the Precautionary Principle for RF-EMF; April 19, 2015
   8. California Medical Association House of Delegates Resolution Wireless Standards Reevaluation; December 7, 2014
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11. Cindy Sage letter to LAUSD on wireless; February 3, 2013
12. Dr. Martha Herbert letter to LAUSD: Wireless vs. Wired in Classrooms; February 8, 2013
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15. Proposal for Consideration by the Green Party of Portland Oregon Moritorium on, and Process for Removal of, Wi-Fi in Public Schools
16. Teacher Unions are Taking Action on Wireless Health Risks! January 21, 2015

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3. Title 5, California Code of Regulations - School Facilities Construction
4. Power Line Setback Exemption Guidance, May 2006
5. A Message from the State Board of Education and the State Superintendent of Public Instruction
6. California State PTA Resolution on Wireless Equipment/Cellular Phones and Antennas; January 27, 2001

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2. Wi-Fi and Cellphone Radiation Comparison
3. Best Practices with Wireless Radiation for Schools - A Review of Global Advisories February 5 2015
4. CHPS Collaborative for High Performance: 2014 Criteria - New Construction and Renovation

G. Electromagnetic Hypersensitivity (EHS):

1. Guideline of the Austrian Medical Association for the Diagnosis and Treatment of EMF-related Health Problems and Illnesses; March 3, 2012
2. Electro Hypersensitivity - Talking to Your Doctor
3. Introduction to Electrical Hypersensitivity
4. What's the Diagnosis, Doctor? Fall 2014
5. Heavy Metal Toxicity Increases Your Risk of Electromagnetic Sensitivity
6. Calming Behavior in Children with Autism and ADHD - The Electromagnetic Radiation (EMR) Lowering Protocol (That Has No Cost or Side Effects) 2014

H. International Policy & Advocacy:

1. IARC/WHO Classifies Radiofrequency Electromagnetic Fields as Possibly Carcinogenic to Humans; May 2011
2. International Appeal (to the United Nations): Scientists Call for Protection from Non-Ionizing Electromagnetic Field Exposure; May 2015
3. Parliamentary Assembly of the Council of Europe; PACE Calls on Governments to 'Take All Reasonable Measures' to Reduce Exposure to Electromagnetic Fields; May 27, 2011
4. Parliamentary Assembly of the Council of Europe; The Potential Dangers of Electromagnetic Fields and their Effect on the Environment; Resolution 1815; 2011
5. France: Law on Public Exposure to Electromagnetic Waves Adopted; February 5, 2015
6. The Venice Resolution Initiated by the International Commission for Electromagnetic Safety; June 6, 2008
7. Benevento Resolution: The Precautionary EMF Approach: Rationale, Legislation and Implementation; February 2006
8. Irish Doctor's Environmental Association letter to Irish schools on Wi-Fi; January 7, 2013

9. Russian National Committee on Non-Ionizing Radiation Protection: Recommendations to Regulate Strictly the Use of Wi-Fi in Kindergartens and Schools; June 19, 2012
10. Russian National Committee on Non-Ionizing Radiation Protection Resolution: Electromagnetic Fields From Mobile Phones: Health Effects on Children and Teenagers; April 2011
11. Canadian Medical Association Journal Reports Health Canada's Wireless Limits are "A Disaster to Public Health"; May 7, 2015
12. Scientists Decry Canada's Outdated Wi-Fi Safety Rules; May 7, 2015
13. Declaration: Scientists Call for Protection from Radiofrequency Radiation Exposure
14. Safety Code 6 Plus Corruption = An Emerging Genocide! April 29, 2015
15. Ontario Catholic Teachers Union Issues Wi-Fi Warning; February 13, 2012
16. Frank Clegg letter to The Committee on Radiation Protection; April 9, 2014
17. Dr. Olle Johansson letter to Australian Schools to Adopt the Precautionary Principle on Wireless in Schools; February 18, 2013
18. Open Letter by British Medical Doctors: Health and Safety of Wi-Fi and Mobile Phones; July 10, 2013
19. Dr. Stephen Sinatra letter to Ontario Schools on Wi-Fi in Schools; April 15, 2011
20. Worldwide: Government and Authorities Around the World warnings on Wi-Fi Use in Schools
21. Removal of Wi-Fi from Schools and Libraries in Canada and Other Countries
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3. LAUSD Aborts 'Computer Per Student' Program with Apple; February 22, 2015
4. L.A. School District Demands iPad Refund From Apple; April 16, 2015
5. Maryland's Largest School District Agrees to Independent Wireless Radiation Measurements; May 7, 2015
6. MCPS Agrees to Perform Independent Radiation Measurements in Their Schools! May 7, 2015

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1. Screen Time vs. Play Time: What Tech Leaders Won't Let Their Own Kids Do; May 23, 2015
2. A Silicon Valley School That Doesn't Compute; October 22, 2011
3. The Private School in Silicon Valley Where Tech Honchos Send Their Kids So They DON'T Use Computers; October 24,2011
4. Schools That Ban Mobile Phones See Better Academic Results; May 16, 2015
5. Kids Do a Lot Better When Schools Ban Smartphones; May 18, 2015
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7. In the Classroom: Giving Laptops the Boot; May 10, 2008
8. This Year, I Resolve to Ban Laptops From My Classroom; December 30, 2014
9. Is Technology Producing a Decline in Critical Thinking and Analysis? January 27, 2009
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11. Internet-addicted Teens Can Unplug at Japanese 'Fasting Camps'; August 30, 2013
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13. Why Taiwan is Right to Ban iPads for Kids; February 4, 2015
14. Digital Device Use Leads to Eye Strain, Even in Kids; January 25, 2014
15. Attached to Technology and Paying a Price; June 6, 2010

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A. Science Articles on Environmental Effects:

1. Electromagnetic Pollution from Phone Masts. Effects on Wildlife; January 30, 2009
2. New Research Confirms That Our Electronics and Radio Waves Disrupt Migratory Birds; May 8, 2014
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6. High Frequency (900 MHz) Low Amplitude (5Vm-1) Electromagnetic Field: A Genuine Environmental Stimulus That Affects Transcription, Translation, Calcium and Energy Charge in Tomato; March 2008

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1. The Effects of Electromagnetic Fields on the Number of Ovarian Primordial Follicles: An Experimental Study; June 2015
2. Effect of Mobile Phone Use on Metal Ion Release from Fixed Orthodontic Appliances; June 2015
3. Are Men Talking Their Reproductive Health Away? May-June 17, 2015
4. Effects of 2.4 GHz Radiofrequency Radiation Emitted from Wi-Fi Equipment on MicroRNA Expression in Brain Tissue; May 20, 2015
5. Can Prenatal Exposure to a 900 MHz Electromagnetic Field Affect the Morphology of the Spleen and Thymus, and Alter Biomarkers of Oxidative Damage in 21-Day-Old Male Rats? May 19, 2015
6. Mobile Phone Radiation Causes Brain Tumors and Should be Classified as a Probable Human Carcinogen (2A) (review); May 2015
7. Use of Mobile Phone During Pregnancy and the Risk of Spontaneous Abortion; April 21, 2015
8. Tumor Promotion by Exposure to Radiofrequency Electromagnetic Fields Below Exposure Limits for Humans; April 17, 2015
9. The Effects of 2100-MHz Radiofrequency Radiation on Nasal Mucosa and Mucociliary Clearance in Rats; April 16, 2015
10. Effects of Chronic Exposure to Electromagnetic Waves on the Auditory System; April 2, 2015
11. Exposure to 900 MHz Electromagnetic Fields Activates the mkp-1/ERK Pathway and Causes Blood-Brain Barrier Damage and Cognitive Impairment in Rats; March 19, 2015
12. Cognitive Impairment and Neurogenotoxic Effects in Rats Exposed to Low-Intensity Microwave Radiation; March 5, 2015
13. The Effects of Long-Term Exposure to a 2450 MHz Electromagnetic Field on Growth and Pubertal Development in Female Wistar Rats; March 2015
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15. Effects of Prenatal and Postnatal Exposure of Wi-Fi on Development of Teeth and Changes in Teeth Element Concentration in Rats: Wi-Fi (2.45 GHz) and Teeth Element Concentrations; February 2015
16. Investigation of the Effects of Distance from Sources on Apoptosis, Oxidative Stress and Cytosolic Calcium Accumulation Via TRPV1 Channels Induced by Mobile Phones and Wii-Fi in Breast Cancer Cells; February 19, 2015
17. Effect of Low-Intensity Microwaves Radiation on Monoamine Neurotransmitters and Their Key Regulating Enzymes in Rat Brain; February 12, 2015

18. The Impact of Electromagnetic Radiation of Different Parameters on Platelet Oxygen Metabolism - In Vitro Studies; January-February 2015
19. The Effect of 2100 MHz Radiofrequency Radiation of a 3G Mobile Phone on the Parotid Gland of Rats; January-February 2015
20. Generation of Infant Anatomical Models for Evaluating Electromagnetic Field Exposures; January 2015
21. Validation of Self-Reported Start Year of Mobile Phone Use in a Swedish Case-Control Study on Radiofrequency Fields and Acoustic Neuroma Risk; January 2015
22. Impact of Head Morphology on Local Brain Specific Absorption Rate from Exposure to Mobile Phone Radiation; January 2015
23. Effects of Extremely Low Frequency Electromagnetic Field (ELF-EM F) on Catalase, Cytochrome P450 and Nitric Oxide Synthase in Erythro-Leukemic Cells; January 15, 2015
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30. Is Magnetite a Universal Memory Molecule? November 2014
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32. Short- and Long-Term Exposure to Alternating Magnetic Field (50 Hz, 0.5 mT) Affects Rat Pituitary ACTH Cells: Stereological Study; October 27, 2014
33. Decreased Survival of Glioma Patients with Astrocytoma Grade IV (Glioblastoma Multiforme) Associated with Long-Term Use of Mobile and Cordless Phones; October 16, 2014
34. Behavior and Memory Evaluation of Wistar Rats Exposed to 1.8 GHz Radiofrequency Electromagnetic Radiation; September 2014
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37. Exposure to 1800 MHz Radiofrequency Radiation Impairs Neurite Outgrowth of Embryonic Neural Stem Cells; May 29, 2014
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65. Effects of Wi-Fi Signals on the p300 Component of Event-Related Potentials During an Auditory Hayling Task; June 2011
66. Pulse Modulated 900 MHz Radiation Induces Hypothyroidism and Apoptosis in Thyroid Cells: a Light, Electron Microscopy and Immunohistochemical Study; December 2010
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69. Bioeffects of Mobile Telephony Radiation in Relation to its Intensity or Distance From the Antenna; May 2010
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2. Cell phones and Blood-Brain Barrier: Chinese Scientists Confirm Findings of Swedish Salford group; May 18, 2015
3. Does the Brain Detect 3G Mobile Phone Radiation Peaks? May 11, 2015
4. In Vitro Effect of Cell Phone Radiation on Motility, DNA Fragmentation and Clusterin Gene Expression in Human Sperm; April 21, 2015
5. Use of Mobile Phone During Pregnancy and the Risk of Spontaneous Abortion; April 21, 2015
6. Effects of 2.4 GHz Radiofrequency Radiation Emitted from Wi-Fi- Equipment on MicroRna Expression in Brain Tissue; March 16, 2015
7. RF Cancer Promotion: Animal Study Makes Waves; March 13, 2015
8. Evaluation of Selected Biochemical Parameters in the Saliva of Young Males Using Mobile Phones; March 2015
9. Effect of Cell Phone Use on Salivary Total Protein, Enzymes and Oxidative Stress Markers in Young Adult: A Pilot Study; February 2015
10. New Study: Carrying a Cell Phone in a Backpack Leads to Blood Abnormalities; January 17, 2015
11. Why Children Absorb More Microwave Radiation Than Adults: The Consequences; December 2014
12. Decreased Survival of Glioma Patients with Astrocytoma Grade IV (Glioblastoma Multiforme) Associated with Long-Term Use of Mobile and Cordless Phones; October 16, 2014
13. Effect of Low-Frequency Electromagnetic Field Exposure on Oocyte Differentiation and Follicular Development; January 27, 2014
14. Effect of Mobile Phone Usage Time on Total Antioxidant Capacity of Saliva and Salivary Immunoglobulin A; January 10, 2014
15. Extremely Low-Frequency Electromagnetic Fields Cause DNA Strand Breaks in Normal Cells; January 8, 2014
16. Wi-Fi Technology - An Uncontrolled Global Experiment on the Health of Mankind; June 2013
17. Electromagnetic Fields Act Via Activation of Voltage-Gated Calcium Channels to Produce Beneficial or Adverse Effects; May 20, 2013
18. Microwave Electromagnetic Fields Act by Activating Voltage-Gated Calcium Channels: Why the Current International Safety Standards Do Not Predict Biological Hazard; 2013
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21. Exposure to Electromagnetic Fields from Laptop Use of "Laptop" Computers; 2012
22. Use of Laptop Computers Connected to Internet Through Wi-Fi Decreases Human Sperm Motility and Increases Sperm DNA Fragmentation; October 11, 2011
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28. Effects of Laptop Computers' Electromagnetic Field on Sperm Quality; July 31, 2010
29. Effects of Exposure to 2.45 GHz Microwave Radiation on Male Rat Reproductive System; January 6, 2010
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31. Increased Blood-Brain Barrier Permeability in Mammalian Brain 7 Days After Exposure to the Radiation from a GSM-900 Mobile Phone; January 30, 2009
32. 2.45 GHz Low Level CW Microwave Radiation Affects Embryo Implantation Sites and Single Strand DNA Damage in Brain Cells of Mice, Mus Musculus; 2009
33. The Dangers of Electromagnetic Smog; August 2007
34. DNA Strand Breaks in Rat Brain Cells Exposed to Low Level Microwave Radiation; April 2006
35. Non-Thermal Effects of EMF Upon the Mammalian Brain; February 2006
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37. Nerve Cell Damage in Mammalian Brain After Exposure to Microwaves from GSM Mobile Phones; January 29, 2003

CAUTION: External email. Please verify sender before opening attachments or clicking on links.

Hello Davis City Leaders,

Over 90 local governments are standing up to unconstitutional FCC rules. Last night you heard comments from 5G activists urging the City of Davis to join these lawsuits.

When the dust settles, ordinary voters will understand why it was necessary to sue a federal regulatory agency. The majority of municipalities, unable to distinguish the difference between a rule and a law, will also benefit from this minority of elected and appointed officials who are doing the right thing on behalf of all Americans.

Thank you, Davis City Council and Davis Planning Commission, for being foresighted enough to have this topic on the agenda. Clearly, you are beginning to see beneath the sparkling surface presented by tech corporations.

Lauren Ayers
Former resident of Davis
Now residing in Guinda (Capay Valley)
530 321-4662

CAUTION: External email. Please verify sender before opening attachments or clicking on links.

Dear Mike Webb, Ashley Feeney, Inder Khalsa, Sherri Metzger, City Council, City Staff et al.:

[Clerical: Please place this email and attached files into the public records under WTF, thank you)

Here is a recap I made on the edits, and reasoning, regarding the draft wireless ordinance for the City of Davis:

I am providing these again for the need to add these crucial edits into the current draft ordinance, while it is currently written as is, does not reflect the language we would like to see in our wireless telecommunications facilities ordinance. The residents of the City of Davis recognize a strong protective ordinance and this current draft isn't it. We need to have an ordinance that reflects the needs and wants of the townsfolk and our position we enumerate is always - safety first. We want an ordinance we can be proud to accept and embrace. Provided in this email is the attached list in abbreviated form our "asks".

The residents of the City of Davis requests to see a revised draft copy of the wireless ordinance 72 hours before the meeting date of January 28, 2020. Many changes are necessary and required due to most recent court cases and final judgements.

We would also like the courtesy of responses and reasons for acceptance or non-acceptance to the edits provided in the Word documents attached in this message.

Any questions, please respond to this email.

Thank you,

Lena Pu
Environmental Health Consultant
National Association for Children and Safe Technology (NACST.org)
&
Founder
Davis Anti-5G Microwave Network (DAMN 5G)

Edits to Draft Wireless Telecommunications Facilities Ordinance for the City of Davis, California

January 18, 2020

Submitted on behalf of the Davis Anti-5G Microwave Network

15 Points General Outline on Changes & Intent:

1.) "Tele" is to be reinstated into the main title for consistency and conformity to the requirements of the "Tele"communications Act of 1996, and not the arbitrary and capricious request of the FCC's agenda to connect billions of wireless devices to service the Internet of Things (IoT). The IoT is not within jurisdiction for need of service, only (telephony) gap in coverage is. The revised wording as directed by RWG and legal counsel introducing "Communications" instead of the original "Telecommunications" opens us up to the acceptance of other usage of wireless communications not related to calls but for the IoT, and thus, the agenda of densifications of "small" cell antennas throughout the city. The Davis residents do not care to be exposed to such increases and unnecessary microwave radiation as a result of this "communications" agenda, the fulfillment of the so-called IoT. The original title, "Wireless Telecommunications Facilities" should be reinstated, and not "Wireless Communications Facilities".

2.) Industry must show proof of need for gap in coverage regarding telephone communications services under Title II, and the Telecommunications Act of 1996. Industry must also determine the least intrusive means for achieving this coverage.

3.) Submittal by applicant proof of NEPA review by the FCC as required by the National Environmental Policy Act (NEPA) for actions that may have significant environmental effect (47 CFR 1.1307) based on the federal undertaking of deploying over 800,000 5G/4G sWTF.

4.) All small wireless telecommunication facilities locations considered shall be in compliance with the United States Access Board and Americans with Disabilities Act (ADA) recognizing individuals with electro-sensitivity (ES) as a disability, and providing safe access to and from their homes and community where they live, work, study, commune, and heal. Electro-sensitivity is also known as radar sickness and microwave sickness, but not limited to these.

5.) No sWTF shall be placed within the radius of 1000' from any residential home. The topography of the City of Davis is flat which means the wireless radiation propagation distance will travel further in the tens to thousands and thousands of feet than areas in hills, swales and valleys. Because of the low to no impedance of RF microwave radiation propagation due to a flat topography, dense placements of sWTF and WTF is not necessary. Industry tests on MMW have proven these frequencies can travel over 2'000 feet through dense canopy of trees and vegetation and still enable connectivity.

6.) Each sWTF must be at minimum 1,500' away from another nearest sWTF and/or WTF.

7.) Each sWTF must be at minimum 1,000' away from pre-schools, schools, parks, and sports fields.

8.) Proof of Safety Testing Above 6GHz. Submittal of report of proof of safety testing and/or SAR and/or similar calculable means for RF power levels of exposures from all antennas, transmitters and electronic components that utilize frequencies past 6GHz determined at ground level, second and third storied buildings**.**

9.) Proof of Insurance. The applicant shall submit evidence of ability to attain independent third-party insurance, cannot show self as being the insurer.

10.) The applicant has demonstrated that the proposed project will be in planned compliance with all applicable FCC regulations and guidelines for human exposure to RF emissions. The facilities will not expose people to radio frequency (RF) radiation in excess of FCC standards being that the power density cannot exceed 5% of the power density exposure limit applicable to that transmitter or facility or in a field strength that, when squared, exceeds 5% of the square of the electric or magnetic field strength limit applicable to that transmitter or facility (47 CFR 1.1310).

11.) All RF values shall be shown, described and graphed out in actual real time data showing maximum peak measurements, not averages. Report must show PEAK potential power density. And the report must be generated by an independent third-party member written by an RF engineer or professional building biologist or hygienist, and shall be chosen by the city, and funded by the applicant. Payment for future RF reports shall be built into the lease for yearly monitoring of RF levels to ensure continued safety compliance.

12.) Generate a Cumulative Impact RF Analysis. The applicant must submit a cumulative impact analysis for the proposed facility and other WTFs on the project site within a radius of 1,500' of the proposed WTF site. The analysis shall include all existing and proposed (application submitted to the community development and sustainability department) WTFs on or near the site, dimensions of all antennas and support equipment on or near the site, power rating for all existing and proposed back-up equipment, and a report estimating the ambient RF fields and maximum potential cumulative electromagnetic radiation at, and surrounding, the proposed site that would result if the proposed WTF were operating at full buildout.

13.) Facilitate public hearings on proposed conditionally permitted sWTF and WTF and follow in conduct according to Sections 40.30.070 of the Davis Municipal Code. Also add in "Noticing Radius" to notify all residents living within a 500' radius of the proposed sWTF. The noticing radius shall be measured from the outer boundary of the subject parcel, or, for those facilities in the PROW, from the outer boundary of the closest parcel adjacent to the subject PROW site.

14.) An encroachment permit must be obtained for any work in the public right-of-way.

15.) Police power must be maintained to enforce the quiet enjoyment of streets and the ability to protect city residents their health and safety regarding sWTF exposures whether it be harm and endangerment from RF exposures, high voltage induced fires, undue surveillance, data harvesting, live wires and/or electrical arcs, but not limited to these.

10 Points of Statements for Elimination:

1.) Eliminate “preferential” locations of WTF and sWTF to stating definitive setback distances as described in the preceding 15 points list.

