Subject: NTRPA Governing Board Meeting 11/03/2022 — Public Comment (Item # 2)
From: Brent Wisner <brent.wisner@legalprivilege.ch>
Date: 10/30/2022, 9:45 PM
To: scarey@lands.nv.gov
BCC: Info <info@BBILAN.org>

Greetings NTRPA Boardmembers;

I wish to express my strong concern about the veracity of the hearing materials Verizon and the Tahoe Prosperity Center have submitted to you and local governments in Nevada and California. I am informed by the long history of telecom applicants submitting documents to the cities and agencies in the Tahoe Basin and TRPA that have been clearly erroneous at best, and might so much amount to neglectful, reckless, knowing, or purposeful misrepresentation, if not outright **fraud**. Please read this entire letter very carefully and consider each and every damning factual revelation and point.

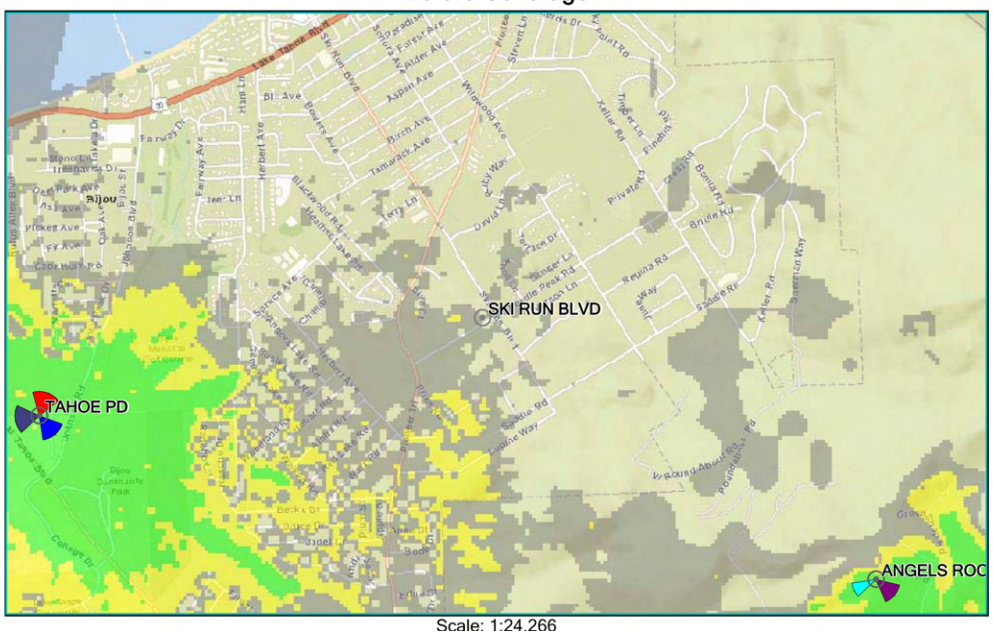
For example...

First, Verizon lies about its cell phone signal coverage. For example, it supplied the undermentioned fraudulent cell coverage map in order to bully south shore governments and the TRPA into believing there was a "significant gap" in coverage and it would therefore be an "unlawful prohibition of service" under Telecommunications Act for the City or the TRPA to deny this controversial permit for this tower. The misrepresentation was outrageous:

SKI RUN BLVD
Coverage Maps

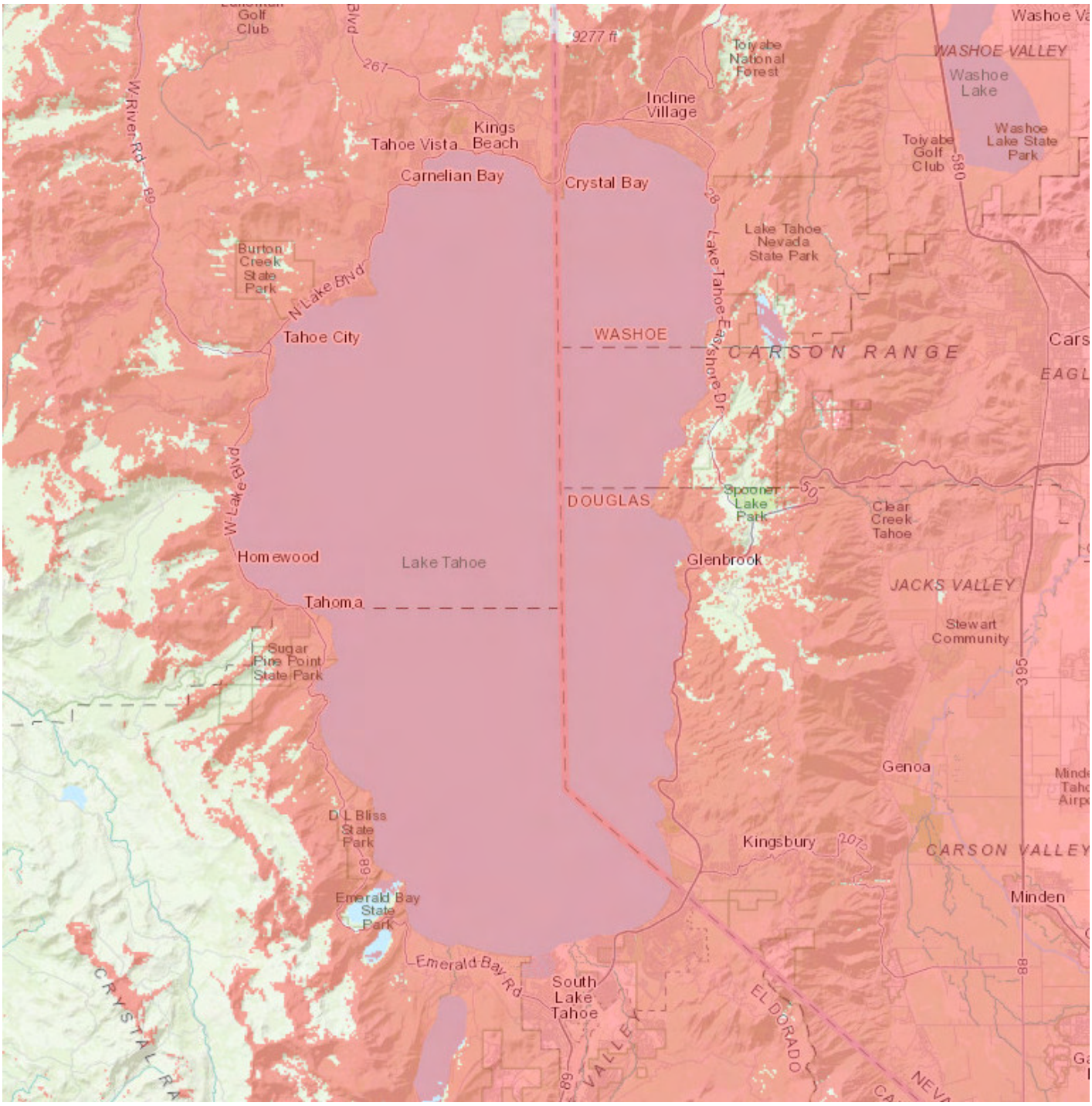
verizon

Before Coverage



Scale: 1:24,266

LTE: AWS: RSRP - Existing Coverage
Best Signal Level (dBm) >=-85
Best Signal Level (dBm) >=-95
Best Signal Level (dBm) >=-105

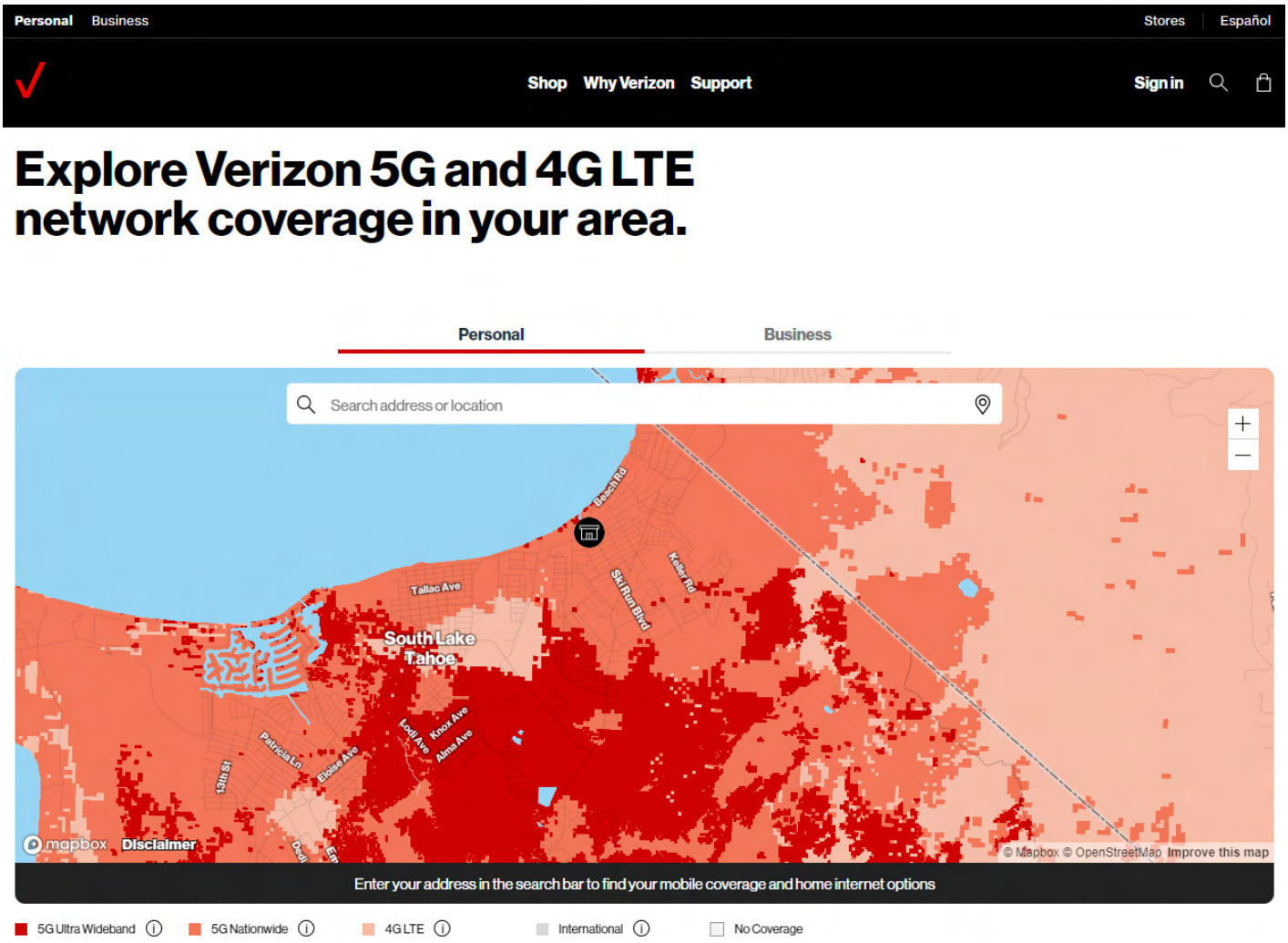


However, during the same time, Verizon reported its cell phone signal coverage to the FCC—[available on this 2019 "Form 477" submission]—which documented that Verizon had coverage in all places in pink, and hence no "significant gap":

As of 2022, the truth still is that there is not a [cell phone signal coverage] issue in the Ski Run neighborhood:

> https://fcc.maps.arcgis.com/apps/webappviewer/index.html?id=6c1b2e73d9d749cdb7bc88a0d1bdd25b

Even Verizon advertises differently to the public, as previously entered into the city record back in January 2020. It would also be a **state crime** if Verizon's advertisements were "untrue or misleading" (BPC § 17500):



https://www.verizon.com/coverage-map

You may also realize that Verizon (Paul Bierer Albritton) also lied to the City Council that "South Lake Tahoe will not be seeing 5G anytime soon" whereas they now publicly advertise the city is almost entirely covered by "5G Nationwide" and has substantial "5G Ultrawideband" cellular signals (City Council Hearing, Nov. 3, 2020, Item 12 @ 1:53:20-55).

It is a crime for telecommunications carriers to report false coverage to the FCC (47 U.S.C. §§ 220(e) & 643; 18 U.S.C. § 1001; 47 CFR § 1.7009). It is presumed that this FCC coverage map is accurate and this Verizon Advertisement is true and the contradicting coverage map submitted to the TRPA and City was **false** where the two disagree.

The fact is that the FCC Form 477 coverage maps are required by law to be "granular and accurate" as to depict "a cell edge probability of not less than 90 percent" (47 U.S.C. § 642(b)(2)(B); 47 CFR § 1.7004(c)(3)(ii)). The coverage maps must also be granular as to accurately depict the signal "as would be measured at the industry standard of 1.5 meters above ground"

(47 CFR § 1.7004(c)(3)(v)).Verizon has contracted with "" (*i.e.,* "Ookla") to obtain on-the-ground test data which validated to the FCC that these maps depict to a 95% statistical confidence interval that the cell coverage is 90% or higher, at a height of 1.5 meters above ground, during business hours (47 CFR § 1.7006(c)).

Those FCC Form 477 maps are required under the penalty of criminal punishment to be made to very specific objective criteria. The maps are used to evaluate telecommunications provider performance by the federal government when "making any new award of funding with respect to the deployment of broadband internet access service intended for use by residential and mobile customers" (47 U.S.C. § 642(c)(2)(B)). It would be a crime for Verizon to make false statements to federal agencies about these coverage maps, but it appears Verizon can lie to the TRPA and gaslight the public with impunity.

In the year 2000, the FCC adopted standardized procedures for collecting service data of telecom carriers (15 FCC Rcd 7717 (12); 65 FR 19675 & 65 FR 24653). In 2013, the FCC modernized the collection to include coverage maps (28 FCC Rcd 9887 (12); 78 FR 49126). Circa Christmas 2019, an FCC staff report to their governing commissioners reported cellular coverage maps being submitted by the telecoms were grossly inaccurate (FCC DOC-361165A1). This bureaucratic staff report concluded Form 477 data depicting coverage between 2014 and 2020 were unreliable. Subsequently, Congress passed PUBLIC LAW 116–130; 134 STAT. 233 followed by FCC rulemaking (35 FCC Rcd 7460 (9); 85 FR 50886) which fixed reliability of the coverage maps and setting objective specifications, requirements, and technical definitions—and punishment for false submissions. The 2021 & 2022 FCC coverage maps are made to this objective standard and now prove there is no "coverage gap" in the Ski Run area.

As a result of the aforementioned Broadband DATA Act of March 2020, coverage maps now have a standardized and objective criteria for which it is a crime to submit inaccurate coverage maps to the FCC. Mobile carriers may get into quite a bit of trouble with the law if they allege a "significant gap" in coverage to local governments, while simultaneously telling the FCC they have provided complete mobile coverage to the same area in fulfillment with their federal subsidy, loan, or grant agreements. That goes beyond false coverage reporting, and into the realm of **fraud**. This is what clearly appears to be the case with the coverage maps submitted by Verizon to the TRPA and City of south Lake Tahoe.

The City and the Courts may take judicial notice of Verizon's coverage reporting to the FCC. “Judicial notice is appropriate for records and reports of administrative bodies.” *United States v. 14.02 Acres of Land More or Less in Fresno County*, 547 F.3d 943, 955 (9th Cir. 2008). It may then conclude Verizon provided false coverage maps to the City. This conclusion can then be used in weighing the credibility of Verizon's other claims.

