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November 13, 2020

**VIA EMAIL** **(rithy.khut@multco.us)**
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Daniel Kearns, Hearings Officer
c/o Rithy Khut, Planner
Multnomah County Land Use Planning Division
1600 SE 190th Avenue
Portland, Oregon 97233

Re: Applicant: Blackrock LLC/Verizon Wireless
Application Casefile T2-2019-12701
Final Written Argument

Dear Mr. Kearns:

As you know, this firm represents the applicant for the above-reference Application, Blackrock LLC/Verizon Wireless ("Verizon"). Verizon is submitting this final written argument pursuant to the post-hearing procedures you established at the October 16, 2020 public hearing. This final written argument is based on the evidence that has already been submitted into the record and contains no new evidence. For the reasons provided in this final written argument and the record, Verizon requests that you reject the appeal and approve the Application subject to the conditions of approval set forth in the Planning Director's Administrative Decision, dated August 20, 2020 (the "Planning Director's Decision").

**A. The Application complies with the applicable approval criteria.**

The Application must be reviewed based on the standards and criteria set forth in the Multnomah County Code ("MCC"). ORS 227.173(1). The purpose for requiring that the standards and criteria be set forth in the code is to ensure that both the applicant and the public understand the standards upon which a development proposal will be judged. *State ex rel. West Main Townhomes, LLC v. City of Medford*, 233 Or App 41, 225 P3d 56 (2009).

The property is zoned Multiple Use Agricultural ("MUA-20") and does not contain any environmental overlays, geologic hazards overlays, or areas of Special Flood Hazard. The property is densely wooded and contains many tall, mature trees that are approximately 114 feet

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in height. A wireless communication facility ("WCF") that employs concealment technology is allowed as a Review Use under MCC 39.4315(F).

The proposed WCF employs concealment technology and therefore is allowed as a Review Use. Verizon initially proposed a monopole WCF for this property, but Verizon withdrew that request and proposed a monopine tower concealed to mimic a pine tree in order to minimize the visual impacts on the surrounding area. The proposed monopine is an ideal concealment design for this property given the dense and tall trees located on the property and in the immediate area around the WCF site.

The WCF is the minimum height necessary to achieve the coverage/capacity objectives for this site. The minimum antenna height necessary to achieve the coverage/capacity objectives is 150 feet, but the WCF requires an additional 6 feet (total 156 feet) in order to accommodate the branching at the top of the monopine to make it look like an actual tree and the FAA required lighting.

As detailed in the Application and the Planning Director's Decision, the proposal meets or exceeds the applicable approval criteria. The Planning Director's Decision provides a detailed analysis of the approval criteria and responds to all of the issues raised by neighbors in the area. These are many of the same issues that have been raised in the appeal. Verizon agrees with the Planning Director's Decision and suggests that the Hearings Officer rely on these findings as part of the appeal decision.

**B. Response to the appeal.**

There are multiple reasons to reject the appeal and affirm the Planning Director's Decision. The appellants violated the mandatory notice of appeal requirements and should be denied on that basis. The appellants violated procedural requirements in a way that prejudiced Verizon's substantial rights. The appeal focuses primarily on issues that are not relevant to the applicable approval standards and criteria. To the extent the appellants address the relevant standards and criteria, they failed to submit substantial evidence demonstrating that the Planning Director erred in concluding that the Application complies. Verizon addressed each of the appeal issues below and explained why the Application complies with the applicable approval criteria based on the substantial evidence in the record.

**1. The appeal should be denied because the appellants failed to comply with the mandatory notice of appeal requirements in MC 39.1160(A)(3)(d).**

MC 39.1160(A)(3) provides the mandatory requirements for the notice of appeal – "The following must be included as part of the Notice of Appeal." (Emphasis added). MC 39.1160(A)(3)(d) requires a "statement of the specific grounds for the appeal." This notice of appeal requirement is important because it ensures that the applicant and other parties know what part of the decision is being challenged and can be prepared to defend their position at the public hearing.

