**MACKENZIE & ALBRITTON LLP**
220 SANSOME STREET, 14TH FLOOR
SAN FRANCISCO, CALIFORNIA 94104

TELEPHONE 415 / 288-4000
FACSIMILE 415 / 288-4010

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**VIA EMAIL**

Mayor Ken Dyda
Mayor Pro Tem Brian Campbell
Councilmembers Susan Brooks, Jerry Duhovic
and Anthony M. Misetich
City Council
Rancho Palos Verdes
30940 Hawthorne Boulevard
Rancho Palos Verdes, California 90275

Re: Ordinance Regulating Wireless Telecommunications Facilities in the Public Right-of-Way
City Council Agenda, January 19, 2016

Dear Mayor Dyda, Mayor Pro Tem Campbell and Councilmembers:

We write to you on behalf of our client Verizon Wireless regarding the draft ordinance regulating wireless telecommunications facilities in the public right-of-way (the "Draft Ordinance") to be considered at your meeting of January 19, 2016. Verizon Wireless only recently became aware of efforts by the City of Rancho Palos Verdes (the "City") to codify regulations for right-of-way wireless facilities, and believes that there are numerous problematic provisions in the Draft Ordinance that conflict with state and federal law.

In particular, requirements to demonstrate the need for a new wireless facility and to analyze alternative locations conflict with the California Public Utilities Code, and certain restrictions on placement of facilities conflict with the federal Telecommunications Act. There also appear to be conflicts within the Draft Ordinance, which requires that equipment be placed underground while at the same time including standards for pole-mounted equipment. Certain provisions refer to zoning permits that are irrelevant to the proposed permits for right-of-way wireless facility installations. The Draft Ordinance will benefit from further consideration and consultation with industry, and we propose that adoption of the Draft Ordinance be deferred to allow for needed revisions.

Our specific comments on the Draft Ordinance are as follows:

**§12.18.050 – Application for Wireless Telecommunications Facility Permit**

**(B) Application Contents**

(5) Engineering Plans

*(a) Minimum Height and Diameter*

This provision contains ambiguous language and can be read to limit the size of antennas and licensed radio equipment. Requiring wireless carriers to use equipment of the minimum height and size would amount to regulation of the type of technology to be used, and is therefore preempted by federal law. Federal courts have determined that local jurisdictions may not dictate the technology used by wireless providers. *See New York SMSA v. Town of Clarkstown, 612 F.3d 97 (2d Cir. 2010).* Requiring very small antennas could result in the need to deploy additional antennas to achieve a service objective. This requirement should be deleted.

(6) Justification Study of Coverage Gap and Least Intrusive Means

Verizon Wireless, as a telephone corporation, has been granted a statewide right to use the public right-of-way for the provision of its services under California Public Utilities Code §7901, and under Public Utilities Code §7901.1, the City is limited to regulating the "time, place and manner" in which Verizon Wireless occupies the right-of-way. As the franchise to use the right-of-way is granted under state law, the City may not lawfully require Verizon Wireless to justify the need for such use through a coverage gap analysis. Demonstration of a coverage gap has no relation to required findings for issuance of a wireless telecommunications facility permit under Draft Ordinance §12.18.090. The requirement to demonstrate a coverage gap must be deleted.

With respect to the demonstration of "least intrusive means" to provide service, Verizon Wireless does not need to establish its right to use the right-of-way over any other location outside the right-of-way. The City may not, under state law, require Verizon Wireless to evaluate alternatives to be used in lieu of the right-of-way. This requirement should clarify that carriers need only to evaluate alternatives within the public right-of-way and only in those circumstances where the proposed facility will create impacts that impede public use of the right-of-way.

(10) Materials for Exception Application

As discussed below, the exception granted by the Director under Draft Ordinance §12.18.190 obligates the Director to make speculative legal judgments and is an unworkable means to regulate the use of right-of-way.

(16) Noise Study

Certain new equipment boxes used for right-of-way facilities emit no noise, and for noiseless installations, applicants should be allowed to submit manufacturer specification sheets indicating that equipment is silent instead of a noise study prepared by an engineer.

(18) Landscape Plan

Many pole-mounted wireless facilities in the right-of-way are very small, present minimal visual impacts and should not require any landscaping. This requirement should be imposed only where landscaping is appropriate.

(19) Master Plan

This submittal requirement requests a projection of a carrier's future wireless facility installations, but such projections would be entirely speculative due to changing voice and data demand, varying use patterns and new technology. Such projections may be theoretically interesting but rarely shed light on future deployment of a dynamic wireless network. Demonstration of any future plans should not be required as Verizon Wireless's use of the right-of-way is authorized by state law. In lieu of a master plan, the City should consider requiring applicants to provide a list of existing facilities and pending applications.