2.) Eliminate “Consequences of Non-Compliance” regarding Article 40.29 of the Davis Municipal Code as portions of the Report and Order has been overturned and deemed “capricious and arbitrary” by the D.C. Court of Appeals.

3.) Eliminate “The Master License Agreement” (MLA) as again, many crucial areas of the FCC Report and Order has been overturned and deemed “capricious and arbitrary” by the D.C. Court of Appeals.

4.) Eliminate anything that has to do with the FCC Report and Order as it no longer holds weight in the decision making for the City on placement, modification, operations of WTF and sWTF. It actually never did, but the D.C. court case and final judgement makes definitive this motion.

5.) Eliminate the “Conclusion” section regarding the FCC Report and Order placing limitations on the City and the MLA, which no longer holds true for reasons stated above.

6.) Eliminate the “Project Analysis” section because it states eliminating discretionary authority and replacing it with ministerial authority by city staff and legal counsel only. This is not a legal process nor a fulfillment of required public due process, not to mention the same reasons as stated above.

7.) Eliminate “Environmental Determination” because that is no longer true. The deployment of the FCC’s 800,000 plus sWTF has been deemed an environmentally significant federal undertaking requiring NEPA review.

8.) Eliminate all areas which states that environmental effects are deemed insignificant and exempt from NEPA and CEQA regulations. That is no longer the case for reasons stated above.

9.) Eliminate “Ministerial Permits” for reasons that it does not allow public due process and gives unbalanced decision-making power to the legal counsel and city manager.

10.) Eliminate all statements allowing ministerial permits to be applied and approved for the processing any permit applications.

STAFF REPORT
(Edits made 1-19-20)

DATE: October 9, 2019

TO: Planning Commission

FROM: Sherri Metzker, Principal Planner

SUBJECT: **Zoning Ordinance Amendment - Wireless Ordinance**

Recommendation

Hold a public hearing and recommend approval to the City Council of:

1. AN ORDINANCE OF THE CITY OF DAVIS REGARDING WIRELESS TELECOMMUNICATION FACILITIES AND AMENDING AND RESTATING ARTICLE 40.29 OF THE DAVIS MUNICIPAL CODE IN ITS ENTIRETY REGARDING THESAME
2. A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF DAVIS ADOPTING A CITY WIDE POLICY REGARDING PERMITTING REQUIREMENTS AND DEVELOPMENT STANDARDS FOR SMALL WIRELESS TELECOMMUNICATION FACILITIES (please add throughout document "Telecommunication" back in for sake of consistency)

Project Description

The City of Davis is proposing an amendment to the Davis Municipal Code, thereby amending and restating Article 40.29 entitled Wireless Telecommunication Facilities to bring the City's regulation into compliance with Federal and State laws. This amendment will ensure to the greatest extent possible that wireless facilities are located, designed, installed, constructed, maintained and operated in a manner that meets the aesthetic and public health and safety requirements of the City. The proposed ordinance addresses they type of wireless facilities that are exempt, permitted, conditionally permitted, and prohibited. Further, it outlines the procedure for permit approval, design standards, and abandonment procedures.

The City of Davis is also proposing a resolution establishing permitting requirements and development standards for small cell wireless telecommunication facilities. The Federal Communication Commission adopted its Declaratory Ruling and Third Report and Order relating to the placement of small wireless telecommunication facilities in the public right of way. The Report and Order gives providers of wireless services certain rights to utilize public right of way and to attach small wireless facilities to public infrastructure subject to the payment of reasonable fees.

Background

On September 24, 2019, an informational item on wireless telecommunications regulations was presented to City Council. The presentation was intended to help get information out to the community and provide an update to the City Council on Wireless Telecommunications regulations. The majority of the background section of this staff report is duplicative to the information that was presented to the City Council at that meeting. The following section of this staff report provides a background summary on recent FCC (Federal Communications Commission) rules and requirements related to wireless telecommunications and the restrictions imposed on state and local government's ability to regulate them.

SUMMARY OF FCC REPORT AND ORDER

On September 27, 2018, the Federal Communications Commission's ("FCC's") Declaratory Ruling and Third Report and Order ("Report and Order") was issued, which established a new category of "small wireless telecommunication facilities" and imposed substantial restrictions on state and local governments' ability to regulate them. These restrictions include a new federal requirement that requires cities to allow small wireless telecommunication facilities on city-owned infrastructure in the public right-of- way, such as streetlights. The Report and Order does allow cities to establish aesthetic and (to a limited degree) locational requirements for small cell facilities. However, the City's small wireless telecommunication facility regulations are required to be "reasonable, objective, non-discriminatory, and published in advance." It further imposes tight deadlines for approving or denying small wireless telecommunication facility applications and limits the fees the city can charge for applications and for the use of City-owned infrastructure in the public right-of-way.

These requirements are in addition to existing federal requirements, which provide that "[n]o state or local statute or regulation, or other state or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide … telecommunications service."[1] Thus, any regulations that the City adopts must not "effectively prohibit" the provision of wireless service in the City. This is particularly relevant for any locational or zoning requirements the City may impose on wireless telecommunication facilities; the City may not restrict the location of wireless telecommunication facilities in a manner that eliminates wireless coverage in any area of the City.

Small Wireless Facilities are defined as follows:

- Must show proof of need for any gap in coverage of communications services under Title II.
- Must determine the least intrusive means to achieve this gap in coverage.
- They are mounted on either structures 50 feet or less in height including their antennas, or no more than 10 percent taller than other adjacent structures, or do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater; and
- Each antenna is no more than three cubic feet in volume, excluding associated antenna equipment; and
- All equipment associated with the antenna and any pre-existing associated equipment is no more than 28 cubic feet in volume; and

[1] Federal Telecommunications Act of 1996, 47 U.S.C. § 253.

- The facilities do not expose people to radio frequency (RF) radiation in excess of FCC standards. These standards being that the power density cannot exceed 5% of the power density exposure limit applicable to that transmitter or facility or in a field strength that, when squared, exceeds 5% of the square of the electric or magnetic field strength limit applicable to that transmitter or facility (47 CFR 1.1310).
- Submittal of report of proof of safety testing and/or SAR and/or similar calculable means for RF power levels from all antennas, transmitters and electronic components that utilize frequencies past 6GHz determined at ground level, second and third storied buildings.
- Submit proof of National Environmental Protection Act (NEPA) review from the FCC on actions that may have significant environmental effect (47 CFR 1.1307).

Preemption of Local Aesthetic Regulations. The Report and Order requires that local regulations of small wireless telecommunication facilities concerning aesthetics, undergrounding, and spacing must be:

- Reasonable, meaning technically feasible and reasonably related to the harms created by unsightly deployments;
- No more burdensome than those applied to other types of infrastructure deployments;
- Objective; and
- Published in advance.

These requirements went into effect on April 15, 2019. Local agencies were not required to adopt new standards by that date, but any standards in effect that do not meet the requirements after that date are unenforceable. In an effort to maintain local control allowed under the law, City of Davis staff did develop and implement design criteria prior to the April 15, 2019 thereby preserving local control over design aesthetics to the extent permissible under the FCC Report and Order.

New Shot Clock Deadlines. Local agencies must act on all small wireless facility applications before the following "shot clock" deadlines: 60 days for a collocation on an existing structure; and 90 days for new small wireless facilities on a new structure. These extremely tight deadlines apply to all applications, regardless of whether they are submitted in large batches, and all permits and approvals required by the local agency, including but not limited to building permits, planning permits, encroachment permits, license agreements, etc. If the City fails to act within the required deadline, the City is presumptively in violation of the Federal Telecommunications Act, entitling the applicant to seek injunctive relief from the court.

New Limits on Local Fees. The Report and Order further limits the extent to which local agencies may impose fees on small wireless facility deployments. Local fees must now be shown to be a reasonable approximation of the state or local government's costs, and no higher than the fees charged to similarly situated competitors in similar situations. These limits apply to fees imposed for:

- Processing applications;
- The use of the public right-of-way; and
- The privilege of attaching to or using fixtures and structures in the public right-of-way that are owned or controlled by the government.

The Report and Order's impact on fees is most severe with respect to this last category because it intrudes on any leases, licenses, or other agreements with a wireless provider. Local agencies were previously under no obligation to allow wireless providers access to their physical property in the public-right-of-way, such as streetlights, traffic lights, and signs, and could therefore negotiate with providers for compensation. Under the Report and Order, however, local agencies can no longer refuse to allow facilities on their property or even leverage their properties in the right-of-way for additional revenue, but can only recover fees that are reasonably related to their actual

costs. Whether existing agreements violate the fee limits in the Report and Order will depend upon all the facts and circumstances of the specific case.

The Report and Order also established presumptively reasonable "safe harbor" fees as follows:

- Either $500 for non-recurring fees, including application fees for up to five small wireless facilities, with an additional $100 for each application beyond five; or $1,000 for non-recurring fees for a new pole (i.e., not a collocation) intended to support one or more Small Wireless Facilities; and
- $270 per Small Wireless Facility per year for all recurring fees, including any possible public right-of-way access fee or fee for attachment to municipally-owned structures in the public right-of-way.

Local agencies may still charge higher fees, but they must establish such fees are reasonable and non-discriminatory and constitute a reasonable approximation of costs.

PENDING LEGAL CHALLENGE TO THE REPORT AND ORDER

Numerous municipalities have filed legal challenges to the Report and Order in federal court, arguing on various grounds that the Federal Communications Commission (the "FCC") exceeded its statutory authority and abused its discretion by acting in an arbitrary and capricious manner. Several wireless providers have also filed challenges on the grounds that the FCC should have adopted a "deemed approved" remedy for small wireless facility shot clock violations.

These cases have been consolidated as *City of San Jose v. FCC* and transferred to the Ninth Circuit Court of Appeals. Briefing is scheduled to conclude this month, but staff is unaware of any date scheduled for oral arguments. Unfortunately, the municipalities' motion to stay the effect of the Report and Order pending their legal challenge was denied. The Report and Order therefore remains in effect for the time being

~~**CONSEQUENCES OF NON-COMPLIANCE**~~

~~Under the current provisions of Article 40.29 of the Davis Municipal Code ("Municipal Code" or "DMC"), all wireless telecommunication facilities are subject to a thorough permitting process and must comply with detailed design requirements and standards. (*See* DMC § 40.29.010 *et seq*.) Under the Report and Order, however, many of these provisions are now unenforceable with respect to small wireless facilities because they are too subjective. Moreover, the City's current regulations are not sufficiently streamlined to allow expedient, ministerial approval of small wireless facility applications within the strict confines of the new shot clock. For this reason, City staff has prepared the recommended amendments to Article 40.29 to comply with other developments in telecommunications law. Those changes are discussed further below.~~

~~**THE MASTER LICENSE AGREEMENT**~~

~~All cities are facing the challenge of complying with the Report and Order, and there is no one-size-fits-all solution. Staff, together with legal counsel has developed a Master License Agreement (MLA) as a mechanism to respond to requests from wireless providers to attach to City-owned~~ *("attach to City owned facilities in the public right of way as required by the new FCC rules"* to note: becomes a dangerous condition of liability for the city melding a private facility to a publicly owned one) ~~facilities in the public right-of-way as required by the new FCC rules until the City can amend its~~

~~telecommunications ordinance. That said, the MLA will continue in effect and will become subject to any future ordinance or design standards adopted by the City. The MLA does not lock in design standards or City fees at the time of approval, so any future applications the company might submit would be subject the City's regulations in place at that time. This is advisable because: (1) the City cannot readily predict how wireless technology might change in the future; (2) cost-based fees will certainly increase in the future; and (3) the entire Report and Order – including the cap on annual license fees – could be overturned if the lawsuit against the FCC is successful.~~

~~Thus, the MLA provides that the annual license fees would automatically increase the annual license fee to $1,250 per installation in the event the relevant provisions of the Report and Order are no longer legally effective. The MLA does not involve the expenditure of City funds. As explained above, the fees that can be collected for small wireless facilities on City property have been essentially capped at a low "safe harbor" amount. Finally, the approval of the small wireless facilities themselves is non-discretionary, subject to compliance with limited objective standards. For these reasons, we believe that the MLA is an appropriate tool for the City to use in effort to condition and memorialize City discretion to the greatest extent allowed under the law.~~

PROPOSED CHANGES TO THE CITY'S WIRELESS REGULATIONS

With regard to the wireless telecommunications ordinance, staff recommends that amendments to Article 40.29 of the Municipal Code ("Wireless Telecommunication Facilities") include a provision that~~: (1) exempts small wireless facilities that meet the FCC's definition from Article 40.29; and (2)~~ make such small wireless telecommunication facilities subject to a separate Small Wireless Facility Policy ("Policy") that the City Council would adopt by resolution. The Policy would apply to small wireless telecommunication facilities in both the right-of-way and on private property.

The purpose of adopting the Policy by resolution rather than by an ordinance amending the Municipal Code is to maintain the City's ability to update its regulations quickly to respond to changes in technology and federal law.

~~LIMITS ON CONSIDERATION OR~~ RADIO FREQUENCY (RF) EMISSIONS

Concerns about the possible negative health effects of radio frequency (RF) emissions generated by wireless telecommunication facilities are often raised whenever cities consider approving new wireless regulations or approve new wireless telecommunication facility applications. ~~However, federal law has preempted the City's ability to consider such matters to the extent wireless facilities comply with RF standards promulgated by the FCC.~~ The Federal Telecommunications Act of 1996 states in part:

> *"No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [FCC's] regulations concerning such emissions."*

~~(47 U.S.C. § 332(c)(7)(B)(iv) (emphasis added).) This rule predates the Report and Order, and therefore applies to all wireless telecommunication facilities, including small wireless facilities.~~

~~The City may not regulate wireless facilities, including small wireless facilities, based on concerns regarding RF emissions, including health concerns. All that the City can do is to require that such~~

~~facilities meet the FCC requirements for RF emissions. Therefore,~~ staff recommends that the City's Policy for small wireless telecommunication facilities include the following provisions:

- Applications should be required to include an RF exposure compliance report that certifies that the proposed small wireless facility, as well as any collocated wireless telecommunication facilities, will comply with applicable federal RF exposure standards and exposure limits. That report ~~would be required to be~~ shall be prepared by a third party independent certified ~~and certified by an~~ RF engineer, or professional building biologist or hygienist, determined by ~~acceptable to~~ the City and funded by the applicant.

- No small wireless telecommunication facility would be approved unless the City finds that the applicant has demonstrated that the proposed project will be in compliance with all applicable FCC regulations and guidelines for human exposure to RF emissions.

- Any approved project would be subject to a standard condition of approval that requires all small wireless telecommunication facilities to be maintained in compliance at all times with all federal, state and local statutes, regulations, orders or other rules applicable to human exposure to RF emissions.

- All small wireless telecommunication facilities would be required to be designed, constructed, operated and maintained in compliance with all generally applicable health and safety regulations, which includes without limitation all applicable regulations for human exposure to RF emissions.

- All small wireless telecommunication facilities locations consideration shall be in compliance with the United States Access Board and Americans with Disabilities Act (ADA) both recognizing individuals with electro-sensitivity (ES) as a disability and providing safe access to and from their homes and community where they live, work, study, commune, and heal. Electro-sensitivity is also known as radar sickness and microwave sickness but not limited to these.

~~CONCLUSION~~

~~In conclusion, the FCC's Report and Order places substantial new limitations on the City's ability to regulate small wireless facilities, one of which is that local aesthetic regulations must be objective and published in advance. The City continues to be prohibited from regulating small wireless facilities (or any wireless facilities) based on RF emissions or health impacts. The MLA is strongly recommended as an appropriate means of complying with the Report and Order with regard to the pending and future applications while maximizing the ability to condition and memorialize City discretion to the greatest extent allowed under the law. The proposed amendments and the MLA process, would protect the City's interests and preserve the maximum authority allowed under the new law~~

~~Project Analysis~~

~~The last time the City of Davis did a major update to the Wireless Telecommunications Ordinance was in 2012. At that time, the city was able to maintain much of its local authority with regard to regulations in the wireless industry. However, since that time, the Federal Government has~~

~~adopted new regulation removing much of the local discretionary authority and replacing it with simple ministerial authority. In particular, as described above, this applies to small cell facilities. It is staff's expectation that these antennas will be located in various places around the City in the public right of way and will make use of City light poles for their structural mechanism. Staff has worked with legal counsel to include provisions in the ordinance that allow for locational~~

~~preferences and other aesthetic measures to the extent allowed under the law. The following is a brief explanation of each new section of Article 40.29.~~

40.29.010 – 030 Purpose, Authority and Definitions

These three sections are simply updated to reflect the current code format. The definitions have been updated to reflect current provisions. In particular, those terms that are subject to change by the Federal Communications Commission (FCC), have been redefined to refer to the appropriate Federal code. This will prevent the need to redefine the term every time the FCC modifies the definition.

40.29.040 – Applicability; Exemptions

This section outlines the applicability of the Article and lists those types of antennas that are exempt from permitting by the City. These types of antenna include satellite dishes, amateur radio operators, public safety repeaters, and temporary emergency antennas, just to name a few. These antennas may need a building permit but are not subject to discretionary approval.

40.29.050 – Conditionally Permitted Wireless Facilities

This section makes approval of a conditional use permit a requirement for all wireless telecommunication facilities except those listed in 40.29.060, 40.29.070, or 40.29.080.

40.29.60 – Permitted Wireless Telecommunication Facilities

Eligible Facility Requests, as defined by the FCC, are permitted uses. Therefore, there is no discretionary approval permitted if the application meets this definition. Currently, an eligible facility request must meet the following requirements;

1. A modification substantially changes a wireless tower on private property if it increases the height of the tower as it existed on February 22, 2012 by more than 10% or 20 feet (whichever is greater). 47 C.F.R. § 1.40001(b)(7)(i).
2. A modification substantially changes a wireless tower on private property if it adds an appurtenance that protrudes from the tower by more than 20 feet or by the width of the tower at the level of the appurtenance (whichever is greater). 47 C.F.R. § 1.40001(b)(7)(ii).
3. A modification substantially changes a wireless tower on private property if it involves more than four (4) new equipment cabinets. 47 C.F.R. § 1.40001(b)(7)(ii).
4. A modification substantially changes a wireless tower on private property if it entails any excavation or deployment outside the current boundaries of the leased or owned property surrounding the tower and any access or utility easements related to the site. 47 C.F.R. §§ 1.40001(b)(6), 1.40001(7)(iv).
5. A modification substantially changes a wireless tower on private property if it would defeat the concealment elements of the tower. 47 C.F.R. § 1.40001(b)(7)(v).
6. A modification substantially changes a wireless tower on private property if it does not comply with conditions associated with the siting approval for the original construction or subsequent modification(s) of the tower. Noncompliance with prior permit conditions

related to height, width, equipment cabinets and excavation would not cause a substantial change to the extent the condition is more restrictive than the applicable FCC thresholds. 47 C.F.R. § 1.40001(b)(7)(vi).

40.29.070 – Prohibited Wireless Telecommunication Facilities

This section contains the types of wireless facilities that are prohibited in the City. Those that exceed the radio frequency emissions standards adopted by the FCC, those in areas zoned for residential uses, zoned for schools, sensitive habitat areas or historical resources. It should be noted that this section applies to those antennas that would otherwise require a conditional use permit. They do not apply to small wireless telecommunication facilities as they have their own locational preferences.

40.29.80 – Small Wireless Telecommunication Facilities

Small Wireless Telecommunication Facilities are defined by the FCC as follows:

(1) The facilities—
(i) are mounted on structures 50 feet or less in height including their antennas as defined in section 1.1320(d), or
(ii) are mounted on structures no more than 10 percent taller than other adjacent structures, or
(iii) do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater;

(2) Each antenna associated with the deployment, excluding associated antenna equipment (as defined in the definition of antenna in section 1.1320(d)), is no more than three cubic feet in volume;

(3) All other wireless equipment associated with the structure, including the wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than 28 cubic feet in volume;

(4) The facilities do not require antenna structure registration under part 17 of this chapter;

(5) The facilities are not located on Tribal lands, as defined under 36 CFR 800.16(x); and

(6) The facilities do not result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified in section 1.1307(b).

The Federal regulations permit the local jurisdictions to establish certain aesthetic design standards. In light of that provision, staff is recommending adoption of the attached resolution entitled, "Citywide Policy Regarding Permitting Requirements and Development Standards for Small Wireless Facilities." Adopting the standards by resolution, as opposed to ordinance will allow the City to react more quickly to the changing provisions for small wireless telecommunication facilities.

40.29.090 – Applications

The provisions for a conditional use permit for a wireless telecommunication facility are very similar to those in effect today. This section explains the requirements for obtaining a conditional use permit, including recommending pre submittal conference and a submittal appointment.

40.29.100 – General Requirements and Design Standards

This section describes the requirements and standards that apply to all permitted and conditionally permitted wireless telecommunication facilities.

40.29.110 – Public Hearing and Noticing Radius
40.29.120 - Findings
40.29.130 - Regulatory Compliance

These three sections describe procedures and findings for approving a conditional use permit. The regulatory compliance section requires the permittee to ensure compliance with the current regulations.