The appellants notice of appeal did not list any grounds for appeal. Exhibit H.1. The notice of appeal refers to the cover letter and states: "Additional written testimony - findings of fact & conclusions of law & supporting evidence will be submitted appropriately before the public

hearing to the Hearings Officer with a copy to the original applicant or their attorney." Exhibit H.1, p.2. (Emphasis added). Appellants' cover letter lists all of the approval criteria and states: "Please note that we will be submitting additional written testimony including findings of fact & conclusions of law and supporting evidence within a reasonable time before the public hearing to the Hearings Officer with a copy to the original applicant or their attorney." Exhibit H.1, p.4. (Emphasis added). Merely listing the approval criteria without any explanation as to the specific grounds for appeal does not comply with MC 39.1160(A)(3)(d).

Although the appellants stated they would provide their specific grounds for appeal a reasonable time prior to the hearing, they did not submit anything until minutes before the October 16 hearing started. The appellants did not submit the bulk of their written material until after the hearing. Since the appellants filed the notice of intent to appeal on September 3, 2020, a month and one-half prior to the hearing, the last-minute submission of the specific grounds for appeal appears to be deliberate.

MC 39.1160(A)(3) is a substantive requirement and the appellants failure to comply with it is grounds for denying the appeal. *Lang v. Ashland*, 64 Or LUBA 250, 255 (2011). Even if MC 39.1160(A)(3) is merely a procedural requirement, the appellants failure to comply prejudiced Verizon's substantial rights and warrants a denial. Verizon could not adequately prepare for the hearing because it had no idea what grounds for appeal the appellants intended to raise. The appellants decision to submit the bulk of their written material after the hearing exacerbated the problem. Although Verizon had an opportunity to respond to the appellants written material after the hearing, the post-hearing process does not provide Verizon the same procedural opportunities to defend their case. Since the Hearings Officer did not know the grounds for appeal or have an opportunity to review the appellants written material until after the hearing, Verizon does not have an opportunity to respond to questions or issues the Hearings Officer may have based on your review of the appellants material.

The notice of appeal should be denied for failing to comply with the filing requirements in MC 39.1160(A)(3)(d) and exacerbating the error by deliberately waiting until the last minute to comply. Even if you deny the appeal on these grounds, Verizon requests that you also address the substantive merits of the appeal in the alternative in the event the appellants elect to appeal your decision.

**2. The appellants' rebuttal evidence should be rejected because the appellants failed to comply with the post-hearing procedures in a way that prejudiced Verizon's substantial rights.**

As you explained at the October 16th hearing and as provided in ORS 197.763(6)(c), all parties were required to submit new evidence in the first round of post-hearing submissions. You specifically discouraged parties from submitting rebuttal evidence in the second round, but you indicated that parties could do so only if they requested your permission prior to submission and the rebuttal evidence was responsive to new evidence submitted in the first round. These procedures comply with the requirements in ORS 197.763(6)(c).

The appellants failed to comply with these procedural requirements. The appellants waited until the second round of post-hearing submissions to submit any material and they submitted new

evidence and raised new issues that were not responsive to Verizon's supplemental evidence submissions. Exhibit J.1. Verizon's substantial rights have been prejudiced because it has been deprived of any opportunity to respond to the appellants' new evidence which should have been submitted during the first round. The appellants failure to comply with these procedures is particularly troubling because it is the same type of sand-bagging approach they adopted with respect to the notice of appeal and hearing submissions.

The appellants' rebuttal evidence (Exhibits J.2 through J.10) should be rejected because the appellants failed to comply with the post-hearing procedures in a way that prejudiced Verizon's substantial rights.

**3. Although the applicable approval criteria do not require Verizon to demonstrate a need for the WCF, Verizon demonstrated a need for the WCF based on substantial evidence.**

The appellants' claim that Verizon does not need the WCF because some of the appellants feel they have adequate coverage at their properties is erroneous. Although Verizon is not required to demonstrate that there is a need for the WCF under MCC 39.7740 or any of the other approval criteria, Verizon provided substantial evidence that there is a significant gap in coverage and capacity in this area of the County and Troutdale.

