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File No.
2464.130

October 11, 2017

VIA EMAIL: PMACDONALD@PIEDMONT.CA.GOV

Pierce Macdonald-Powell
Senior Planner
City of Piedmont
120 Vista Avenue
Piedmont, CA 94611

Re: Crown Castle NG West LLC: Wireless Communication Facilities (Sites PHS01-
PHS09) Design Review Application 16-0385

Dear Pierce,

This office is counsel for Crown Castle NG West LLC (“Crown Castle”) with regard to the above-referenced Wireless Communications Facilities (“Project”), which are pending for action by the City of Piedmont (“City”).

In furtherance of meeting the Planning Department’s deadline for making agenda packets for the October 16, 2017, continued City Council meeting on the above-referenced matter, Crown Castle submits its redlined revisions to the City’s proposed conditions of approval for sites PHS-01, PHS-03 and PHS-04. Crown Castle reserves its rights under federal and state law to supplement the record in this proceeding up to the date of the continued City Council hearing.

Crown Castle’s representatives will be on hand to answer any questions about the Project and this letter.

Very truly yours,

Michael W. Shonafelt

MWS

Enclosures (one by email attachment)

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cc: Kevin Jackson, Interim Planning Director, City of Piedmont (by email -
kjackson@piedmont.ca.gov
Josh Trauner, Esq., Government Relations Counsel, Crown Castle
Daniel Schweizer, Director, Government Relations, West Region, Crown Castle
Sharon James, Manager Government Relations, Crown Castle

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Should the City Council wish to make the required findings to approve the wireless communication facilities permit applications, staff recommends that the City Council make the following conditions of approval for each of the project applications as part of the motion to approve the projects:

1. **Conditions in construction documents.** These conditions of approval shall be included as a sheet in the plan set submitted for any building permit or encroachment permit for the work approved herein.
2. **Contract engineer.** Prior to issuance of an encroachment permit for proposed work in the public right-of-way, the applicant shall file a deposit of \$15,000 ~~for each installation site~~ to be used by the City to cover the costs associated with contract engineer to monitor construction and excavation within the right-of-way. The applicant is responsible for the full cost of the contract engineer.
3. **Patch and repair.** The applicant shall patch and repair City sidewalks and other improvements in the public right-of-way, ~~directly affected by applicants project construction~~, such as curbs or walls, to match the color, texture, materials, and scoring pattern of the existing improvements, including custom integral concrete color in accordance with City of Piedmont standard plans and as directed by the Director of Public Works. Directional bore shall be utilized over trenching at the reasonable discretion of the Public Works Director.
4. ~~**Alternative vault design and location — underground utilities.** Prior to issuance of an encroachment permit, applicant or contractor shall provide detailed utility plans with existing utilities locations and shall pot hole for utilities as required by the Director of Public Works. If an approved location is found to be unsuitable due to conflicts with underground utilities then the applicant shall relocate the underground vault to a location in the parking lane of the street immediately adjacent to the approved location. Street rated underground vault and construction shall be used for all street locations subject to review and approval of the City Engineer. If the street location is also unsuitable due to conflicts with tree roots, utilities, or other physical condition(s), then the project shall be subject to new application(s) and fees and shall be scheduled for review by the Planning Commission and City Council. The ground mounted cabinets designed to look like U.S. Mail mailboxes are not approved and an alternative location for an underground vault shall be specified in the roadway prior to issuance of an encroachment permit or building permit for the sites numbered PHS03, near 799 Magnolia Avenue, and PHS04, across from 740 Magnolia Avenue.¹~~
4. **Contractor's general liability insurance.** To ensure that the contractor doing work in the City will be responsible for damages caused by the work to City property or to neighboring property, the applicant shall require all contractors performing work on the Project to maintain General Liability Insurance for protection from claims for damages because of bodily injury, including death, and claims for damages, other than to the contractor's work itself, to property which may arise out of or result from the contractor's operations. Such insurance shall be written for not less than \$1,000,000 per occurrence. The insurance shall include an endorsement requiring 10 days prior notice to the City if the insurance is to be cancelled or changed, and the applicant shall immediately arrange for substitute insurance coverage. If the contractor's insurance carrier states in writing that it is unable to provide the required endorsement, then the applicant shall be responsible for providing the City with the required notice if the insurance is to be cancelled or changed. The applicant's failure to provide such notice shall constitute grounds

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for revocation of the City's wireless communication facilities permit. If the applicant does not have a general contractor, the applicant shall maintain property insurance and coverage for contractors, which is substantially equivalent to the contractor's requirement of this section.