40.29.140 – Existing Conforming and Legal Nonconforming Wireless Facilities
40.29.150 – Periodic Review

These sections provide provisions for dealing with changes to non-conforming wireless facilities and the periodic review of facilities to determine if the facility is conforming.

40.29.160 – Transfer of Operation
40.29.170 – Abandonment or Discontinuation of Use

These sections deal with the transfer of ownership of a permit and the abandonment of discontinuation of a wireless facility.

40.29.180 – Violations; Public Nuisance
40.29.190 – Revocation of Permit
40.29.200 – Mandatory Removal and Relocation
40.29.210 – Appeals
40.29.220 – Effect of State or Federal Law

These five sections describe procedural provisions for violations and revocations of permits.

Resolution of the City Council of the City of Davis Adopting a Citywide Policy Regarding Permitting Requirements and Development Standards for Small Wireless Telecommunication Facilities

As mentioned earlier, the purpose of adopting development standards via a resolution is to facilitate prompt updates to the City's standards. The resolution outlines application requirements. It also describes submittal and completeness review requirements. The approval or denial provisions are followed by a list of standard conditions of approval.

One area of particular public concern is the locational preference requirements. Staff is recommending three levels of preference, starting with,

1 nonresidential zones,

2 any location in a residential zone ~~250~~ 1000 feet or more from any structure approved for a residential or school use,

~~3~~ if located in a residential area, no pole mounted antennas shall be placed directly in front, on the side or behind a residential home. ~~a location that is as far as possible from any structure approved for a residential use.~~

Applications for less preferred locations or structures may be approved so long as the applicant demonstrates that either,

1) no more preferred locations or structures exist within 500 feet from the proposed site, or
2) any more preferred locations or structures within 500 feet from the proposed site would be technically infeasible as supported by clear and convincing written evidence.

Prohibited support structures would also be denied a permit.

The resolution also includes design standards for a variety of factors. Issues such as noise, lighting, landscaping, signage, concealment, installation preferences, and accessory equipment provisions. These design provisions address both steel and wooden poles.

Environmental Determination

~~The City of Davis (City) has determined that the lease applicant has to adopt the requirements of the adoption of the resolution is exempt from review under the California Environmental Quality Act.(CEQA) (California Public Resources Code Section 21000, et seq.), pursuant to State CEQA Regulation Section 15061 (B)(3) (14 Cal. Code Regs. Section 15061 (b)(3)) covering activities with no possibility of having a significant effect on the environment. In addition, the City of Davis has determined that the ordinance is categorically exempt pursuant to Section 15301 of the CEQA regulations applicable to minor alterations of existing governmental and/or utility owned structures.~~

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ORDINANCE NO.

AN ORDINANCE OF THE CITY OF DAVIS REGARDING WIRELESS TELECOMMUNICATION FACILITIES AND AMENDING AND RESTATING ARTICLE 40.29 OF THE DAVIS MUNICIPAL CODE IN ITS ENTIRETY REGARDING THE SAME

WHEREAS, there have been significant changes in the types of wireless telecommunication facilities used to provide communications services within the City; and

WHEREAS, both federal and state law has been modified regarding the regulation of wireless telecommunication facilities both in the public rights or way and on private property outside of the public rights of way; and

WHEREAS, the City desires ensure to the greatest extent allowed under federal state law that wireless telecommunication facilities are located, designed, installed, constructed, maintained, and operated in a manner that meets the aesthetic and public health and safety requirements of the City; and

WHEREAS, the City deems it necessary and appropriate to adopt standards and regulations relating to the location, design, installation, construction, maintenance, and operation of wireless telecommunication facilities, including towers, antennas, and other structures both in the public rights or way and on private property outside of the public rights of way and to provide for the enforcement of these standards and regulations consistent with federal and state legal requirements;

NOW, THEREFORE, the City Council of the City of Davis does hereby ordain as follows:

Section 1. Code Amendment. Article 40.29 of the Davis Municipal Code is hereby amended and restated in its entirety and replaced and reenacted as set forth in **Exhibit A** attached hereto and incorporated herein. The provisions of Article 40.29, insofar as they are substantially the same as provisions of ordinances previously adopted by the City relating to the same matter, shall be construed as restatements and continuations of the earlier enactment, and not as new enactments. The adoption of this Ordinance shall not affect any actions and proceedings that began before the effective date of this Ordinance; prosecution for ordinance violations committed before the effective date of this Ordinance; licenses and penalties due and unpaid at the effective date of this Ordinance.

Section 2. Severability. If any provision of this Ordinance, or its application to any person or circumstance, is determined by a court of competent jurisdiction to be unlawful, unenforceable or otherwise void, that determination shall have no effect on any other provision of this Ordinance or the application of this Ordinance to any other person or circumstance and, to that end, the provisions of this Ordinance are severable.

Section 3. Effective Date and Notice. The City Clerk shall certify to the adoption of this

Ordinance, and the City Clerk shall, at least five (5) days prior to meeting at which this Ordinance is to be adopted and within fifteen (15) days of its adoption, cause a summary of this Ordinance to published in a newspaper of general circulation published and circulated in the City of Davis and a certified copy of the full text of the Ordinance to be posted in the office of the City Clerk. This Ordinance shall take effect thirty (30) days following its adoption.

INTRODUCED on the_____day of,_____, and PASSED AND ADOPTED by the City Council of the City of Davis on the_____day of, _____, by the following vote:

AYES:

NOES:

ABSTAIN:

ATTEST:

_____
Zoe S. Mirabile, CMC
City Clerk

EXHIBIT A

Article 40.29 WIRELESS TELECOMMUNICATION FACILITIES

40.29.010. Purpose.

The purpose of this Article is to provide uniform standards for the establishment and modification of wireless telecommunications facilities (WTFs) in the City and to provide for the desired location, design, installation, construction, maintenance, and operation of WTFs consistent with applicable federal and state requirements. These standards are intended to address and balance the potentially adverse visual and aesthetic impacts of WTFs while providing for the communication needs of residents, local businesses, and government agencies; manage the public rights-of-way and ensure the public is not incommoded by the placement of WTFs in the public rights-of-way.

40.29.020. Authority.

This Article is enacted pursuant to the City's police power to regulate for the public health, safety and welfare subject to the limitations of that power under federal and state law, including but not necessarily limited to the Federal Telecommunications Act of 1996, Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, state laws regulating the processing and procedures associated with local WTF approvals. This Article shall be interpreted in conjunction with the federal and state laws and regulations regarding the processing and placement of telecommunications facilities within the City.

40.29.030. Definitions.

For the purposes of this Article, the following terms shall have the meanings set forth below:

(a) **Antenna**. Any system of wires, poles, rods, discs, reflecting discs, panels, flat panels, dishes, whip antennae, or other similar devices used for the transmission or reception of wireless signals. Antennae includes devices having active elements extending in any direction, and directional beam-type arrays having elements carried by and disposed from a generally horizontal boom that may be mounted upon and rotated through a vertical mast or tower interconnecting the boom and antenna support, all of which elements are deemed to be a part of the antenna. The height of the antenna shall include all array structures.

(1) **Antenna—Amateur radio**. A ground, building, or tower mounted antenna, or similar antenna structure, operated by a federally licensed amateur radio operator as part of the Amateur Radio Service, and as designated by the Federal Communications Commission (FCC).

(2) **Antenna array**. A group of antennas located on the same structure.

(3) **Antenna—Building mounted**. An antenna, other than an antenna with its supports resting on the ground, directly attached, façade-mounted or affixed to a building, tank, or structure other than a tower.

(4) **Antenna—Roof mounted**. Any antenna which is mounted to the roof of a building, tank, or similar structure.

(5) **Antenna—Flush mounted**. An antenna mounted to the wall of a structure that does not project above the façade to which it is mounted

(6) **Antenna—Direct broadcast satellite service (DBS)**. An antenna, usually a small home receiving satellite dish.

(7) **Antenna—Directional**. A device used to transmit and/or receive radio frequency signals in a directional pattern of less than three hundred sixty degrees. Also known as panel antenna.

(8) **Antenna—Ground mounted**. Any antenna with its base, single or multiple posts, placed directly on the ground.

(9) **Antenna—Satellite earth station (SES)**. An antenna designed to receive and/or transmit radio frequency signals directly to and/or from a satellite.

(10) **Antenna—Television broadcast service (TVBS)**. An antenna designed to receive only television broadcast signals.

(11) **Antenna—Radio antennas**. An antenna designed to receive AM/FM radio broadcast signals, or similar signals used for commercial purposes.

(12) **Antenna—Distributed Antenna System (DAS)**. Network of spatially separated antenna sites connected to a common source that provides wireless communication service within a geographic area or structure.

(13) **Antenna—All other antennas**. All other antenna(s) not previously covered in this section.

(b) **Base Station**. The same as defined by the FCC in 47 C.F.R. § 1.60001(b)(1), as may be amended or superseded.

(c) **CPCN**. A Certificate of Public Convenience and Necessity granted by the California Public Utility Commission, or its duly appointed successor agency, pursuant to California Public Utilities Code Sections 1001 *et seq.*, as may be amended or superseded.

(d) **Collocation**. The mounting of one or more WTFs, including antennas, on an existing or proposed WF or utility pole.

(e) **Director**. The Director of the City's Community Development and Sustainability Department or his or her designee.

(f) **Equipment building, shelter, or cabinet**. A cabinet or building used by telecommunications providers to house equipment at a site or facility.

(g) **Eligible Facilities Request**. An eligible facility request within the meaning of 47 C.F.R.§ 1.6100(b)(3) as may be amended or superseded.

(h) **FCC**. The Federal Communications Commission or its lawful successor.

(i) **Lattice tower**. A tower constructed of metal crossed strips or bars to support WTF antennas and related equipment.

(j) **Monopole**. A tower that consists of a single pole structure (non-lattice), designed and erected on the ground or on top of a structure, to support WTF antennas and related equipment.

(k) **Permittee**. The recipient, or its heirs, successors, or assigns of a permit issued pursuant to this Article or any predecessors to this Article, or any operator, user, or lessee of any permitted WTF issued a permit pursuant to this or any predecessors to this Article.

(l) **Personal Wireless Services**. Commercial mobile services, unlicensed wireless services and common carrier wireless exchange access services as defined in 47 U.S.C. Section 332(c)(7)(C)(i), as may be amended or superseded.

(m) **Public Right-of-Way (PROW)**. Any public road, highway, or waterway subject to Public Utilities Code section 7901 (as it may be amended from time to time).

(n) **RF**. Radio frequency or electromagnetic waves generally between 30 kHz and 300 GHz in the electromagnetic spectrum.

(o) **Section 6409**. Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156, codified as 47 U.S.C. Section 1455 (a), as may be amended.

(p) **Shot Clock**. The presumptively reasonable time under federal law in which a local government must act on an application or request for authorization to place, construct, or modify WTF facilities.

(q) **Small Wireless Telecommunication Facilities (SWTF)**. A small wireless telecommunication facility within the meaning of 47 C.F.R. § 1.6002(*l*) or any successor provision.

(r) **Stealth technology/techniques**. Methods of camouflaging or otherwise rendering minimally visible to the casual observer the visual appearance of WTF towers, antenna, cabinets, and/or other related equipment. Stealth techniques render WTF more visually appealing or blend WTF into an existing structure and may utilize, but does not require, concealment of all components of the WTF.

(s) **Tower**. A freestanding mast, pole, monopole, guyed tower, lattice tower, free standing tower or other structure designed and primarily used to support WTF antennae.

(t) **Temporary Wireless Telecommunication Facilities**. A portable wireless telecommunication facility intended or used to provide personal wireless services on a temporary or emergency basis, such as a large scale special event in which more users than usually gather in a confined location or when a disaster disables permanent wireless facilities. Temporary wireless facilities include, without limitation, cells on wheels (COWS), sites on wheels (SOWs), cells on light trucks (COLTs) or other similarly portable wireless facilities not permanently affixed to the site on which it is located.

(u) **Wireless Telecommunication Facility (WTF)**. The transmitters, antenna structures and other types of installations used for the provision of personal wireless services at a fixed location, including but not limited to associated towers, support structures, base stations, poles, pipes, mains, conduits, ducts, pedestals, and electronic equipment, and antennas.

(v) **Wireless**. Transmissions through the airwaves including, but not limited to, infrared line of sight, cellular, PCS, microwave, satellite, radio, or television.

40.29.040. Applicability; Exemptions.

(a) **Applicability**. No person shall construct, install, attach, operate, collocate, modify, reconstruct, relocate, or otherwise deploy any WTF within the City's jurisdictional and territorial boundaries, on private property and within the public right of way except in compliance with this Article.

(b) **Other Permits and Regulatory Approvals**. In addition to any permit or approval required under this Article, the applicant, owner or operator, who owns or controls an WTF, must obtain all other permits and regulatory approvals such as the National Environmental Protection Act (NEPA) review and California Environmental Quality Act) required by the City, any federal, state or local government agencies; and the applicant, owner or operator must comply with all applicable federal state and local government agency laws and regulations applicable to the WFs including without limitation, any applicable laws and regulations governing RF emissions.

(c) **Exemptions**. Notwithstanding Section 40.29.040(a), this Article shall not apply to any of the following:

(1) Television antennae, satellite dishes, and amateur radio facilities, whether interior or exterior, as follows:

(A) Direct broadcast satellite (DBS) antennae and television broadcast service (TBS) antennae or other similarly scaled telecommunication device that neither exceeds one meter in diameter nor extends above the roof peak or parapet.

(B) Ground mounted antennas and support structures: (i) located entirely on-site and not overhanging or extending beyond any property line; (ii) not located within any required front or side yard setback; and (iii) screened from public view to the extent practical.

(C) Antenna height shall not exceed the maximum allowable building height for the zoning district in which it is located by more than ten feet. The antenna support structure shall not exceed a width or diameter of twenty four inches.

(2) WTFs used only for public safety purposes, including transmitters, repeaters, and remote cameras so long as the facilities are designed to match the supporting structure.

(3) WTFs that are accessory to other publicly owned or operated equipment used for data acquisition such as irrigation controls, well monitoring, and traffic signal controls.

(4) WTFs erected and operated for emergency situations, as designated by the police chief, fire chief, or City manager so long as the facility is removed at the conclusion of the emergency.

(5) Multipoint distribution service (MDS) antennas and other temporary mobile wireless service including mobile WFs and services providing public information coverage of news events (less than two-weeks duration).

(6) Mobile WTFs when placed on a site for less than seven consecutive days, provided any necessary building permit is obtained.

(7) SES in a commercial or industrial zone that meet the following standards:

(A) The antennas do not exceed two meters in either diameter or diagonal measurement.

(B) The antennas are located as far away as possible from the edges of rooftops or are otherwise adequately screened to eliminate visibility from adjacent properties. The method of screening shall be approved by the director.

(8) Commercial television (TVBS) and AM/FM radio antennas not extending more than twelve feet beyond the maximum allowed building height for the zone.

(9) Personal wireless internet equipment, such as a wireless router, provided that the equipment is included entirely within a building or residence.

~~(10) Any WF that is specifically and expressly exempt from local regulation pursuant to federal or state law, but only to the extent of any such exemption and provided that the applicant must provide the documentation necessary to prove the exemption to the satisfaction of the Director.~~

40.29.050. Conditionally Permitted WTFs.

All WFs subject to this Article shall be conditionally permitted unless permitted under Section 40.29.060, prohibited under Section 40.29.070, or subject to Section 40.29.080 regarding small wireless facilities.

40.29.060. Permitted WTFs.

The following types of WTFs are permitted in any zone.

(a) Eligible facility requests.

(b) Collocation facilities that meets the requirements of California Government Code § 65850.6, as may be amended or superseded.

40.29.070. Prohibited WTFs.

The following types of WTFs are prohibited.

(a) WTFs that exceed current standards for RF emissions standards adopted by the FCC.

(b) WTFs in areas zoned or designated on the general plan land use map for residential uses; or within five hundred feet of areas so designated or zoned. Mixed use zones are subject to this prohibition.

(c) WTFs on sites containing existing or planned public or private school facilities; or within five hundred feet of said areas so designated or zoned.

(d) WTFs in designated sensitive habitat areas, such as habitat restoration areas, as designated by the City. The community development and sustainability department shall maintain a map identifying such areas.

(e) WTFs on a property that has been designated an historical resource in accordance with Article 40.23.

40.29.080. Small Wireless Telecommunication Facilities.

Notwithstanding any other provision of the Davis Municipal Code to the contrary, all small wireless telecommunication facilities shall be subject only to and must comply with the "Citywide Policy Regarding Permitting Requirements and Development Standards for Small Wireless Facilities" adopted by City Council resolution. No person shall construct, install, attach, operate, collocate, modify, reconstruct, relocate, remove, or otherwise deploy any small wireless telecommunication facility in violation of such policy.

40.29.090. Applications.

(a) **Application required**. All conditional use permit applications for WTFs shall be submitted under the conditional use permit procedures set forth in Article 40.30 and must include the following:

(1) All application materials generally required for a conditional use permit under Article 40.30

(2) Any other information or materials the Director may require in order to properly assess a particular application. The Director shall determine the required number, size, and contents of any required plans.

(3) A vicinity map, including topographic areas, one-thousand-foot radius from proposed site/facility, residential and school zones and major roads/highways. The distance of the existing or proposed WTF from existing residentially designated/zoned areas, existing residences, schools, major roads and highways, and all other telecommunication sites and facilities (including other providers locations) within a one-thousand-foot radius shall be delineated on the vicinity map.

(4) A site plan that includes and identifies:

(A) All facility related support and protection equipment;

(B) A description of general project information, including the type of facility, number of antennas, height to top of antenna(s), radio frequency types, propagation techniques and range, wattage output of equipment, and a statement of compliance with current FCC requirements.

(C) All RF values shall be shown, described and graphed out at maximum peak measurements.

(D) Elevations of all proposed telecommunication structures and appurtenances, and composite elevations from the street(s) showing the proposed project and all buildings on the site.

(5) Photo simulations, photo-montage, story poles, elevations and/or other visual or graphic illustrations necessary to determine potential visual impact of the proposed project. Visual impact demonstrations shall include accurate scale and coloration of the proposed facility. The visual simulation shall show the proposed structure as it would be seen from surrounding properties from perspective points to be determined in consultation with the community development and sustainability department prior to preparation. The City may also require the simulation analyzing stealth designs, and/or on-site demonstration mock-ups before the public hearing.

(6) Landscape plan that shows existing vegetation, vegetation to be removed, and proposed plantings by type, size, and location. If deemed necessary, the community development and sustainability director may require a report by a licensed landscape architect to verify project impacts on existing vegetation. This report may recommend protective measures to be implemented during and after construction. Where deemed appropriate by the community development and sustainability department, a landscape plan may be required for the entire parcel and leased area.

(7) A written statement and supporting information describing the least intrusive means and proof of need for gap in coverage, as requested by staff and/or the planning commission, regarding alternative site selection and co-location opportunities in the service area. The application shall describe the preferred location sites within the geographic service area, a statement why each alternative site was rejected, and a contact list used in the site selection process. Provide a statement and evidence of refusal regarding lack of co-location opportunities.

(8) Noise and acoustical information for the base transceiver station(s), equipment buildings, and associated equipment such as air conditioning units and back-up generators. Such information shall be provided by a qualified firm or individual, approved by the City, and paid for by the project applicant.

(9) An RF analysis conducted and certified by a state-licensed/registered RF engineer or qualified consultant to determine the maximum peak potential RF power density of the proposed WF at full build-out, along with a comparison of the maximum RF exposure calculations at ground level with the FCC's RF safety standards. The engineer shall use accepted industry standards for evaluating compliance with FCC-guidelines for human

exposure to RF, such as OET 65, or any superseding reports/standards. The RF analysis

shall be provided by a qualified firm or individual, approved by the City, and paid for by the project applicant.

(10) A cumulative impact analysis for the proposed facility and other WTFs on the project site or within one thousand three hundred feet of the proposed WTF site. The analysis shall include all existing and proposed (application submitted to the community development and sustainability department) WTFs on or near the site, dimensions of all antennas and support equipment on or near the site, power rating for all existing and proposed back-up equipment, and a report estimating the ambient RF fields and maximum potential cumulative electromagnetic radiation at, and surrounding, the proposed site that would result if the proposed WTF were operating at full buildout.

(11) Statement by the applicant of willingness to allow other carriers to co-locate on their facilities wherever technically and economically feasible and aesthetically desirable.

(12) A signed copy of the proposed property lease agreement, exclusive of the financial terms of the lease, including provisions for removal of the WTF and appurtenant equipment within ninety days of its abandonment and provisions for City access to the WTF for removal where the provider fails to remove the WTF and appurtenant equipment within ninety days of its abandonment pursuant to Section 40.29.025(b). The final agreement shall be submitted at the building permit stage.

(13) An evidence of needs report detailing operational and capacity needs of the provider's system within the City of Davis and the immediate area adjacent to the City. The report shall detail how the proposed WTF is technically necessary to address current demand and technical limitations of the current system, including technical evidence regarding significant gaps in the provider's coverage, if applicable, and that there are no less intrusive means to close that significant gap. Such report shall be evaluated by a qualified firm or individual, chosen by the City, and paid for by the project applicant. The qualified firm or individual chosen by the City may request additional information from the applicant to sufficiently evaluate the proposed project.