Verizon submitted substantial evidence demonstrating that there is a significant gap in coverage and capacity that the WCF will rectify. As part of the Application, Verizon submitted a Search Ring Map, two reports on the Radio Frequency ("RF") Usage and Facility Justification, and a RF Engineering Review which demonstrate that there is a significant gap in coverage and capacity for persons inside buildings and cars as reflected in the propagation maps. Exhibits A.13, A.14, A.21 & A.41. Verizon is entitled to a considerable amount of deference in defining the coverage and capacity objectives for its facility and determining how to address those coverage and capacity objectives. *Sprint PCS c. Washington County*, 42 Or LUBA 512 (2002), *aff'd in part and modified in part*, 186 Or App 470 (2003). Testimony that there is a need for a WCF from multiple RF experts clearly constitutes substantial evidence. The Planning Director agreed that Verizon demonstrated there is a need for a WCF based on this substantial evidence. Planning Director's Decision, p.11-12.

The appellants challenge to this conclusion has two flaws. First, there is no approval criterion that requires Verizon to demonstrate there is a need for the WCF. There is nothing in MC 39.7740 that requires it and the appellants failed to cite to any such provision. Nor does such a requirement make sense. Why would Verizon or any other wireless carrier spend such a large amount of time, resources and money siting a WCF that is unnecessary?

Second, the appellants failed to submit substantial evidence to support their claim. Anecdotal evidence from individual residents that their coverage is acceptable is insufficient to overcome the significant expert evidence submitted by Verizon. Jeff Cully, the Verizon RF representative who prepared the RF Usage and Facility Justifications, explained that the mere fact that some individual residents have good signals does not mean that the propagation maps are inaccurate or that there is no need for a WCF in this area. Some variations between the propagation maps and

actual individual experiences are to be expected and do not mean that the maps are wrong. Exhibit I.2.

The appellants reliance on Dr. Fulks submissions have several problems. As explained in more detail in Section B.5 below, Dr. Fulks is not an RF engineer or specialist, he does not have access to all of the proprietary modules and information that went into creating the propagation maps and therefore his conclusions are based on incomplete information. Exhibit I.2. More importantly, Dr. Fulks agreed that there are coverage and capacity issues in this area that warrant the need for a WCF and is merely quibbling about the scope of the coverage issues:

> "As to Verizon's general claims of spotty coverage in certain areas and sometimes overloaded existing nodes, I have no reason to doubt that. I presume they are telling the truth and relying on actual reports, not simulations. They do not want to spend a great deal of money to install another node, if there is no need." Exhibit H.14, p.3.

**4. Verizon demonstrated there are no co-location options available to address the coverage/capacity objectives for this site based on substantial evidence. Verizon is not required to consider alternative sites that would require a new tower.**

The appellants' claim that Verizon did not adequately consider alternatives to the proposed site has two flaws. First, Verizon submitted substantial evidence from two RF experts demonstrating that there are no co-location options available to address the coverage objectives, supported those conclusions with data and Dr. Fulks agreed with this analysis. Second, the appellants mistakenly assume that Verizon is required to consider alternative sites that would require a new tower. The approval criteria require Verizon to only consider co-location options on existing towers or structures and do not require the consideration of alternative sites that would require a new tower.

MCC 39.7740(B)(1) sets forth the applicable criteria. MCC 39.7740(B)(1) provides: "The ranking of siting preferences is as follows: first, co-location upon an existing tower or existing structure; second, use of concealment technology; and third, a vegetatively, topographically, or structurally screened monopole." Since the proposed WCF is a monopine tower that uses concealment technology, Verizon is only required to consider co-location options on existing towers or structures.

Verizon demonstrated that it is not feasible to co-locate on an existing tower or structure. Verizon conducted a search for co-location sites within the Columbia River Gorge National Scenic Area (CRGNSA), East of the Sandy River rural area, and City of Troutdale. The initial search found an existing tower at Mt. Hood Community College and a tower at Cherry Park Presbyterian Church. Exhibit A.13 & A.14. Neither of those options are feasible because the towers are too short and they will not provide coverage in the areas intended to be covered by this site. Exhibit A.14. This RF analysis was reviewed and supported by a RF Engineering Review completed by David J. Pinion, a registered Professional Engineer who is a radio engineer and RF specialist with over 35 years of experience. Exhibit A.21, p.3-4. Mr. Pinion also noted

that these two towers are too close to existing Verizon WCFs and therefore would cause interference and duplicate the coverage areas. Exhibit A.21, p.3.