Moreover, Verizon has used the aforementioned purposefully bogus cellular coverage maps submitted to the City Staff to perpetrate a **great fraud** upon the residents of the City of South Lake Tahoe, and the City Council and Attorney have been all but a willing accomplice in this unlawful deception. This **fraud** being that once a cellular telecom company has established

their ability to provide basic voice coverage, it may no longer use the Telecommunications Act provision (47 U.S.C. § 332(c)(7)(B)(1)(ii)) as a "gun" to force cities to submit to their cell tower requests (*Extenet Systems v. Village of Flower Hill*, 2022 U.S. Dist. LEXIS 135267 (Fed. Dist. Court, July 29, 2022) (upholding municipality's rejection of the telecom company's application to install 18 small cell wireless facilities within the municipality on the ground that the applicant had failed to demonstrate a significant gap in coverage; holding that the TCA does not extend to the new uses of wireless to provide broadband and other services; the protections afforded to telecoms by the TCA are limited to ensuring that state and local governments not unreasonably impede their ability to provide cellular telephone service; "Improved capacity and speed are desirable (and, no doubt, profitable) goals in the age of smartphones, but they are not protected by the Act"); *Accord Crown Castle NG East LLC v. Town of Hempstead*, 2018 WL 6605857, at *9 (Fed. Dist. Court, Dec. 17, **2018**) ("A gap in 4G coverage does not establish that the target area is underserved by voice cellular telephone service."); *Clear Wireless LLC v. Bldg. Dep't of Vill. of Lynbrook*, 2012 WL 826749, at *9 (Fed. Dist. Court, Mar. 8, **2012**) ("[I]t is not up to the FCC to construe the [Act] to say something it does not say, nor up to the Court to find broadband communication encompassed by the law."). *See also*, *T-Mobile West LLC v. City and County of San Francisco*, 6 Cal.5th 1107, 1122 (CA. Supreme Court, 2019) (holding the power to regulate the location and manner of telephone installation is generally a matter left to local regulation)). The City was not legally obliged by the Telecommunications Act to approve the Ski Run tower, and the City Attorney is a incompetent failure if she earnestly believed Verizon's frivolous legal and factual claim. To claim otherwise was an unlawful artifice or false statement of law. Implicit by her purposeful soliciting of legal advice from Telecom Law Firm PC, she is zealously advocating for the expansion of municipal cell towers by advancing culled legal arguments that undermine the City's local control over sitting and location of cell towers.

Verizon also **purposely misrepresented** the validity of the Longley-Rice **I**rregular **T**errain Propagation **M**odel (**I.T.M.**) to local officials. Contrary to Verizon's **false statements**, it has long been settled that this propagation model was designed and has been validated for frequencies between 20 MHz and 40 GHz and for path lengths over irregular terrain for distances of up to 2,000 km (A. G. Longley, "*Radio propagation in urban areas,*" *OT Rep. 78-144*, Apr. 1978; and A. G. Longley, "*Local variability of transmission loss- land mobile and broadcast systems*," NTIA Technical Report OT 76-87, May 1976; *See also,* Anita G. Longley; Philip L. Rice, "*Prediction of Tropospheric Radio Transmission Loss Over Irregular Terrain: A Computer Method – 1968*," NTIA Technical Report ERL 79-ITS 67, July 1968). "The ITM model of radio propagation for frequencies between 20 MHz and 20 GHz (the Longley-Rice model) is a general purpose model that can be applied to a large variety of engineering problems" (NTIA REPORT 82-100). The FCC adopted this NTIA model in 1997 for modeling broadband cell phone signal propagation (FCC 94-144; 59 FR 32830 (1994)). It again affirmed the utility of this model in 2013 by standardizing it for modeling cellular signal propagation into quiet "protection zones" of critical national security sensitive earth stations (FCC-13-102A1; 78 FR 51559 (2013)). A year later, the FCC rejected suggestions by Verizon and AT&T that the ISIX Methodology use the Hata or the free space propagation model instead of the Longley-Rice model for modeling interference with DTV receivers

(FCC 14-157A1; FCC-14-157A1_Rcd; 79 FR 76903 (2014)). The ITM, as a deterministic physics model, is lot harder for cell phone companies to "game." In 2015, the FCC recommended that the ITM be used to model cell tower propagation as the method to determine whether LTE cell signals interfere with satellite television receivers. The FCC held: "the Longley-Rice propagation model which has long been used by the Commission to predict interference to television receivers. Additionally, the OET-74 methodology is supported by measurements showing that wireless LTE signals have similar interference characteristics to DTV signals." It further stated "our confidence in the Longley-Rice model is strengthened by a staff comparison of Longley-Rice model versus TASO measured data that shows a difference in median value of absolute error between the predicted value and the measured value of less than 1 dB" (FCC 15-141A1; OET-74). It should suffice without saying that Verizon does not use cell phone signals that exceed 6 GHz (6,000 MHz). Verizon's lied to the TRPA Governing Board.

The FCC actually sought comment in 2020 on whether to standardize the Longley-Rice model (ITM) for broadband cell coverage reporting. They proposed such a rulemaking stating "we seek comment on whether to require providers, as part of the challenge process, to produce a standardized "challenge evaluation map" of specific geographic areas being challenged using a Commission-approved propagation model (e.g., Longley-Rice, or E-Hata), so that third parties and the Commission are able to analyze the technical and statistical factors that lead to variations in actual coverage and user experience. Such a Commission-approved standard model, implemented by the service provider(s), would produce signal strength predictions, as well as predictions of expected minimum downlink and uplink user speeds, based on provider specific system parameters (such as spectrum band and bandwidth deployed, transmit power, etc.)" (FCC 20-94; 35 FCC Rcd 7460 (9); 85 FR 50911 (2020)). The Longley-Rice model (ITM) is not only openly embraced by the FCC, but its use is mandatorily codified into U.S. law (47 U.S. Code § 339(c)(3)(a); 47 CFR Appendix I to Subpart E of Part 24 (3); 47 CFR § 73.616). Verizon deliberately exploits the arcane technical nature of its technology and regulatory arena to pull the wool over the eyes of local governmental hearings officers with **bold-faced lies**. The pattern of behavior supports a finding of **fraud**.

Verizon purposely misrepresented the Longley-Rice model (ITM) as having been specifically designed for "broadcast television." As aforementioned, the ITM is "a general purpose model that can be applied to a large variety of engineering problems" for radiofrequency propagation between 20 MHz and 40 GHz over irregular terrain. More importantly, the ITM easily models the full range—700MHz-7GHz—of potential cellular frequencies at low power. The ITM vastly exceeds the entire frequency range allocated or otherwise available to Verizon under federal law (49 FR 2373, 2378-2420 (1984); 47 CFR § 2.106; FCC 2022 Frequency Allocation Handbook). Verizon knows this as they even have the Longley-Rice model (ITM) included in their Atoll "advanced coverage modeling software." I quote the software's User Manual:

4 Radio Calculations and Models

Once you have created a network, you can make predictions. There are two types of predictions:

- **Point predictions:** The **Point Analysis** tool allows you to predict, at any point on the map, the profile between a reference transmitter and a receiver, the value of the signal levels of the surrounding transmitters, an active set analysis for UMTS, CDMA2000, and TD-SCDMA projects and an interference analysis for GSM/GPRS/EDGE projects.
- **Coverage predictions:** You can calculate standard coverage predictions, coverage by transmitter, coverage by signal level and overlapping zones, and specific coverage predictions such as interference predictions for GSM/GPRS/EDGE projects or handover, or service availability for UMTS, CDMA2000, and TD-SCDMA projects. Many customisation features on coverage predictions are available in order to make their analysis easier.

Atoll facilitates the calculation of coverage predictions with support for multithreading and distributed calculating. The progress of the calculations can be displayed in the **Events** viewer or in a log file.

Atoll also allows you to use polygonal zones to limit the amount of resources and time used for calculations. The polygonal zones, such as the filtering zone and the computation zone, help you to restrict calculations to a defined set of transmitters, and to limit calculations and coverage predictions.

Depending on the type of project you are working on, you can choose between the propagation models available in **Atoll**.

4.1 Radio Propagation Models

This section covers the following topics:

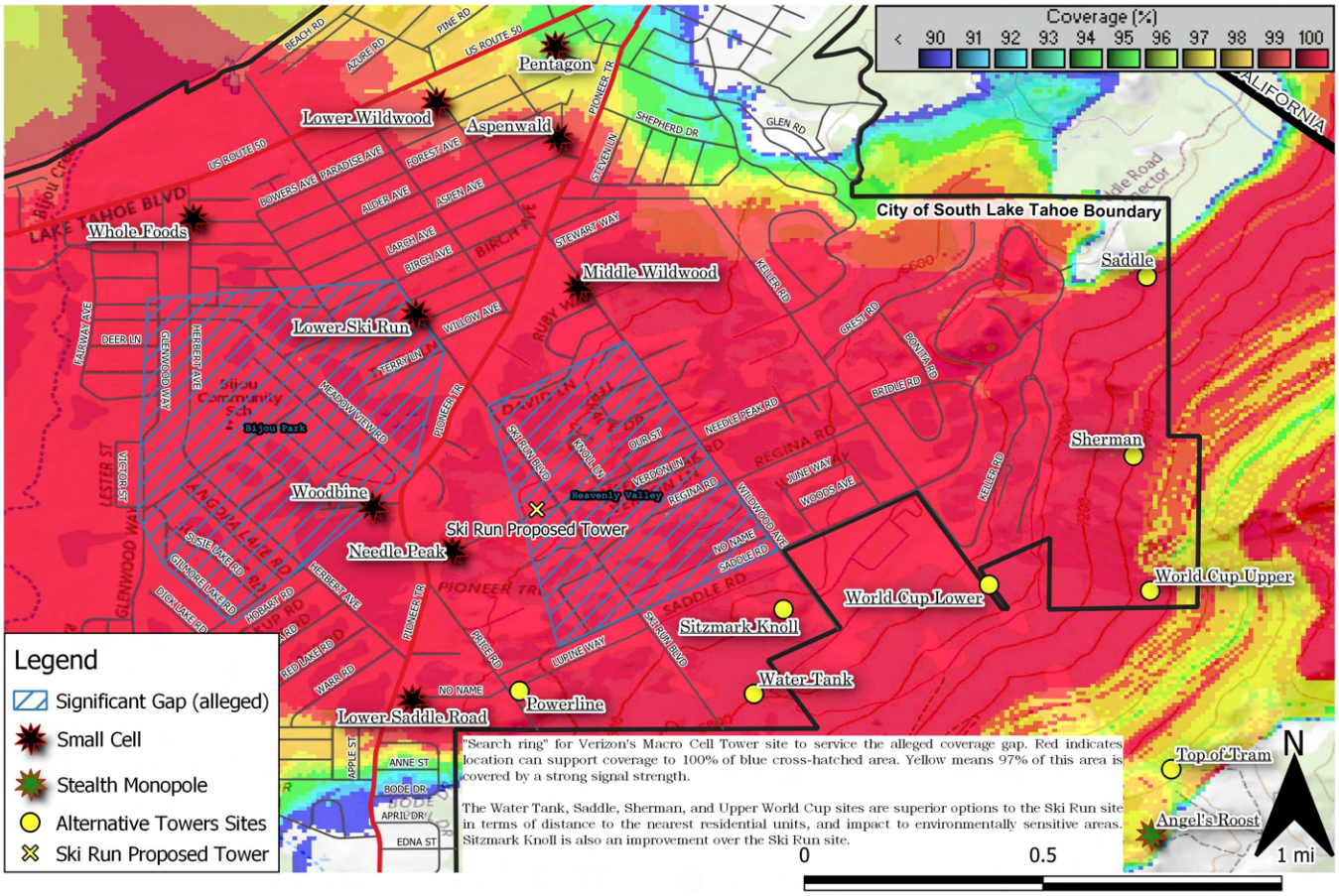
4.1.1 Overview of Propagation Model Characteristics

Each propagation model available in **Atoll** is suited for certain conditions, frequencies and radio technologies. The following table summarises the frequency band, necessary geo data, and recommended use of each propagation model.

Model	Frequency Range	Geo Data Taken into Account	Recommended Use
ITU 370-7 Vienna 93	100 – 400 MHz	Terrain profile	d > 10 km Low frequencies Broadcast
ITU 1546	30 – 3000 MHz	Terrain profile	1 < d < 1000 km Land and maritime mobile Broadcast
ITU 526-5 (theoretical)	30 – 10000 MHz	Terrain profile	Fixed receivers WLL
WLL	30 – 10000 MHz	Terrain profile Deterministic clutter	Fixed receivers WLL, Microwave links, WiMAX
Okumura-Hata (Automatic calibration)	150 – 1000 MHz	Terrain profile Statistical clutter (at the receiver)	1 < d < 20 km GSM 900, CDMA2000, LTE

The truth of the matter is that the undermentioned Longley-Rice Irregular Terrain Model (ITM) cell tower site selection map is a generally accurate depiction of feasible cell tower locations to service their bogus "significant gap"—an allegation which is completely contradicted by their Form 477 FCC coverage map and their public advertisements:

Actual Best Site Locations to Serve the Alleged "Coverage Gaps"



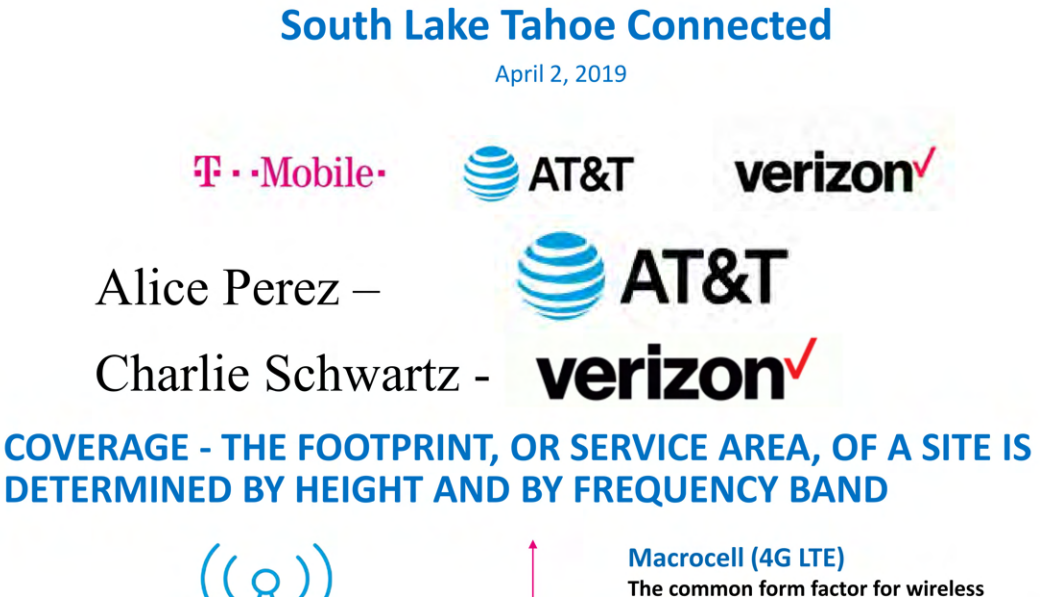
Verizon apparently first used business decision factors—such as the undermentioned decision matrix—to select the proposed Ski Run tower site, and then back-calculated a dubious engineering justification through purposefully misleading or outright fraudulent coverage maps in order to deceive the City and the TRPA into believing there was somehow a "significant gap" in coverage:

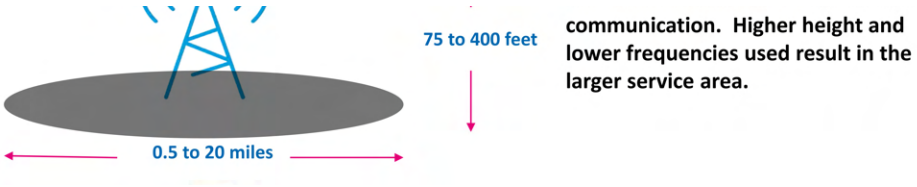
Carrier Decision Making Factors for Choosing Site	Rooftop	Collocation	Tenant Improvement (Water Tower)
Available Azimuths	2	3	3
Equipment area	2	3	2
Ease of Construction	2	3	1
Construction Cost	1	3	2
Structural Capacity	3	2	3
Ease of Leasing	2	3	1
Cost of Leasing	3	2	1
Ease of Access	2	3	1

Preferred RAD Center	1	3	2
Cost of Expansion/Modification	2	2	2
Proximity to Residential Areas	2	1	3
	22	28	21
1 being least desirable, 3 being most desirable			

As purely a business decision, "cost of leasing," "ease of construction," "ease of access," and "proximity to residential areas" all combine to vastly outweigh "available azimuths" to serve purported "significant coverage gaps." However, these are neither acceptable factors from a city planning perspective nor from a Telecommunications Act (47 U.S.C. § 642(c)(2)(B)) mandate. For more than 20 years, Verizon has been in the top 20 in the Fortune 500 listings of corporations in the United States by total revenue. Verizon earned 133.61 billion in revenue in 2021 and local agencies are clearly under no obligation whatsoever to avoid requiring Verizon to select more costly alternatives cell sites on account of "business hardship." To the contrary, local agencies are under heavy obligation to consider hardships on residents from prospective cell tower site locations. Verizon submitted false or misleading application materials and perhaps committed outright fraud with its coverage maps, radiofrequency modeling, and engineering statements with the business purpose of avoiding the anticipated expenses of more appropriate and perhaps more costly cell tower location(s).