5. Noise study and field testing of equipment noise. The applicant shall prepare an acoustical study for the specific equipment to be installed including manufacturers' specifications and field tested noise levels prior to issuance of an encroachment permit for the approved scope of work. Prior to completion of the project, the applicant shall provide a copy of an acoustical report prepared in the field by an acoustical engineer which demonstrates that noise levels are 50 dBA or less per occurrence or incident. If noise exceeds 50 dBA per occurrence or incident, then the applicant or contractor shall install measures to reduce the noise, such as additional insulation, mufflers, etc., as required by the Building Official. ~~The noise study shall be conducted on an annual basis.ⁱⁱ~~

6. Radio frequency radiation testing. Prior to issuance of an encroachment permit, the applicant shall provide a revised radio frequency radiation exposure report which ~~specifies the maximum radiation potential of the equipment, including full utilization of the equipment and cumulative radiation levels~~ demonstrates the project's compliance with applicable FCC health safety standards. Prior to completion of the project and the release of any bond or deposit, the applicant shall provide to the Planning Department the results of radio frequency and electromagnetic radiation testing conducted at each of the sites and prepared by a qualified electrical engineer.ⁱⁱⁱ ~~Should results of the testing reveal inconsistencies with the application and the provided radio frequency radiation exposure report, then the applicant shall alter the design of the antenna and communication equipment to bring the project's radio frequency and electromagnetic radiation levels to those specified in the application and reports, with the altered design receiving verification of compliance through further field tests. Should the applicant or owner of the WCF equipment be unable to comply with this condition of approval, the facility must be disconnected from power until the applicant has obtained approval from the City Council for a new radio frequency and electromagnetic radiation level. The radio frequency and electromagnetic field radiation exposure report shall be peer reviewed at the expense of the applicant or owner of the WCF equipment. The radio frequency radiation exposure report shall be conducted on an annual basis.~~

7. Future modifications. Future modifications of the approved installation ~~shall be subject to 47 U.S.C. § 1455 (a). If any such future modifications do not qualify as an "eligible facilities request" ("EFR") pursuant to section 1455 (a), that and~~ extend beyond the approved project site, increase excavation beyond the approved project site, or that remove or subvert the concealment design of the approved antennas and equipment, including the underground vaults and shielding of the antennas, shall constitute a new application and shall require new application forms and fees. ~~Applications that extend beyond the approved project site, increase excavation beyond the approved project site, or that remove or subvert the concealment design of the approved antennas and equipment shall not be eligible for Planning Director review under Rule 6409 processing.^{iv}~~

8. Construction Management Plan. The applicant or contractor shall develop a comprehensive Construction Management Plan. The Construction Management Plan shall address noise, vibrations, traffic control, parking, debris removal, dust control, sanitary facilities, site safety security and other potential construction impacts, as well as other details involving the means and methods of completing the Project, including the construction route and the days and hours permitted for heavy excavation. Outside construction involving high levels of noise,

ⁱⁱ 7164880.1
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including excavation, hammering, and pile driving, shall be limited to Monday through Saturday, from 8:30 a.m. to 4:30 p.m. Construction personnel shall be instructed not to park in front of driveways to private residences. The plan shall specify the sequencing of pruning, demolition, and construction activities. The City Building Official may require modifications and amendments to the Construction Management Plan throughout the course of the Project and until the Final Inspection.

9. Construction Site Control of Stormwater. The California Regional Water Quality Control Board requires all projects that disturb the site to comply with Provision C.6 of the San Francisco Bay Regional Stormwater NPDES Permit in order to prevent construction site discharges of pollutants and other regulated materials during construction. Prior to the issuance of a building permit, the Applicant shall submit a construction stormwater management plan prepared by a licensed Civil Engineer to achieve timely and effective compliance with Provision C.6. Permit Provision C.6.c.ii provides sources for site specific, and seasonally- and phase-appropriate, effective Best Management Practices (BMPs) that must be incorporated into the stormwater management plan. Copies of the Municipal Regional Stormwater Permit are available from the Piedmont Public Works Department and on-line at cleanwaterprogram.org.

10. Continual Street Access for Emergency Vehicles. The Construction Management Plan shall specifically address methods of providing continual street access for emergency vehicles at all times via a traffic control permit reviewed and approved by the Public Works Director. ~~which shall be subject to review and approval by the Fire Chief.~~ Maintenance of the communication equipment shall be conducted pursuant to ~~an encroachment~~ a traffic control permit reviewed and decided by the Public Works Director.