In response to public comments that identified additional water tank sites, Verizon evaluated these water tank sites and provided an updated RF Usage and Facility Justification. Exhibit A.41. The updated RF Usage and Facility Justification considered the water tanks on Cabbage Hill, the Mershon Road Reservoir, the Loudon Road Reservoir, and the Larch Mountain Reservoir. The updated RF Usage and Facility Justification demonstrated that none of these co-location sites are feasible because they are too short, have a poor line of site due to topography and will not provide the necessary coverage to meet the objectives for this site. Exhibit A.41.

Dr. Fulks agreed that most of these co-location options will not provide the necessary coverage to meet the objectives for this site. Dr. Fulks explained:

> "I understand and agree that alternative existing towers in Troutdale may be too close to existing Verizon nodes to be usable. They do not want one node interfering with another. And I agree that the Corbett Water District tanks (such as the Mershon tank) far to the east are not viable alternatives for meeting Verizon's objectives." Exhibit H.14, p.6.

Dr. Fulks disputed Verizon's claim that the Cabbage Hill water tank would not work, but he is assuming that Verizon can make it work if it constructed a tower on the water tank: "The Cabbage Hill site would clearly need a short tower to function." Exhibit H.14, p.7. Mr. Culley clarified that the "short tower" would need to be 60 feet tall: "Based on the height of the water tank, I evaluated this option and determined that a tower of approximately 60 feet would need to be added to the top of the water tank in order to raise the antennas towards the top of the surrounding trees." Exhibit I.2, p.2. For purposes of MCC 39.7740(B)(1), the requirement to consider co-location on an existing tower or structure does not include a site that requires a 60-foot tower to be constructed on top of a water tank.

The appellants' assertion that Verizon should be required to locate the WCF on a different site that will not impact them as significantly, such as the Riverview site identified by Dr. Fulks, is inconsistent with MCC 39.7740(B)(1) and the other approval criteria. Verizon is not required to consider alternative sites that would require a new tower. The monopine WCF is allowed as a Review Use in the MUA-20 zone and Verizon was only required to consider co-location options, not different sites that would also require a new tower. MCC 39.4315(F). Although it is not necessary for Verizon to demonstrate that the proposed site is a superior site, it is an ideal site for a monopine tower that employs concealment technology given that the property is densely wooded and contains many tall, mature trees that are approximately 114 feet in height.

**5. Verizon's RF analyses and propagation maps are accurate and reliable.**

Dr. Fulks' claim that Verizon's RF analyses and propagation maps are inaccurate and unreliable has multiple flaws. First, Dr. Fulks failed to establish himself as a RF expert. Dr. Fulks may be a physicist with multiple degrees, but he is not an RF engineer or specialist. Mr. Culley has done network design work for Verizon for 20 years and Mr. Pinion is a registered RF engineer who

reviewed the RF Usage and Facility Justification material and concurred with its conclusion.[1] With all due respect to Dr. Fulks, the professional opinions of a 20-year RF network design representative and a registered RF engineer are more credible than a physicist who lives in the area and has a personal interest in the outcome of this case.

Second, Dr. Fulks does not have access to all of the proprietary modules and information that went into creating the propagation maps. Exhibit I.2. Therefore, his conclusions are based on incomplete information. An example of the problem with relying on Dr. Fulks analysis is his is erroneous claim that Verizon solely relies on computer simulations and does not do verify these assumptions with on the ground drive tests. Mr. Culley corrected Dr. Fulks on that assumption:

> "The propagation maps use specific data based on transmitters and terrain in the calculations but there are some variables that make assumptions like how much loss there is from buildings, or a clump of trees. These assumptions are validated by comparing the clutter models to actual drive data during the creation of our clutter models." Exhibit A.41, p.1.

Third, Dr. Fulks did not dispute Mr. Culley's statement that the methodology and propagation maps provided for this site are standard industry propagation maps that are used by Verizon and other wireless carriers for siting new wireless facilities. Mr. Culley explained that these propagation maps are industry standard, credible and reliable tools that Verizon has been using for many years to determine where there are coverage deficiencies in areas and to identify sites for new wireless communication facilities. Exhibit I.2, p.1. If Dr. Fulks position was adopted by the County, all wireless carriers would be required to create a new system for determining coverage deficiencies and identifying new sites and enlist Dr. Fulks services to review their reports. Such an approach is clearly not required or viable. The multiple RF Usage and Facility Justification reports and the RF Engineering Review clearly meet the application submittal requirements under MCC 39.7735(B)(4) and are credible and reliable.