Verizon also purposely misrepresented a very limited broadcast range of 4G macro towers during the hearings in order to purport a "significant gap." Verizon contradicts the maximum range in its other public hearings—it tends to state the maxim range whenever it wishes to brag about the service a proposed tower will provide, and minimizes the range when showing why surrounding macro towers do not service a fabricated "significant gap." Verizon made a group presentation on April 2nd 2019 to the South Lake Tahoe City Council where they expressly stated as a general principle that 4G macro towers broadcast up to 20 miles (pp. 24-36):





Verizon has further told our local agencies that this would be a "4G macro tower" and attested it would use a maximum frequency of 2,110 MHz. All hypothetical—5G—uses within the Unlicensed National Information Infrastructure (U-NII) radio band must have a radiated power of less than **1 watt** to prevent interference with other nearby devices including residential Wi-Fi and Bluetooth (47 CFR § 15.407). These frequencies might be usable for Verizon's "micro," "nano," or "pico" cells and DAS, but are unavailable to be used at macro tower power levels and would also require a new "Radio Frequency Exposure Report." In comparison, Verizon attests that the radiated power of the cellular bands for the proposed macro tower would be 5,000-19,000 times higher. Verizon clearly did not attest or account for any 4 or 5G radiofrequency emissions whatsoever in the U-NII radio band which would be federally limited to 1 Watt and modeled as such. If Verizon has concealed that its coverage maps were computed using a radiated power of 1 watt because it intends to use U-NII radio band contrary to the engineering report they submitted to the City and TRPA, this would be a purposeful misrepresentation.

Verizon purposely misrepresented the accuracy of Longley-Rice propagation model coverage maps which computed the technical specifications attested by Verizon—including the manufacturer's antenna patterns for CommScope Models NHH-65C and NHH-45C, the respective orientations (azimuth), tilts (altitude), irradiated power (IRP), and frequencies. Verizon has quite some effrontery to attack anyone impugning its coverage maps. It was already proven that the coverage maps Verizon submitted to the City and TRPA directly contradict the coverage maps they submitted to the FCC and currently advertise to the public. These maps both show that 4G coverage is saturated, and it would be an impossible task for any third-party to misrepresent or otherwise exaggerate "over-coverage" beyond what they depict on their **completely saturated** map. The Longley-Rice model (ITM) outputs are congruent with the 2019 coverage maps Verizon submitted to the FCC—and are even at times more conservative. The Longley-Rice model (ITM) outputs do not purposely misrepresent the existing cellular coverage, Verizon's maps created to win the City and TRPA hearings do. Verizon and Rootmetrics (Ookla) have a documented history of submitting false or otherwise inaccurate coverage maps to government agencies.

Verizon and the Tahoe Prosperity Center (TPC) also lied *inter alia* that it would be impossible to get a permit to install cell towers on the contiguous Forest Service land approximately 2,000-3,000 feet away—where there are innumerable preferred locations.

October 14, 2019

Dear Mayor and City Council Members,

As you know, the Lake Tahoe Basin Prosperity Plan, completed in 2010, created the Tahoe Prosperity Center and was focused on ways to improve the local community and economy. The top two issues in the original Lake Tahoe Basin Prosperity Plan that would improve prosperity in our community were:

1. Certainty in the marketplace and
2. Broadband and cell phone connectivity.

You have an opportunity to do both in the case of the cell tower located at 1360 Ski Run Boulevard and begin that process of improving prosperity. As stated in our previous email of August 5, 2019 the Tahoe Prosperity Center is very concerned about the public safety ramifications (and negative consequences) of reversing the approval of a previously approved cell tower that is desperately needed.

We are also concerned about the misinformation being shared about potential negative impacts from cell towers and about the process they believe you should follow as you make a determination. We address each of those below using the "quoted language" of those who have not been named, but list themselves as "Concerned Citizens of South Lake Tahoe" as they have been emailing me.

"Just put them on public lands." Some have suggested that cell towers can "easily be relocated to public lands" in the Tahoe Basin. That is simply untrue. Our Connected Tahoe project mapped all of the public land in the Tahoe Basin and the towers that are able to be placed on those lands have been evaluated. The few sites identified for public lands are moving forward through the normal permit processes, but one of those has been in process for nine years! Yes – nine years of permitting. Our evaluation found only a handful of sites determined as viable on public lands. We recognized that private property, such as the land at 1360 Ski Run Boulevard is a better solution for improving public safety and cell service and it will be co-located with multiple carriers.

"This is not proper planning." It has also been suggested that these sites are being proposed without thoughtful consideration and that providers should give up their "master plans" publicly. Not only does this fly in the face of "business competitive advantage", it is also factually incorrect. Tahoe Prosperity Center did map proposed cell tower sites in the region and this location is a priority site.

I would argue that those who oppose this cell tower would still like to see improved cell service, but just not in "their neighborhood." As stated earlier, these towers can't simply be located on US Forest Service (USFS) public lands. USFS lands have already been evaluated and the minimum number of sites that were determined feasible are moving forward, but those few sites will not be enough to improve coverage for all our residents, businesses and visitors in the community.

We hope that you support the City Planning Commission and the previous approval of the cell tower at 1360 Ski Run Blvd – for the safety of all the residents of the City of South Lake Tahoe.

Thank you,

Heidi Hill Drum
CEO, Tahoe Prosperity Center

While the TPC publicly purported to have illicitly ghostwritten the City's own **nonexistent cell tower master planning**, it actively concealed that this telecom lobbyist group had already submitted a permit application on March 15th 2019 which trivially gained rapid approval on May 22, 2019 to **concurrent servicing the same area with Verizon's Heavenly DAS**:

TAHOE REGIONAL PLANNING AGENCY

Mail
PO Box 5310
Stateline, NV 89449-5310

Location
128 Market Street
Stateline, NV 89449

Contact
Phone: 775-588-4547
Fax: 775-588-4527
www.trpa.org

Permit

PROJECT DESCRIPTION: On-Mountain Communications System APN: 030-370-04, et.al.

PERMITTEE: Heavenly Mountain Resort FILE #: ERSP2019-0375

COUNTY/LOCATION: City of South Lake Tahoe, CA and Douglas County, NV / 3860 Saddle Road

Having made the findings required by Agency ordinances and rules, the TRPA approved the project on **May 22, 2019**, subject to the standard conditions of approval attached hereto (Attachments Q) and the special conditions found in this permit.

This permit shall expire on **May 22, 2022**, without further notice unless the construction has commenced prior to this date and diligently pursued thereafter. Commencement of construction consists of pouring concrete for a foundation. Diligent pursuit is defined as completion of the project within the approved construction schedule. The expiration date shall not be extended unless the project is determined by TRPA to be the subject of legal action which delayed or rendered impossible the diligent pursuit of the permit.

CONSTRUCTION SHALL NOT COMMENCE UNTIL:

(1) TRPA RECEIVES A COPY OF THIS PERMIT UPON WHICH THE PERMITTEE(S) HAS ACKNOWLEDGED RECEIPT OF THE PERMIT AND ACCEPTANCE OF THE CONTENTS OF THE PERMIT;

(2) ALL PRE-CONSTRUCTION CONDITIONS OF APPROVAL ARE SATISFIED AS EVIDENCED BY TRPA'S ACKNOWLEDGEMENT OF THIS PERMIT;

(3) THE PERMITTEE OBTAINS APPROPRIATE COUNTY PERMIT. TRPA'S ACKNOWLEDGEMENT MAY BE NECESSARY TO OBTAIN A COUNTY PERMIT. THE COUNTY PERMIT AND THE TRPA PERMIT ARE INDEPENDENT OF EACH OTHER AND MAY HAVE DIFFERENT EXPIRATION DATES AND RULES REGARDING EXTENSIONS; AND

(4) A TRPA PRE-GRADING INSPECTION HAS BEEN CONDUCTED WITH THE PROPERTY OWNER AND/OR THE CONTRACTOR.

5.22.19

TRPA Executive Director/Designee

Date

It is incontrovertible that Verizon's Heavenly DAS system was already preordained to get streamlined environmentally exempt approval via a strained and dubious construction of Heavenly Ski Area's Special Use Permit under the Ski Area Permit Act (16 U.S.C. § 497b; 36 CFR § 220.6; 40 C.F.R. § 1508.8; 47 C.F.R. § 1.1307):

Memorandum

March 30, 2020

To: Permitting Agencies

From: Rob Brueck

From: Rob Brueck
Hauge Brueck Associates

RE: HEAVENLY MOUNTAIN RESORT 2020 COMMUNICATION SYSTEM UPGRADE PROJECT

Heavenly Mountain Resort (Heavenly), with the assistance of its contractor American Tower Company (ATC), is proposing to update Heavenly's on mountain communication systems to meet current and anticipated voice and data demands with modern technologies as provided for by the communication provisions of the Heavenly Ski Area Term Special Use Permit (Auth. ID: ELD508901) with the USDA Forest Service.

Permitting Requirements for Capital Upgrades to the Heavenly Communication System

Permitting for the proposed communication system will require coordination with El Dorado County and the USDA Forest Service, Tahoe Regional Planning Agency, and Regional Water Quality Control Board, Lahontan. As presently understood, the permitting requirements for each agency are outlined below.

USDA Forest Service
Will issue a permit to construct under the existing Special Use Permit for all on mountain facilities. Environmental documentation will consist of a Categorical Exclusion under NEPA, supported with biological and cultural resources technical reports showing no impacts to special status species or eligible historic resources.

Tahoe Regional Planning Agency
Will issue a linear public service permit for all in-basin facilities. Environmental documentation will consist of an Initial Environmental Checklist documenting how existing MDP design features and mitigation programs will mitigation potential impacts.

California Regional Board, Lahontan Region
Will process the Project under the Tahoe Construction General Permit (Order No R6T-2016-0010). Application materials and project plans, including the SWPPP, will be processed through the Stormwater Multiple Application and Report Tracking System (SMARTS) operated by the state of California. MDP EIR will be referenced to document required mitigation measures.

However, in an August 26, 2020 16:10 USDA Forest Service email—publicly subject to the Freedom of Information Act—USFS employee Daniel Cressy—in his official capacity (daniel.cressy@usda.gov)—contradicted Rob Brueck's alleged authorization under a prior existing ski area special use permit:

> The Heavenly Distributed Antennae System (DAS) special use lease (ELD402502) was approved September 11, 2019, for the construction of a new communication hub building, above- and below-ground fiber optic cable and electrical power, and six (6) nodes (monopines and equipment shelters) to host radio equipment. The communication lease is a separate special use authorization from the Ski Area Resort special use permit....If you have further questions about the project, please contact Kimberly Felton, Special Uses Permit Administrator, at Kimberly.felton@usda.gov.

Its hard to know whether Mr. Brueck was lying to the TRPA to avoid triggering environmental review under a brand new permit, or whether Mr. Cressy was lying in order to cover his federal agency's abuse of the Ski Area Permit Act—if this project were authorized under a valid Use Permit, the alterations were not "only administrative and not involving changes in the authorized facilities" and they certainly increased "the scope or magnitude of" any purportedly "authorized activities" (36 CFR § 220.6(d)(11)). In any case, the application

was **rapidly approved** upon respective agency receipt without objection and was even exempted from appropriate environmental review. The takeaway is that **neither the TRPA nor the USFS are an obstruction to Verizon placing towers on USFS land** and in a myriad of ways bent over backwards to inappropriately streamline approval of cell towers on ecologically sensitive USFS land.

The USDA Forest Service had actual knowledge that Verizon's Heavenly DAS would be installed in an area which was suitable habitat for an endangered species—Sierra Nevada Yellow Legged Frog—and thus abused its discretion in "finding" a categorical exclusion against the mandates of 36 CFR § 220.6(b)(1)(i). There is some compelling and unrefuted evidence that this species is in fact currently utilizing the area (1 & 2). Scoping is required for all Forest Service proposed actions, including those that would appear to be categorically excluded from further analysis and documentation in an EA or an EIS (36 CFR §§ 220.4(e), & 220.6). Resource conditions that should be considered in determining whether extraordinary circumstances related to a proposed action warrant further analysis and documentation in an EA or an EIS include: Federally listed threatened or endangered species, or Forest Service sensitive species (36 CFR § 220.6(b)(1)(i)). Presidential Executive Orders 13057 and 13186 add further gravity to this specific situation. If the proposed action may have a significant environmental effect, the agency must prepare an EIS (36 CFR § 220.6(c); 40 C.F.R. § 1508.1(b)).

The USDA Forest Service (USFS) needed to obtain a U.S. Fish and Wildlife Service (FWS) biological opinion pursuant to 16 U.S.C. § 1536(a)(2); 50 CFR §§ 402.11, 402.14, & 402.15; and FSM2672.4. The Federal Communications Commission (FCC) was even notified of their own obligations of under this issue, but did not respond or apparently perform any due diligence whatsoever as required by law (47 C.F.R. § 1.1307). The TRPA bizarrely does not even protect this endangered species under its threshold standards, and its legal counsel expressly stated in a widely disseminated email that it would not do anything about adverse RF irradiation and PVC plastic—endocrine disrupter—poisoning of federally endangered frogs. Verizon itself is actually required to stop construction (47 CFR § 1.1312(d)). The only agency that has shown any concern whatsoever is the Lahontan Regional Water Quality Control Board. There are analogous obligations under California state law for state agencies and governments to obtain biological opinions from California's Department Fish & Games law as well (PRC §§ 21104.2).

