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September 18, 2019

**VIA EMAIL AND HAND DELIVERY**

President Rick Swig
Vice-President Ann Lazarus
Commissioners Darryl Honda,
Rachael Tanner, and Eduardo Santacana
San Francisco Board of Appeals
1650 Mission Street, Suite 304
San Francisco, CA 94103

Re: Response to Rehearing Request for Appeal No. 19-070,
Rattner v. SFPW-BSM
For Verizon Wireless Personal Wireless Service Facility,
Wireless Site Permit 17WR-0252 (2620 Laguna Street)
Board of Appeals Hearing, September 25, 2019

Dear President Swig and Commissioners:

We submit this letter on behalf of our client Verizon Wireless and its contractor, Modus, LLC ("Modus"), in opposition to the rehearing request referenced above. You will recall that Wireless Site Permit 17WR-0252 (the "Permit") authorized Modus to install a small, unobtrusive wireless communications facility on a wooden utility pole on Laguna Street between Broadway and Vallejo Streets (the "Facility"). At the hearing on August 28, 2019, this Board denied the appeal of Mr. Ron Rattner ("Appellant"). Appellant now requests a rehearing without making the proper showing required. We respectfully ask that you deny this rehearing request, as the Appellant has failed to meet his burden.

## I. Appellant Has Not Carried His Burden Under The Board's Rules

The Rules of the Board of Appeals (the "Rules") permit the Board to rehear a matter only in exceptional cases. Article V, Section 9(b) states that "Except in *extraordinary cases*, and to prevent *manifest injustice*, the Board may grant a Rehearing Request *only* upon a showing that *new or different material facts or circumstances* have arisen, where such facts or circumstances, if known at the time, *could have affected the outcome* of the original hearing." (Emphasis added.)

The Rules also require the Appellant to state: (i) the nature and character of the new facts or circumstances; (ii) the names of the witnesses and/or a description of the documents to be produced; and (iii) why the evidence was not produced at the original hearing. Rules of the Board of Appeals, Article V, Section 9(b)(i-iii).

Appellant has not demonstrated that his request meets these high standards. He has not shown "new or different facts or circumstances" nor has he demonstrated a manifest injustice. Rather, Appellant is misusing the rehearing request as an opportunity to take another bite at the apple and re-argue the merits of the appeal. Appellant is simply unable to meet the Board's elevated standards for a rehearing request.

### A. Appellant Has Not Shown A "New Or Different Fact Or Circumstance" That Would Have "Affected The Outcome Of The Original Hearing"

Instead of identifying a "new or different fact or circumstance" that would have "affected the outcome of the original hearing," Appellant takes a second shot at attacking Verizon Wireless's RF analysis and the City's approval of that analysis. He misuses the rehearing request as a "reply brief" to address Verizon Wireless's and DPW's oppositions

rather than raising a new fact or circumstance. Appellant raises the same arguments, citing to many of the same sources, it made in its brief on the appeal. *Compare* Appeal at p. 9 to Rehearing Request at pp. 3-5. Once again, Appellant bases the entirety of his rehearing request on radio-frequency ("RF") emissions, which is preempted by federal law.

1. The Precautionary Principle Does Not Apply To The Facility

Appellant claims, again, that the Board should apply the "Precautionary Principle" as "uncertainty must be resolved in favor of protecting San Franciscans' public health and safety." Rehearing Request at pp. 1-2. This is wrong for two reasons: (1) there is no uncertainty regarding the Facility's compliance with FCC limits on RF emissions; and (2) this means that Appellant's health concerns are preempted by federal law, San Francisco's Precautionary Principle notwithstanding.

a. The Facility Complies With FCC Limits on RF Emissions

As previously argued before this Board, DPW complied with all applicable requirements in approving the Permit. Before DPW issued the Permit, the Facility was independently reviewed by three City departments, pursuant to Article 25 of the Public Works Code.