The appellants also submitted an FCC staff report regarding the FCC mobility fund phase II coverage map investigation. Exhibit H.13. The appellants do not explain the relevancy of this document, but presumably they submitted it to support their theory that Verizon's RF propagation maps underestimate the actual coverage. This document is not relevant to the credibility or reliability of Verizon's RF propagation maps used in this case for multiple reasons. The broader coverage maps addressed in this report were submitted to the FCC for purposes of the FCC's evaluation of "subscription and connection data for broadband and telephone service" and are different from site specific propagation maps used to locate the need for an individual

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[1] For the first time in this proceeding, Dr. Fulks' rebuttal comments questioned Mr. Culley's education and falsely claimed that Mr. Pinion is no longer a registered or licensed engineer. Exhibit J.2, p.2-3. These rebuttal comments could have and should have been raised prior to the rebuttal submittal since Dr. Fulks knew Mr. Culley prepared the RF Usage and Facility Justification material and Mr. Pinion submitted the RF Engineering Review. Exhibits A.14 & A.21. By waiting until the rebuttal comments to make these assertions, the appellants deprived Verizon of the opportunity to submit rebuttal evidence correcting the record and demonstrating that these claims are false. This is just one example of the prejudice the appellants caused to Verizon by waiting until the rebuttal comments to raise new issues.

WCF. Exhibit H.13, p.8 & 13. The report supports the opposite of the appellants' claim – it concluded that the coverage maps overstated the actual coverage. Exhibit H.13, p.7. Finally, the appellants' claim that the County should disregard Verizon's propagation maps altogether based purely on this FCC staff report would make it impossible for any carrier to satisfy the County requirements for WCFs. There is no basis for ignoring site-specific expert testimony based solely on a FCC staff report that addresses a different type of coverage map used for a different purpose.

**6. The WCF complies with the Dark Sky Lighting requirements.**

The appellants incorrectly claim that the proposed WCF does not comply with the Dark Sky Lighting requirements because it includes Federal Aviation Administration ("FAA") and Oregon Department of Aviation ("ODA") required lighting. The Dark Sky Lighting requirements are set forth in MCC 39.6850(C), which requires that the lighting be fully shielded and be contained within the boundaries of the Lot of Record. MCC 39.6850(B), however, includes a list of 14 exemptions from these requirements. MCC 39.6850(B)(9) exempts "Lighting required by a federal, state, or local law or rule, when such lighting cannot comply with both the law or rule and the standards in paragraph (C) of this section."

The lighting on the proposed WCF is exempt from the Dark Sky Lighting requirements under MCC 39.6850(B)(9) because both the FAA and ODA are requiring lighting on the WCF for air safety. Exhibits A.27 - A.30. This FAA and ODA mandated lighting is clearly required by a federal and state law which cannot comply with both the law and MCC 39.6850(C) since fully shielding the lights and preventing them from going beyond the property boundaries would defeat the whole purpose for requiring the lights in the first place (alert aircraft about the presence of the WCF). While the appellants cite the purpose of the Dark Sky Lighting requirements and potential impacts as a basis for denying the Application due to this lighting, there is no doubt that the WCF lighting is exempt under MCC 39.6850(B)(9).