Likewise, while **Verizon had secretly and trivially obtained streamlined approval** on adjacent **USFS land** for the undermentioned **six** new monopine cell towers, and on August 1, 2019 already applied for even more cell antennas atop the nearby Tahoe Season building, it deceptively told the City the following:

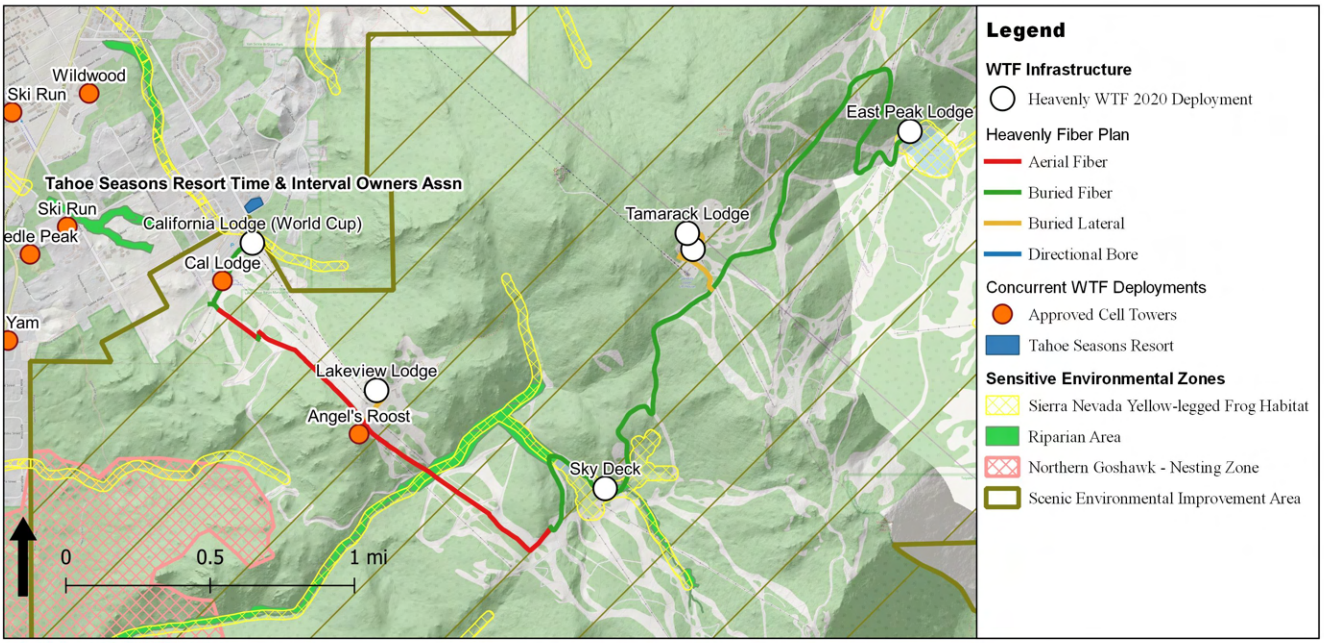
> ***Alternatives Raised by Appellant***
>
> In a letter to the City dated August 6, 2019, an attorney for the appellant of the Proposed Facility raised numerous distant alternatives as possible locations, none of which are feasible to serve the Significant Gap due to factors such as distance, low elevation and

terrain. Many of those locations are near Lake Tahoe Boulevard, approximately one mile north of the Proposed Facility, with some close to Verizon Wireless's existing Harrah's facility in Stateline.

In addition to specific locations reviewed below, appellant's counsel mentioned the various USDA Forest Service lands around the greater vicinity. In recent consultation with the Forest Service regarding placement of wireless facilities on its properties, the Forest Service requested that Verizon Wireless seek private property landlords in the area. The Forest Service is presently unwilling to dedicate resources to wireless facilities.

The TPC and Verizon lied to the City order to further deceive it into incorrectly believing that the Ski Run location was necessary in order to avoid an "unlawful prohibition of service" under Telecommunications Act:

Verizon's Unfair and Deceptive Business Practice:
Concurrent National Forest Deployment

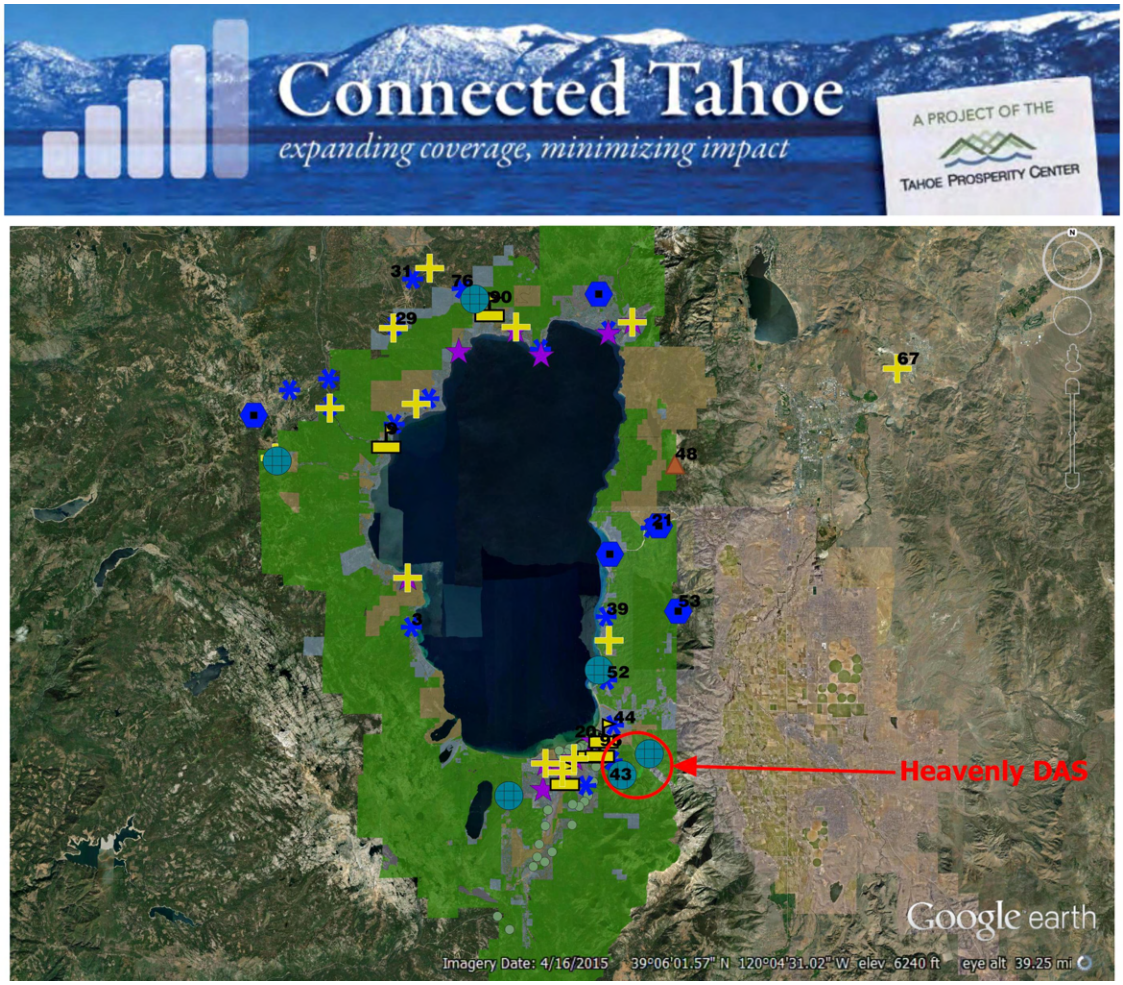


Unfair and Deceptive Business Practices

Verizon and the Tahoe Prosperity Center deceived City of South Lake Tahoe elected leaders, officials, staff, and residents into believing it was too burdensome to deploy towers in the adjacent National Forest lands, while simultaneously using existing special use permits to "fast-track" cell tower deployments and side-step non-discretionalry environmental review of which they had feigned as onerous. This constitutes Unfair and Deceptive Business Practices.

(*See* Business & Professions Code §§ 17200 *et seq.*):

The Tahoe Prosperity Center and Verizon knew of the Heavenly DAS the whole time. They made a 2019 presentation which exposed this:



The Tahoe Prosperity Center (TPC) knew before April 2nd 2019 that Verizon would be getting streamlined approval for cell tower deployments on National Forest land. The deprecated Google Earth logo in the lower right corner proves that the TPC was using Google Earth prior to version 7.1.7.2600 (September 1, 2016). The imagery date is from 2015. This infers that the TPC knew of the Heavenly DAS *circa* 2015. This is further supported by evidence that the TPC lost momentum after their "Connected Tahoe" Project Manager quit in 2018—according to TPC Board of Director's meeting minutes from April 2019:

TAHOE PROSPERITY CENTER
tahoeprosperity.org

TPC Board of Directors Meeting - Location: Parasol Community Building April, 2019

Board Present: Bill Roby, Jennifer Merchant, Robert Stern, Rick Lind, Jane Layton, Darcie Goodman-Collins, Patrick Rhamey, Cindy Gustafson, Roger Kahn, Andy Chapman, Joanne Marchetta, Sue Novasel
Board call-in: Lisa Granahan, Lew Feldman, Devin Middlebrook, Jesse Walker
Staff: Heidi Hill Drum, CEO, Erin Jones, Fiscal Manager, Shelby Cook, Organizational Coordinator

Meeting was started at 9:36 AM

Addition of Patrick Rhamey to the Board - Welcome Patrick!
Patrick did a lot of work on the new Edgewood hotel. After the hotel was built, he went to the Tahoe Beach Club, of which he is now president. He is very interested in community and economic development. Bill Roby:

of which he is now president. He is very interested in community and economic development. Bill Roby motioned, Cindy Gustafson seconded, passes unanimously.

Discussion Items:

Investment in TPC: Bob Stern

How do we close the gap and make this organization sustainable?

- Finding capacity building grants (unrestricted, general operations funding).
- Heidi and the program officer for EDCF are going to look into a general operations grant that could sustain for 3-4 years which would allow for staff expansion.

Corporate Sponsorship

How do we instill value in our work when asking for funds? What is their incentive for giving?

- Both our work in housing and in workforce will become more apparent as projects are developed.
- There's no one else doing what we do.

Jurisdictions

We should be seen as a low cost alternative to policy that would be much more taxing at the jurisdiction level. The fact that we are a nonprofit and can be flexible, neutral and nimble is an asset.

Philanthropic Individuals

Roby stated that just like anyone else, they're looking for why they should give to *you*. Those folks are in this community and contributing in major ways. It's not to exhaust them, it's to engage them - give them a reason to lean in.

Work Plan Update

At their next meeting, each committee should set a quantifiable goal.

Questions from Board about programs:

Connected Tahoe: Chris Fajkos was the project manager and left in 2018. There was a lot to address with the EDA grant so Heidi filled in to oversee the consultant, edit the draft reports, coordinate the maps with the GIS team and catch up after Chris left.

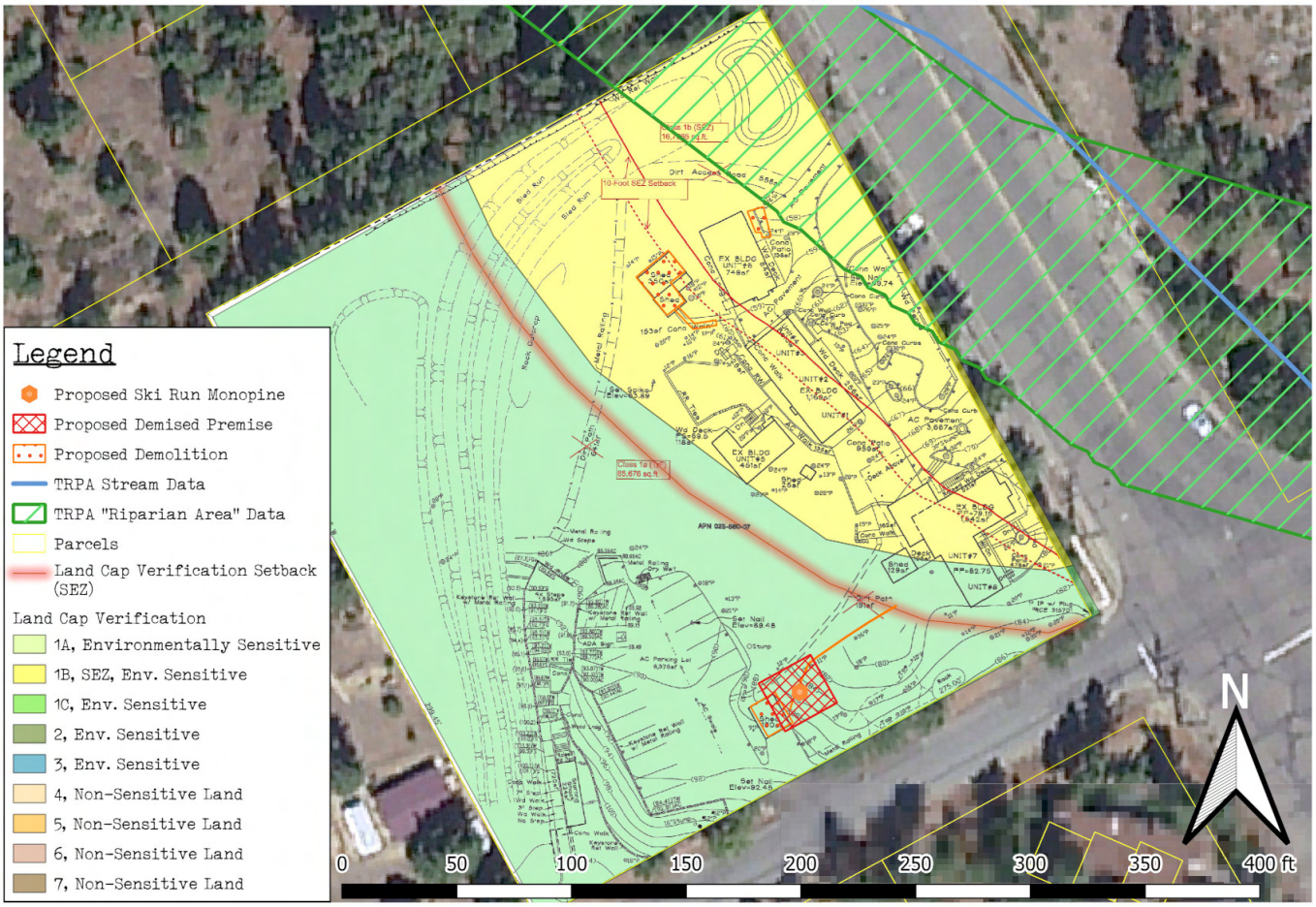
- *The feasibility study is done and addresses what build out/funding methods work best for our region. It* lays out a variety of models that we can move forward with CPUC and EDA.
- Next step is to apply for a CASF grant for infrastructure and an EDA grant for implementation. We would use existing staff and current consultants to complete the Connected Tahoe project.
- There were 3 sites originally identified by USFS - we've identified 2 more but the USFS staff have been slow to consider.

It is also damning that the attending TPC boardmembers which include Joanne Marchetta, Devin Middlebrook, Sue Novasel, and Cindy Gustafson quite apparently desire to market the TPC as a "low cost alternative" to government—to get the public to waive governmental **due process rights** under a secretive, constitutionally exempt, para-governmental organization in exchange for lower taxes. By April 2019, the entire cell tower network had been designed in private, and was publicly rolled-out through ostensibly isolated piecemealed hearings. Because each of the towers in the secret cell tower plan are interdependent, it was but a forgone conclusion that the piecemeal permitting review would be approved no matter the facts because it secretly was too big to fail. In fact, the TPC CEO aggressively conspired to get the City Planning Commissioners Madson and Palacio to astroturf the hearings. Madson recruited Chris McNamara, Corey Rich, Parker Alexander *et. al.*, to be an obsequious "plant" or "shill" or "operative" of the TPC. This cabal attacked the City Council hearings with a bunch of TPC disseminated talking points and propaganda flyers—many of them have been proven false. This para-governmental collusion enraged the public and undercut the authority of then City Manager Frank Rush leading to his resignation. Sue Novasel's shameless and

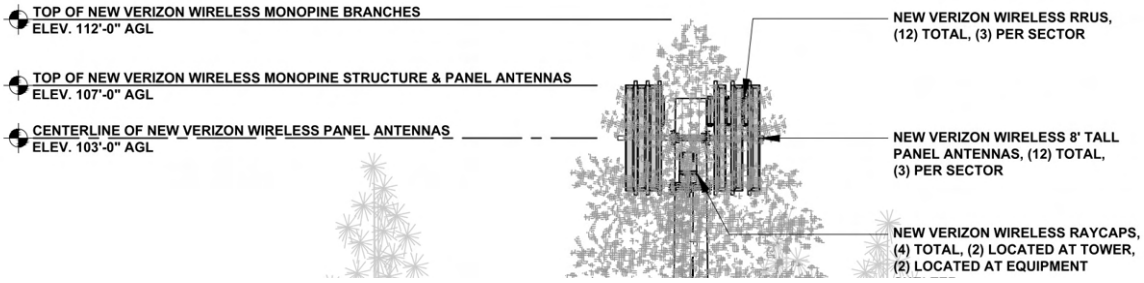
corrupt continued quasi-judicial adjudication of TRPA hearings to approve these piecemeal towers is a blatant and unlawful conflict-of-interest—which has substantially eroded public confidence in the City and TPRA.