(14) A security plan which includes emergency contact information, main breaker switch, emergency procedures to follow, and any other information as required by Section 40.29.180 and/or the community development and sustainability director.

(15) A description of the anticipated maintenance program and back-up generator power testing schedule.

(16) Any other documents, information, and other materials the Director deems necessary to make the findings required for approval and ensure that the WTF will comply with applicable federal and state law, the City Code.

(17) The name of the applicant, its telephone number and contact information, and if the applicant is a wireless infrastructure provider, the name and contact information for the wireless service provider that will be using the personal wireless services facility;

(18) A complete description of the proposed WTF and the work that will be required to install or modify it, including, but not limited to, detail regarding proposed excavations, if any; detailed site plans showing the location of the WTF, and specifications for each element of the WTF, clearly describing the site and all structures and facilities at the site before and after installation or modification; and describing the distance to the nearest residential dwelling unit and any historical structure within 500 feet of the facility. Before and after 360 degree photosimulations must be provided.

(19) Documentation sufficient to show that the proposed facility will comply with generally-applicable health and safety provisions of the City Code and the FCC's radio frequency emissions standards. The facilities do not expose people to radio frequency (RF) radiation in excess of FCC standards. These standards being that the power density cannot exceed 5% of the power density exposure limit applicable to that transmitter or facility or in a field strength that, when squared, exceeds 5% of the square of the electric or magnetic field strength limit applicable to that transmitter or facility (47 CFR 1.1310).

(20) Submittal of report of proof of safety testing and/or SAR and/or similar calculable means for RF power levels from all antennas, transmitters and electronic components that utilize frequencies past 6GHz determined at ground level, second and third storied buildings.

(21) Submittal of NEPA review by the FCC for actions that may have significant environmental effect (47 CFR 1.1307).

(22) A copy of the lease or other agreement between the applicant and the owner of the property to which the proposed facility will be attached.

(23) If the application is for a small cell facility, the application shall state as such and shall explain why the proposed facility meets the definition of small cell facility in this Article.

(24) If the application is for an eligible facilities request, the application shall state as such and must contain information sufficient to show that the application qualifies as an eligible facilities request, which information must show that there is an existing WTF that was approved by the City. Before and after 360 degree photosimulations must be provided, as well as documentation sufficient to show that the proposed facility will comply with generally-applicable health and safety provisions of the City Code and the FCC's radio frequency emissions standards.

(25) Proof that notice has been mailed to owners of all property owners, and the resident manager for any multi-family dwelling unit that includes ten (10) or more units, within 300 feet of the proposed personal wireless services facility.

(26) If applicant contends that denial of the application would prohibit or effectively prohibit the provision of service in violation of federal law, or otherwise violate applicable law, the application must provide all information on which the applicant relies on in support of that claim. Applicants are not permitted to supplement this showing if doing so would prevent City from complying with any deadline for action on an application.

(27) The electronic version of an application must be in a standard format that can be easily uploaded on a web page for review by the public.

(28) Any required fees.

(29) If the proposed WTF is to be located in the public right of way, sufficient evidence of the permittee's regulatory status as a telephone corporation under the California Public Utilities Code (such as a valid CPCN).

(b) The Director may develop, publish, and from time to time update or amend any forms, checklists, guidelines, informational handouts, or other related materials that the Director finds necessary, appropriate, or useful for processing any application governed under this Article.

(c) The Director may establish any other reasonable rules and regulations as the Director deems necessary or appropriate to organize, document and manage the application intake process, which may include without limitation regular hours for appointments with applicants. All such rules and regulations must be in written form and publicly stated to provide applicants with prior notice.

(d) If deemed necessary by the Director, the City may hire a third party independent RF engineer to evaluate any technical aspect or siting issues proposed in the application. The applicant will be responsible to pay for all charges of this analysis.

(e) **Pre-submittal Conference**.

(1) The pre-submittal conference is intended to streamline the review process through informal discussion that includes, without limitation, the appropriate project classification and review process, any latent issues in connection with the proposed or existing wireless tower or base station, including compliance with generally applicable rules for public health and safety, potential concealment issues or concerns, if applicable; coordination with other departments responsible for application review; and application completeness issues. To mitigate unnecessary delays due to application incompleteness, applicants are encouraged, but not required to, bring any draft applications or other materials so that staff may provide informal feedback and guidance about whether such applications or other materials may be incomplete or unacceptable. The City shall use reasonable efforts to provide the applicant within an appointment within five working days after receiving a request and any applicable fee or deposit to reimburse the City for its reasonable costs to provide the services rendered in the pre-submittal conference.

(2) A pre-submittal conference is required for all permitted and conditionally permitted WTFs. Pre-submittal conferences are allowed and encouraged, but not required, for small wireless telecommunication facilities.

(b) **Submittal Appointment**. All applications must be submitted to the City at a pre-scheduled meeting with the director. The director shall use reasonable efforts to provide the applicant with an appointment within five working days after receipt of a request and if applicable, confirms that the applicant complied with the pre-submittal conference requirement. Any application received without an appointment, whether delivered in person, by mail or through any other means, will not be considered duly filed unless the applicant received a written exemption from the City of Davis at a pre-submittal conference.

40.29.100. General Requirements and Design Standards.

The following general requirements and development standards are applicable to all permitted and conditionally permitted WTFs.

(a) **Upgrades**. If technological improvements or developments occur that allow the use of materially smaller or less visually obtrusive equipment, the service provider may be required to replace or upgrade an approved WTF upon application for a new permit in order to minimize the WTF's adverse impacts on land use compatibility and aesthetics. This provision would only apply to the specific site where the application for modification is requested.

(b) **Business License**. Each service provider with a WTF in the City shall obtain a City business license prior to initiation of service.

(c) **Mixed Use Projects**. New mixed-use planned developments over fifty acres in size shall be encouraged to identify a preferred site or sites for WTFs under the terms of the planned development. Such sites may be developed with WTFs, even if subsequent land use development occurs.

(d) **Code Compliance**. All WTFs shall be installed and maintained in compliance with the requirements of the Uniform Building Code, National Electrical Code, the Americans with Disabilities Act, the United States Access Board, as well as other restrictions specified in this Article and other applicable provisions of the Davis Municipal Code.

(e) **Permit Term**. The City may impose a condition limiting the duration of any conditional use permit for a WTF located on any property, but in no event shall such duration be less than 10 years. Prior to expiration, the permittee may apply for an extension of its conditional use permit. An extension of the conditional use permit would be for a period of time determined by the City, and would be subject to the then existing requirements of this Article. The City may approve, modify, or deny the application for extension subject to the then existing requirements of this Article and applicable law.

(f) **Height**. All WTFs shall be designed to the minimum functional height required.

(1) The height of the WTF shall be measured from the natural, undisturbed ground surface below the center of the base of the structure to either the top of the structure or the highest antenna or related equipment attached thereto, whichever is higher.

(2) If the WTF is not attached to a building, the height of the facility shall be reviewed for the visual impact on the surrounding land uses and the community.

(g) Setbacks.

(1) All WTFs shall comply with the building setbacks applicable to the zoning district in which it is located, provided that in no instance, shall the WTF (including antennae and equipment) be located closer than five feet to any property line unless a reduced setback is approved pursuant to a conditional use permit based on a finding that aesthetic impacts would be reduced and/or open space improved.

(2) No WTF shall be located within any required front, ~~or~~ side, or back yard unless approved by pursuant to a conditional use permit based on a finding that aesthetic impacts would be reduced and/or open space improved.

(h) **Landscaping.** Landscaping shall be used for screening as appropriate to reduce visual impacts of WTFs.

(1) Existing landscaping in the vicinity of a proposed WTF shall be protected from damage during and after construction. Submission of a tree protection plan may be required to ensure compliance with this requirement.

(2) Offsite landscaping may be required to mitigate off site impacts, subject to willing property owners. Additional landscaping may also be required in the public right of way to obscure visibility of a WTF from passing motorists, bicyclists, and pedestrians.

(i) **Towers**. Towers, where utilized, must be monopoles. Lattice towers are prohibited. Monopoles shall not exceed 4 feet in diameter unless technical evidence is provided showing that a larger diameter is necessary to attain the proposed tower height and the proposed tower height is necessary.

(j) **Stealth Design**. All WTFs shall employ state of the art stealth technology and techniques shall be used, as appropriate to the site and the facility, to minimize visual impacts and provide appropriate screening to make the WTF as visually inconspicuous as possible and to hide the WTF from the predominant views from surrounding properties. In the case of WTF mounted on existing structures, the WTF shall also be located in a manner so as to minimize visual impacts from surrounding properties and PROW. Where no stealth technology is proposed for the site, a detailed analysis as to why stealth technology is physically and technically infeasible for the project shall be submitted with the application.

(k) **Building Mounted Antenna**. All flush mounted antenna and support structures mounted on a building shall be painted to be architecturally compatible with the building on which it is located or painted to minimize the visual impacts where the structures extend above the roof line and minimize visual impacts from surrounding properties. The specific color is subject to City review based on a visual analysis of the particular site.

(l) **Accessory Equipment**. All accessory equipment shall be designed and screened from public view. The specific design is subject to City review based on a visual analysis of the particular site.

(m) **Collocation**. Support structures and site area for WTFs shall be designed and of adequate size to allow at least one additional service provider to potentially collocate on the structure, subject to any specific design standards and aesthetic considerations required as a condition of approval.

(n) **Fencing**. All proposed fencing shall be decorative and compatible with the adjacent buildings and properties within the surrounding area and shall be designed to limit and/or allow for removal of graffiti.

(o) **Noise**. WTFs and all related equipment must comply with all noise regulations and shall not exceed such regulations, either individually or cumulatively. The City may require the applicant to incorporate appropriate noise baffling materials and/or strategies to avoid any ambient noise from equipment reasonably likely to exceed the applicable noise regulations. Back-up generators

shall only be operated during power outages and/or for testing and maintenance purposes on weekdays between the hours of 9:00 a.m. and 4:00 p.m.

(p) **Security**. WTFs may incorporate reasonable and appropriate site security measures, such as locks and anti-climbing devices to prevent unauthorized access, theft or vandalism. All WTFs shall be constructed of graffiti resistant materials. Barbed wire, razor wire, electrified fences or any similar security measures are prohibited.

(q) **Power Sources**. Permanent backup power sources that emit noise or exhaust fumes are prohibited.

(r) **Lighting**. WTFs may not include exterior lights other than as may be required by an applicable governmental regulation or applicable pole owner policies related to public or worker safety. All exterior lights permitted or required to be installed must comply with the City's Dark Sky Ordinance, No. 1966, if applicable, and shall be installed in locations and within enclosures that mitigate illumination impacts on other properties to the maximum extent feasible. The provisions of this subsection shall not be interpreted to prohibit installations on street lights or the installation of luminaires on new poles when required.

(s) **Signage**. All WTFs must include signage that accurately identifies the equipment owner/operator, the owner/operator's site name or identification number and a toll free number to the owner/operator's network operations center. WTFs shall not bear any other signage or advertisements unless expressly approved by the City, required by law or recommended under governmental agencies for compliance with RF emissions regulations.

(t) **Utilities**. All cables and connectors for telephone, primary electric and other similar utilities must be routed underground to the extent feasible in conduits large enough to accommodate future collocated WTFs. To the extent feasible, undergrounded cables and wires must transition directly into the pole base without any external cabinet, doghouse, or similar equipment housing. Meters, panels, disconnect switches and other associated improvements must be placed in inconspicuous locations to the extent feasible. The City shall not approve new overhead utility lines or service drops merely because compliance with the undergrounding requirements would increase the project cost. Microwave or other wireless backhaul is discouraged when it would involve a separate and unconcealed antenna.

(u) **Public Safety**.

(1) No WTF shall interfere with access to any fire hydrant, fire station, fire escape, water valve, underground vault, valve housing structure, or any other public health or safety facility. No person shall install, use, or maintain any WTF, which in whole or in part rest upon, in or over any public right of way, when such installation , use or maintenance endangers or is reasonably likely to endanger the safety of persons or property, or when such site or location is used for public utility, public transportation purposes, or other governmental purpose, or when such facility unreasonable interferes with or unreasonably impedes the flow of pedestrian or vehicular traffic including any legally parked or stopped vehicle, the ingress into to egress from any residence or place of business, the use of poles,

posts, traffic signs or signals, hydrants, mailboxes, permitted sidewalk dining, permitted street furniture or other objects permitted at or near the location where the WTFs are located.

(2) For the protection of emergency response personnel, each WTF shall have a main breaker switch to disconnect electrical power at the site. For co-location WTF sites, a single main switch shall be installed to disconnect electrical power for all carriers at the site in the event of an emergency.

(3) WTFs shall not be operated in any manner that would cause interference with the City's existing and/or future emergency telecommunication system. If such interference occurs, it is the service provider's responsibility to remedy the issue to the satisfaction of the City.

(v) **Security Plan.** A security plan, subject to the Director's approval, must be kept on file with the City. Permittee must comply with the security plan at all times.

(w) **Indemnification; Liability**. The following requirements shall be conditions of approval of all permits approved by the City for any WTF.

(1) The permittee shall provide proof of third-party insurance, it cannot provide self as its own insurance.

(2) The permittee shall defend, indemnify, and hold harmless the City of Davis, its officers, employees, or agents from or against any action or challenge to attack, set aside, void, or annul any approval or condition of approval of the City of Davis concerning this approval, including but not limited to any approval or condition of approval of the City council, planning commission, or Director.

(3) The permittee shall further defend, indemnify and hold harmless the City of Davis, its officers, agents, and employees from any damages, liabilities, claims, suits, or causes of action of any kind or form, whether for personal injury, death or property damage, arising out of or in connection with the activities or performance of the permittee, its agents, employees, licensees, contractors, subcontractors, or independent contractors, pursuant to the approval issued by the City.

(4) WTF operators and permittees shall be strictly liable for interference their WTF causes with City communications systems and they shall be responsible for the all costs associated with determining the source of the interference, eliminating the interference (including but not limited to filtering, installing cavities, installing directional antennas, powering down systems, and engineering analysis), and arising from third party claims against the City attributable to the interference.

(5) The City shall promptly notify the permittee of any claim, action, or proceeding concerning the project and the City shall cooperate fully in the defense of the matter. The City reserves the right, at its own option, to choose its own attorney to represent the City, its officers, employees and agents in the defense of the matter.

(6) Failure to comply with any of these conditions shall constitute grounds for revoking a WTF permit.

EXHIBIT A

40.29.110. Public Hearing and Noticing Radius.

Public hearings on proposed conditionally permitted WTFs shall be conducted and noticed in accordance with Sections 40.30.070 of the Davis Municipal Code. The noticing radius for proposed WTFs shall be five hundred feet. The noticing radius shall be measured from the outer boundary of the subject parcel, or, for those facilities in the PROW, from the outer boundary of the closest parcel adjacent to the subject PROW site.

40.29.120. Findings.

In addition to the required findings for a conditional use permit, and other standards set forth in this Article, the following findings shall be met prior to approval of any WTF requiring a conditional use permit:

(a) The proposed WTF has been designed to minimize its visual and environmental impacts, including the utilization of stealth technology, when applicable.

(b) The proposed site has the appropriate zoning, dimensions, slope, design, and configuration for the development of a WTF.

(c) That proposed site will be appropriately landscaped as required by this Article.

(d) Based on information submitted, the proposed WTF is in compliance with all FCC and California Public Utilities Commission (PUC) requirements.

40.29.130. Regulatory Compliance and Monitoring.

(a) Permittees shall ensure that its WTF complies at all times with all current regulatory and operational requirements, including but not limited to RF emission standards adopted by the FCC, antenna height standards adopted by the Federal Aviation Administration, and any other regulatory or operational standard established by any other government agency with regulatory authority over the WTF.

(b) No WTF, either by itself or in combination with other such facilities, shall generate at any time, electromagnetic or RF emissions in excess of the FCC-adopted standards for human exposure, as they may be amended over time.

(c) The permittee shall, at its own expense, obtain and maintain the most current information from the FCC regarding allowable RF emissions and all other applicable regulations and standards, and shall file a monitoring report documenting its WTFs' current emissions (including field measurements). The field measurements shall be conducted in accordance with accepted industry standards or above, whichever one is more precise in measurement of actual real time data such as taking peak measurements. The report shall include findings from a qualified independent third-party engineer, or professional building biologist or hygienist, chosen by the city, as to whether the monitoring results are in compliance with FCC standards.

EXHIBIT A

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(1) The monitoring report shall be filed with the Director as follows:

(A) For WTFs approved after June 1, 2012, within five days of the WTF's first day of operation (i.e., within 5 days of when the WTF "goes live"), or as set forth in the permit issued under this Article;

(B) For WTFs approved after June 1, 2012, annually on the anniversary of the initial compliance report submittal date, and for existing WTFs, upon request by the Director and annually thereafter;

(C) Within six months of the effective date of any amendment or revision of applicable regulatory and operational standards, unless the controlling agency mandates a more stringent compliance schedule, in which case the report shall be filed consistent with the more stringent compliance schedule

(D) Upon any change or alteration in the WTF's equipment or operation, including but not limited to addition of new antennas, change in frequency use, increase in effective radiated power, propagation techniques, or addition of a new wireless provider to an existing WTF (e.g., addition of a new tenant to a DAS WTF).

(2) At the Director's sole discretion, a qualified independent RF engineer or consultant, selected by and under contract to the City, may be retained to review and verify monitoring reports for compliance with FCC regulations. All costs associated with the City's review of these monitoring reports shall be the responsibility of the permittee, which shall reimburse the City for the review costs within 30 days of the City's demand for reimbursement.

(3) If a new WTF is not in compliance with applicable FCC standards and conditions of approval, a final building permit shall not be issued, any operation of the WTF shall cease immediately, and the permittee will be subject to the revocation procedures under this Article if compliance is not achieved within a reasonable period as specified by the Director following written notice and an opportunity to cure.

(4) The FCC's own RF guidelines will be enforced so that the facilities do not expose people to radio frequency (RF) radiation in excess of FCC standards. These standards being that the power density cannot exceed 5% of the power density exposure limit applicable to that transmitter or facility or in a field strength that, when squared, exceeds 5% of the square of the electric or magnetic field strength limit applicable to that transmitter or facility (47 CFR 1.1310).

(5) Submittal of report of proof of safety testing and/or SAR and/or similar calculable means for RF power levels from all antennas, transmitters and electronic components that utilize frequencies past 6GHz determined at ground level, second and third storied buildings.

40.29.140. Existing Conforming and Legal Nonconforming WTFs.

(a) Except as may otherwise be required by state or federal law (as in the case of an eligible facility request), modification of an existing legal nonconforming WTF shall be subject to same

permitting requirements as a new WTF.

(b) Without otherwise limiting the applicability of any other provision of the Davis Municipal Code, all existing conforming and legal nonconforming WTFs are subject to, Sections 40.29.130, 40.29.150, 40.29.160, and 40.29.170 of this Article.

40.29.150. Periodic Review.

The City may conduct a periodic review of any WTF to consider whether or not the facility is conforming with the conditions of its entitlements and permits.

40.29.160. Transfer of Operation.

Permittee shall not assign or transfer any interest in its permits for WTFs without advance written notice to the Director. The notice shall specify the identity of the assignee or transferee of the permit, as well as the assignee or transferee's address, telephone number, name of primary contact person(s), and other applicable contact information, such as an e-mail address or facsimile number. The new assignee or transferee shall comply with all of the WTF's conditions of approval.

40.29.170. Abandonment or Discontinuation of Use.

(a) All permittees who intend to abandon or discontinue the use of any WTF shall notify the City of such intentions no less than sixty (60) days prior to the final day of use. Said notification shall be in writing, shall specify the date of termination, the date the WTF will be removed, and the method of removal.

(b) Non-operation, disuse (including, but not limited to, cessation of wireless telecommunication services) or disrepair for ninety (90) days or more shall constitute abandonment by the permittee under this Article or any predecessors to this Article. The Director shall send a written notice of abandonment to the permittee.

(c) Upon abandonment, the conditional use permit shall become null and void. Absent a timely request for a hearing pursuant to subdivision (e) of this section, the WTF shall be physically removed at the permittee's expense no more than ninety (90) days from the date of the abandonment notice. The WTF shall be removed in accordance with applicable health and safety requirements and the site upon which the WTF was located shall be restored to the condition that existed prior to the installation of the WTF, or as required by the Director. The permittee shall be responsible for obtaining all necessary permits for the removal of the WTF and site restoration.

(d) At any time after ninety (90) days following abandonment, the Director may have the WTF removed and restore the premises as he/she deems appropriate. The City may, but shall not be required to, store the removed WTF (or any part thereof). The WTF permittee shall be liable for the entire cost of such removal, repair, restoration, and storage. The City may, in lieu of storing the removed WTF, convert it to the City's use, sell it, or dispose of it in any manner deemed appropriate by the City.