(22) Temporary Mock-Up

Mock-ups of proposed facilities may be helpful in certain situations but should not be required for locations where a facility poses no visual impacts or encounters no opposition. Photosimulations provide sufficient visual representation for the Director to evaluate visual impacts. Mock-ups should only be required at the Director's discretion.

**(C) Application Contents – Modification of Existing Facility**

For modifications that qualify as eligible facilities requests under 47 U.S.C. §1455, applicants may only be required to submit information to determine whether the modification is an eligible facilities request according to rules adopted by the Federal Communications Commission codified as 47 C.F.R. §1.40001. These limitations must be better reflected in the Draft Ordinance.

**(E) Independent Expert**

Any third-party consultants evaluating certain technical aspects of an application for the City should be engineers registered in the State of California. As discussed above, Verizon Wireless does not need to demonstrate a significant gap in service as its use of

the right-of-way is authorized by state law, and any analysis of alternative locations must be limited to right-of-way locations and only when a facility may create impacts that impede public use of the right-of-way. Technical information will only be relevant where Verizon Wireless seeks to show why a particular alternative will not provide required service.

**§12.18.060 – Review Procedure**

**(B) Appeal to City Council**

Wireless telecommunications facilities permits issued for right-of-way wireless facilities should not be appealable to the City Council where encroachment permits granted to other utilities are not similarly appealable.

**§12.18.080 – Requirements for Facilities within the Public Right-of-Way**

**(A) Design and Development Standards**

(1) General Guidelines

*(a) Design Techniques*

In addition to screening, undergrounding and camouflage options to minimize visual impacts, the City should consider techniques for pole-mounted equipment such as painting to match pole color and rotation of pole-mounted equipment away from predominant views. Many new pole-mounted facilities in the right-of-way are very small, and painting and equipment rotation are sufficient to render such facilities unnoticeable. In some locations, small pole-mounted equipment boxes are concealed behind existing traffic signs. As discussed below, the City may not require Verizon Wireless to place equipment underground if other entities occupying the right-of-way are not subject to the same requirement.

*(c) Private Residential Views*

The Draft Ordinance cannot protect private views from residential structures of telephone corporation facilities in the public right-of-way. The City is limited by Public Utilities Code §7901 which only limits right-of-way facilities that "incommode the public use of the road." *See* California Public Utilities Code §7901. While federal case law provides for limited aesthetic review of the right-of-way facilities of telephone corporations and their effect on public views from the right-of-way, such review does not extend to private views of telephone corporation facilities.

(2) Notice

By reference to the City's zoning regulations for noticing, this provision requires public notice to property owners within 500 feet of a proposed facility. Traditional land use noticing for right-of-way facilities would be inappropriate where 500 foot radius noticing would include yards or homes that have no relation to the street where the proposed facility is to be located. The City should consider a 150-foot linear noticing along the right-of-way where the facility is to be located.

(5) Equipment

The City's requirements for equipment mounting distances must comply with California Public Utilities Commission General Order 95 which specifies certain safety clearances for antennas and wireless equipment. The requirement to flush-mount antennas would generally conflict with the two-foot horizontal separation from the pole required by General Order 95 Rule 94.4(E), and the City should instead encourage the use of side-arm antenna mounts which in certain cases may eliminate the need to extend a pole's height to provide optimal signal propagation. The requirement that antennas be situated as close to the ground as possible should be stricken as small antennas present minimal visual impacts. Lowered antenna heights may require installation of additional antennas to meet a service objective.

(6) Poles

*(a) Requirement to Locate on Arterial Streets*

By a reference to Draft Ordinance §12.18.190 regarding exceptions, this provision limits Verizon Wireless's state-mandated right to place wireless facilities on most City rights-of-way unless Verizon Wireless proves that this limitation violates state or federal law. There are few arterial streets in Rancho Palos Verdes. Restricting placement of small right-of-way wireless facilities, which may have a limited coverage area extending only 500 feet, could prohibit service to neighborhoods distant from arterial streets in violation of the Telecommunications Act, specifically 47 U.S.C. §332(c)(7)(B)(i)(II). We suggest that the City create a preference for arterial streets but allow placement of right-of-way facilities on all streets. As discussed below, the exception granted by the Director under Draft Ordinance §12.18.190 obligates the Director to make speculative legal judgments and is an unworkable means to regulate the use of right-of-way.