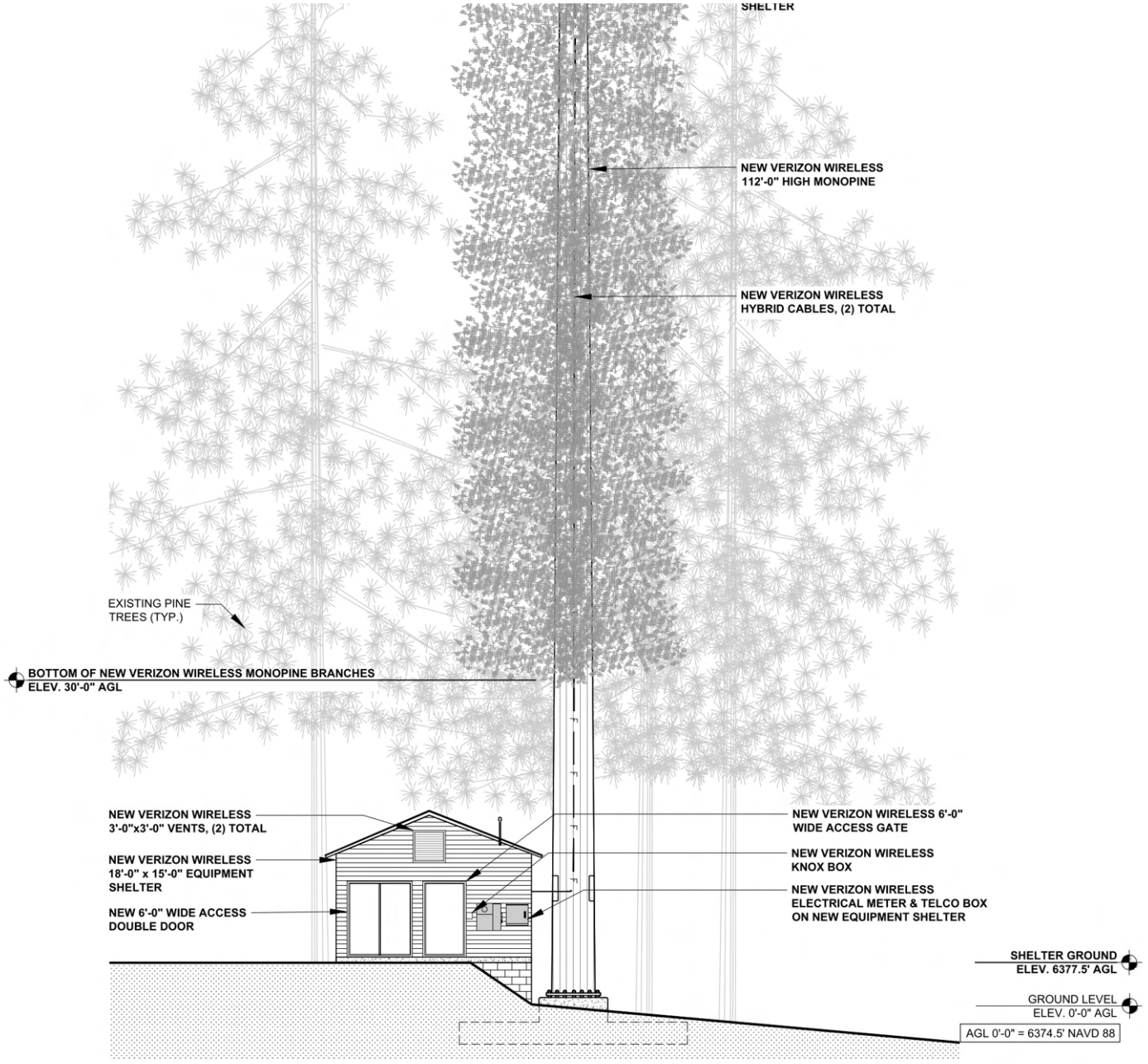
In another **purposeful misrepresentation**, Verizon outright committed fraud to hide its land overcoverage and outright moved the TPRA verified boundary line of the stream environmental zone (SEZ). The thin red lines to the right are Verizon's; the yellow area is the actual SEZ (Land Capacity 1B):

The Gregory J. Cook Engineering Survey's Mapped SEZ in Relation to TRPA "Land Verification" Data.



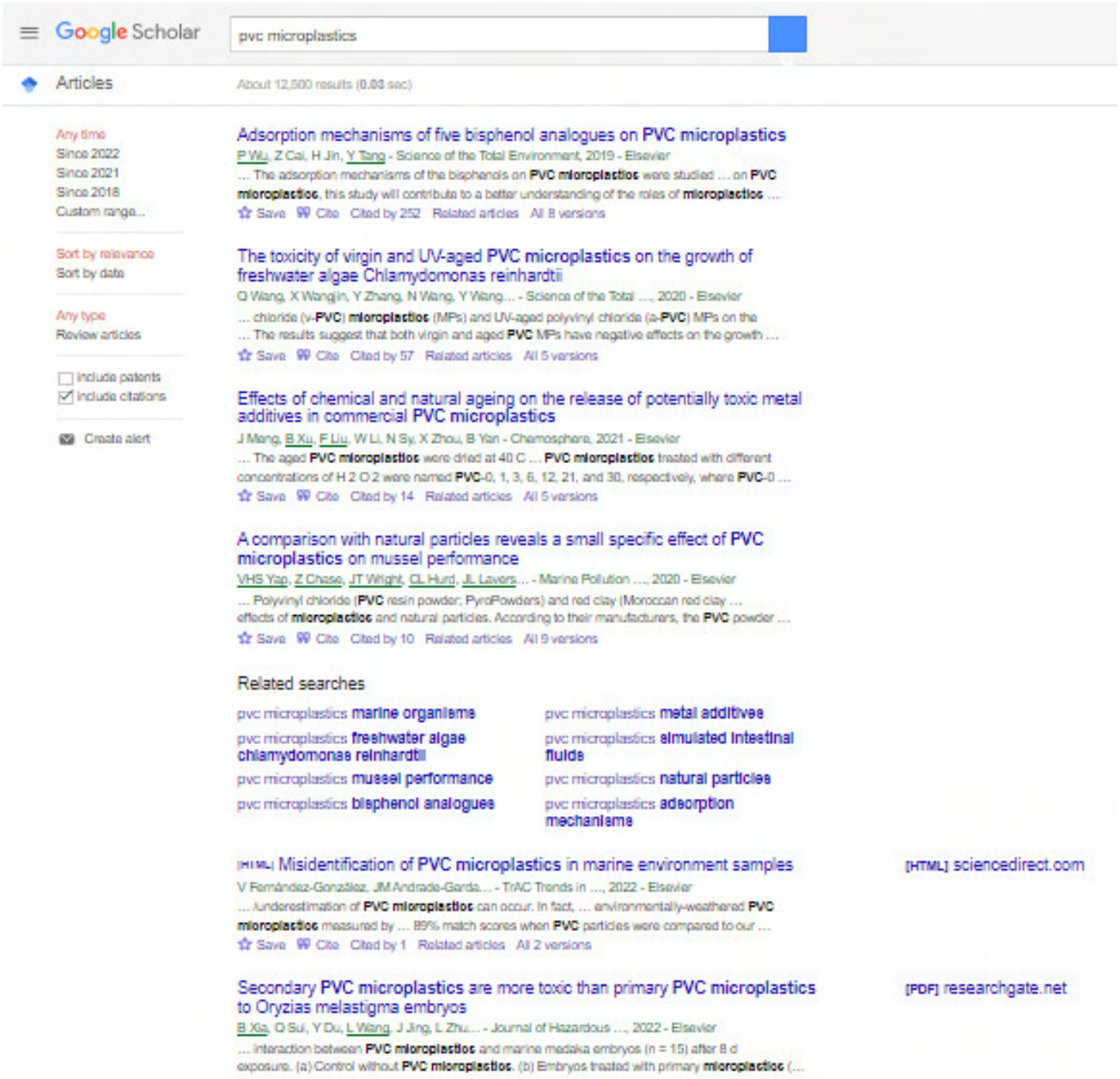
This was important staging for the stunt that followed. None of the hearing officers expressed investigative interest in the SEZ boundary location or the ineligible land coverage swap, because the hearings officers at the City of South Lake Tahoe thought they were approving **a superficial surface slab**, not an excavation:





But a major excavation adjacent to an SEZ, is exactly what happened after the applicant made multiple misrepresentations in order to duck triggering the requisite more stringent environmental review, and then manipulated the process at the staff level after the public hearings at the City and TRPA in order to actually do the following:

Then Verizon submitted a controversial "*Evaluation of Monopine Needles*" by Integral Consulting Inc which lead the Governing Board to produce findings that were clearly absurd: "TRPA staff and Verizon reviewed the complaint and found the needles are made of PVC, which doesn't break down into microplastics." (Laney Griffo. *Tahoe Daily Tribune*, March 25th 2022, p. 3). However, even entering a cursory search of "PVC microplastics" into Google Scholar reveals this is not the case:



It was a finding that was so implausible that even the State water board found that Verizon is discharging solid waste into the environment:

CALIFORNIA Water Boards

GAVIN NEWSOM GOVERNOR

YANA GARCIA SECRETARY FOR ENVIRONMENTAL PROTECTION

Lahontan Regional Water Quality Control Board

September 7, 2022

Michelle Duarte
SAC Wireless
8880 Cal Center Drive, Suite 170
Sacramento, CA 95826

Request for Report of Waste Discharge, Guilliam/Verizon Cell Tower Project, 1360 Ski Run Boulevard, South Lake Tahoe, CA, El Dorado County, Assessor's Parcel Number 025-580-007, and all other monopine style cell towers owned by Verizon on the California side of the Lake Tahoe Watershed

the Lake Tahoe Watershed

The Lahontan Water Quality Board staff requests that SAC Wireless submit a Report of Waste Discharge (ROWD) for the proposed Guilliam/Verizon Cell Tower Project, located at 1360 Ski Run Boulevard, South Lake Tahoe, CA (Project), and all other monopine style cell towers owned by Verizon on the California side of the Lake Tahoe Watershed, in accordance with California Water Code, section 13260(c). Section 13260 states that persons discharging or proposing to discharge waste that could affect the quality of the waters of the State, other than into a community sewer system, shall file a ROWD containing information which may be required by the appropriate Regional Water Quality Control Board (Water Board). Observations of faux pine tree cell phone tower locations indicate shedding of plastic debris into the environment. **Please submit a separate ROWD for each monopine style cell tower within 45 days of receipt of this letter.**

Moreover, laboratory studies have shown that the faux monopine needles are discharging not just microplastics, but toxic quantities of lead:

element

Lead with Microwave Digestion by SFS-0116, Rev 13
Inductively Coupled Plasma-Mass Spectrometry

Sample preparation: A cross-section of the sample was cut and freezer-milled into small pieces. A portion of the freezer-milled sample (0.2 g) was digested with 5 mL of nitric acid in a closed-vessel microwave digestion system. After cooling, internal standards were added and the digestate was diluted to 100 g with high-purity water. The sample mostly dissolved.

Sample ID	Lead
Raw PVC encased w/fiberglass (Branch) w/PVC/RFP needles - cross-section Sample	6.8

PVC microplastic discharges are important because PVC leeches toxic chemicals including endocrine disruptors such as Bisphenol A (BPA). It is well-known that even trace levels —parts per billion—of endocrine disruptors discharged into public waters cause intersex abnormalities in frogs and fish (*see,* Frontline PBS. "Poisoned Waters," Corporation for Public Broadcasting *at* time 43:41-45:45 (2009)). Clearly the microplastics may affect frogs—their existential ability to reproduce—such as the federally endangered Sierra-Nevada Yellow Legged Frog. Macro towers inappropriately placed near stream environmental zones deliver a synergistic "one-two punch" of lead and endocrine disruptor discharges in conjunction with RF radiation which is also toxic to frogs. There is some evidence—on the record—that endangered frog is living within a portion of upper Bijou Park Creek that is within a sectional range that is 250 to 1,500 feet of this proposed project (1, 2, 3, 4 & 5, 6). Both Verizon and the captured FCC have ignored their obligation on this matter and now it falls on state and local agencies (47 CFR §§ 1.13, 1.41, 1.1307(a)&(d)(3), 1.1308, 1.1311,

1.1312(d); 40 CFR §§ 1501.3(b)(1) & 1508.1(b); 7 CFR § 650.4(k)(2)(ii) (formerly 40 CFR § 1508.27(b)(3)); *United Keetoowah Band of Cherokee Indians in Okla. v. FCC*, 933 F.3d 728, 735 (D.C. Cir. 2019) ("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"; "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"); *Jaeger v. Cellco P'ship*, No. 3:09CV567, p. 18, 2010 U.S.Dist.LEXIS 24394, at *26 (D.Conn. Mar. 15, 2010) ("The plain meaning of the term 'environmental effects' incorporates adverse effects on all biological organisms.")).

Now that I have demonstrated a large pattern of Verizon's misrepresentations, this concern is paramount to the instant hearing—Verizon's "Exhibit B: Report by SAC Wireless Regarding Required Tower Foundation Depth":

September 21, 2022

Verizon Wireless
2785 Mitchell Drive, Bldg 9,
Walnut Creek, CA 94598

SAC Wireless
9020 Activity Road, Suite A
San Diego, CA 92126
(619) 736-3766

Subject: **Min. Tower Foundation Depth**

Carrier Site name Ski Run Blvd - PSL#444780

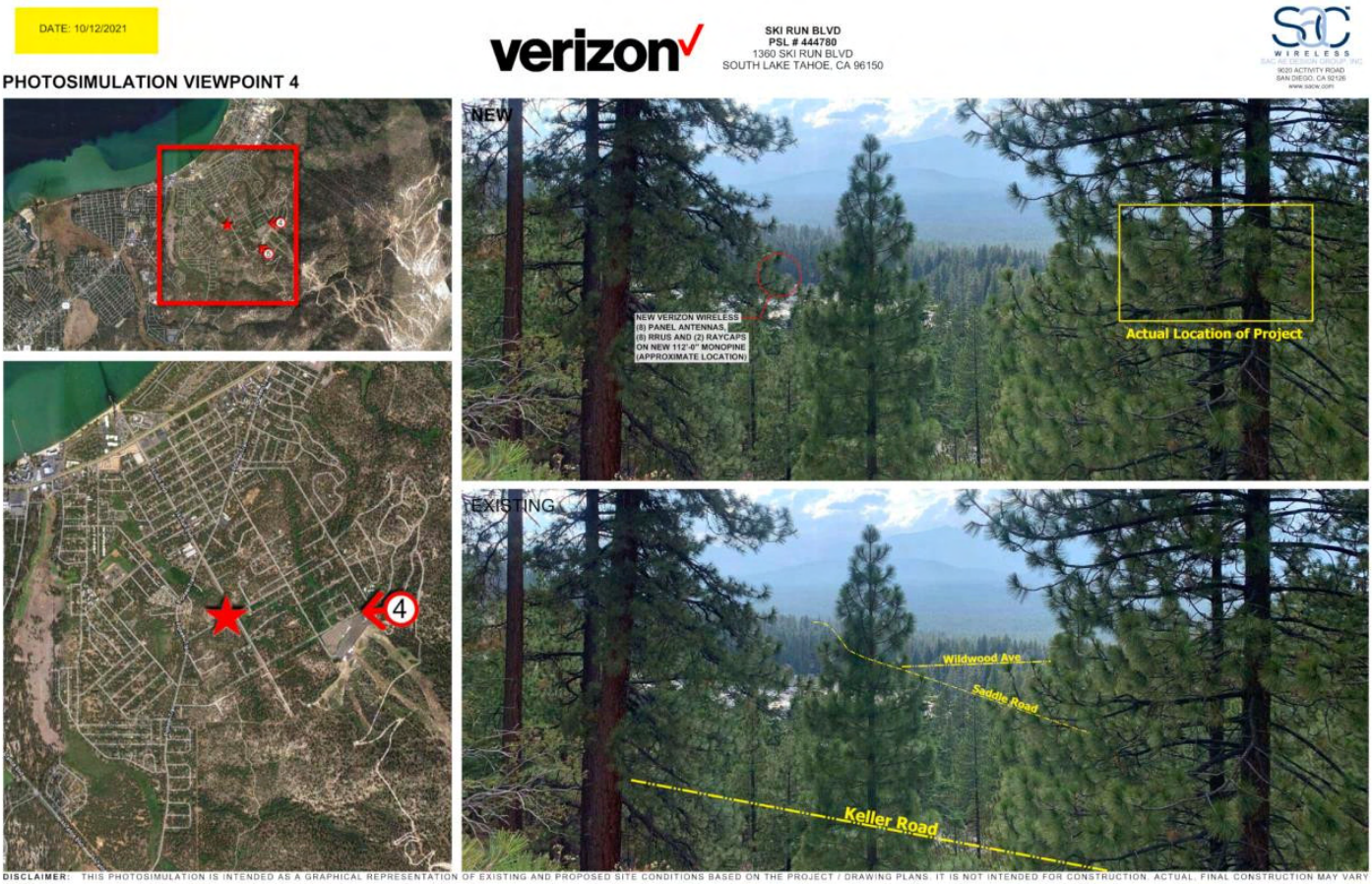
Site Data: **1360 Ski Run Blvd**
South Lake Tahoe, CA 96150