(e) The permittee may request a hearing before a hearing officer appointed by the City manager regarding the notice of abandonment, provided a written hearing request is received by the Director within 10 days of the date of the notice of abandonment. The appeal hearing shall be conducted pursuant to Section 23.04.060(d). The hearing officer shall issue a written decision. The decision of the hearing officer regarding abandonment of the WTF shall constitute the final administrative decision of the City and shall not be appealable to the City council or any committee or commission of the City. Failure to file a timely hearing request means the notice of abandonment is final and the WTF shall be removed within 90 days from the date of the abandonment notice.

(f) Prior to commencing operations of a WTF, the permittee shall file with the City, and shall maintain in good standing throughout the term of its approval, a bond or other sufficient security in an amount equal to the cost of physically removing the WTF and all related facilities and equipment on the site, as determined by the Director. However, the City may not require the owner

or operator to post a cash deposit or establish a cash escrow account as security under this subsection. In setting the amount of the bond or security, the Director shall take into consideration the permittee's estimate of removal costs.

40.29.180. Violations; Public Nuisance.

Any violation of this Article is deemed a public nuisance subject to abatement and shall, in addition to any other available legal penalty or remedy, constitute grounds for revocation of any permits and/or approvals granted under this Article or any predecessors to this Article.

40.29.190. Revocation of Permit.

(a) Permittees shall fully comply with all conditions related to any permit or approval granted under this Article or any predecessors to this Article. Failure to comply with any condition of approval or maintenance of the WTF in a matter that creates a public nuisance or otherwise causes jeopardy to the public health, welfare or safety shall constitute grounds for revocation. If such a violation is not remedied within a reasonable period, following written notice and an opportunity to cure, the Director may schedule a public hearing before the planning commission to consider revocation of the permit. The planning commission revocation action may be appealed to the City council pursuant to Article 40.35.

(b) If the permit is revoked pursuant to this section, the permittee shall remove its WTF at its own expense and shall repair and restore the site to the condition that existed prior to the WTF's installation or as required by the Director within ninety (90) days of revocation in accordance with applicable health and safety requirements. The permittee shall be responsible for obtaining all necessary permits for the WTF's removal and site restoration.

(c) At any time after ninety (90) days following permit revocation, the Director may have the WTF removed and restore the premises as he/she deems appropriate. The City may, but shall not be required to, store the removed WTF (or any part thereof). The WTF permittee shall be liable for the entire cost of such removal, repair, restoration, and storage. The City may, in lieu of storing the removed WTF, convert it to the City's use, sell it, or dispose of it in any manner deemed appropriate by the City.

40.29.200. Mandatory Removal and Relocation.

If a WTF must be modified or relocated because of an abandonment, undergrounding of utilities, or change of grade, alignment or width of any street, sidewalk or other public facility (including the construction, maintenance, or operation of any other City underground or aboveground facilities including, but not limited to, sewers, storm drains, conduits, gas, water, electric or other utility systems, or pipes owned by City or any other public agency), the permittee shall modify, remove, or relocate its WTF, or portion thereof, as necessary without cost or expense to City. Said modification or removal of a WTF shall be completed within ninety (90) days of notification by the City unless exigencies dictate a different period of time as established by the Director. In the event a WTF is not modified or removed within the requisite period of time, the City may cause the same to be done at the sole expense of permittee. Further, in the event of an emergency, the City may modify, remove, or relocate WTFs without prior notice to permittee provided permittee is notified within a reasonable period thereafter. A permittee electing to relocate a WTF that was removed

pursuant to this section shall be subject to the requirements of this Article applicable to the proposed relocation site.

40.29.210. Appeals.

Any person dissatisfied with the decision to approve, deny, or revoke a conditional use permit for the construction or modification of a WTF subject to this Article may file an appeal in accordance with Article 40.35.

40.29.220. Effect of State or Federal Law.

~~(a) **Ministerial Permits.** In the event the city attorney determines that state or federal law prohibits any discretionary permitting requirements of this Article, all provisions of this Article shall be apply with the exception that the required permit shall be reviewed and administered as a ministerial permit by the Director rather than as a discretionary permit. Any conditions of approval set forth in this Article or deemed necessary by the Director shall be imposed and administered as reasonable time, place, and manner rules. If the city attorney subsequently determines that the law has changed and that discretionary permitting has become permissible, the city attorney shall issue such determination in writing with citations to legal authority and all discretionary permitting requirements shall be reinstated. The city attorney's written determinations under this section shall be a public record.~~

(b) **Exceptions**. Exceptions to any provision of this article, including, but not limited to, exceptions from findings that would otherwise justify denial, may be granted pursuant to a conditional use permit subject to the following:

(1) An applicant must request the exception at the time its application is submitted. The request must include both the specific provision(s) of this article from which the exception is sought and the legal and factual basis of the request. Any request for an exception after the City has deemed an application complete shall be treated as a new application.

(2) The exception shall only be granted upon a finding that application of the provision of this article from which the exception is sought would in the case of the proposed WTF violate federal law, state law, or both. The applicant shall have the burden of proof as to this finding.

(3) The City may hire an independent consultant, at the applicant's expense, to evaluate the issues raised by the exception request and shall have the right to submit rebuttal evidence to refute the applicant's claim.

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RESOLUTION _____

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF DAVIS ADOPTING A CITYWIDE POLICY REGARDING PERMITTING REQUIREMENTS AND DEVELOPMENT STANDARDS FOR SMALL WIRELESS TELECOMMUNICATION FACILITIES

WHEREAS, on September 26, 2018, the Federal Communications Commission ("FCC") adopted its Declaratory Ruling and Third Report and Order ("Report and Order") relating to placement of small wireless telecommunication facilities in public rights-of-way; and

WHEREAS, the Report and Order purports to give providers of wireless telecommunication services rights to utilize public rights-of-way and to attach so-called "small wireless telecommunication facilities" to public infrastructure, including infrastructure of the City of Davis, subject to payment of "presumed reasonable", non-recurring and recurring fees., and the ability of local agencies to regulate use of their rights-of-way is substantially limited under the Report and Order; and

WHEREAS, notwithstanding the limitations imposed on local regulation of small wireless telecommunication facilities in public rights-of-way by the Report and Order, local agencies retain the ability to regulate the aesthetics of small wireless telecommunication facilities, including location, compatibility with surrounding facilities, spacing, and overall size of the facility, provided the aesthetic requirements are: (i) "reasonable," i.e., "technically feasible and reasonably directed to avoiding or remedying the intangible public harm or unsightly or out-of-character deployments"; (ii) "objective," i.e., they "incorporate clearly-defined and ascertainable standards, applied in a principled manner"; and (iii) published in advance. Regulations that do not satisfy the foregoing requirements are likely to be subject to invalidation, as are any other regulations that "materially inhibit wireless telecommunication service," (e.g., overly restrictive spacing requirements); and

WHEREAS, local agencies also retain the ability to regulate small wireless telecommunication facilities in the public rights-of-way in order to more fully protect the public health and safety, ensure continued quality of telecommunications services, and safeguard the rights of consumers, and pursuant to this authority retained, the City Council has amended the Davis Municipal Code to require all small wireless telecommunication facilities as defined by the FCC in 47 C.F.R. § 1.60002(l), as may be amended or superseded, to comply with the requirements of a policy adopted by resolution of the City Council entitled "City Wide Policy Regarding Permitting Requirements And Development Standards For Small Wireless Telecommunication Facilities";

NOW THEREFORE, THE CITY COUNCIL OF THE CITY OF DAVIS DOES HEREBY RESOLVE AS FOLLOWS:

Section 1. Findings. The City Council finds each of the facts in the preceding recitals to be true.

Section 2. City Wide Policy Adopted. The City Council of Davis hereby adopts the "City

Wide Policy Regarding Permitting Requirements and Development Standards for Small

Wireless Telecommunication Facilities" set forth in Exhibit A to this Resolution, which is hereby incorporated as though set forth in full.

Section 3. NEPA/CEQA. The City of Davis requires Federal regulations be followed and submittal of proof of compliance with the National Environmental Protection Act (NEPA) review as the federal deployment of sWTF is considered a significant environmental effect (47 CFR 1.1307). As a result, here in the State of California, the CEQA requirement must follow suit. ~~has determined that the adoption of this Resolution is exempt from review under the California Environmental Quality Act ("CEQA") (California Public Resources Code Section 21000, et seq.), pursuant to State CEQA Regulation §15061(b)(3) (14 Cal. Code Regs. § 15061(b)(3)) covering activities with no possibility of having a significant effect on the environment. In addition, the City of Davis has determined that the ordinance is categorically exempt pursuant to Section 15301 of the CEQA Regulations applicable to minor alterations of existing governmental and/or utility-owned structures.~~

Section 4. Certification. The City Clerk shall certify to the adoption of this resolution and shall cause a certified resolution to be filed in the book of original resolutions.

PASSED AND ADOPTED this day of____, 2019.

_____

Mayor

ATTEST:

_____

City Clerk

EXHIBIT A

CITY OF DAVIS
CITY WIDE POLICY REGARDING PERMITTING REQUIREMENTS AND DEVELOPMENT STANDARDS FOR SMALL WIRELESS TELECOMMUNICATION FACILITIES

SECTION 1. GENERAL PROVISIONS

SECTION 1.1. PURPOSE AND INTENT

(a) On September 27, 2018, the Federal Communications Commission ("FCC") adopted a *Declaratory Ruling and Third Report and Order,* FCC 18-133 (the *"Small Cell Order"),* in connection with two informal rulemaking proceedings entitled *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT* Docket No. 17-79, and *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment,* WC Docket No. 17-84. The regulations adopted in the *Small Cell Order* significantly curtail the local authority over wireless and wireline communication facilities reserved to State and local governments under sections 253 and 704 in the federal Telecommunications Act. Numerous legal challenges to the *Small Cell Order* have been raised but its regulations will become effective while such challenges are pending. Although the provisions may well be invalidated by future action, the City recognizes the practical reality that failure to comply with the *Small Cell Order* while it remains in effect will likely result in greater harm to the City's interests than if the City ignored the FCC's ruling. Accordingly, the City Council adopts this Policy ("Policy") as a means to accomplish such compliance that can be quickly amended or repealed in the future without the need to amend the City's municipal code.

(b) The City of Davis intends this Policy to establish reasonable, uniform and comprehensive standards and procedures for small wireless facilities deployment, construction, installation, collocation, modification, operation, relocation and removal within the City's territorial boundaries, consistent with and to the extent permitted under federal and California state law. The standards and procedures contained in this Policy are intended to, and should be applied to, protect and promote public health, safety and welfare, and balance the benefits from advanced wireless services with local values, which include without limitation the aesthetic character of the City. This Policy is also intended to reflect and promote the community interest by (1) ensuring that the balance between public and private interests is maintained; (2) police power must be maintained to enforce the quiet enjoyment of streets and the ability to protect city residents their health and safety regarding sWTF exposures whether it be harm and endangerment from RF exposures, high voltage induced fires, undue surveillance, data harvesting, live wires and/or electrical arcs, but not limited to these; and, (2) protecting the City's visual character from potential adverse impacts and/or visual blight created or exacerbated by small wireless facilities and related communications infrastructure; (3) protecting and preserving the City's environmental resources; (4) protecting and preserving the City's public rights-of-way and municipal infrastructure located within the City's public rights-of-way; and (5) promoting access to high-quality, advanced wireless services for the City's residents, businesses and visitors.

(c) This Policy is not intended to, nor shall it be interpreted or applied to: (1) prohibit or effectively prohibit any personal wireless service provider's ability to provide personal wireless services; (2) prohibit or effectively prohibit any entity's ability to provide any

telecommunications service, subject to any competitively neutral and nondiscriminatory rules, regulations or other legal requirements for rights-of-way management; (3)

unreasonably discriminate among providers of functionally equivalent personal wireless services; (4) deny any request for authorization to place, construct or modify personal wireless service facilities on the basis of environmental effects of radio frequency emissions to the extent that such wireless facilities comply with the FCC's regulations concerning such emissions; (5) prohibit any collocation or modification that the City may not deny under federal or California state law; (6) impose any unreasonable, discriminatory or anticompetitive fees that exceed the reasonable cost to provide the services for which the fee is charged; or (7) otherwise authorize the City to preempt any applicable federal or California law.

SECTION 1.2. DEFINITIONS

(a) **Undefined Terms**. Undefined phrases, terms or words in this Policy will have the meanings assigned to them in 1 U.S.C. § 1, as may be amended or superseded, and, if not defined therein, will have their ordinary meanings. If any definition assigned to any phrase, term or word in Section 1.2 conflicts with any federal or state-mandated definition, the federal or state-mandated definition will control.

(b) **Defined Terms**.

(1) **"Accessory equipment"** means the same as "antenna equipment" as defined by FCC in 47 C.F.R. § 1.6002(b), as may be amended or superseded.

(2) **"Antenna"** means the same as defined by the FCC in 47 C.F.R. § 1.6002(b), as may be amended or superseded.

(3) **"Approval authority"** means the City official(s) responsible for reviewing applications for small cell permits and vested with the authority to approve, conditionally approve or deny such applications as provided in this Policy.

(4) **"Collocation"** means the same as defined by the FCC in 47 C.F.R. § 1.6002(g), as may be amended or superseded.

(5) **"Concealed"** or **"concealment"** means camouflaging techniques that integrate the transmission equipment into the surrounding natural and/or built environment such that the average, untrained observer cannot directly view the equipment and would not likely recognize the existence of the wireless facility or concealment technique.

(6) **"Decorative pole"** means any pole that includes decorative or ornamental features and/or materials intended to enhance the appearance of the pole. Decorative or ornamental features include, but are not limited to, fluted poles, ornate luminaires and artistic embellishments. Cobra head luminaires and octagonal shafts made of concrete or crushed stone composite material are not considered decorative or ornamental.

(7) **"FCC"** means the Federal Communications Commission or its duly appointed successor agency.

(8) **"FCC Shot Clock"** means the presumptively reasonable time frame within which the City generally must act on a given wireless application, as defined by the FCC and as may be amended or superseded.

~~(9) **"Ministerial permit"** means any City-issued non-discretionary permit required to commence or complete any construction or other activity subject to the City's jurisdiction. Ministerial permits may include, without limitation, any building permit, construction permit, electrical permit, encroachment permit, excavation permit, traffic control permit and/or any similar over-the-counter approval issued by the City's departments.~~

(10) **"Personal wireless services"** means the same as defined in 47 U.S.C. § 332(c)(7)(C)(i), as may be amended or superseded.

(11) **"Personal wireless service facilities"** means the same as defined in 47 U.S.C. § 332(c)(7)(C)(ii), as may be amended or superseded.

(12) **"Public right-of-way"** means any land which has been reserved for or dedicated to the City for the use of the general public for public road purposes, including streets, sidewalks and unpaved areas.

(13) **"RF"** means radio frequency or electromagnetic microwaves.

(14) **"Section 6409"** means Section 6409(a) of the Middle-Class Tax Relief and Job Creation Act of 2012, Pub. **L.** No. 112-96, 126 Stat. 156, codified as 47 U.S.C. § 1455(a), as may be amended or superseded.

(15) **"Small wireless telecommunication facility"** or **"small wireless facilities"** means the same as defined by the FCC in 47 C.F.R. § 1.6002(1), as may be amended or superseded.

SECTION 2. SMALL WIRELESS TELECOMMUNICATION FACILITIES

SECTION 2.1. *PUBLIC HEARING AND NOTICING RADIUS*

Facilitate public hearings on proposed conditionally permitted sWtF and WETF and follow in conduct according to Sections 40.30.070 of the Davis Municipal Code. Also add in "Noticing Radius" to notify all residents living within a 500' radius of the proposed sWTF. The noticing radius shall be easured from the outer boundary of the subject parcel, or, for those facilities in the PROW, from the outer boundary of the closest parcel adjacent to the subject PROW site.

SECTION 2.2. APPLICABILITY; REQUIRED PERMITS AND APPROVALS

(a) **Applicable Facilities**. Except as expressly provided otherwise in this Policy, the provisions in this Policy shall be applicable to all existing small wireless telecommunication facilities and all applications and requests for authorization to construct, install, attach, operate, collocate, modify, reconstruct, relocate, remove or

otherwise deploy small wireless telecommunication facilities within the City's jurisdictional boundaries.

(b) **Approval Authority**. The approval authority for small wireless telecommunication facilities in public rights-of-way shall be the Public Works Director or his/her designee. The approval authority for small wireless telecommunication facilities outside of public rights-of-way shall be the Community Development Director or his/her designee.

(c) **Small Wireless Telecommunication Facility Permit**. A small wireless telecommunication facility permit, subject to the approval authority's prior review and approval, is required for any small wireless telecommunication facility proposed on an existing, new or replacement structure.

(d) **Request for Approval Pursuant to Section 6409**. Requests for approval to collocate, replace or remove transmission equipment at an existing wireless tower or base station submitted pursuant to Section 6409 are not be subject to this policy, but shall be reviewed in accordance with the Municipal Code.

(e) **Other Permits and Approvals**. In addition to a small wireless facility permit, the applicant must obtain all other permits and regulatory approvals as may be required by any other federal, state or local government agencies, which includes the necessary environmental assessment (EA) as conducted and fulfilled by the FCC required under the National Environmental Protection Act (NEPA), and resultant CEQA. ~~without limitation any ministerial permits and/or other approvals issued by other City departments or divisions. All applications for ministerial permits submitted in connection with a proposed small wireless facility must contain a valid small wireless facility permit issued by the City for the proposed facility. Any application for any ministerial permit(s) submitted without such small cell permit may be denied without prejudice.~~ Furthermore, any small cell permit granted under this Policy shall remain subject to all lawful conditions and/or legal requirements associated with such other permits or approvals.

SECTION 2.2. SMALL WIRELESS FACILITY PERMIT APPLICATION REQUIREMENTS

(a) **Application Contents**. All applications for a small wireless telecommunication facility must include all the information and materials required in this subsection (a).

(1) **Application Form**. The applicant shall submit a complete, duly executed small wireless facility permit application using the then-current City form which must include the information described in this subsection (a).

(2) **Application Fee.** The applicant shall submit the applicable small wireless facility permit application fee established by City Council resolution. Batched applications must include the applicable small wireless telecommunication facility permit application fee for each small wireless telecommunication facility in the batch. If no permit application fee has been established, then the applicant must submit a signed written statement that acknowledges that the applicant will be required to reimburse the City for its reasonable costs incurred in connection with the application within 10 days after the City issues a written demand for reimbursement.

(3) **Construction Drawings.** The applicant shall submit true and correct construction drawings on plain bond paper and electronically, prepared, signed and stamped by a California licensed or registered structural engineer, that depict all the existing and proposed improvements, equipment and conditions related to the proposed project and project site, which includes without limitation any and all poles, posts, pedestals, traffic signals, towers, streets, sidewalks, pedestrian ramps, driveways, curbs, gutters, drains, handholes, manholes, fire hydrants, equipment cabinets, antennas, cables, trees and other landscape features. If the

applicant proposes to use existing poles or other existing structures, the structural

engineer must certify that the existing above and below ground structure will be adequate for the purpose. The construction drawings must: (i) contain cut sheets that contain the technical specifications for all existing and proposed antennas and accessory equipment, which includes without limitation the manufacturer, model number and physical dimensions; (ii) identify all structures within 250 feet from the proposed project site and call out such structures' overall height above ground level; (iii) depict the applicant's plan for electric and data backhaul utilities, which shall include the locations for all conduits, cables, wires, handholes, junctions, transformers, meters, disconnect switches, and points of connection; (iv) traffic control plans for the installation phase, stamped and signed by a California licensed or registered civil or traffic engineer; and (v) demonstrate that proposed project will be in full compliance with all applicable health and safety laws, regulations or other rules, which includes without limitation all building codes, electric codes, local street standards and specifications, and public utility regulations and orders.

(4) **Site Plan.** The applicant shall submit a survey prepared, signed and stamped by a California licensed or registered surveyor. The survey must identify and depict all existing boundaries, encroachments, buildings, walls, fences and other structures within 250 feet from the proposed project site, which includes without limitation all: (i) traffic lanes; (ii) all private properties and property lines; (iii) above and below-grade utilities and related structures and encroachments; (iv) fire hydrants, roadside call boxes and other public safety infrastructure; (v) streetlights, decorative poles, traffic signals and permanent signage; (vi) sidewalks, driveways, parkways, curbs, gutters and storm drains; (vii) benches, trash cans, mailboxes, kiosks and other street furniture; and (viii) existing trees, planters and other landscaping features.

(5) **Photo Simulations.** The applicant shall submit site photographs and photo simulations that show the existing location and proposed small wireless facility in context from at least three vantage points within the public streets or other publicly accessible spaces, together with a vicinity map that shows the proposed site location and the photo location for each vantage point. At least one simulation must depict the small wireless facility from a vantage point approximately 50 feet from the proposed support structure or location.

(6) **Project Narrative and Justification.** The applicant shall submit a written statement that explains in plain factual detail why the proposed wireless facility qualifies as a "small wireless facility" as defined by the FCC in 47 C.F.R. § 1.6002(/). A complete written narrative analysis will state the applicable standard and all the facts that allow the City to conclude the standard has been met. Bare conclusions not factually supported do not constitute a complete written analysis. As part of the written statement the applicant must also include (i) whether and why the proposed support is a "structure" as defined by the FCC in 47 C.F.R. § 1.6002(m); and (ii) whether and why the proposed wireless facility meets each required finding as provided in Section 2.4.