~~**11. Haul routes.** All equipment and vehicle haul routes shall be provided to the City for review and approval. To the extent possible, haul routes shall attempt to minimize or eliminate use of minor residential roadways. Street and pavement conditions shall be observed and documented by the City on all haul routes prior to commencement of construction. Damage or observable and unusual wear and tear to haul routes on city roadways as specified by the City shall be repaired at the Property Owner's expense after Final Inspection.~~

12. Site Safety Security. The City and the public have an interest in not having an unfinished project blighting the neighborhood, restricting access, and undermining property values. These public interests are primarily safety and aesthetics, and diminishment of property values. Prior to the issuance of an encroachment permit for the approved project, Crown Castle NG West LLC shall provide to the City a specific cash deposit, letter of credit, bank guarantee, or other similar financial vehicle ("Site Safety Security") in the amount of \$100,000 for each site to ensure the Project site is not left in a dangerous or unfinished state, and if any funds are remaining, to complete repairs in the public right-of-way. City shall release such security to Crown Castle NG West LLC at the time it completes the final inspection and certification of compliance with all conditions of approval.

- a. The Site Safety Security shall be in an amount to include three components:
 - i. safety, which means the cost to make the site and structure safe and accessible if construction should cease mid-way through the Project;

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- ii. aesthetics, which means an amount to install and maintain hardscape paving and landscaping all around the Project; and
- iii. staff and consultant time to evaluate and implement this condition.

b. If, as the Project proceeds, the expected cost of these components increases beyond the original estimate in the opinion of the Director of Public Works, the City may require Crown Castle NG West LLC to increase the amount of the Site Safety Security by the additional amount. Crown Castle NG West LLC shall provide City with written evidence of compliance within 15 working days after receiving written notice of the additional required amount. The City shall retain, at Crown Castle NG West LLC's expense, an independent estimator mutually selected by Crown Castle and the City, to verify the total expected costs to complete the Project and any subsequent revisions.

c. The form and amount of the Site Safety Security is subject to the approval of the Director of Public Works. Payment to City under the Site Safety Security shall be made payable upon demand by the City and prior to the issuance of the Building Permit, conditioned solely on the Director of Public Works' certification on information and belief that all or any specified part of such Performance Security is due to the City. **[This places undue discretion in the staff to determine whether there is a liability to pay the Site Safety Security.]**

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d. The Site Safety Security shall not be released until the Project has an approved Final Inspection by the Building Official. However, if sufficient work has been completed according to the benchmarks and construction values as established under the Construction Completion Schedule, the Site Safety Security may be reduced to the extent the Director of Public Works in his sole discretion determines is appropriate.

13. City Facilities Security. The applicant ("Crown Castle NG West LLC) shall provide a specific cash deposit, letter of credit, bank guarantee, or other similar financial vehicle ("City Facilities Security") in the amount of \$100,000 per site as established by the Director of Public Works. This financial vehicle serves as an initial sum to cover the cost of any potential damage to City property or facilities in any way caused by Crown Castle NG West LLC's contractors or subcontractors, or any of their agents, employees or assigns, and related in any way to the Project. The Crown Castle NG West LLC is responsible for the full cost of repair as determined by the City Engineer prior to final inspections. The form and terms of such City Facilities Security shall be determined by the Director of Public Works after consultation with the Property Owner. The Director may take into account any of the following factors: the cost of construction; past experience and costs; the amount of excavation; the number of truck trips; the physical size of the proposed project; the logistics of construction; the geotechnical circumstances at the site; and City right-of-way and repaving costs.

a. To provide clear baseline information to assist in determining whether damage to the City's facilities has been caused by Crown Castle NG West LLC or others working for or on behalf of Crown Castle NG West LLC, the City will document such facilities (including, without limitation, streets and facilities along the approved construction route as specified in the Construction Management Plan, to establish the baseline condition of the streets and facilities. The City shall further re-document the streets as deemed appropriate after the Project commences until the Director of Public Works determines that further documentation is no longer warranted. As part of the documentation, the City may water down the streets to better emphasize any cracks or damage in the surface. Crown Castle NG West LLC is responsible for

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the full cost of the documentation and repair work as determined by the City Engineer, and shall reimburse the City for those costs prior to the scheduling of final inspection.

b. When the City Facilities Security is in a form other than cash deposit with the City, the proceeds from the City Facilities Security shall be made payable to the City upon demand, conditioned solely on the Director of Public Works' certification on information and belief that all or any specified part of the proceeds are due to the City. **Under what conditions is the security released? This places undue discretion in the staff to determine whether there is a liability to pay the Site Safety Security. These security provisions violate state law, specifically, Government Code section 65964 because they are not rationally related to the potential impacts of the facility.**