Greetings,

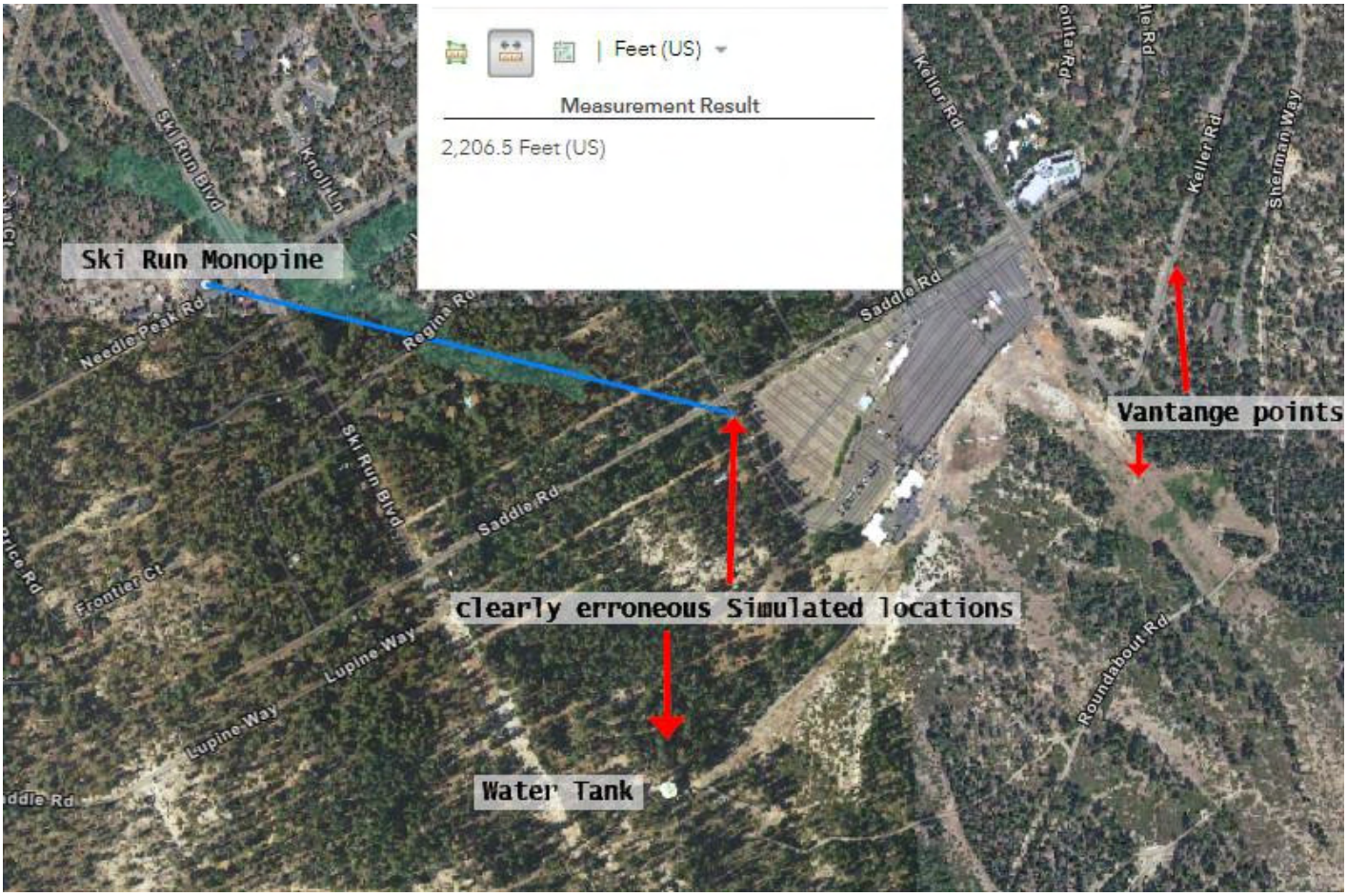
Per your request, SAC AE Design Group has prepared this letter to discuss the minimum tower foundation depth below ground level per 2019 California Building Code (2019 CBC) requirements for the above mentioned site.

You may remember from the "Hearing's Officer Appeal" materials for March 23rd 2022 G.B. meeting, Agenda Item No. VIII.B Appeal of Hearings Officer Special Use Permit for Verizon Wireless Monopine Staff Report—Attachment E_2021-12-01_Statement of Appeal (pp. 53-58), that Verizon secured the services of "**SAC Wireless**" who they purported to be a small boutique shop which specialized photosimulations. "SAC Wireless" submitted the following clearly erroneous if not fraudulent photosimulations:

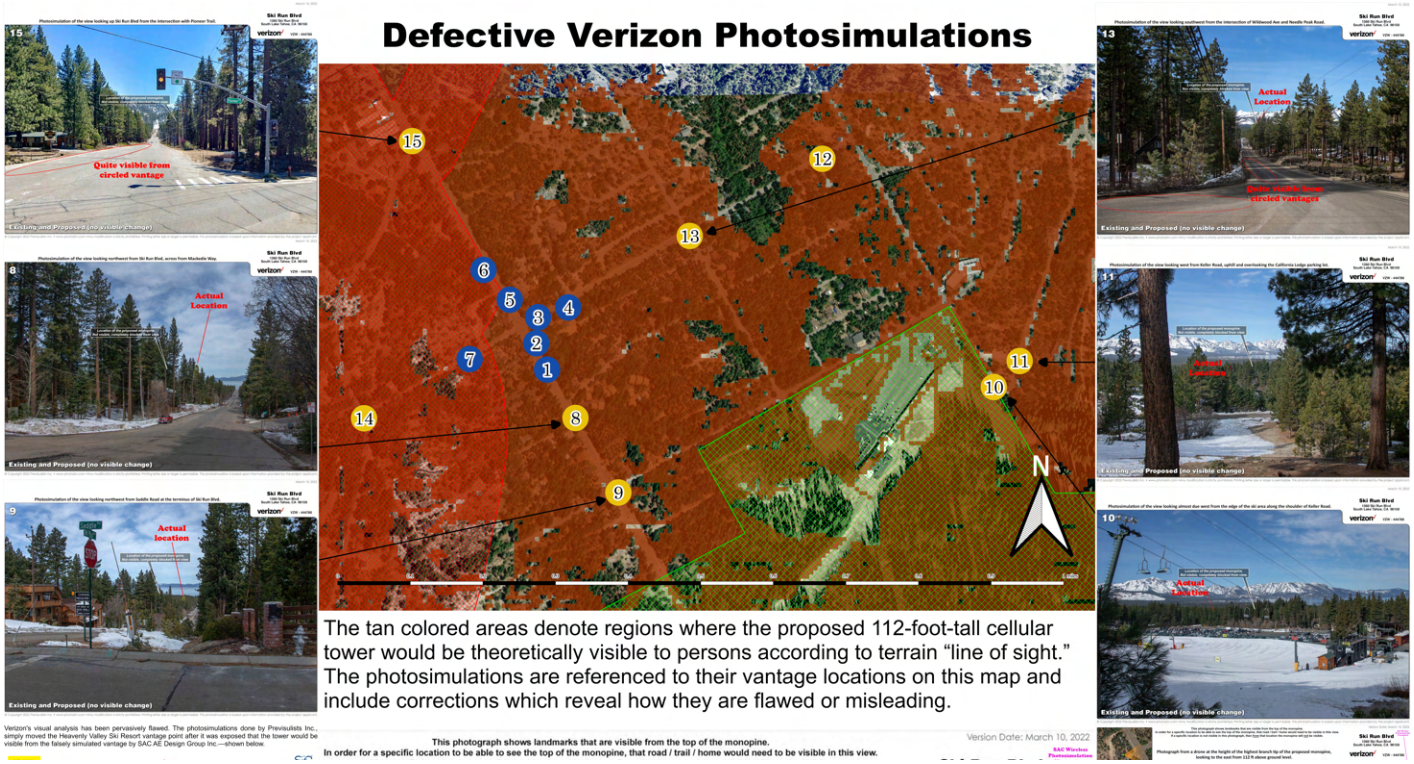
&

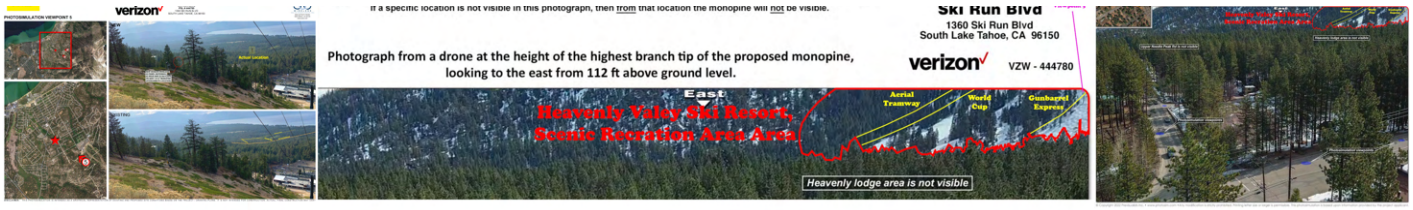


Which at best amounted to negligent, reckless, knowing, or purposeful misrepresentation, if not outright fraud:



Verizon was forced to "correct the deficiency" for which they simply repeated the stunt by submitting new photosimulations a few days before the Governing Board hearing when they could not be analyzed in time by the appellants. These new photosimulations also proved to be **another misrepresentation**:





Now all-of-the-sudden it turns out that "SAC Wireless" is an "expert" in soils and structural engineering. This firm is not an small unbiased third-party technical specialist, but is in fact acting as **an outright manipulative project advocacy arm of Verizon**. The City and the TRPA must assume that their materials, representations, and conclusions are just as erroneous as their **bogus photosimulations**.

Verizon, Ookla, and the telecoms continue to **lie** to you today, just as they have **lied** to everyone else during every other step along the way, including this last September.

Reject their claims, and enforce the City Code Sections 6.75.060(G), 6.75.100(D), **6.75.110(A)(20)&(22)**, & 6.75.140. Please confer with the extensive local environmental review on the proposed facility: **Ski Run Monopine Antenna—Report On Significant Effect On The Human Environment**. Please also read the TRPA Statement of Appeal, the previously submitted 3,300 page compendium of peer-reviewed scientific research on radiofrequency radiation health and environmental effects, the medical textbook chapter on RFR, and the BioInititve Report.

Thank you for your time and consideration,

Brent Wisner

Attachments:

Extenet Systems v. Village of Flower Hill, USCOURTS-nyed-2_19-cv-05588-0 (E.D.N.Y. July 29, 2022).pdf	604 KB
T-Mobile West LLC v City and County of San Francisco, 6 Cal.5th 1107 (2019).pdf	365 KB
Heavenly Fiber Plan—Deception.pdf	1.3 MB
Cook's Engineering Survey & Land Verification.pdf	1.9 MB

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

EXTENET SYSTEMS, LLC

Plaintiff,

-against-

VILLAGE OF FLOWER HILL and FLOWER HILL VILLAGE BOARD OF TRUSTEES,

Defendants.
----------x

MEMORANDUM AND ORDER
Case No. 19-CV-5588-FB-VMS

Appearances:
For the Plaintiff:
CHRISTOPHER B. FISHER
BRENDAN GOODHOUSE
Cuddy & Feder LLP
445 Hamilton Avenue, 14th Floor
White Plains, New York 10601

For the Defendants:
EDWARD M. ROSS
JUDAH SERFATY
Rosenberg Calica & Birney LLP
100 Garden City Plaza, Suite 408
Garden City, New York 11530

BLOCK, Senior District Judge:

In this action under the Telecommunications Act of 1996 ("the Act"), 47 U.S.C. §§ 251-61, 332(c)(7), ExteNet Systems, LLC. ("ExteNet"), seeks judicial review of a decision of the Flower Hill Village Board of Trustees ("the Village" or "the Board") denying ExteNet's application for a permit to install wireless infrastructure on public rights-of-way in the village. Both parties move for summary judgment pursuant to Federal Rule of Civil Procedure 56. For the following, reasons the Village's motion is granted and ExteNet's is denied.

I

The following facts are taken from the pleadings and the parties' Rule 56.1 statements. Except where noted, they are undisputed.

ExteNet builds and operates telecommunications infrastructure, including "small wireless facilities" that house low-power antennas to improve network connectivity. It operates under a Certificate of Public Convenience and Necessity ("CPCN") from the New York State Public Service Commission.

As their name suggests, small wireless facilities are substantially smaller than the large, freestanding cellular towers traditionally used by providers. They are about the size of a backpack and, under regulations promulgated by the Federal Communications Commission ("FCC"), are mounted on structures (such as utility poles or buildings) no more than 50 feet high or 10% taller than adjacent structures, whichever is greater. *See* 47 C.F.R. § 1.6002(*l*)(1).

For approximately seven years, ExteNet has been under contract with Verizon Wireless, a major wireless provider, to build and operate small wireless facilities throughout Long Island. The stated goal of the contract is to improve coverage of Verizon's 4G LTE network.[1] In broad terms, Verizon identifies a deficiency in its network and asks ExteNet to design a solution that will provide a specified signal

[1] 4G LTE stands for "fourth-generation long-term evolution," a wireless standard that improves the capacity and speed of a carrier's network.

strength over a specified area. Pursuant to its CPCN, ExteNet must secure permission from the local authorities before beginning installation.

In 2016, Verizon identified the area around the Village of Flower Hill as having insufficient 4G LTE service and asked ExteNet to design and install a network of 66 small wireless facilities, eighteen of which would be located within the Village. Verizon estimated that the network would provide a signal strength of -85 decibel-milliwatts (dBm) to 90% of the area under consideration.

ExteNet first filed a permit application for one small wireless facility in May 2017. Shortly thereafter, the Village imposed a moratorium on such applications while it considered an ordinance governing them. In March 2019 the Board adopted Article VIII to Chapter 209 of the Village Code ("Article VIII"), which now regulates the approval process for small wireless facilities.

In the meantime, ExteNet had filed permit applications for the eighteen small wireless facilities to be located within the Village in late 2018 and early 2019. ExteNet proposed mounting the facilities on ten new utility poles, two existing poles and six replacement poles. At a meeting with ExteNet in April 2019, Village officials expressed a preference for more "decorative" poles disguised as streetlights and fewer utility poles. In response, ExteNet submitted a revised proposal for eleven streetlights, two existing poles and five replacement poles.

The Board held public hearings on ExteNet's application on May 6 and June

3, 2019. Opposition to the proposal, which came from both members of the Board and residents, focused on the lack of need for improved 4G LTE coverage, adverse affects on Village's aesthetic and concerns about exposure to radio waves. In response, ExteNet offered to reduce the height of the mounting structures from 30 to 20 feet and to work with a consultant on an aesthetically acceptable streetlight design. Nevertheless, a third public meeting on July 1, 2019, revealed continued opposition.