(7) **RF Compliance Report.** The applicant shall submit an RF exposure compliance report that certifies that the proposed small wireless facility, as well as any collocated wireless facilities, will comply with applicable federal RF exposure standards and exposure limits. The RF report must be prepared and certified by an independent third-party RF engineer acceptable to the City. The RF report must include the actual frequency at peak power and power levels (in watts effective radiated power) for all existing and proposed antennas at the site and exhibits that show the location and orientation of all transmitting antennas and the boundaries of areas with RF exposures in excess of the uncontrolled/general population limit (as that term is defined by the FCC) and also the boundaries of areas with RF exposures in excess of the controlled/occupational limit (as that term is defined by the FCC). Each such boundary shall be clearly marked and identified for every transmitting antenna at the project site.

(8) **Cumulative Impact RF Analysis.** The applicant must submit a cumulative impact analysis for the proposed facility and other WTFs on the project site within a radius of 1,500' of the proposed WTF site. The analysis shall include all existing and proposed (application submitted to the community development and sustainability department) WTFs on or near the site, dimensions of all antennas and support equipment on or near the site, power rating for all existing and proposed back-up equipment, and a report estimating the ambient RF fields and maximum potential cumulative electromagnetic radiation at, and surrounding, the proposed site that would result if the proposed WTF were operating at full buildout.

(9) **Proof of Safety Testing Above 6GHz**. The applicant shall provide substantial record of third-party conducted safety tests such as SAR and/or related of RF emissions levels from frequencies used above 6GHz.

(10) **NEPA Review from the FCC.** The applicant shall provide a copy of the NEPA Review from the FCC to show proof of compliance (47 CFR 1.1307).

(11) **Proof of Insurance.** The applicant shall submit evidence of ability to attain independent third-party insurance, cannot show self as being the insurer.

(12) **Regulatory Authorization.** The applicant shall submit evidence of the applicant's regulatory status under federal and California law to provide the services and construct the small wireless telecommunication facility proposed in the application.

(13) **Site Agreement.** For any small wireless telecommunication facility proposed to be installed on any structure located within the public rights-of-way, the applicant shall submit a partially-executed site agreement on a form prepared by the City that states the terms and conditions for such use by the applicant. No changes shall be permitted to the City's form site agreement except as may be indicated on the form itself. Any unpermitted changes to the City's form site agreement shall be deemed a basis to deem the application incomplete. Refusal to accept the terms and conditions in the City's site agreement shall be an independently sufficient basis to deny the application.

(14) **Property Owner's Authorization.** The applicant must submit a written authorization signed by the property owner that authorizes the applicant to submit a wireless telecommunication application in connection with the subject property and, if the wireless telecommunication facility is proposed on a utility-owned support structure, submit a written final utility design authorization from the utility.

(15) **Acoustic Analysis.** The applicant shall submit an acoustic analysis prepared and certified by an engineer licensed by the State of California for the proposed small wireless telecommunication facility and all associated equipment including all environmental control units, sump pumps, temporary backup power generators and permanent backup power generators demonstrating compliance with the City's noise regulations. The acoustic analysis must also include an analysis of the manufacturers' specifications for all noise-emitting equipment and a depiction of the proposed equipment relative to all adjacent property lines. In lieu of an acoustic analysis, the applicant may submit evidence from the equipment manufacturer(s) that the ambient noise emitted from all the proposed equipment will not, both individually and cumulatively, exceed the applicable noise limits.

~~(16)~~ **Justification for Non-Preferred Location or Structure.** ~~If a facility is proposed anywhere other than the most preferred location or the most preferred structure within 500 feet of the proposed location as described in Section 2.6, the applicant shall demonstrate with clear and convincing written evidence all of the following:~~

(A) Proof of need to close gap in coverage and finding least intrusive means;

~~(B) A clearly defined technical service objective and a map showing areas that meets that objective;~~

~~(C) A technical analysis that includes the factual reasons why a more preferred location(s) and/or more preferred structure(s) within 500 feet of the proposed location is not technically feasible;~~

~~(D) Bare conclusions that are not factually supported do not constitute clear and convincing written evidence.~~

(b) **Additional Requirements.** The City Council authorizes the approval authority to develop, publish and from time to time update or amend permit application requirements, forms, checklists, guidelines, informational handouts and other related materials that the approval authority finds necessary, appropriate or useful for processing any application governed under this Policy. All such requirements and materials must be in written form and publicly stated to provide all interested parties with prior notice.

SECTION 2.3. SMALL WIRELESS TELECOMMUNICATION FACILITY PERMIT APPLICATION SUBMITTAL AND COMPLETENESS REVIEW

(a) **Requirements for a Duly Filed Application.** Any application for a small wireless telecommunication facility permit will not be considered duly filed unless submitted in accordance with the requirements in this subsection (a).

(1) **Submittal Appointment.** All applications must be submitted to the City at a pre-scheduled appointment with the approval authority. Potential applicants may generally submit either one application or one batched application per appointment as provided below. Potential applicants may schedule successive appointments for multiple applications whenever feasible and not prejudicial to other applicants for any other development project. The approval authority shall use reasonable efforts to offer an appointment within five working days after the approval authority receives a written request from a potential applicant. Any purported application received without an appointment, whether delivered in-person, by mail or through any other means, will not be considered duly filed, whether the City retains, returns or destroys the materials received.

(2) **Pre-Submittal Conferences.** The City encourages, but does not require, potential applicants to schedule and attend a pre-submittal conference with the approval authority for all proposed projects that involve small wireless telecommunication facilities. A voluntary pre-submittal conference is intended to streamline the review process through informal discussion between the potential applicant and staff that includes, without limitation, the appropriate project classification and review

process; any latent issues in connection with the proposed project, including compliance with generally applicable rules for public health and safety; potential concealment issues or concerns (if applicable); coordination with other City departments responsible for application review; and application completeness issues.

(b) **Applications Deemed Withdrawn.** To promote efficient review and timely decisions, and to mitigate unreasonable delays or barriers to entry caused by chronically incomplete applications, any application governed under this Policy will be automatically deemed withdrawn by the applicant when the applicant fails to tender a substantive response to the approval authority within 60 calendar days after the approval authority deems the application incomplete in a written notice to the applicant. As used in this subsection (b), a "substantive response" must include the materials identified as incomplete in the approval authority's notice.

(c) **Batched Applications.** Applicants may submit applications individually or in a batch; provided, that the number of small wireless facilities in a batch should be limited to five and all facilities in the batch should be substantially the same with respect to equipment, configuration, and support structure. Applications submitted as a batch shall be reviewed together, provided that each application in the batch must meet all the requirements for a complete application, which includes without limitation the application fee for each application in the batch. If any individual application within a batch is deemed incomplete, the entire batch shall be automatically deemed incomplete. If any application is withdrawn or deemed withdrawn from a batch, all other applications in the same batch shall be automatically deemed withdrawn. If any application in a batch fails to meet the required findings for approval, the entire batch shall be denied.

(d) **Additional Procedures.** The City Council authorizes the approval authority to establish other reasonable rules and regulations for duly filed applications, which may include without limitation regular hours for appointments with applicants, as the approval authority deems necessary or appropriate to organize, document and manage the application intake process. All such rules and regulations must be in written form and publicly stated to provide all interested parties with prior notice.

SECTION 2.4. APPROVALS AND DENIALS

(a) **Review by Approval Authority.** The approval authority shall review a complete and duly filed application for a small wireless facility and may act on such application without prior notice or a public hearing.

(b) **Required Findings.** The approval authority may approve or conditionally approve a complete and duly filed application for a small wireless telecommunication facility permit when the approval authority finds:

(1) The proposed project meets the definition for a "small wireless telecommunication facility" and/or "small wireless facility" as defined by the FCC;

~~(2) The proposed facility would be in the most preferred location within 500 feet from the proposed site in any direction or the applicant has demonstrated with clear and convincing evidence in the written record that any more preferred location(s) within 500 feet would be technically infeasible;~~ The proposed facility must connect to an already existing utility pole that can support its weight.

(3) The proposed facility would not be located on a prohibited support structure identified in this Policy;

(4) All new wires needed to service the small wireless telecommunication facility must be installed within the width of the existing utility pole so as to not exceed the diameter and height of the existing utility pole.

(5) All ground-mounted equipment not installed inside the pole must be undergrounded, flush to the ground, within three feet of the utility pole.

(6) Aside from the transmitter/antenna itself, no additional equipment may be visible.

(7) No sWTF shall be placed within the radius of 1,000' from any residential home, both single and mixed use. Davis' flat topography lends itself to unimpeded propagation opportunities, therefore, dense placements of sWTF and WTF is not necessary.

(8) Each sWTF must be at minimun 1,000' away from pre-schools, schools, parks, and sports fields.

(9) Each sWTF must be at minimum 1,500' away from another nearest sWTF and/or WTF.

(10) An encroachment permit must be obtained for any work in the public right-of-way.

~~(11) The proposed facility would be on the most preferred support structure within 500 feet from the proposed site in any direction or the applicant has demonstrated with clear and convincing evidence in the written record that any more preferred support structure(s) within 500 feet would be technically infeasible;~~

(12) The proposed facility complies with all applicable design standards in this Policy;

(13) The applicant has demonstrated that the proposed project will be in planned compliance with all applicable FCC regulations and guidelines for human exposure to RF emissions. The facilities will not expose people to radio frequency (RF) radiation in excess of FCC standards being that the power density cannot exceed 5% of the power density exposure limit applicable to that transmitter or facility or in a field strength that, when squared, exceeds 5% of the square of the electric or magnetic field strength limit applicable to that transmitter or facility (47 CFR 1.1310).

(c) **Conditional Approvals; Denials without Prejudice.** Subject to any applicable federal or California laws, nothing in this Policy is intended to limit the approval authority's ability to conditionally approve or deny without prejudice any small wireless facility permit application as may be necessary or appropriate to ensure compliance with this Policy.

(d) **Decision Notices.** Within five calendar days after the approval authority acts on a small wireless facility permit application or before the FCC Shot Clock expires (whichever occurs first), the approval authority shall notify the applicant by written notice. If the approval authority denies the application (with or without prejudice), the written notice must contain the reasons for the decision.

(e) **Appeals.** Any decision by the approval authority shall be final and not subject to any administrative appeals.

SECTION 2.5. STANDARD CONDITIONS OF APPROVAL

(a) **General Conditions.** In addition to all other conditions adopted by the approval authority permits issued under this Policy shall be automatically subject to the conditions in this subsection (a).

(1) **Conditional Use Permit Term.** This permit will automatically expire ~~10~~ 3 years and one day from its issuance unless California Government Code § 65964(b) authorizes the City to establish a shorter term for public safety reasons. Any other permits or approvals issued in connection with any collocation, modification or other change to this wireless telecommunication facility, which includes without limitation any permits or other approvals deemed-granted or deemed-approved under federal or state law, will not extend this term limit unless expressly provided otherwise in such permit or approval or required under federal or state law.

(2) **Permit Renewal**. Within one (1) year before the expiration date of this permit, the permittee may submit an application for permit renewal. To be eligible for renewal, the permittee must demonstrate that the subject wireless telecommunication facility is in compliance with all the conditions of approval associated with this permit and all applicable provisions in the Davis Municipal Code and this Policy that exist at the time the decision to renew the permit is rendered. The approval authority shall have discretion to modify or amend the conditions of approval for permit renewal on a case-by-case basis as may be necessary or appropriate to ensure compliance with this Policy. Upon renewal, this permit will automatically expire 10 years and one day from its issuance, except when California Government Code § 65964(b), as may be amended or superseded in the future, authorizes the City to establish a shorter term for public safety reasons.

(3) **Post-Installation Certification.** Within 60 calendar days after the permittee commences full, unattended operations of a small wireless facility approved or deemed-approved, the permittee shall provide the approval authority with documentation reasonably acceptable to the approval authority that the small wireless telecommunication facility has been installed and/or constructed in strict compliance with the approved construction drawings and photo simulations. Such documentation shall include without limitation as-built drawings, and site photographs.

(4) **Build-Out Period.** This small wireless telecommunication facility permit will automatically expire six (6) months from the approval date unless the permittee obtains all other permits and approvals required to install, construct and/or operate the approved small wireless telecommunication facility, which includes without limitation any permits or approvals required by the any federal, state or local public agencies with jurisdiction over the subject property, the small wireless telecommunication facility or its use. If this build-out period expires, the City will not extend the build-out period, but the permittee may resubmit a complete application, including all application fees, for the same or substantially similar project.

(5) **Site Maintenance.** The permittee shall keep the site, which includes without limitation any and all improvements, equipment, structures, access routes, fences and landscape features, in a neat, clean and safe condition in accordance with the approved construction drawings and all conditions in this small wireless telecommunication facility permit. The permittee shall keep the site area free from all litter and debris at all times. The permittee, at no cost to the City, shall remove and remediate any graffiti or other vandalism at the site within 48 hours after the permittee receives notice or otherwise becomes aware that such graffiti or other vandalism occurred.

(6) **Compliance with Laws.** The permittee shall maintain compliance at all times with all federal, state and local statutes, regulations, orders or other rules that carry the force of law ("laws") applicable to the permittee, the subject property, the small wireless telecommunication facility or any use or activities in connection with the use authorized in this small wireless telecommunication facility permit, which includes without limitation any laws applicable to human exposure to RF emissions. The permittee expressly acknowledges and agrees that

this obligation is intended to be broadly construed and that no other specific requirements in these conditions

are intended to reduce, relieve or otherwise lessen the permittee's obligations to maintain compliance with all laws. No failure or omission by the City to timely notice, prompt or enforce compliance with any applicable provision in the Davis Municipal Code, this Policy any permit, any permit condition or any applicable law or regulation, shall be deemed to relieve, waive or lessen the permittee's obligation to comply in all respects with all applicable provisions in the Davis Municipal Code, this Policy, any permit, any permit condition or any applicable law or regulation.

(7) **Adverse Impacts on Other Properties.** The permittee shall use all reasonable efforts to avoid any and all unreasonable, undue or unnecessary adverse impacts on nearby properties that may arise from the permittee's or its authorized personnel's construction, installation, operation, modification, maintenance, repair, removal and/or other activities on or about the site. The permittee shall not perform or cause others to perform any construction, installation, operation, modification, maintenance, repair, removal or other work that involves heavy equipment or machines except during normal construction work hours authorized by the Davis Municipal Code. The restricted work hours in this condition will not prohibit any work required to prevent an actual, immediate harm to property or persons, or any work during an emergency declared by the City or other state or federal government agency or official with authority to declare a state of emergency within the City. The approval authority may issue a stop work order for any activities that violates this condition in whole or in part.

(8) **Inspections; Emergencies.** The permittee expressly acknowledges and agrees that the City's officers, officials, staff, agents, contractors or other designees may enter onto the site and inspect the improvements and equipment City's officers, officials, staff, agents, contractors or other designees may, but will not be obligated to, enter onto the site area without prior notice to support, repair, disable or remove any improvements or equipment in emergencies or when such improvements or equipment threatens actual, imminent harm to property or persons. The permittee, if present, may observe the City's officers, officials, staff or other designees while any such inspection or emergency access occurs.

(9) **Permittee's Contact Information.** Within 10 days from the final approval, the permittee shall furnish the City with accurate and up-to-date contact information for a person responsible for the small wireless telecommunication facility, which includes without limitation such person's full name, title, direct telephone number, facsimile number, mailing address and email address. The permittee shall keep such contact information up-to-date at all times and promptly provide the City with updated contact information if either the responsible person or such person's contact information changes.

(10) **Indemnification.** The permittee shall defend, indemnify and hold harmless the City, City Council and the City's boards, commissions, agents, officers, officials, employees and volunteers (collectively, the "indemnitees") from any and all (i) damages, liabilities, injuries, losses, costs and expenses and from any and all

claims, demands, law suits, writs and other actions proceedings ("claims") brought against the indemnitees to challenge, attack, seek to modify, set aside, void or annul the City's approval of this permit, and (ii) other claims of any kind or form, whether for personal injury, death or property damage, that arise from or in connection with the permittee's or its agents', directors', officers', employees', contractors', subcontractors', licensees' or customers' acts or omissions in connection with this small cell permit or the small wireless telecommunication facility. In the event the City becomes aware of any claims, the City will use best efforts to promptly notify the permittee shall reasonably cooperate in the defense. The permittee expressly acknowledges and agrees that the City shall have the right to approve, which approval shall not be unreasonably withheld, the legal counsel providing the City's defense, and the permittee shall promptly reimburse City for any costs and expenses directly and necessarily incurred by the City in the course of the defense. The permittee expressly acknowledges and agrees that the permittee's indemnification obligations under this condition are a material consideration that motivates the City to approve this small cell permit, and that such indemnification obligations will survive the expiration, revocation or other termination of this small cell permit.

(11) **Performance Bond.** Applicable to small wireless telecommunication facilities within public rights-of-way. Before the City issues any permits required to commence construction in connection with this permit, the permittee shall post a performance bond from a surety and in a form acceptable to the approval authority in an amount reasonably necessary to cover the cost to remove the improvements and restore all affected areas based on a written estimate from a qualified contractor with experience in wireless telecommunication facilities removal. The written estimate must include the cost to remove all equipment and other improvements, which includes without limitation all antennas, radios, batteries, generators, utilities, cabinets, mounts, brackets, hardware, cables, wires, conduits, structures, shelters, towers, poles, footings and foundations, whether above ground or below ground, constructed or installed in connection with the wireless facility, plus the cost to completely restore any areas affected by the removal work to a standard compliant with applicable laws. In establishing or adjusting the bond amount required under this condition, and in accordance with California Government Code § 65964(a), the approval authority shall take into consideration any information provided by the permittee regarding the cost to remove the wireless telecommunication facility to a standard compliant with applicable laws. The performance bond shall expressly survive the duration of the permit term to the extent required to effectuate a complete removal of the subject wireless telecommunication facility in accordance with this condition.

(12) **Permit Revocation.** The approval authority may recall this approval for review at any time due to complaints about noncompliance with applicable laws or any approval conditions attached to this approval after notice and an opportunity to cure the violation is provided to the permittee. If the noncompliance thereafter continues, the approval authority may, following notice and an opportunity for the permittee to be heard (which hearing may be limited to written submittals), revoke this approval or amend these conditions as the approval authority deems necessary or appropriate to correct any such noncompliance.

(13) **Record Retention.** Applicable to small wireless telecommunication facilities within public rights- of-way. The permittee must maintain complete and accurate copies of all permits and other regulatory approvals issued in connection with the wireless telecommunication facility, which includes without limitation this approval, the approved plans and photo simulations incorporated into this approval, all conditions associated with this approval and any ministerial permits or approvals issued in connection with this approval. In the event that the permittee does not maintain such records as required in this condition, any ambiguities or uncertainties that would be resolved through an inspection of the missing records will be construed against the permittee. The permittee may keep electronic records; provided, however, that hard copies or electronic records kept in the City's regular files will control over any conflicts between such City-controlled copies or records and the permittee's electronic copies, and complete originals will control over all other copies in any form.

(14) **Abandoned Wireless Facilities.** A small wireless facility shall be deemed abandoned if not operated for any continuous six-month period. Within 90 days after a small wireless facility is abandoned or deemed abandoned, the permittee shall completely remove the small wireless facility and all related improvements and shall restore all affected areas to a condition compliant with all applicable laws, which includes without limitation the Davis Municipal Code. In the event that the permittee does not comply with the removal and restoration obligations under this condition within said 90-day period, the City shall have the right (but not the obligation) to perform such removal and restoration with or without notice, and the permittee shall be liable for all costs and expenses incurred by the City in connection with such removal and/or restoration activities.

(15) **Landscaping.** The permittee shall replace any landscape features damaged or displaced by the construction, installation, operation, maintenance or other work performed by the permittee or at the permittee's direction on or about the site. If any trees are damaged or displaced, the permittee shall hire and pay for a licensed arborist to select, plant and maintain replacement landscaping in an appropriate location for the species. Only workers under the supervision of a licensed arborist shall be used to install the replacement tree(s). Any replacement tree must be substantially the same size as the damaged tree unless otherwise approved by the approval authority. The permittee shall, at all times, be responsible to maintain any replacement landscape features.

(16) **Cost Reimbursement.** Applicable to small wireless facilities within public rights-of-way. The permittee acknowledges and agrees that (i) the permittee's request for authorization to construct, install and/or operate the wireless facility will cause the City to incur costs and expenses; (ii) the permittee shall be responsible to reimburse the City for all costs incurred in connection with the permit, which includes without limitation costs related to application review, permit issuance, site inspection, independent third party RF analysis engineer, professional building biologist or hygienist and any other costs reasonably related to or caused by the request for authorization to construct, install and/or operate the wireless facility; (iii) any application fees required for the application may not

cover all such reimbursable costs and that the permittee shall have the obligation to reimburse City for all such costs 10 days after a written demand for reimbursement and reasonable documentation to support such costs; and (iv) the City shall have the right to withhold any permits or other approvals in connection with the wireless facility until and unless any outstanding costs have been reimbursed to the City by the permittee.