14. Neighboring Property Damage Security. The Applicant shall provide adequate and appropriate Insurance or bonds, as approved by the Director of Public Works and City Attorney against damage to neighboring properties by any construction, excavation, and related work in any way involving the project, such insurance or bonds to be in the amount of \$1,000,000.00 for each installation site and with any conditions established by the Director of Public Works after consultation with the Applicant (Crown Castle NG West LLC). If the Director of Public Works determines that obtaining any particular insurance would be extremely difficult for Applicant due to its lack of availability even at an increased cost, the Director of Public Works may authorize an alternative method of providing equal protection to neighboring properties, including but not limited to partial coverage by Umbrella Insurance if that appears appropriate. Such insurance or any alternative method shall allow for claims to be made for up to one year after the final inspection of the Applicant's project. Any and all such insurance or any alternative method shall specifically indicate that it covers damages to neighboring private properties, and if such insurance is meant to also cover other potential damages, such as personal injuries or damages to other than the above named properties, any such further coverage shall be in addition to the \$1,000,000 earmarked for neighboring properties. **Under what conditions is the security released? This places undue discretion in the staff to determine whether there is a liability to pay the Site Safety Security. These security provisions violate state law, specifically, Government Code section 65964 because they are not rationally related to the potential impacts of the facility.**

Comment [JS1]: Crown has already provided a COI for general liability per the demand of the license agreement as well as \$40,000 bond.

15. Height Verification. Prior to completion of the project and release of any bonds or security deposits, the applicant shall provide the Building Official written verification by a licensed land surveyor stating that the height of the new utility pole and the bottom and top edges of the antennas match the indicated heights in the approved plans **within 1%**. If the heights exceed those approved by the City Council, then the applicant or contractor shall reduce the height of the utility pole(s) and antenna(s) until they comply.

16. Antenna Design, Project Site, and Concealment Design. Prior to issuance of an encroachment permit or building permit for the approved scope of work, the applicant shall **determine whether it is technically feasible to** revise the designs of the installations to use one 24-inch-tall maximum panel antennas in all installations. ~~Each radome and vault shall be identified as the "concealment design" for each installation and shall be labeled as such on the plans. The outline of the installation in elevation and in plan view shall be identified as the "project site" and shall be labeled as such on the plans.~~^v

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17. Underground Vault Design. Prior to issuance of an encroachment permit, the applicant or contractor shall provide plans and specifications for the underground vault and venting, including manufacturer's specifications for cover, color, materials, dimensions, and reveal at the sidewalk, for the review and approval of the Planning Director and City Engineer.

18. Decommissioning Plan. The approval of the wireless communication facilities permit is valid for a term of 10 years unless **unless what?!** Obsolete equipment or accessories shall be removed with each modification of the installation or annually whichever comes first. All modifications shall incorporate the highest industry standards for compact designs that minimize visibility. Pursuant to Section 17.46.070.C, this wireless communication facility permit is valid for an initial period of ten years unless: (i) a longer period is required by state or federal law; or (ii) a shorter time is required as a condition of approval for particular circumstances set forth in the decision, particularly with respect to public safety or substantial land use reasons under California Government Code section 65964(b). The permit approval is valid for only 10 years.

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19. Cables and Cabling. ~~Applicant shall use reasonable efforts to minimize the amount of exposed cables, cabling or wire(s) on plans filed for building permit and during installation and after completion of construction. No more than 5 inches of exposed cables, cabling or wire(s) shall be evident on plans filed for building permit or evident on the wireless installation after completion of construction. If required by the Building Official, the applicant shall install a full scale mock up of the installation at the City's corporation yard prior to issuance of a building permit.~~

20. Lease Requirement. All installations on street lights shall be subject to the terms and conditions of a lease to be decided by the City Council prior to issuance of a building permit or encroachment permit for the approved scope of work.

21. City Monitoring of City Street Trees. Tree pruning related to construction, pre-construction clearance, or on-going maintenance after construction is restricted and may only occur with Park Commission approval of an annual pruning program.