Later in July, ExteNet hosted a public forum to discuss and identify designs for the decorative streetlights. No consensus emerged, with several participants rejecting the possibility of any acceptable design and others expressing a preference for existing utility poles. ExteNet then submitted yet another alternative using one or two streetlights, one flagpole, three existing poles, six or seven new poles and six replacement poles. At a fourth public meeting on August 5, 2019, ExteNet described the first proposal as focusing on utility poles, the second on decorative poles, and the third as a hybrid of the two.

At a public meeting held on September 3, 2019, the Board voted on ExteNet's application and unanimously denied it. It then approved a written statement of findings prepared by the Village Attorney and entered them into the record. As grounds for the denial, the statement of findings cited: "(1) the significant adverse aesthetic and property values impacts of the 18 nodes permeating the tiny Village;

(2) there is no gap in wireless coverage for Verizon and no need to justify the significant adverse impacts; and (3) ExteNet's abject refusal to submit for consideration an actual fixed plan for each of the 18 wireless nodes and poles, instead offering multiple different plans, with different pole/node locations and configurations, abject refusal and failure to provide onsite photo simulations for each of its proposed nodes, and refusal to comply with the public notice provisions of the Village Code which further required denial of the application." Defs. 56.1 Stmt. ¶ 13.

This action followed.

II

A. The Act's Preemptive Effect

The Act declares 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 any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). It then provides, however, that "[n]othing in this section affects the authority of a State or local government to manage the public rights-of-way . . . , on a competitively neutral and nondiscriminatory basis[.]" *Id.* § 253(c). These declarations are repeated —perhaps unnecessarily— later in the Act:

> (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.
>
> (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.

Id. § 332(c)(7).

B. Substantial Evidence

In addition to banning prohibitions (or effective prohibitions) and discrimination, the Act requires that any denial of an application "to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii). Substantial-evidence review is a "deferential standard, and courts may neither engage in their own fact-finding nor supplant the Board's reasonable determinations." *Omnipoint Comm'ns, Inc. v. City of White Plains*, 430 F.3d 529, 533 (2d Cir. 2005) (internal quotation marks and alterations omitted). "Substantial evidence, in the usual context, has been construed to mean less than a preponderance, but more than a scintilla of evidence." *Id.* (internal quotation marks omitted).

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (internal quotation marks omitted). "If the Court finds that even one reason given for the denial is supported by substantial evidence, the decision of the local zoning body cannot be disturbed." *T-Mobile Ne. LLC v. Town of Islip*, 893 F. Supp. 2d 338, 355 (E.D.N.Y. 2012) (internal quotation marks and alteration omitted).

C. Summary

To summarize, the Act "is in many important respects a model of ambiguity or indeed even self-contradiction." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999). But at least three clear principles emerge from the statutory language and cases construing it.

First, the Act forbids a municipality from prohibiting or effectively prohibiting the provision of personal wireless services. Any local permitting requirement that does so is preempted.

Second, the Act requires a municipality to support its decision with substantial evidence.

Third, the Act requires a municipality to make its permitting decisions in a nondiscriminatory manner. A coverage gap has no apparent bearing on discrimination; rather, the statutory standard is whether the favored and disfavored applicants offer "functionally equivalent services," 47 U.S.C. § 332(c)(7)(B)(i)(I).

With these principles in mind, the Court turns to ExteNet's claims in this case.

III

ExteNet's complaint includes four claims. First, it alleges that Article VIII is preempted because it facially constitutes an effective prohibition on personal wireless services in violation of 47 U.S.C. § 253(a). Second, it alleges that Article VIII, as it was applied to its permit application, is preempted for the same reason. Third, it alleges that the denial of its application violated § 332(c)(7) because it was an effective prohibition, discriminatory, and not supported by substantial evidence. Fourth, it claims that the denial violated § 27 of New York's Transportation Corporations Law.

The parties' motions for summary judgment reframe the issues in a more sensible way. The balance of this memorandum and order addresses those issues.

A. Did the Board's denial effectively prohibit personal wireless services?

As noted, the Act is not a model of clarity. In part, this is because it "strikes a balance between two competing aims—to facilitate nationally the growth of wireless telephone service and to maintain substantial local control over siting of towers." *Omnipoint*, 430 F.3d at 531 (internal quotation marks omitted).

The Second Circuit addressed where the balance lay in *Sprint Spectrum L.P. v. Willoth*, 176 F.3d 630 (2d Cir. 1999). After "a detailed parsing of the statutory language, including layers of highly technical definitions," the circuit court held that

the proper balance could be found by deciding "what Congress meant by 'personal wireless services.'" *Id.* at 641. It then concluded that "local governments may not regulate personal wireless service facilities in such a way as to prohibit remote users from reaching such facilities." *Id.* at 643. "In other words, local governments must allow service providers to fill gaps in the ability of wireless telephones to have access to land-lines." *Id.*

By contrast, the stated intent of Verizon's contract with ExteNet was to improve Verizon's 4G LTE service. Indeed, it is undisputed that a signal strength far less than Verizon's desired -85 dBm would still be sufficient to make a phone call. *See* Defs. Counter 56.1 Stmt. ¶ 151 ("At the level of signal strength is typically when the mobile user would experience their device 'downshift' into 3G or even 1X service which only supports voice." (quoting ExteNet's engineering expert)).

ExteNet objects that a 2018 ruling by the FCC expands the scope of the Act to include services beyond access to a telephone network. In that ruling, the FCC "clarif[ied] that an effective prohibition occurs where a state or local legal requirement materially inhibits a provider's ability to engage in any of a variety of activities related to its provision of a covered service. This test is met not only when filling a coverage gap but also when densifying a wireless network, introducing new services or otherwise improving service capabilities." *In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv.*, 33 F.C.C.R.

9088, 9104-05 (2018) (footnotes omitted).

ExteNet argues that the FCC's ruling is entitled to deference under *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). However, *Chevron* deference applies only when the statute in question is silent or ambiguous. *See id.* at 842-43. Although the Second Circuit found the phrase "personal wireless services" "opaque," it ultimately relied on "[t]he plain statutory language" to define it. Therefore, the phrase was not ambiguous.

Improved capacity and speed are desirable (and, no doubt, profitable) goals in the age of smartphones, but they are not protected by the Act. *See Willoth*, 176 F.3d at 643 ("We hold only that the Act's ban on prohibiting personal wireless services precludes denying an application for a facility that is the least intrusive means for closing a significant gap in a remote user's ability to reach a cell site that provides access to land-lines."). The circuit court may wish to reconsider its definition in light of new technology, but the Court is not in a position to ignore its binding pronouncement. *Accord Crown Castle NG East LLC v. Town of Hempstead*, 2018 WL 6605857, at *9 (E.D.N.Y. Dec. 17, 2018) ("A gap in 4G coverage does not establish that the target area is underserved by voice cellular telephone service."); *Clear Wireless LLC v. Bldg. Dep't of Vill. of Lynbrook*, 2012 WL 826749, at *9 (E.D.N.Y. Mar. 8, 2012) ("[I]t is not up to the FCC to construe the [Act] to say something it does not say, nor up to the Court to find broadband communication

encompassed by the law." (internal quotation marks omitted)).

B. Was the Board's denial supported by substantial evidence?

Although the Act requires that the denial of an application to install wireless facilities be supported by substantial evidence, *see* 47 U.S.C. § 332(c)(7)(B)(iii), it does not set any substantive standards for evaluating the application; "[t]hat authority must be found in state or local law." *Willoth*, 176 F.3d at 644. Under New York law, lack of "public necessary" can justify a denial. *See Omnipoint*, 430 F.3d at 535 (citing *Consol. Edison Co. v. Hoffman*, 43 N.Y.2d 598, 611 (1978)). In the context of wireless facilities, public necessary requires the provider "to demonstrate that there was a gap in cell service, and that building the proposed [facility] was more feasible than other options." *Id.*

Thus, as with the effective prohibition issue, the lack of a gap in coverage is relevant here and can constitute substantial evidence justifying denial of a permit. For the reasons stated in the previous section, there was substantial evidence justifying the Board's conclusion that there was no gap in coverage justifying ExteNet's application. And, since one reason given by the Board for its decision was supported by substantial evidence, the Court need not evaluate its other reasons. *See Town of Islip*, 893 F. Supp. 2d at 355.

C. Was the Board's denial discriminatory?

Unlike the prior two issues, there is little caselaw as to what constitutes a

discriminatory denial. Fortunately, the statutory standard is clear. As noted, the comparison must be between "providers of functionally equivalent services." 47 U.S.C. § 332(c)(7)(B)(i)(I).

ExteNet principally argues that the Village's permitting process singles out small wireless facilities and impose requirements "above and beyond those applied to any other telecommunication structure." Pl's. Mem. of Law in Supp. of its Mot. for Summ. J. at 24. But it fails to identify any such structure that offers functionally equivalent services. The only other candidate in the record is a large cell tower, which, by ExteNet's own admission, does not offer the same functionality as its small wireless facilities.

ExteNet briefly argues that the Village allowed Altice USA to install small wireless facilities without prior permission, but the comparison is still not apt. Altice One is a cable provider to whom the Village was legally required to offer access to its rights-of-way. In addition, Altice USA offers cable and WiFi access; by ExteNet's own admission, these are not equivalent to the cell service provided by its small wireless facilities.

D. Did the Board's denial violate New York law?

Finally, ExteNet argues that the Board's denial violates § 27 of New York's Transportation Corporations Law. That statute—somewhat confusingly—governs telephone and telegraph corporations, and provides that "any such corporation may

erect, construction and maintain the necessary fixtures for its lines upon, over or under any of the public roads, streets, and highways." *Id.*

Given its focus on "lines," it is far from clear that the statute applies to providers of wireless services. In any event, the statute requires that the corporation must "first obtain from . . . the trustees of villages . . . permission to use the streets within such . . . village . . . for the purposes herein set forth." *Id.* It is undisputed that ExteNet did not receive such permission.

IV

For the foregoing reasons, the Village's motion for summary judgment is granted and ExteNet's motion is denied. The Clerk shall enter a judgment dismissing the case.

SO ORDERED.

_/S/ Frederic Block_____
FREDERIC BLOCK
Senior United States District Judge

Brooklyn, New York
July 29, 2022

6 Cal.5th 1107
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
|
April 4, 2019

Synopsis

Background: Wireless telephone service providers brought action against city for declaratory and injunctive relief challenging city's wireless facility site permit ordinance. The Superior Court, City and County of San Francisco, No. CGC–11–510703, James McBride, J., granted summary adjudication for city on providers' claims that the ordinance violated a state wireless facility permit statute and California Environmental Quality Act (CEQA), but ruled in providers' favor in part, after bench trial, on claims that the ordinance violated the Public Utilities Code and the Middle Class Tax Relief and Job Creation Act. Providers appealed. The Court of Appeal, 208 Cal.Rptr.3d 248, affirmed. Providers sought review.

Holdings: After grant of review, the Supreme Court, Corrigan, J., held that:

[1] state statute providing 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" did not preempt local regulation allowing city to condition permit approval for telephone line construction on aesthetic considerations, and

[2] statute roads are "accessed" by wireless telephone corporations only applies to temporary access during construction and installation of telephone lines and equipment.

Affirmed.

West Headnotes (22)

[1] **Counties** Governmental powers in general
Municipal Corporations Conformity to constitutional and statutory provisions in general

General laws, for purposes of constitutional provision allowing cities and counties to make and enforce ordinances not in conflict with general laws, are those that apply statewide and deal with matters of statewide concern. Cal. Const. art. 11, § 7.

[2] **Zoning and Planning** Police power

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.

[3] **Zoning and Planning** Police power

The local police power generally includes the authority to establish aesthetic conditions for land use.

[4] **Municipal Corporations** Conformity to constitutional and statutory provisions in general

Municipal legislation that conflicts with state law is void.

1 Cases that cite this headnote

[5] **Municipal Corporations** Conformity to constitutional and statutory provisions in general

A conflict exists between local legislation and state law, rendering local legislation void, when the local legislation duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.

3 Cases that cite this headnote

[6] **Municipal Corporations** Conformity to constitutional and statutory provisions in general

Local legislation duplicates general law, as could render local legislation void, if both enactments are coextensive.

[7] **Municipal Corporations** Conformity to constitutional and statutory provisions in general

Local legislation is contradictory to general law, as could render the local legislation void, when it is inimical to general law.

2 Cases that cite this headnote

[8] **Municipal Corporations** Conformity to constitutional and statutory provisions in general

State law fully occupies a field, as could render local legislation in same field void, when the Legislature expressly manifests its intent to occupy the legal area or when the Legislature impliedly occupies the field.

1 Cases that cite this headnote

[9] **Municipal Corporations** Presumptions and burden of proof

The party claiming preemption of local legislation by state law has the burden of proof.

1 Cases that cite this headnote

[10] **Municipal Corporations** Presumptions and burden of proof

Zoning and Planning Validity of regulations in general

When local government regulates in an area over which it traditionally has exercised control, such as the location of particular land uses, courts will presume the regulation is not preempted by state law unless there is a clear indication of preemptive intent.

1 Cases that cite this headnote

[11] **Municipal Corporations** Proceedings concerning construction and validity of ordinances

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.

2 Cases that cite this headnote

[12] **Appeal and Error** De novo review

Questions of law are subject to de novo review.

4 Cases that cite this headnote

[13] **Municipal Corporations** Concurrent and Conflicting Exercise of Power by State and Municipality

Telecommunications Franchises or licenses and rights of way regulation

State statute providing that telephone corporations could construct lines and erect equipment along public roads in ways and locations that did not "incommode the public use of the road" did not preempt local regulation allowing city to condition permit approval for telephone line construction on aesthetic considerations; city's inherent police power to determine appropriate uses of land included authority to establish aesthetic conditions for land use, to "incommode" could include various impacts disturbing quiet enjoyment, ordinance did not require a company to obtain any local franchise, and statute said nothing about aesthetics or appearance of telephone lines. Cal. Pub. Util. Code § 7901.

[14] **Municipal Corporations** Concurrent and Conflicting Exercise of Power by State and Municipality

Telecommunications Franchises or licenses and rights of way regulation

Because state law grants telephone corporations a statewide franchise to engage in the telecommunications business, a local government cannot insist that a telephone corporation obtain a local franchise to operate within its jurisdiction. Cal. Pub. Util. Code § 7901.

[15] **Telecommunications** Local Franchise or Regulation; Use of Streets, Roads or Public Places

The right of telephone corporations to construct telephone lines in public rights-of-way is not absolute; instead, it is a limited right to use the highways only to the extent necessary for the furnishing of services to the public.

[16] **Municipal Corporations** Concurrent and Conflicting Exercise of Power by State and Municipality

Municipal Corporations Ordinances permitting acts which state law prohibits

The "contradictory and inimical" form of preemption of an ordinance does not apply unless the ordinance directly requires what the state statute forbids or prohibits what the state enactment demands.

[17] **Municipal Corporations** Concurrent and Conflicting Exercise of Power by State and Municipality

Field preemption generally exists over an ordinance where the Legislature has comprehensively regulated in an area, leaving no room for additional local action.

2 Cases that cite this headnote

[18] **Telecommunications** Regulation in general

The power to regulate the location and manner of telephone line installation is generally a matter left to local regulation.

[19] **Administrative Law and Procedure** Public utilities

Public Utilities Review and determination in general

The Public Utility Commission's (PUC) interpretation of the Public Utility Code should not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language. Cal. Pub. Util. Code § 1 et seq.

[20] **Telecommunications** Judicial review or intervention

Default policy of Public Utilities Commission (PUC) is one of deference to municipalities in matters concerning the design and location of wireless facilities. Cal. Const. art. 12, § 8.

[21] **Public Utilities** Nature and status

Role of Public Utilities Commission (PUC) is that of the agency of last resort, intervening only when a utility contends that local actions impede statewide goals. Cal. Const. art. 12, § 8.

[22] **Telecommunications** Local government regulation; proceedings

Statute allowing cities to control time, place, and manner in which roads are "accessed" by wireless telephone corporations only applies to temporary access during construction and installation of telephone lines and equipment. Cal. Pub. Util. Code § 7901.1.