(17) **Future Undergrounding Programs.** Applicable to small wireless telecommunication facilities within public rights-of-way. Notwithstanding any term remaining on any small cell permit, if other utilities or communications providers in the public rights-of- way underground their facilities in the segment of the public rights-of-way where the permittee's small wireless telecommunication facility is located, the permittee must also underground its equipment, except the antennas and any approved electric meter, at approximately the same time. Accessory equipment such as radios and computers that require an environmentally controlled underground vault to function shall not be exempt from this condition. Small wireless telecommunication facilities installed on wood utility poles that will be removed pursuant to the undergrounding program may be reinstalled on a streetlight that complies with the City's standards and specifications. Such undergrounding shall occur at the permittee's sole cost and expense except as may be reimbursed through tariffs approved by the state public utilities commission for undergrounding costs.

(18) **Electric Meter Upgrades.** Applicable to small wireless telecommunication facilities within public rights-of-way. If the commercial electric utility provider adopts or changes its rules obviating the need for a separate or ground-mounted electric meter and enclosure, the permittee on its own initiative and at its sole cost and expense shall remove the separate or ground-mounted electric meter and enclosure. Prior to removing the electric meter, the permittee shall apply for any encroachment and/or other ministerial permit(s) required to perform the removal. Upon removal, the permittee shall restore the affected area to its original condition that existed prior to installation of the equipment.

(19) **Rearrangement and Relocation.** Applicable to small wireless telecommunication facilities within public rights-of-way. The permittee acknowledges that the City, in its sole discretion and at any time, may: (i) change any street grade, width or location;
(ii) add, remove or otherwise change any improvements in, on, under or along any street owned by the City or any other public agency, which includes without limitation any sewers, storm drains, conduits, pipes, vaults, boxes, cabinets, poles and utility systems for gas, water, electric or telecommunications; and/or (iii) perform any other work deemed necessary, useful or desirable by the City (collectively, "City work"). The City reserves the rights to do any and all City work without any admission on its part that the City would not have such rights without the express reservation in this small cell permit. If the Public Works Director determines that any City work will require the permittee's small wireless facility located in the public rights-of-way to be rearranged and/or relocated, the permittee shall, at its sole cost and expense, do or cause to be done all things necessary to accomplish such rearrangement and/or relocation. If the permittee

fails or refuses to either permanently or temporarily rearrange and/or relocate the permittee's small wireless facility within a reasonable time after the Public Works Director's notice, the City may (but will not be obligated to) cause the rearrangement or relocation to be performed at the permittee's sole cost and expense. The City may exercise its rights to rearrange or relocate the permittee's small wireless telecommunication facility without prior notice to permittee when the Public Works Director determines that the City work is immediately necessary to protect public health or safety. The permittee shall reimburse the City for all costs and expenses in connection with such work within 10 days after a written demand for reimbursement and reasonable documentation to support such costs.

SECTION 2.6. LOCATION REQUIREMENTS

(a) **Preface to Location Requirements.** To better assist applicants and decision makers understand and respond to the community's aesthetic preferences and values, subsections (b) and (c) set out listed preferences for locations and support structures to be used in connection with small wireless telecommunication facilities in an ordered hierarchy. Applications that involve less-preferred locations or structures may be approved so long as the applicant demonstrates that either (1) no more preferred locations or structures exist within 500 feet from the proposed site; or (2) any more preferred locations or structures within 500 feet from the proposed site would be technically infeasible as supported by clear and convincing evidence in the written record. Subsection (d) identifies "prohibited" support structures on which the City shall not approve any small cell permit application for any competitor or potential competitor.

~~(b)~~ **Locational Preferences.** The City prefers small wireless facilities to be installed in ~~locations, ordered from most preferred to least preferred, as follows:~~

(1) any location in a non-residential zone or non-residential Specific Plan designation;

~~(2) any location in a residential zone 250 feet or more from any structure approved for a residential or school use;~~

~~(3) If located in a residential area, a location that is as far as possible from any structure approved for a residential or school use.~~

(c) **Support Structures in Public Rights-of-Way.** The City prefers small wireless telecommunication facilities to be installed on support structures in the public rights-of-way, ordered from most preferred to least preferred, as follows:

(1) Existing or replacement streetlight poles;

(2) New, non-replacement streetlight poles;

(3) New or replacement traffic signal poles;

(4) New, non-replacement poles;

(5) Existing or replacement wood utility poles.

(d) **Prohibited Support Structures in Public Rights-of-Way.** The City prohibits small wireless facilities to be installed on the following support structures:

(1) Decorative poles;

(2) Signs;

(3) Any utility pole scheduled for removal or relocation within 12 months from the time the approval authority acts on the small cell permit application;

(4) New, non-replacement wood poles.

SECTION 2.7. DESIGN STANDARDS

(a) General Standards.

(1) **Noise.** Noise emitted from small wireless facilities and all accessory equipment and transmission equipment must comply with all applicable City noise control standards.

(2) **Lights.** Small wireless telecommunication facilities shall not include any lights that would be visible from publicly accessible areas, except as may be required under Federal Aviation Administration, FCC, other applicable regulations for health and safety. All equipment with lights (such as indicator or status lights) must be installed in locations and within enclosures that mitigate illumination impacts visible from publicly accessible areas. The provisions in this subsection (a)(2) shall not be interpreted or applied to prohibit installations on streetlights or luminaires installed on new or replacement poles as may be required under this Policy.

(3) **Landscape Features.** No small wireless telecommunication facility shall encroach into the protected zone of a protected oak or landmark tree. Small wireless telecommunication facilities shall not displace any other existing landscape features unless: (A) such displaced landscaping is replaced with native and/or drought-resistant plants, trees or other landscape features approved by the approval authority and (B) the applicant submits and adheres to a landscape maintenance plan. The landscape plan must include existing vegetation, and vegetation proposed to be removed or trimmed, and the landscape plan must identify proposed landscaping by species type, size and location. Landscaping and landscape maintenance must be performed in accordance with all applicable provisions of the Davis Municipal Code.

(4) **Site Security Measures.** Small wireless telecommunication facilities may incorporate reasonable and appropriate site security measures, such as locks and anti-climbing devices, to prevent unauthorized access, theft or vandalism. The approval authority shall not approve any barbed wire, razor ribbon, electrified fences or any similarly dangerous security measures. All exterior surfaces on small wireless telecommunication facilities shall be constructed from or coated with graffiti-resistant materials.

(5) **Signage; Advertisements.** All small wireless telecommunication facilities must include signage not to exceed one (1) square feet in sign area that accurately identifies the site owner/operator, the owner/operator's site name or identification number and a toll-free number to the owner/operator's network operations center. Small wireless telecommunication facilities may not bear any other signage or advertisements unless expressly approved by the City, required by law or recommended under FCC, Occupational Safety and Health Administration or other United States governmental agencies for compliance with RF emissions regulations.

(6) **Compliance with Health and Safety Regulations.** All small wireless telecommunication facilities shall be designed, constructed, operated and maintained in compliance with all generally applicable health and safety regulations, which includes without limitation all applicable regulations for human exposure to RF emissions where the facilities do not expose people to radio frequency (RF) radiation in excess of FCC standards. These standards being that the power density cannot exceed 5% of the power density exposure limit applicable to that transmitter or facility or in a field strength that, when squared, exceeds 5% of the square of the electric or magnetic field strength limit applicable to that transmitter or facility (47 CFR 1.1310).

(7) **Safety Testing Report Past 6GHz.** Submittal of report of proof of safety testing and/or SAR and/or similar calculable means for RF power levels from all antennas, transmitters and electronic components that utilize frequencies past 6GHz determined at ground level, second and third storied buildings.

(8) Compliance with the United States Access Board and the federal Americans with Disabilities Act (ADA) of 1990 (42 U.S.C. §§ 12101 *et seq.)* and accommodations for individuals with electro-sensitivity, also known as radar sickness and microwave sickness.

(9) **Overall Height.** Small wireless telecommunication facilities must comply with the minimum separation from electrical lines required by applicable safety regulations (such as CPUC General Order 95 and 128).

(b) Small Wireless Telecommunication Facilities within Public Rights-of-Way.

(1) Antennas.

(A) **Concealment.** All antennas and associated mounting equipment, hardware, cables or other connecters must be completely concealed within an opaque antenna shroud or radome. The antenna shroud or radome must be painted a flat, non-reflective color to match the underlying support structure.

(B) **Antenna Volume.** Each individual antenna may not exceed three cubic feet in volume.

(2) Accessory Equipment.

(A) **Installation Preferences.** All non-antenna accessory equipment shall be installed in accordance with the following preferences, ordered from most preferred to least preferred: (i) underground in any area in which the existing utilities are primarily located underground; (ii) on the pole or support structure; or (iii) integrated into the base of the pole or support structure. Applications that involve lesser-preferred installation locations may be approved so long as the applicant demonstrates that no more preferred installation location would be technically feasible as supported by clear and convincing evidence in the written record.

(B) **Undergrounded Accessory Equipment.** All undergrounded accessory equipment must be installed in an environmentally controlled vault that is load-rated to meet the City's standards and specifications. Underground

vaults located beneath a sidewalk must be constructed with a slip-resistant cover. Vents for airflow shall be flush-to-grade when placed within the sidewalk and may not exceed two feet above grade when placed off the sidewalk. Applicants shall not be permitted to install an underground vault in a location that would cause any existing tree to be materially damaged or displaced. The Noise restrictions apply to underground equipment as well, especially ventilation/cooling equipment.

(C) **Pole-Mounted Accessory Equipment.** All pole-mounted accessory equipment must be installed flush to the pole to minimize the overall visual profile. If any applicable health and safety regulations prohibit flush-mounted equipment, the maximum separation permitted between the accessory equipment and the pole shall be the minimum separation required by such regulations. All pole-mounted equipment and required or permitted signage must be placed and oriented away from adjacent sidewalks and structures. Pole-mounted equipment may be installed behind street, traffic or other signs to the extent that the installation complies with applicable public health and safety regulations. All cables, wires and other connectors must be routed through conduits within the pole, and all conduit attachments, cables, wires and other connectors must be concealed from public view. To the extent that cables, wires and other connectors cannot be routed through the pole, applicants shall route them through a single external conduit or shroud that has been finished to match the underlying support structure.

(D) **Base-Mounted Accessory Equipment.** All base-mounted accessory equipment must be installed within a shroud, enclosure or pedestal integrated into the base of the support structure. All cables, wires and other connectors routed between the antenna and base-mounted equipment must be concealed from public view.

(E) **Ground-Mounted Accessory Equipment.** The approval authority shall not approve any ground-mounted accessory equipment including, but not limited to, any utility or transmission equipment, pedestals, cabinets, panels or electric meters.

(F) **Accessory Equipment Volume.** All accessory equipment associated with a small wireless telecommunication facility installed above ground level shall not cumulatively exceed: (i) nine (9) cubic feet in volume if installed in a residential district; or (ii) seventeen (17) cubic feet in volume if installed in a non-residential district. The volume calculation shall include any shroud, cabinet or other concealment device used in connection with the non-antenna accessory equipment. The volume calculation shall not include any equipment or other improvements placed underground.

(3) **Streetlights.** Applicants that propose to install small wireless telecommunication facilities on an existing streetlight must remove and replace the existing streetlight with one

substantially similar to the design(s) for small wireless telecommunication facilities on streetlights described in the City's Road Design and Construction Standards. To mitigate any material changes in the streetlighting patterns, the replacement pole must: (A) be located as close to the removed pole as possible; (B) be aligned with the other existing streetlights; and (C) include a luminaire at substantially the same height and distance from the pole as the luminaire on the removed pole. All antennas must be installed above the pole within a single, canister style shroud or radome that tapers to the pole.

(4) **Wood Utility Poles.** Applicants that propose to install small wireless telecommunication facilities on an existing wood utility pole must install all antennas in a radome above the pole unless the applicant demonstrates that mounting the antennas above the pole would be technically infeasible as supported by clear and convincing evidence in the written record. Side-mounted antennas on a stand-off bracket or extension arm must be concealed within a shroud. All cables, wires and other connectors must be concealed within the radome and stand-off bracket. The maximum horizontal separation between the antenna and the pole shall be the minimum separation required by applicable health and safety regulations.

(5) **New, Non-Replacement Poles.** Applicants that propose to install a small wireless telecommunication facility on a new, non-replacement pole must install a new streetlight substantially similar to the City's standards and specifications but designed to accommodate wireless antennas and accessory equipment located immediately adjacent to the proposed location. If there are no existing streetlights in the immediate vicinity, the applicant may install a metal or composite pole capable of concealing all the accessory equipment either within the pole or within an integrated enclosure located at the base of the pole. The pole diameter shall not exceed twelve (12) inches and any base enclosure diameter shall not exceed sixteen (16) inches. All antennas, whether on a new streetlight or other new pole, must be installed above the pole within a single, canister style shroud or radome that tapers to the pole.

(6) **Encroachments over Private Property.** Small wireless telecommunication facilities may not encroach onto or over any private or other property outside the public rights-of- way without the property owner's express written consent.

(7) **Backup Power Sources.** Fossil-fuel based backup power sources shall not be permitted within the public rights-of-way; provided, however, that connectors or receptacles may be installed for temporary backup power generators used in an emergency declared by federal, state or local officials.

(8) **Obstructions; Public Safety and Circulation.** Small wireless telecommunication facilities and any associated equipment or improvements shall not physically interfere with or impede access to any: (A) worker access to any aboveground or underground infrastructure for traffic control, streetlight or public transportation, including without limitation any curb control sign, parking meter, vehicular traffic sign or signal, pedestrian traffic sign or signal,

barricade reflectors; (B) access to any public transportation vehicles, shelters, street furniture or other improvements at any public transportation stop; (C) worker access to above-ground or underground infrastructure owned or operated by any public or private utility agency; (D) fire hydrant or water valve; (E) access to any doors, gates, sidewalk doors, passage doors, stoops or other ingress and egress points to any building appurtenant to the rights-of-way; (F) access to any fire escape or (G) above ground improvements must be setback a minimum of 2 feet from existing or planned sidewalks, trails, curb faces or road surfaces.

(9) **Utility Connections.** All cables and connectors for telephone, data backhaul, primary electric and other similar utilities must be routed underground in conduits large enough to accommodate future collocated wireless telecommunication facilities. Undergrounded cables and wires must transition directly into the pole base without any external doghouse. All cables, wires and connectors between the underground conduits and the antennas and other accessory equipment shall be routed through and concealed from view within: (A) internal risers or conduits if on a concrete, composite or similar pole; or (B) a cable shroud or conduit mounted as flush to the pole as possible if on a wood pole or other pole without internal cable space. The approval authority shall not approve new overhead utility lines or service drops merely because compliance with the undergrounding requirements would increase the project cost.

(10) **Spools and Coils.** To reduce clutter and deter vandalism, excess fiber optic or coaxial cables shall not be spooled, coiled or otherwise stored on the pole outside equipment cabinets or shrouds.

(11) **Electric Meters.** Small wireless telecommunication facilities shall use flat-rate electric service or other method that obviates the need for a separate above-grade electric meter. If flat-rate service is not available, applicants may install a shrouded smart meter. The approval authority shall not approve a separate ground-mounted electric meter pedestal unless required by the utility company.

(12) **Street Trees.** To preserve existing landscaping in the public rights-of-way, all work performed in connection with small wireless telecommunication facilities shall not cause any street trees to be trimmed, damaged or displaced. If any street trees are damaged or displaced, the applicant shall be responsible, at its sole cost and expense, to plant and maintain replacement trees at the site for the duration of the permit term.

(13) **Lines of Sight.** No wireless telecommunication facility shall be located so as to obstruct pedestrian or vehicular lines-of-sight.

(c) Small Wireless Telecommunication Facilities Outside of Public Rights-of-Way

(1) **Setbacks.** Small wireless telecommunication facilities on private property may not encroach into any applicable setback for structures in the subject zoning district.

(2) **Backup Power Sources.** The Approval Authority shall not approve any diesel generators or other similarly noisy or noxious generators in or within 250 feet from any residence; provided, however, the Approval Authority may approve sockets or other connections used for temporary backup generators.

(3) **Parking; Access.** Any equipment or improvements constructed or installed in connection with any small wireless telecommunication facilities must not reduce any parking spaces below the minimum requirement for the subject property. Whenever feasible, small wireless facilities must use existing parking and access rather than construct new parking or access improvements. Any new parking or access improvements must be the minimum size necessary to reasonably accommodate the proposed use.

(4) **Freestanding Small Wireless Facilities.** All new poles or other freestanding structures that support small wireless telecommunication facilities must be made from a metal or composite material capable of concealing all the accessory equipment, including cables, mounting brackets, radios, and utilities, either within the support structure or within an integrated enclosure located at the base of the support structure. All antennas must be installed above the pole in a single, canister-style shroud or radome. The support structure and all transmission equipment must be painted with flat/neutral colors that match the support structure. The pole diameter shall not exceed twelve (12) inches and any base enclosure diameter shall not exceed sixteen (16) inches.

(5) Small Wireless Telecommunication Facilities on Existing Buildings.

(A) All components of building-mounted wireless facilities must be completely concealed and architecturally integrated into the existing facade or rooftop features with no visible impacts from any publicly accessible areas. Examples include, but are not limited to, antennas and wiring concealed behind existing parapet walls or facades replaced with RF-transparent material and finished to mimic the replaced materials.

(B) If the applicant demonstrates with clear and convincing evidence that integration with existing building features is technically infeasible, the applicant may propose to conceal the wireless telecommunication facility within a new architectural element designed to match or mimic the architectural details of the building including length, width, depth, shape, spacing, color, and texture.

(6) Small Wireless Telecommunication Facilities on Existing Lattice Tower Utility Poles

(A) Antennas must be flush-mounted to the side of the pole and designed to match the color and texture of the pole. If technologically infeasible to flush-mount an antenna, it may be mounted on an extension arm that protrudes as little as possible from the edge of the existing pole provided that the wires are concealed inside the extension arm. The extension arm shall match the color of the pole.

(B) Wiring must be concealed in conduit that is flush-mounted to the pole. The conduit and mounting hardware shall match the color of the pole.

(C) All accessory equipment must be placed underground unless undergrounding would be technically infeasible as supported by clear and convincing evidence in the written record. Above-ground accessory equipment mounted on a pole, if any, shall be enclosed in a cabinet that matches the color and finish of the structures on which they are mounted. Above-ground cabinets not mounted on a structure, if any, shall be dark green in color.

(D) No antenna or accessory equipment shall be attached to a utility line, cable or guy wire.

(7) Small Wireless Telecommunication Facilities on Existing Wood Utility Poles.

(A) All antennas must be installed within a cylindrical shroud (radome) above the top of the pole unless the applicant demonstrates that mounting antennas above the pole would be technically infeasible as supported by clear and convincing evidence in the written record.

(B) All antennas must be concealed within a shroud (radome) designed to match the color or the pole, except as described in (8) (E).

(C) No antenna or accessory equipment shall be attached to a utility line, cable or guy wire.

(D) If it is technically infeasible to mount an antenna above the pole it may be flush-mounted to the side of the pole. If it is technically infeasible to flush-mount the antenna to the side of the pole it may be installed at the top of a stand-off bracket/extension arm that protrudes as little as possible beyond the side of the pole. Antenna shrouds on stand-off brackets must be a medium gray color to blend in with the daytime sky.

(E) Wires must be concealed within the antenna shroud, extension bracket/extension arm and conduit that is flush-mounted to the pole. The conduit and mounting hardware shall match the color of the pole.

(F) All accessory equipment must be placed underground, unless undergrounding would be technically infeasible as supported by clear and convincing evidence in the written record. Above ground accessory equipment mounted on a pole, if any, shall be enclosed in a cabinet that matches the color and finish of the pole. Above-ground cabinets not mounted on a structure, if any, shall be dark green in color.

CAUTION: External email. Please verify sender before opening attachments or clicking on links.

[Dear Clerical: Please put this in the public records, thank you]

Dear City of Davis Staff and Council Members,

Thank you for hearing us tonight. Again, we reiterate how imperative it is we take the NEPA compliance seriously. It is a way to keep the cell antennas away from the residents.

Provided in links below are strong testimonials written by a realtor whose sales are impacted when homes are in close proximity to cell towers and "small" cell antennas. Any cell towers/"small" cells MUST be disclosed before point of sale, it's the law of disclosure. I know I would never ever consider a home near any microwave radiating tower or "small" cell of any kind. Nor would I want one near my own home.

Regards,
Lena Pu

Here are the links:

HOLLY MANION
17090 El Mirador
Rancho Santa Fe, CA 92067

February 19, 2019

Board of Supervisors
San Diego County
1600 Pacific Hwy #335
San Diego, CA 92101

RE: 5G Wireless Installation and Property Values

Dear Members of the San Diego County Board of Supervisors:

I'm writing to you as a real estate broker of 40 years and a member of the North San Diego Association of Realtors regarding my deep concern for property devaluation as 5G cell towers are permitted in and around residential areas.