DPW Order No. 184504 requires an application to include "proof of compliance with the Public Health Compliance Standard" in the form of a "Verified Statement from a registered engineer to the effect that the Applicant complies with the Public Health Compliance Standard." DPW Order 184504, Section 5(F)(1). To fulfill this requirement, Verizon Wireless submitted an RF report prepared by Hammett & Edison, Inc.,

Consulting Engineers, confirming that the Facility will comply with applicable FCC standards. The Department of Public Health ("DPH") confirmed that the Facility "would be in compliance with the FCC standards and would not produce radio frequency energy exceeding the FCC public exposure limits." *See* DPH Approval, p. 1. This is undisputed, as Appellant has never argued that the Facility will exceed FCC limits on RF emissions.

DPH also imposed conditions to ensure compliance. DPH Special Condition Number 4 requires that "[o]nce the antenna is installed, Verizon Wireless must take RF power density measurements with the antenna operating at full power to verify the level reported in the Hammett & Edison report and to ensure that the FCC public exposure level is not exceeded in any publicly accessible area. This measurement must be taken again at the time of the permit renewal." Exhibits C, E. This condition ensures that the Facility will not exceed FCC limits on RF emissions.

Consequently, Verizon has provided all of the required and relevant information to demonstrate – and ensure – that the Facility will comply with FCC limits on RF emissions. Consequently, Appellant's health concerns about RF emissions are preempted by the Telecommunications Act. *See* 47 U.S.C. § 332(c)(7)(B)(iv). As we discuss below, neither the City's Precautionary Principle nor anything else cited by Appellant changes this.

b. The City's Precautionary Principle Is Preempted By Federal Law

Appellant urges this Board to "immediately invoke and follow the San Francisco precautionary principle ordinance" and to "deny the 2620 Laguna Street permit."

Rehearing Request at p. 6. He appears to believe that this principle, applied to RF emissions, somehow overrides federal law. Appellant has it backwards.

The City's Precautionary Principle Ordinance, adopted as part of the City's Environment Code, is subject to federal law just like any other local ordinance. If interpreted as Appellant urges, to justify denial of the Permit based on concerns about RF emissions, it is *preempted* by federal law. In any event, Appellant misreads the City's Precautionary Principle, which "does not impose specific duties upon any City employee or official to take specific actions." Environment Code § 104.

None of the other information cited in the rehearing request qualifies as "new or different material facts or circumstances," but even if it did, it could not possibly have affected the outcome. Since the "evidence" to which Appellant cites pertains to his concerns about RF emissions and there is no dispute that the Facility will comply with FCC limits, denial on any of the grounds urged by Appellant is preempted.

2. No New Facts Exist To Warrant A Rehearing

Appellant also claims that "important newly discovered evidence of Verizon fraud" merits a rehearing. Rehearing Request at p. 1. The "evidence" is the fine print of various cell phone insurance policies, which excludes damage to cell phones caused by the discharge of pollutants. Not only could Appellant have previously produced this so-called evidence, but it is also irrelevant. The Total Mobile Protection policy covers only damage to devices owned by the end user and does not even relate to Appellant's concerns about the alleged impacts of RF emission on human health (which in any event are preempted). The "discovery" of this policy does not warrant a rehearing.

**B. Appellant Has Failed To Demonstrate That There Are Extraordinary Circumstances And That A Rehearing Is Required To Prevent A Manifest Injustice**

Appellant has also failed to establish any "extraordinary circumstances" or that a "manifest injustice" is present. To the contrary, the City evaluates hundreds of similar applications every year, and relies on the expertise of third-party and DPH engineers to determine that the proposed facilities comply with the applicable FCC standards. There is nothing unusual about the Facility that constitutes a "manifest injustice."

## II. Conclusion

In conclusion, this Board should deny this rehearing request, as it does not meet the Board's high threshold. Representatives of Modus, Hammett and Edison, and Verizon Wireless will be present at the hearing to answer any questions.

Very truly yours,

Melanie Sengupta

cc: William K. Sanders, Esq.
Scott Sanchez, AICP
Leoncio Palacios, DPW