Witkin Library Reference: 8 Witkin, Summary of Cal. Law (11th ed. 2017) Constitutional Law, § 1108 [Test of Valid Regulation]

****241** *****414** First Appellate District, Division Five, A144252, San Francisco City and County Superior Court, CGC-11-510703, James J. McBride, Judge

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Opinion

Opinion of the Court by Corrigan, J.

***1113** By ordinance the City and County of San Francisco (the City) requires wireless telephone service companies to obtain permits to ***1114** 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 *****415** 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. 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."

****242**

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. (*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 ***1115** 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 ***416 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 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, 208 Cal.Rptr.3d 248.)

*1116 II. DISCUSSION

A. Section 7901 Does Not Preempt the Ordinance

1. Preemption Principles

[1] **[2]** **[3]** Under the California Constitution, cities and counties "may make and enforce **243 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, 177 P.2d 558.) 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, 156 Cal.Rptr.3d 409, 300 P.3d 494 (*City of Riverside*); see also *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1151, 45 Cal.Rptr.3d 21, 136 P.3d 821 (*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, 50 Cal.Rptr.2d 242, 911 P.2d 429; *Disney v. City of Concord* (2011) 194 Cal.App.4th 1410, 1416, 124 Cal.Rptr.3d 58.)

[4] **[5]** **[6]** **[7]** **[8]** "[L]ocal legislation that conflicts with state law is void." (***417 *City of Riverside*, *supra*, 56 Cal.4th at p. 743, 156 Cal.Rptr.3d 409, 300 P.3d 494, citing *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897, 16 Cal.Rptr.2d 215, 844 P.2d 534.) 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, 16 Cal.Rptr.2d 215, 844 P.2d 534.) Local legislation duplicates general law if both enactments are coextensive. (*Ibid.*, citing *In re Portnoy* (1942) 21 Cal.2d 237, 240, 131 P.2d 1.) Local legislation is contradictory when it is inimical to general law. (*Sherwin-Williams*, at p. 898, 16 Cal.Rptr.2d 215, 844 P.2d 534, citing *Ex parte Daniels* (1920) 183 Cal. 636, 641-648, 192 P. 442.) 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, 63 Cal.Rptr.3d 67, 162 P.3d 583 (*O'Connell*), citing *Sherwin-Williams*, at p. 898, 16 Cal.Rptr.2d 215, 844 P.2d 534.)

[9] **[10]** **[11]** The party claiming preemption has the burden of proof. (*Big Creek Lumber*, *supra*, 38 Cal.4th at p. 1149, 45 Cal.Rptr.3d 21, 136 P.3d 821.) "[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 *1117 *IT Corp. v. Solano County Bd. of Supervisors* (1991) 1 Cal.4th 81, 93, 2 Cal.Rptr.2d 513, 820 P.2d 1023.) 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, 207 Cal.Rptr.3d 684, citing *Pieri v. City and County of San Francisco* (2006) 137 Cal.App.4th 886, 894, 40 Cal.Rptr.3d 629, which in turn cites *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084, 40 Cal.Rptr.2d 402, 892 P.2d 1145.)[6]

2. Analysis

[12] **[13]** 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 granting those rights, the Legislature ****244** 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, 122 Cal.Rptr.3d 331, 248 P.3d 1185; *Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1089, fn. 10, 72 Cal.Rptr.3d 112, 175 P.3d 1170.)

[14] The parties agree that section 7901 grants telephone corporations a statewide *****418** franchise to engage in the telecommunications business.[7] (See *Western Union Tel. Co. v. Visalia* (1906) 149 Cal. 744, 750, 87 P. 1023 (*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, 87 P. 1023; see also *Pac. Tel. & Tel. Co. v. City & County of S. F.* (1959) 51 Cal.2d 766, 771, 336 P.2d 514 (*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.

***1118** 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 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, 208 Cal.Rptr.3d 248, citing Merriam-Webster Online Dict. <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, 208 Cal.Rptr.3d 248, 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 *****419** 7901's enactment.[9] Obstructing the ***1119** path of ****245** 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, 208 Cal.Rptr.3d 248.) 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, 282 P.2d 43 (*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, 282 P.2d 43; see also *Pacific Telephone I*, *supra*, 51 Cal.2d at p. 770, 336 P.2d 514; *County of Inyo v. Hess* (1921) 53 Cal.App. 415, 425, 200 P. 373 (*County of Inyo*).) Similarly, *Pac. Tel. & Tel. Co. v. City of Los Angeles* (1955) 44 Cal.2d 272, 282 P.2d 36 (*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, 282 P.2d 36.)

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, 336 P.2d 514; *Petaluma*, *supra*, 44 Cal.2d at p. 285, 282 P.2d 43; *City of Los Angeles*, *supra*, 44 Cal. 2d at p. 276, 282 P.2d 36; *County of Inyo*, *supra*, 53 Cal.App. at p. 425, 200 P. 373.) 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, 17 Cal.Rptr. 687 (*Pacific Telephone II*), the City argued ***1120** 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, 17 Cal.Rptr. 687.) 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 *****420** 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, 87 P. 1023, 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, 87 P. 1023.) The city asserted its ordinance operated to grant the company a " 'franchise,' " and ****246** then attempted to assess a tax on the franchise. (*Id.* at p. 745, 87 P. 1023.) 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, 87 P. 1023.) We concluded the ordinance did not create a local franchise. (*Id.* at p. 750, 87 P. 1023.) 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, 87 P. 1023, 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, 87 P. 1023)[10]

[15] 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 ***1121** 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, 154 Cal.Rptr.3d 241 (*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 public.' " (*Ibid*., quoting *County of L. A. v. Southern Cal. Tel. Co.* (1948) 32 Cal.2d 378, 387, 196 P.2d 773; see also *Pacific Tel. & Tel. Co. v. Redevelopment Agency* (1977) 75 Cal.App.3d 957, 963, 142 Cal.Rptr. 584.)[11]

*****421** 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, 87 P. 1023), we presume the ordinance is not preempted absent a clear indication of preemptive intent. (*Big Creek Lumber*, *supra*, 38 Cal.4th at p. 1149, 45 Cal.Rptr.3d 21, 136 P.3d 821.) 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.

[16] "The 'contradictory and inimical' form of preemption does not apply unless the ordinance directly requires what the state statute forbids or prohibits what the state enactment demands." (*City of Riverside*, *supra*, 56 Cal.4th at p. 743, 156 Cal.Rptr.3d 409, 300 P.3d 494, citing ****247** *Big Creek Lumber*, *supra*, 38 Cal.4th at p. 1161, 45 Cal.Rptr.3d 21, 136 P.3d 821.) "[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, 156 Cal.Rptr.3d 409, 300 P.3d 494.) As noted, section 7901 grants telephone corporations the right to install lines on ***1122** 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.

[17] **[18]** 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, 23 Cal.Rptr.3d 453, 104 P.3d 813; *O'Connell*, *supra*, 41 Cal.4th 1061, 1068-1074, 63 Cal.Rptr.3d 67, 162 P.3d 583.) 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, 336 P.2d 514; *Pacific Telephone II*, *supra*, 197 Cal.App.2d at p. 152, 17 Cal.Rptr. 687), the power to regulate the location and manner of line installation is generally a matter left to local regulation. The City is not *****422** 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, 45 Cal.Rptr.3d 21, 136 P.3d 821.)

City of Riverside, *supra*, 56 Cal.4th 729, 156 Cal.Rptr.3d 409, 300 P.3d 494, 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, 156 Cal.Rptr.3d 409, 300 P.3d 494.) 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, 156 Cal.Rptr.3d 409, 300 P.3d 494.) 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, 156 Cal.Rptr.3d 409, 300 P.3d 494.) 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, 156 Cal.Rptr.3d 409, 300 P.3d 494).

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." (***1123** *City of Riverside*, *supra*, 56 Cal.4th at p. 755, 156 Cal.Rptr.3d 409, 300 P.3d 494.) 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 ****248** 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, 118 Cal.Rptr.2d 746, 44 P.3d 120; cf. *City of Riverside*, *supra*, 56 Cal.4th at pp. 763-765, 156 Cal.Rptr.3d 409, 300 P.3d 494 (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, 110 S.Ct. 2668, 110 L.Ed.2d 579.) *****423** 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.

[19] 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, 3 Cal.Rptr.3d 703, 74 P.3d 795, quoting *Greyhound Lines, Inc. v. Public Utilities Com.* (1968) 68 Cal.2d 406, 410-411, 67 Cal.Rptr. 97, 438 P.2d 801.) Here, the PUC has made determinations about the scope of permissible regulation that are on point.

***1124** 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, 154 Cal.Rptr.3d 241.) 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).

[20] **[21]** 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 ****249** of cell sites ...." (PUC, General order No. 159A (1996) p. 3 (General Order 159A), available at <http://docs.cpuc.ca.gov/PUBLISHED/Graphics/611.PDF> [as of Apr. 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 ***424** 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. (General Order 159A, at ***1125** 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, 172 Cal.Rptr. 487, 624 P.2d 1215; see also *Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 Cal.4th 251, 267, 5 Cal.Rptr.2d 545, 825 P.2d 438.)

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]

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.)

***1126** Before trial, the parties stipulated to the following facts. First, that the City requires all utility and telephone corporations, both wireless and nonwireless, to ***425** 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 **250** telephone corporations to obtain site-specific permits, conditioned on aesthetic approval, for the *ongoing* occupation and maintenance 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, 208 Cal.Rptr.3d 248.) 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 right to control construction." (Assem. Com. on Utilities & 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 ***1127** 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.)

[22] 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, 208 Cal.Rptr.3d 248.) 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, *****426** 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.

Cantil-Sakauye, C. J., Chin, J., Liu, J., Cuéllar, J., Kruger, J., and Groban, J., concurred.

All Citations

6 Cal.5th 1107, 438 P.3d 239, 245 Cal.Rptr.3d 412, 19 Cal. Daily Op. Serv. 3067, 2019 Daily Journal D.A.R. 2886

Footnotes

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, 208 Cal.Rptr.3d 248 (*T-Mobile West*).) 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.

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, 208 Cal.Rptr.3d 248.) We review the current version of the Ordinance. (*Kash Enterprises, Inc. v. City of Los Angeles* (1977) 19 Cal.3d 294, 306, fn. 6, 138 Cal.Rptr. 53, 562 P.2d 1302.)

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.

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.

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, 159 Cal.Rptr.3d 358, 303 P.3d 1140.) 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, 90 Cal.Rptr.3d 701, 202 P.3d 1089.) 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, 40 Cal.Rptr.2d 402, 892 P.2d 1145.)

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.

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.)

8 All Internet citations in this opinion are archived by year, docket number, and case name at <http://www.courts.ca.gov/38324.htm>.

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, 28 Cal.Rptr.3d 289, citing *Sunset Tel. and Tel. Co. v. Pasadena* (1911) 161 Cal. 265, 273, 118 P. 796.) 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.)

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].)

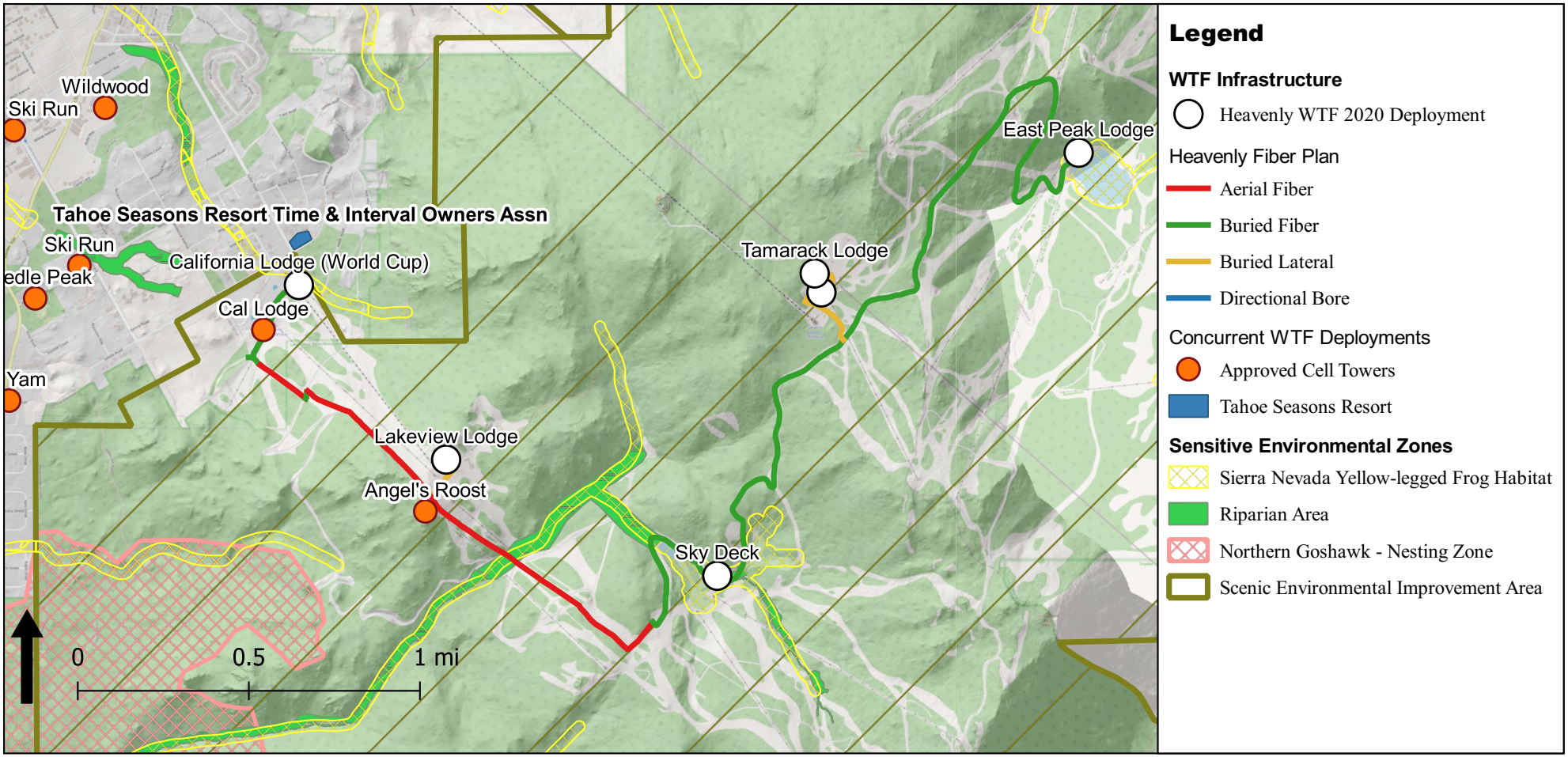
11 The Ninth Circuit has addressed this issue twice, coming to a different conclusion each time. In *Sprint PCS Assets v. City of Palos Verdes Estates* (9th Cir. 2009) 583 F.3d 716, the Ninth Circuit found no conflict between section 7901 and a local ordinance conditioning permit approval on aesthetic 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, 208 Cal.Rptr.3d 248, citing *Bowen v. Ziasun Technologies, Inc.* (2004) 116 Cal.App.4th 777, 787, fn. 6, 11 Cal.Rptr.3d 522.)

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.)

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 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, 17 Cal.Rptr. 687.) 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.)

Verizon's Unfair and Deceptive Business Practice: Concurrent National Forest Deployment



Unfair and Deceptive Business Practices

Verizon and the Tahoe Prosperity Center deceived City of South Lake Tahoe elected leaders, officials, staff, and residents into believing it was too burdensome to deploy towers in the adjacent National Forest lands, while simultaneously using existing special use permits to "fast-track" cell tower deployments and side-step non-discretionalry environmental review of which they had feigned as onerous. This constitutes Unfair and Deceptive Business Practices.

(*See* Business & Professions Code §§ 17200 *et seq.*):

The Gregory J. Cook Engineering Survey's Mapped SEZ in Relation to TRPA "Land Verification" Data.