My experience, as well as the literature and increasing industry norms, suggest that any resident who faces a 5G – or any cell tower – near their property is going to experience devaluation of property and difficulty selling their home.

As the County goes about syncing our present Ordinance for siting "small cell" 5G towers with recently issued FCC regulations, I urge you to consider San Diego County's original cell tower ordinance which has stood the test of legislative time, having victoriously survived two appeals in the 9th Circuit Court of Appeals.

The four-tiered preferential option is less functional in the face of the new FCC regulations that include shot clocks for conditional and ministerial reviews. I would strongly urge you to include language in the new ordinance that includes **substantial setbacks from homes and residential properties.** Without these setbacks, I'm afraid the real estate market in San Diego will be diminished in terms of desirability, profitability, and there will be a taint to our industry that has long been an attribute to San Diego County.

Communities across the nation are working hard to protect their residential areas in view of these new FCC regulations. I know Susan Foster, who was originally on the cell tower siting ordinance committee in 2002 charged with creating the existing ordinance that has stood the test of legal challenge, has provided San Diego County planners with more than a dozen municipal zoning plans. Numerous cities inside California and across the country are working extremely hard to protect their residential areas from the encroachment of cell towers.

In my professional opinion we will lose real estate business if families cannot find what they consider to be safe homes and safe real estate investments in the San Diego area and likewise, if they find that these homes are difficult to sell with cell towers in front of them.

Below I will be citing several surveys done in this country and abroad that show concern dating back to 2003 with respect to cell towers and residences. Again, in my professional opinion, that concern has only grown. The perception of 5G is one of deep concern because of the failure to test this new technology and the fact the millimeter wave is also used in full body scanners that pregnant women are allowed to opt out of at airports. We have to exercise great caution to protect the real estate industry here in San Diego and *I would urge you all to be as generous as you possibly can be when it comes to residential setbacks from cell towers of all kinds.*

An EMF real estate survey conducted by the National Institute for Science, Law and Public Policy initiated in June 2014 was completed by 1000 respondents. The answer, published in "Neighborhood Cell Towers & Antennas—-Do They Impact a Property's Desirability?", was an overwhelming **yes**. The majority of respondents **(94%) reported that the cell towers and antennas in a neighborhood or on a building would negatively impact their interest in a property and the price they would be willing to pay**. 79% said under no circumstance would they purchase or rent a property within a few blocks of a cell tower or antenna. 89% said they were generally concerned about the increasing number of cell towers and antennas in their residential neighborhood. http://electromagnetichealth.org/electromagnetic-health-blog/survey-property-desirability/

A survey conducted in New Zealand in 2003 showed there were concerns 16 years ago about living next to a cell site. "The Impact of Cell Phone Towers on House Prices in Residential Neighborhoods" by Sandy Bond, PhD, and Ko-Kang Wang presents the results from both an opinion survey and a market sales analysis. The results of the sales analysis show ***prices of properties were reduced by around 21% after a cell site was built in the neighborhood***. Please note this survey was conducted prior to all the adverse media publicity that continues to grow regarding cell sites. http://electromagnetichealth.org/wp-content/uploads/2014/06/TAJSummer05p256-277.pdf

We have to exercise great caution to protect the real estate industry and residential property values in San Diego County. I would urge you all to be as generous as you possibly can be when it comes to residential setbacks from cell towers of all kinds.

Thank you very much for your time and attention to this urgent matter.

Respectfully,

Holly Manion

Holly Manion DRE 00646025
Broker Associate
Pacific Sotheby's International Realty
6024 D Paseo Delicias
Rancho Santa Fe, CA 92067

Declaration of Holly E. Manion

I, Holly E. Manion, declare as follows:

1. I am a licensed real estate broker in the State of California, and I have lived in Rancho Santa Fe my entire life. My license number is DRE 00646025. I have been a real estate professional full time for 40 years, and I founded Rancho Santa Fe Realty located in Rancho Santa Fe, California. My firm is now part of Pacific Sotheby's International Realty.

2. I represent buyers and sellers in North San Diego County. I have had numerous experiences with clients who when informed that wireless cell sites are located on or near properties in which they were interested initially, have refused to pursue transactions because of these wireless facilities. Currently, I represent sellers who have placed their home in Rancho Santa Fe on the market. It is a 4 bedroom, 3 bathroom house designed by a master architect in San Diego with stunning views. It is located on two usable acres. My clients are asking in excess of $2 million for the property. A utility pole to which three wireless antennas are attached is located on the County right of way close to the front garden. Three potential buyers came to tour the property, but would not even walk in the door because they were so concerned about the close proximity of the wireless cell site and its potential health risks. There is one prospective buyer who loves the property as it is perfect for her family of four. Her mother, however, will not lend her daughter the necessary down payment to purchase the property due to her concern about the potential health hazard resulting from the wireless antenna especially for her grandchildren who would play in the front yard. The property has been on the market for more than four months, with no offers and few showings. The current market for equivalent homes in this area is strong.

3. Another example of which I am familiar involves two of the least expensive lots in Rancho Santa Fe Covenant. They are listed for less than $1 million, an exceptionally low price for the area. One of the lots is 2.9 useable acres, with lovely views. It was just reduced in price from $715,000 to $630,000. It has been on the market 325 days with no offers. I have shown this property twice this year to qualified buyers. They had no interest in making offers after they learned that there is a wireless cell site disguised as palm trees near these properties. These fake palm trees with their wireless facilities are at least 1,500 feet away in an adjacent community, Hacienda Santa Fe. Although the lots are gorgeous, neither of these two clients were interested in pursuing a purchase at any price.

4. Numerous of my clients have refused to purchase properties near a well-known sports park in Encinitas because of the wireless antennas that are mounted on athletic field light standards towering over the playing fields.

5. I am a member of the San Diego County Board of Realtors, and I use the "Local Area Disclosures for San Diego County" in all of my transactions as required by the Board. This form includes a disclosure of Electrical and Magnetic Fields and notes the

"public concern with EMFs" affecting a property's value. Attached as Exhibit A to my declaration is a true and correct copy of the current version of the "Local Area Disclosures for San Diego County." In addition, I use the "Seller Property Questionnaire" for all my transactions. The Questionnaire states "Note to Seller: Purpose: To tell the Buyer about known material or significant items affecting the value or desirability of the Property ...." It includes a disclosure for "[neighborhood noise, nuisance or other problems from sources such as, but not limited to, the following: ... cell phone towers...." Attached as Exhibit B to my declaration is a true and correct copy of the current version of the Questionnaire.

6. In my professional experience, wireless sites that generate radio frequency emissions on or near residential properties cause a diminution in the value of these properties. This is due to the fact that some likely buyers refuse to even look at them, which leads to the properties staying on the market longer than like properties that do not have cell sites in the vicinity. Over time, this inevitably leads to sellers lowering prices to ensure they can sell their properties.

7. My neighbors and I are extremely happy that Rancho Santa Fe Association is installing 60 miles of underground fiber optic cable network. The trenching for fiber optics is almost completed and we will have the system up and running this year. We believe this network is going to provide us with better quality, faster, safer, and more secure Internet connection than we currently have with the wireless systems available to us. It is my understanding that fiber optics do not emit radio frequency radiation like wireless systems. It is my professional opinion that if the communities in which I work only had fiber optics and no wireless facilities, my clients would no longer have the health and safety concerns I discussed above. I also believe I would then be able to sell their properties more quickly and at top dollar.

I declare under penalty of perjury that the foregoing is true and correct.

April 8, 2019

Holly E. Marion

Inder Khalsa, City Attorney

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One Sansome Street, Suite 2850
San Francisco, CA 94104
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MEMORANDUM

TO: Honorable Mayor & Members of City Council

FROM: Inder Khalsa, City Attorney

DATE: January 23, 2020

SUBJECT: Cease and Desist Letter re: Small Wireless Facility Policy

I. Executive Summary

On December 24, 2019, the City of Davis ("the City") received a cease and desist letter ("the Letter") demanding that the City stop enforcing its city-wide policy governing small wireless facilities ("small cells"). The Letter based its demand on a recent court case, *United Keetoowah Band of Cherokee Indians v. FCC* ("*United Keetoowah*"). That case struck down an order issued by the Federal Communications Commission ("FCC") that excused small cells from certain types of review, including federal environmental review under the National Environmental Policy Act ("NEPA").[1]

The Letter claimed that the decision in *United Keetoowah* prohibits the City from approving permit applications for small cell development,[2] until the FCC issues a revised order containing new rules for NEPA review. However, this argument is based on an misunderstanding of the case and federal law.

This memorandum explains why *United Keetoowah* does not affect the City's small cell policy. **First**, *United Keetoowah* was decided by the D.C. Circuit Court of Appeals. Therefore, the decision does not apply in California, which is overseen by the Ninth Circuit Court of Appeals. **Second**, *United Keetoowah* affects small cell projects that are subject to federal environmental review under NEPA. NEPA is a federal law that only applies to significant actions that are either taken by the federal government or funded with federal money. City rights-of-way are not subject to NEPA. Furthermore, in the absence of a federal agency, the City cannot impose NEPA requirements on private entities like cellular providers. **Third**, *United Keetoowah* does not affect the separate FCC order that restricts the City's ability to impose small cell regulations

[1] *United Keetoowah Band of Cherokee Indians v. FCC* (D.C. Cir. 2019) 933 F.3d 728.

[2] Pursuant to the "City Wide Policy Regarding Permitting Requirements and Development Standards for Small Wireless Facilities."

and delay small cell projects. The City's small cell policy was developed to comply with this separate order, which remains in full force and effect after *United Keetoowah*.

The memorandum concludes that, because *United Keetoowah* does not affect the City's ability to regulate small cells, the City must continue issuing licenses to small cell providers pursuant to federal law regardless of the claims made in the Letter.

II. Background

The FCC is the federal agency charged with regulating cellular wireless services across the country. For over two decades, the FCC has been working to make it easier for cellular service providers to install and upgrade their service facilities. Recently, the FCC has issued two separate orders that allow cellular service providers to set up small cells more quickly. These orders have the full force and effect of law.[3]

In March 2018, the FCC issued an order that excused small cells from certain types of federal review, including environmental review under NEPA ("the Second Order").[4] Typically, NEPA requires that "major federal actions significantly affecting the quality of the human environment" must be reviewed to determine what kind of environmental impact they will have.[5] In the Second Order, the FCC determined that small cells pose little to no environmental risk. As a result, the Second Order held that any federal actions regarding small cells would not require NEPA review.

A group of Native American tribes sued the FCC to invalidate the Second Order. Among other things, the tribes argued that the Second Order minimized the environmental risks associated with small cells, and that the FCC should reevaluate whether NEPA review was required for small cell projects. This lawsuit was eventually resolved by the *United Keetoowah* decision. In *United Keetoowah*, the D.C. Circuit Court of Appeals agreed with the tribes, ruling that the FCC had not fully studied the potential environmental consequences of small cells before issuing the Second Order. The court struck down the Second Order and instructed the FCC to reconsider whether NEPA review was required for small cell projects.

In September 2018, the FCC issued a separate order restricting a state or local government's ability to regulate small cells ("the Third Order").[6] Unlike the Second Order, which only affects *federal* actions regarding small cells, the Third Order specifically targets local government actions. It limits the types of fees and aesthetic regulations that a city can impose on small cells, and restricts a city's ability to delay small cell projects. It is this order that prompted the

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[3] *See, e.g., Wilson v. A.H. Belo Corp.* (9th Cir. 1996) 87 F.3d 393, 397-398.

[4] *In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment (Second Report & Order)*, FCC 18-30, 2018 WL 1559856 (F.C.C.) (Mar. 30, 2018).

[5] 42 U.S.C. § 4332(C).

[6] *In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment (Third Report & Order)*, FCC 18-133, 2018 WL 4678555 (F.C.C.) (Sept. 27, 2018).

creation of the City's proposed small cell policy. The *United Keetoowah* decision did not change anything about the Third Order, which, as of the date of this memo, is still in full effect. As described in the staff report associated with the proposed wireless telecommunications ordinance and small cell policy, the Third Order has been challenged by a number of municipalities, and that case is currently on appeal before the Ninth Circuit.[7] The City Attorney's office is watching that case with interest, as the Ninth Circuit's decision could directly impact the City's regulatory authority over small cell facilities.

III. Analysis

United Keetoowah does not affect the City's ability to enforce its small cell policy. **First**, because the *United Keetoowah* decision was decided by the D.C. Circuit Court of Appeals, it does not apply in California. **Second**, *United Keetoowah* only affects small cell projects that are subject to federal environmental review under NEPA, which do not include the local small cell projects developed under the City's existing and proposed small cell policy. **Third**, *United Keetoowah* does not affect the Third Order, which governs local small cell regulations such as the City's small cell policy. These reasons are discussed in greater detail below.

A. A Decision Issued by the D.C. Circuit Does Not Apply in California.

Because of the way that the federal court system is organized, not every decision issued by a federal court of appeal applies in every state. Only decisions made by the highest court in the United States, the Supreme Court, apply throughout the country. Decisions made by any of the lower Circuit Courts of Appeals only apply within the states or territories that they oversee.[8]

United Keetoowah was decided by the D.C. Circuit Court of Appeals, which oversees cases for Washington, D.C., and the federal agencies that are located there—including the FCC. Decisions made by the D.C. Circuit Court of Appeals do not apply in California, which is part of the Ninth Circuit Court of Appeals.[9] Therefore, the decision in *United Keetoowah* applies to federal agencies, including the FCC itself, but not to the City and other entities in California.

B. *United Keetoowah* Only Affects Small Cells that Are Subject to NEPA Review.

The Letter selectively quotes language from *United Keetoowah* to imply that the ruling applies broadly to require environmental review of all small cell projects. This is simply untrue.

The *United Keetoowah* decision only affects small cell projects that are subject to NEPA review. NEPA applies only to "major federal actions," which are significant actions that are either

[7] These cases have been consolidated as *City of San Jose v. FCC.* Briefing is scheduled to be conclude this month; as far as we know, a date for oral argument has not been set as of the writing of this memorandum.

[8] *Hart v. Massanari* (9th Cir. 2001) 266 F.3d 1155, 1172-1173 ["[A]n opinion of our court is binding within our circuit, not elsewhere in the country. The courts of appeals, and even the lower courts of other circuits, may decline to follow the rule we announce—and often do."].

[9] 28 U.S.C. § 41.

undertaken, funded, or otherwise assisted by the federal government.[10] When the City approves a small cell project per its small cell policy, it is a local government action that is not funded or significantly assisted by the federal government; therefore, the City is not subject to NEPA review and its small cell policy is not affected by *United Keetoowah*.

The City, like other local agencies in California, is subject to the California Environmental Quality Act ("CEQA").[11] The City can require that small cell facilities that are approved within the City comply with CEQA, although it is important to note that the Telecommunications Act of 1996 specifically prohibits the City from regulating wireless telecommunications facilities "on the basis of the environmental effects of radio frequency emissions" if the facilities comply with FCC standards regarding radio frequency (RF) emissions.[12] Furthermore, many small cell facilities are exempt from CEQA pursuant to CEQA Guidelines Section 15301, which exempts "minor modifications to existing facilities." Still, the City can require mitigation of impacts to aesthetics, habitat, air quality, and other environmental impacts that are not specific to RF emissions.

The Letter tries to blur the distinction between federal and local government action, claiming that every small cell project approved by the City qualifies as a "major federal action" because the FCC grants cellular service providers the licenses that they need to operate those small cells. The Letter is probably correct that the FCC's grant of such a license is a major federal action that triggers NEPA review, at least when the FCC expects that the license holder(s) will construct a new small cell project.[13] As noted above, as a federal agency, the FCC is subject to NEPA as well as bound by the *United Keetowah* decision.

However, the duty to conduct NEPA review attaches to the FCC's grant of the license, not the City's approval of the small cell project. The implementation of NEPA ***requires*** the involvement of a federal agency, either as a funding source or an approving entity. While the City of Davis participates in the NEPA process where, for example, federal funds are involved in a local affordable housing project, it does not have the authority to require NEPA compliance.[14] NEPA cannot be imposed without the participation of at least one federal agency.[15] In other words, in the absence of a federal agency or the presence of federal land, the City could not impose NEPA requirements on telecommunications providers even if it wanted to. The City can and does require all local projects to comply with CEQA, but is expressly preempted from regulating the environmental impacts of RF emissions for facilities that demonstrate compliance with the FCC's RF emission standards.

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10 40 C.F.R. § 1508.18(a); *Rattlesnake Coalition v. EPA* (9th Cir. 2007) 509 F.3d 1095, 1101.
11 Pub. Res. Code §§ 21000 *et seq.*; 14 CCR § 15000, *et seq.*
12 42 USC § 332(c)(7)(B)(iv).
13 *United Keetoowah*, *supra*, 933 F.3d at 735-736.
14 42 U.S.C. §4332(D).
15 *See e.g.*, 40 CFR § 1501.5(b)

C. *United Keetoowah* Does Not Affect the Third Order, Which Controls Local Regulations of Small Cells.

Finally, the Letter insists that the City cannot enforce its small cell policy until the FCC revises and reissues the Second Order in compliance with *United Keetoowah*.

This argument confuses the two separate FCC orders concerning small cells. As discussed in Section B above, the Second Order dealt with environmental review requirements for major federal actions. It is the Third Order that contains the FCC's regulations governing local regulations of small cells, including the City's small cell policy. The *United Keetoowah* decision has no effect whatsoever on the Third Order.[16] Therefore, the Third Order remains in effect, imposing constraints on the City's ability to charge fees for small cell projects, regulate the aesthetics of small cells, and delay its evaluation small cell proposals.

The City is not alone in receiving demands to abandon its small cell policy. As far as we are aware, however, no court has upheld such a challenge. For example, in October 2019, a group of citizens sued the City of Simi Valley ("Simi Valley") to invalidate its small cell ordinance. The challengers argued that the FCC's orders were not enforceable law, and that Simi Valley should be barred from creating its own laws that complied with the Third Order. The court broadly dismissed the lawsuit on January 14, 2020.

Unless a court with jurisdiction over Davis (such as the 9th Circuit) strikes down or partially invalidates the Third Order, the City must continue enforcing its small cell policy to remain compliant with federal law and avoid a costly (and likely unsuccessful) legal challenge from telecommunications providers.[17] Especially given that the Third Order has already been challenged by a number of municipalities nationwide and those cases have been consolidated in the Ninth Circuit, it would not be an efficient use of City resources to litigate this issue prior to the Ninth Circuit's decision in that case. Unlike the D.C. Circuit, Ninth Circuit decisions are binding precedent and carry the force of law in California. If the Ninth Circuit strikes down all or part of the Third Order, the City can revise its wireless telecommunications ordinance and policy to reflect that guidance.

IV. Conclusion

Contrary to the cease and desist demands made in the Letter, the decision in *United Keetoowah* does not affect the City's obligation to comply with the Third Order and issue licenses to allow small cell facilities subject to the aesthetic and safety regulations in the existing and proposed policy. The City's action to approve a wireless telecommunications ordinance or small cell policy, as well as its approval of individual facilities, are not subject to NEPA, nor could the City

[16] *United States v. Pepe* (9th Cir. 2018) 895 F.3d 679, 688 ["[C]ases are not precedential for propositions not considered."].

[17] A lawsuit challenging the validity of the Third Order is currently pending review with the Ninth Circuit Court of Appeals.

require NEPA compliance in the absence of federal agency involvement. The City can require CEQA compliance under state law, however, it cannot regulate the environmental impacts of RF emissions, which is the primary concern raised by the public.

As described above, federal law has expressly preempted local regulation of small cell facilities, and the City is significantly constrained in the types of regulations it can impose on such facilities. The Third Order carries the force and effect of federal law and is binding on the City unless it is overturned by a court with jurisdiction over Davis. This is a possible outcome of the current challenge in the Ninth Circuit, and we will likely have a Ninth Circuit decision regarding that challenge within the year. In the absence of such a decision, however, following the urging of the Letter to stop issuing small cell licenses to local telecommunications providers would almost certainly result in a successful challenge brought against the City of Davis by telecommunications providers, at significant expense to the City and its taxpayers. Such a challenge would likely involve monetary damages as well as an injunction mandating the City to approve wireless telecommunications facilities consistent with federal law.

Unfortunately, this is not an area where the City has the discretion to set policy that reflects the desires of the community. Under the "Supremacy Clause"[18] of the United States Constitution and the basic principles of federalism which underpin the United States government, states and local governments do not have the authority to act in a manner that is contrary to federal law, including FCC orders, even where they strongly disagree with the federal mandate in question. The City of Davis has participated in several challenges to the FCC in the past and its interests have been represented in the current Ninth Circuit case regarding the Third Order in the amicus brief filed by the League of California Cities, but unless that case results in a ruling that is favorable to municipalities, the City of Davis is still required to comply with the Third Order.

Ultimately, residents who are unhappy with the requirements of the Third Order, other FCC orders, or the Telecommunications Act of 1996 are encouraged to share their concerns with their congressperson and to support the organizations that are lobbying for their interests at the federal level. Absent a change in federal law, the City will continue to be very limited in its ability to regulate wireless telecommunications facilities.

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[18] U.S. Const. art VI.