*(b) Prohibition on New Poles*

The City should not require an exception for carriers to place new poles in the right-of-way. Though Verizon Wireless prefers to place wireless facilities at existing pole locations and appreciates that the City allows for replacement of existing poles, existing poles locations may not meet service objectives. Verizon Wireless's state-mandated right to occupy the right-of-way allows it to place new poles to support wireless equipment in the same manner that other telephone corporations regulated by the

Public Utilities Commission may place new utility poles to support their equipment. As discussed below, the exception granted by the Director under Draft Ordinance §12.18.190 obligates the Director to make speculative legal judgments and is an unworkable means to regulate the use of right-of-way. We suggest that the City create a preference for existing pole locations but allow for placement of new poles if required to meet a service objective.

*(c) Utility Poles*

As noted above, General Order 95 specifies safety clearances for antennas and wireless equipment mounted to utility poles. By restricting antennas to a height not exceeding 48 inches above an existing utility pole, this provision contradicts the minimum six foot clearance above electrical supply lines required by General Order 95 Rule 94. The requirement that wireless equipment be mounted no less than 16.5 feet above the road surface only serves to increase visibility of such equipment. Southern California Edison may require that electrical meters be mounted a specific distance above ground level.

*(e) Replacement Poles*

The City should allow a modest increase in height for replacement poles to meet coverage objectives and General Order 95 safety clearance and structural requirements. Pole replacement requirements are governed by General Order 95 and rules established by the responsible utility under the joint pole authority. The City cannot arbitrarily dictate pole replacement specifications.

*(f) Pole-Mounted Equipment Volume Limitation*

A limitation of six cubic feet in volume for pole-mounted equipment is overly restrictive. Ventura County recently proposed regulations for right-of-way facilities that allow for administrative approval of small cell facilities with equipment volumes of up to 8.2 cubic feet. *See* Ventura County Code of Ordinances §§12803(i)(1), 12814. While a jurisdiction may create incentives for certain equipment dimensions, blanket limitations on dimensions violate federal law as discussed above.

*(h) Exception Required for New Poles*

As noted above in our comments to Draft Ordinance §12.18.080(A)(6)(b), the City cannot require carriers to obtain an exception under Draft Ordinance §12.18.190 to place new poles in the right-of-way. Rather, the City should consider reasonable design standards for new poles, such as color, material and screening vegetation.

(12) Accessory Equipment Undergrounding Requirement

The requirement to place equipment underground violates both state and federal laws, which state that local regulations must be applied equally to all users of the rights-of-way. Under state law, local regulation, "to be reasonable, shall, at a minimum, be applied to all entities in an equivalent manner." *See* California Public Utilities Code §7901.1(b). Federal law recognizes the authority of States and local governments to "manage the public rights of way" on a "competitively neutral and nondiscriminatory basis." *See* 47 U.S.C. §253(c). The Federal Communications Commission has stated that local governments may impose conditions only if they are applied "equally to *all* users of the rights-of-way" and may not impose conditions on one user, such as a telecommunications company, in a different manner than imposed on other users. *See Second Report and Order*, CS Docket 96-46, §209, FCC 96-249, adopted May 31, 1996. This body of federal and state law requires that a Verizon Wireless application for a facility within the public right-of-way should be treated as any other public utility application. In other words, Verizon Wireless cannot be obligated to underground equipment that is equivalent or similar in size and appearance to facilities mounted on right-of-way poles by other utilities.

As discussed below, the requirement to obtain an exception under Draft Ordinance §12.18.190 for above-ground equipment (limited to five feet in height) obligates the Director to make speculative legal judgments is an unworkable means to regulate the use of right-of-way. Certain development standards in the Draft Ordinance, including Sections 12.18.080(A)(6)(c) and 12.18.080(A)(6)(f), clearly contemplate pole-mounted equipment, and the City should allow for pole-mounted equipment with standards such as painting and rotation to minimize visual impacts. Screening or camouflage requirements for an electrical meter may contradict Southern California Edison policies.

(18) Modification

The City may not require carriers to place equipment underground or reduce equipment size when modifying a facility. As noted above, the requirement to place equipment underground violates state and federal law, and the requirement to reduce equipment size amounts to impermissible dictation of technology barred by federal law. Finally, federal law requires administrative approval of modifications that are "eligible facilities request" and does not allow for discretionary conditions.

**(B) Conditions of Approval**

(13) Prohibition of Facilities within Drip Line

This condition of approval should be revised to exclude pole-mounted equipment. Pole-mounted equipment has no effect on the health of nearby trees that may provide screening.