The appellants argue that Verizon should be required to use an ADLS lighting system in lieu of the FAA and ODS required lighting system because they believe it will be less intrusive, but there are multiple problems with this claim. The FAA and ODS designated the specific type of lighting system required for this WCF. Exhibits A.27 - A.30. Even if the USFW would prefer no lighting or ADLS lighting, the FAA and ODA have regulatory authority over aircraft safety lighting requirements not the USFW. The appellants did not demonstrate that the FAA or ODS will approve the ADLS lighting system for this particular WCF. ADLS lighting is typically used for multi-tower systems like wind farms or catenary wires that go across a river, and it requires use of a white light during both the day and at night. Exhibit I.1, p.2. Verizon attempted to determine if the FAA would allow the use of this type of lighting system for a monopine tower like the proposed WCF, but it was unable to do so in the limited time allowed by the post-hearing process. Exhibit I.1, p.2. The appellants' failure to raise this issue until the October 16 hearing made it extremely difficult for Verizon to fully vet this FAA lighting issue and it would prejudice Verizon to deny or condition the Application due to the appellants failure to timely raise this issue. Finally, the ADLS lighting system does not comply with MCC 39.6850(C) so there is no basis to impose this lighting requirement. MCC 39.6850(B)(9) exempts lighting required by federal or state law period - it does not require an applicant to convince the federal and state agencies to approve the least intrusive lighting system.

The appellants also note that the WCF proposes additional exterior lighting beyond that required by the FAA and ODS, which they claim is not allowed. The WCF includes the following exterior lighting in addition to the FAA/ODS required lighting: "one pole mounted maintenance light on the ground equipment (inside fenced compound and reflected downward) is proposed as shown on site plans – sheet A 1.1. This is required to comply with cell site safety standards for personnel who may need to access the facility during nighttime emergency situations." Exhibit A.4, p.19. This exterior lighting is necessary to comply with federal and state cell site safety standards and complies with the requirements in MCC 39.6850(C) because it is inside the fenced equipment area and reflects downward to illuminate the equipment cabinet area only. The Planning Director imposed a condition of approval to ensure compliance with the Dark Sky Lighting requirements. Planning Director's Decision, p.5, Condition 6.h. To the extent the Hearings Officer does not agree that this maintenance light as conditioned complies with the applicable requirements, the Hearings Officer can impose a condition of approval requiring that this exterior light be removed and Verizon will consider portable or interior lighting options.

**7. The WCF complies with the applicable SEC, environmental and natural resources requirements.**

MCC 39.7740(A)(4) sets forth the approval criteria appliable to Environmental Resource Protection. MCC 39.7740(A)(4)(a)-(c) require an applicant to comply with Significant Environmental Concern, ground disturbing activities and Flood Hazard regulations "when applicable." MCC 39.7740(A)(4)(d) requires alteration or disturbance of native vegetation and topography to "be minimized."

There is substantial evidence in the record that the WCF either does not trigger these requirements or complies with them. It is undisputed that the proposed development area is not located within designated Significant Environmental Concern overlay or an area subject to Flood Hazard regulations, and therefore MCC 39.7740(A)(4)(a) and (c) are not applicable. Planning Director's Decision, p.44. Verizon applied for a permit to authorize ground disturbing activities under the applicable regulations and the Planning Director's Decision includes a condition of approval requiring an Erosion and Sediment Control permit be obtained to demonstrate compliance with ground disturbing activities regulations, which complies with MCC 39.7740(A)(4)(b). Planning Director's Decision, p.3 & 44. Verizon's Erosion, Sediment and Pollution Control Plan and the Landscaping Plan demonstrate that the alteration of topography will be minimized and only nine trees will be removed, which complies with MCC 39.7740(A)(4)(b). Exhibit A.15 – Site Plan: Sheet No. L-1 and L-2. Planning Director's Decision, p.44.

The appellants do not challenge any of these conclusions directly or offer contrary evidence, but rather they raise several environmental related claims that go well beyond the requirements in MCC 39.7740(A)(4) and are not supported by substantial evidence. The appellants argue that the proposed WCF should be subject to the SEC overlay requirements because there are properties in the surrounding area that have SEC overlays, but neither MCC 39.7740(A)(4)(a) nor any of the SEC overlay zone regulations require it. *See* MCC 39.5505(A) ("SEC shall apply to those lands designated SEC on the Multnomah County Zoning Map.")