22. Required Corrections. Prior to issuance of an encroachment permit or building permit for the approved scope of work, as modified herein, the applicant shall provide a ~~corrected~~ construction drawing site plan detail drawn to scale that verifies that the proposed antenna and all related cabling and equipment meet the 18-inch setback to the front of curb in plan view. The applicant shall reference a fixed point in the plans for the terms, such as "3 O'Clock View," to the satisfaction of the Building Official. Plans shall show all improvements within a radius and scale as provided in the zoning drawings. ~~50-foot radius of the antenna at 1/4" = 1' scale or 1" = 10 feet.~~

23. Utility Undergrounding District. Should the area of an installation become part of a utility undergrounding district, then all equipment shall be placed in conduit and vaults underground and the antenna shall be relocated to a streetlight location within the undergrounding district. Street light design shall be subject to the review and approval of the underground district and City Council.

24. Expiration of Wireless Communication Facilities Permit. An application for an encroachment permit ~~or and~~ building permit must ~~be issued~~ submitted within one year of the approval of the City Council or the approval shall be null and void.^{vi}

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ⁱ Conditions on the ground preclude installation of an equipment vault; the condition of approval cannot be performed by Crown Castle. The City is prohibited from imposing conditions of approval that cannot be performed by the applicant – such conditions are unlawful and void. (See, e.g., *Munns v. Stenman* (1957) 152 Cal.App.2d 543, 552.) Accordingly, the City must provide for a technically feasible alternative for allowing Crown Castle to utilize its critical radio equipment. Infeasibility arises from a number of issues, including: (a) concerns regarding noise emissions from operation of larger fans required for subterranean vaults – such noise emissions could violate the City’s noise ordinance when measured from adjacent property lines, as required by the Piedmont Municipal Code; (b) undergrounding constraints arising from the required vault dimensions, the constrictions due to the narrow width of the right-of-way and existing underground utilities; (c) potential impacts to tree roots; (d) potential impairments to use of fire lanes that could arise both from construction and ongoing vault maintenance operations; and (e) impacts arising from obstructions to vault lids from cars parked in parking lanes.

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ⁱⁱ Crown Castle, as any entity operating in the City jurisdiction is subject to the noise ordinance of the City’s municipal code. Enforcement of that code is incumbent on the City pursuant to its nuisance abatement procedures, not the applicant.

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ⁱⁱⁱ The stricken language runs headlong into areas field preempted by federal law. The City is not a proper regulatory body for ensuring compliance with RF emission standards. It is not authorized by any legal authority to assume RF compliance roles, nor is it competent to do so. That job applies exclusively to the FCC. It is settled that the FCC:

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... was expected to serve as the “single Government agency” with “unified jurisdiction” and “regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio.” It was for this purpose given “broad authority.”

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(*City of Rancho Palos Verdes v. Abrams* (2002) 101 Cal.App.4th 367, 376 [124 Cal.Rptr. 2d 80].) To that end, section 332, subdivision (c)(7)(B)(iv), of the Telecommunications Act provides:

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[n]o State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission’s regulations concerning such emissions.

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(47 U.S.C.A. § 332, subd. (c)(7)(B)(iv).) In line with the above-cited principles, federal telecommunications jurisprudence has unequivocally established that municipalities cannot regulate in the area of RF emissions. (See, e.g., *Freeman v. Burlington Broadcasters, Inc.*, (2d Cir. 2000) 204 F.3d 311, 320-321 [“Congress intended the FCC to possess exclusive authority over technical matters related to radio broadcasting”] accord *N.Y. SMSA Ltd. P’ship v. Town of Clarkstown*, (2nd Cir. 2010) 612 F.3d 97 [issues to be so pervasive as to occupy the field]; *Bennett v. T-Mobile United States, Inc.*, (C.D. Cal. 2008) 597 F.Supp.2d 1050, 1053 [same principle, Central District]; *Southwestern Bell Wireless Inc. v. Johnson County Bd. of County Comm’rs*, (10th Cir. 1999) 199 F.3d 1185, 1193 [“Congress intended federal regulation of [radio frequency interference].”])

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^{iv} 47 U.S.C. 1455 (a) preempts efforts by the City to indiscriminately require all project modifications to be subject to new discretionary review and approval. (See *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, etc. Report and Order*, FCC 14-153, WT Docket No. 13-238 (FCC Oct. 17, 2014), ¶ 213, fn. 593 (“Report and Order”).)

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^v These stricken provisions appear to be designed to defeat any subsequent modification as an “EFR.” The City is preempted from regulating EFRs or otherwise attempting to circumvent federal law through the imposition of conditions of approval.

^{vi} Crown Castle cannot be held responsible for the performance of a condition when such performance under the sole control of the City. Such conditions of approval are unlawful and void. (See, e.g., *Munns v. Stenman* (1957) 152 Cal.App.2d 543, 552.)

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