**§12.18.090 – Findings**

**(D) Proposed Installation is Least Intrusive Means Possible**

By basing this finding on the "least intrusive means" standard set forth in federal case law, the Draft Ordinance attempts to create a new hurdle out of the federal protection afforded wireless carriers under 47 U.S.C. §332(c)(7)(B)(i)(II), which provides, in relevant part, that the City's regulation of wireless facilities "shall not prohibit or have the effect of prohibiting the provision of personal wireless services." Federal courts have interpreted this law to mandate approval of wireless facilities where a federal court has determined that the applicant has identified a "significant gap" and the facility represents the "least intrusive means" to fill that gap, even where the local jurisdiction has identified substantial evidence that would otherwise warrant denial of the application under local codes. *See, e.g., MetroPCS v. City and County of San Francisco*, 400 F.3d 715 (9th Cir. 2005). These cases have repeatedly held that evaluations of "significant gap" and "least intrusive means" are judicial determinations that defy any "bright-line" definition. *See, e.g., Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates*, 583 F.3d 716 (9th Cir. 2009) (citing numerous cases that make different factual findings of a significant gap). This approach must be rejected because it would place the City in a position to circumvent the judgment of federal courts and the protections afforded Verizon Wireless under federal law. The City should abandon the "least intrusive means" standard and we suggest revising this finding to compel applicants to minimize aesthetic impacts that may impede public use of right-of-way.

**§12.18.140 – RF Emission and Other Monitoring Requirements**

These requirements for post-installation testing of radio frequency emissions exceed the City's authority when a facility complies with the Federal Communications Commission's emissions standards. The City may only require the carrier to provide the calculations identified in *A Local Government Official's Guide to Transmitting Antenna RF Emission Safety.* Recent case law has determined that emissions testing requirements by local jurisdictions are preempted by federal law. See *Crown Castle USA Inc. v. City of Calabasas* (Los Angeles Superior Court BS140933, 2014) ("…the regulation of a facility's planned or ongoing operation constitutes an unlawful supplemental regulation into an area of federal preemption.")

**§12.18.160 – Permit Expiration**

Rather than terminating permits after ten years and requiring permittees to apply for new permit, the City should allow for renewal of an existing permit within six months of permit expiration. There is no reasonable justification to require a new permit for a facility that is not substantially changed from the originally-approved installation and remains in compliance with conditions of approval.

**§12.18.190 – Exceptions**

Under the Draft Ordinance, an exception is required to place wireless facilities on certain streets, to place a new pole in a new location and to place accessory equipment above ground, but the process for granting an exception outlined in this provision places the burden on the applicant to prove the illegality of the City's regulations while absolving the City from any meaningful evaluation of the impacts of the proposed facility. Requiring the Director of Public Works to find that Draft Ordinance requirements violate state or federal law places inappropriate judicial duties on the Director and would result in speculative legal judgments. This provision uncovers the City's concern that provisions of the Draft Ordinance will result in denials that violate state or federal law, and we have outlined several of these violations above. Such expected violations should be resolved prior to adoption of the Draft Ordinance.

**§12.18.200 – Location Restrictions**

As noted above, prohibiting placement of wireless facilities on most City streets or on new poles is contrary to state and federal law, and the City should instead create preferences for arterial streets and existing pole locations while allowing for wireless facilities on all streets and in new pole locations. As discussed above, the exception granted by the Director under Draft Ordinance §12.18.190 obligates the Director to make speculative legal judgments and is an unworkable means to regulate the use of right-of-way.

**§12.18.220 – State and Federal Law**

This provision appears to apply to conditional use permits issued under Title 17, *Zoning,* of the Rancho Palo Verdes Municipal Code, whereas the Draft Ordinance creates a wireless telecommunications facility permit for right-of-way facilities issued by the Director with findings distinct from conditional use permits. This inconsistency should be resolved. Additionally, as with Draft Ordinance §12.18.190, this provision belies the City's concern that Draft Ordinance conflicts with state or federal law. Such conflicts should be addressed prior to adoption and not left to subsequent interpretations made solely by the City Attorney.

**Conclusion**

The Draft Ordinance must be revised in order to avoid conflicts with state and federal law. To this end, Verizon Wireless encourages the City to defer adoption of the Draft Ordinance to allow for City staff to meet with industry representatives. Verizon Wireless looks forward to an opportunity to work with the City of Rancho Palo Verdes to craft a workable ordinance that limits future conflict.

Very truly yours,

Paul B. Albritton

cc: Dave Aleshire, Esq.
Christy Lopez, Esq.
Nicole Jules