The appellants argue that the Application should be denied because it will impact wildlife and habitat, including "potentially threatened and endangered species," but none of these issues are relevant to the WCF approval criteria and there is no evidence to support their claims of impact. As the Planning Director concluded: "the approval criteria do not require that the applicant maintain the property for wildlife protection. The subject property is not within the any Significant Environmental Concern environmental overlays (i.e., protected State Land Use Planning Goal 5 resources), therefore Staff is unable to make a finding addressing any of the wildlife habitat concerns." Planning Director's Decision, p.16. Although it was not necessary to address the approval criteria, to correct the record Verizon submitted a letter and attachments from EBI Consulting ("EBI"), dated September 16, 2020, which is an update to the Protected Species Impact Evaluation or Natural Resources Review (NR Update), concluding that the proposed WCF will have "No Effect" on the federally listed avian and wildlife species, which includes the species identified as a concern in the appellants comments. Exhibit I.3, p.5. USFW concurred with this conclusion. Exhibit I.3, p.7. The appellants own material from USFW states that "Your location is outside the critical habitat" or "No critical habitat has been designated for this species" for all of the listed species. Exhibit H.7, p.12. The appellants own consultant confirmed this as well. Exhibit H.8, p.1. Even if there was evidence of impacts on threatened and endangered species, which there is not, this issue is within USFW jurisdiction and not for the County to determine.[2] Exhibit I.3, p.9. *See e.g. Hess v. City of Corvallis*, 70 Or LUBA 283, Slip Op. 16 (2014).

**8. The WCF complies with the FCC RF emission standards.**

MCC 39.7740(A)(2) provides that "The applicant shall comply with all applicable FCC RF emissions standards (FCC Guidelines)." Verizon submitted a Non-Ionizing Electromagnetic Exposure Analysis and Engineering Certification, completed by Hatfield & Dawson Consulting Engineers, that addressed the applicable FCC RF emission standards. Exhibit A.22. Hatfield & Dawson Consulting Engineers concluded that the WCF meets the FCC RF emission standards. Exhibit A.22, p.4.

The appellants do not dispute Hatfield & Dawson Consulting Engineers conclusion, but rather they submitted a letter sent to the Portland Public School Board which argues that RF emissions from WCFs are hazardous to health and the FCC standards are not stringent enough. MCC 39.7740(A)(2) requires the County to determine compliance with the FCC RF emission standards, not reconsider the FCC standards and independently determine what is acceptable. Additionally, the Federal Telecommunications Act prohibits local governments from adopting any decision based even partially on the health effects of RF emissions. 47 U.S.C. §332(c)(7)(B)(iv). Any decision based on RF emissions, even if other legitimate reasons were listed as well, violates Section 332(c)(7)(B)(iv). *T–Mobile Ne. LLC v. Inc. Vill. of E. Hills*, 779 F.Supp.2d 256, 265 (E.D.N.Y.2011); *Firstenberg v. City of Santa Fe*, 782 F.Supp.2d 1262, 1271 (D.N.M. 2011); *T-Mobile Ne. LLC v. Town of Ramapo*, 701 F.Supp.2d 446, 460 (S.D.N.Y. 2009). Therefore, the

[2] The appellants own proposed condition of approval to address this issue requests that Verizon be required to submit an Environmental Assessment to USFW and "obtain USFW and FAA approval." Exhibit J.1, p.5.

County is prohibited from basing its decision on RF emissions other than determining compliance with the FCC standards.

**9. Verizon is not required to demonstrate that the WCF is visually subordinate.**

The appellants claim that the WCF will not be visually subordinate because it is taller than the surrounding trees and will have FAA required lighting. Although Verizon maintains that the WCF will be visually subordinate, the appellants are incorrect that Verizon is required to demonstrate that the WCF is visually subordinate because it is a WCF that employs concealment technology.

The appellants claim that the WCF does not meet the definition of "visually subordinate" under MCC 39.7715 but they do not explain why that is relevant. MCC 39.7740(B)(1)(c)(1) is the only section that contains the term "visually subordinate," applies exclusively to a "vegetatively, topographically, or structurally screened monopole" and it provides: "A WCF tower or monopole not employing concealment technology shall not be installed on a site unless it blends with the surrounding existing natural and human-made environment in such a manner so as to be visually subordinate." (Emphasis added). Since the WCF in this case does employ concealment technology, Verizon is not required to demonstrate that it is visually subordinate.

Moreover, the monopine WCF will be visually subordinate. "Visually subordinate" is defined as: "The relative visibility of a wireless communication facility, where that facility does not noticeably contrast with the surrounding landscape. Visibly subordinate facilities may be partially visible, but not visually dominate in relation to their surroundings." The monopine, which is designed to mimic a tree and will be surrounded by tall, mature trees that are approximately 114 feet in height, will clearly not noticeably contrast with the surrounding landscape and will only be partially visible. This is clear from the photosims. Exhibit A.19. The appellants assumption that to be visually subordinate the WCF cannot be visible at all is inconsistent with the definition.

**10. The appellants rely on several of purposes statements and submittal requirements that are not approval criteria and cannot be used as a basis to deny the Application.**

The appellants claim that the Application should be denied because the WCF is not consistent with several purposes statements or Verizon allegedly failed to comply with various application submittal requirements. The appellants cite to purpose statements in MCC 39.7700, 39.4300, 35.6175, 39.7700, the Comprehensive Plan, Metro Code and related planning documents. The appellants also claim that Verizon failed to adequately satisfy various application submittal requirements in MCC 39.7735, such as the visual study the Planning Director approved under MC 39.7735(B)(2). Although Verizon disagrees with the appellants' claim that the WCF does not comply with these provisions, it is immaterial because these purpose and application submittal requirements are not approval criteria and cannot be used as a basis to deny the Application.

Purpose statements are not applied as approval criteria unless there is specific language stating that they are mandatory approval criterion. *Jones v. City of Grants Pass*, 64 Or LUBA 103, 110 (2011); *SEIU v. City of Happy Valley*, 58 Or LUBA 261, 271-72, *aff'd*, 228 Or App 367, 208 P3d 1057, *rev den*, 347 Or 42 (2009). None of the purpose statements cited by the appellants specifically state that they are mandatory approval criteria and the appellants do not allege otherwise.

The same is true with respect to the application submittal requirements. Even if application submittal requirements have not been satisfied, that failure does not provide a basis for denying an application unless it results in noncompliance with approval standards. *Hess v. City of Corvallis*, 70 Or LUBA at Slip Op. 14. The appellants failed to explain how the alleged failure to comply with the application submittal requirements results in noncompliance with approval standards.

**11. The appellants procedural claims are not valid and do not provide a basis for denying the Application.**

The appellants raised two procedural claims, neither of which are accurate or provide grounds for denying the Application. First, the appellants argue that Verizon failed to conduct a pre-application conference. The appellants assertion is neither true nor relevant to the approval or denial of the application. A pre-application conference was held on April 25, 2019 (PA 2019-11705) to discuss the construction of the original 150-tall monopole proposal, which required a Type III Conditional Use. Planning Director's Decision, p.11; Exhibit A.40, p.3. Verizon decided to alter their proposal to utilize concealment technology, which converted the application from a Type III to a Type II land use case. Since the application was converted to the Type II, it was not necessary to conduct a new pre-application conference meeting as the Planning Director has the discretion to waive the pre-application requirements under MCC 39.1120(D) and elected to waive this requirement since Verizon had already conducted a pre-application conference. Planning Director's Decision, p.11. Even if Verizon had not conducted a required pre-application conference, that is not a basis to deny the Application since the appellants were not prejudiced. *Knapp v. City of Jacksonville*, 70 Or LUBA 259, Slip Op. p.3 (2014).

Second, the appellants claim that the Lot of Record exceeds the allowed 2,500 square foot outbuilding criteria and therefore a public hearing is required to resolve that issue. As part of the approval of the Lot of Record, the Planning Director determined that the pole barn and agricultural building were established prior to the existing zoning code and are subject to verification/alteration of non-conforming use. Planning Director's Decision, p.21. There is nothing in the MCC that requires a public hearing to address the non-confirming status of the agricultural buildings before any other development can be approved. Nor is there any relationship between the WCF and these agricultural structures.

**Conclusion**

Verizon requests that you reject the appeal and approve the Application subject to the findings of fact and conditions of approval set forth in the Planning Director's Decision, as supplemented by findings necessary to address the appeal issues. We appreciate your time and consideration of this matter.

Very truly yours,

HATHAWAY LARSON LLP

/s/
E. Michael Connors

EMC/ph
Cc: Verizon Wireless
Blackrock LLC
John Rankin, Appellants Attorney