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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SONOMA

EMF SAFETY NETWORK, et al.,

Petitioners,

vs.

CITY OF SEBASTOPOL, et al.,

Respondents.

CROWN CASTLE GT COMPANY LLC; GTE MOBILNET OF CALIFORNIA LIMITED PARTNERSHIP D/B/A VERIZON WIRELESS; and DOES 11 through 15, inclusive,

Real Parties in Interest.

Case No.: SCV 250976
(Administrative Mandamus Proceeding)

JOINT MEMORANDUM OF REAL PARTIES IN INTEREST VERIZON WIRELESS AND CROWN CASTLE GT COMPANY LLC IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

Judge: Honorable Elliot Lee Daum
Dept.: 16
Date Action Filed: January 11, 2012
Trial Date: December 7, 2012
Time: 9:00 a.m.

BY FAX

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES AND RULES **PAGE**

INTRODUCTION

Petitioner EMF Safety Network ("EMF") claims that the City of Sebastopol (the "City") acted unlawfully by approving the addition of three small antennas to a large communications tower that has operated for many years in downtown Sebastopol (the "Existing Facility"). As Petitioner's name and nearly all of its comments at the administrative level make clear, its claim is based entirely on the alleged environmental impact of radio-frequency ("RF") emissions, and thus expressly preempted by federal law. Its subsidiary complaints about aesthetics and other alleged impacts are just window dressing for EMF's real complaint, and in any event have no factual or legal basis.

The Existing Facility consists of a 96-foot tall monopole, with three Verizon Wireless antennas installed at the 92-foot level, and three MetroPCS antennas and two of the City's antennas installed lower on the pole. (AR 1, 2, 9-10, 62-63.)[1] The use permit at issue here authorized Verizon Wireless to install three new antennas at the same height (92 feet) and essentially the same size as its existing antennas (the "Modification"). (AR 9-11, 292-94, 435-38.) In approving the Modification, the City relied on the Planning Department's findings that "the small size, neutral color and great height of the proposal panel antennae, together with the fact that there are existing panel antennae at that height, will result in minimal visual effect, as demonstrated by photo simulations submitted as part of the application." (AR 64.)

EMF claims the City violated the California Environmental Quality Act ("CEQA") and its zoning code in approving this minor modification. These claims are based *explicitly* on the resulting increase in RF emissions – even though such emissions will remain well below federal limits – and are therefore preempted by the following provision of the federal Telecommunications Act:

> No 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.

47 U.S.C. § 332(c)(7)(B)(iv).

[1] The Existing Facility also includes a back-up generator and various other equipment installed inside equipment shelters or the adjacent City Hall, none of which is implicated in this lawsuit. (AR 100-101.)

Furthermore, EMF's claims are preempted by federal law in two additional respects. First, denial of the application would have discriminated unreasonably against Verizon Wireless in violation of 47 U.S.C. § 332(c)(7)(B)(i)(I), given the City's prior approval of the substantially similar MetroPCS antennas on the same tower. Second, under a newly enacted federal statute, Congress has removed all local discretion regarding the type of minor modifications at issue here, and directed that local governments "*may not deny, and shall approve* any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station." 47 U.S.C. § 1455 (emphasis added). This change in federal law would render any remand meaningless, as there could be only one outcome.

In addition, as set forth in the brief of Respondent City of Sebastopol filed concurrently herewith (the "City's Brief"), the Petition[2] is fatally flawed even on state-law grounds. First, EMF has failed to exhaust administrative remedies as to any CEQA claim, or to any claim based on "cumulative impacts," "mandatory findings of significance," "hazardous materials" or the aesthetic impact of the Modifications. In addition, there is no factual basis for any CEQA claim, and the City's approval of the Modification was amply supported by substantial evidence in the record.

In short, EMF has not met its burden to show a prejudicial abuse of discretion. The Court should therefore deny the writ.

STATEMENT OF FACTS

I. THE PROPOSED PROJECT

Real Party in Interest Crown Castle GT Company LLC ("Crown Castle") is the owner, operator and manager of towers and other support structures for wireless communication facilities located throughout California, including the Existing Facility that is the subject of this litigation. The Existing Facility is located at 7120 Bodega Avenue in Sebastopol, behind City Hall. (AR 100.) It was constructed in 1996 under a use permit that authorized construction of a monopole up to 106 feet high and placement of antennas and related equipment. (AR 100, 257-60.) Crown Castle has a

[2] All references or citations to the "Petition" in this brief refer to EMF's Amended Petition for Writ of Mandate filed on or about February 17, 2012.

lease with the City for the facility until 2031, and the City has given its consent as landlord for the Modification at issue here. (AR 100, 138.)

The original project consisted of construction of 96-foot monopole (which replaced an existing lattice tower) and included the installation of three panel antennas and related equipment owned by Real Party in Interest GTE Mobilnet, now known as Verizon Wireless (AR 1, 257-60). During the approval process, the City conducted environmental review under CEQA, which concluded with a negative declaration finding that the project did "not have a significant effect on the environment." (AR 1.)

In 2005, the City authorized Metro PCS to install three panel antennas and related equipment, which it determined to be categorically exempt from CEQA under the Class 3 exemption for small structures at Section 15303 of the CEQA Guidelines (hereinafter, "Guidelines"). (AR 4, 261.) In 2006, Crown Castle received approval for renewal of its use permit for an additional 10 years, allowing for continued operation of the facility. (AR 7-8.)

The facility as it exists today consists of the same 96-foot monopole bearing antennas for Verizon Wireless, Metro PCS and the City. (AR 101). The installation of multiple providers on the monopole is consistent with the City's Telecommunications Ordinance, which encourages "co-location" of antennas to minimize the number of telecommunication facilities in the City to the extent possible. (AR 101.) At present, Verizon Wireless has three panel antennas located at a height of approximately 92 feet, Metro PCS has three panel antennas located below Verizon Wireless, and there are two City-owned antennas located below Metro PCS. (AR 101).

In 2011, Crown Castle requested, on behalf of Verizon Wireless, to make the Modification at issue here, which consists of adding three LTE (Long Term Evolution) panel antennas to the existing array of Verizon Wireless antennas. (AR 20, 100-101.) LTE is an advanced telecommunications technology that supports 3G and 4G networks, and the Modification will allow Verizon Wireless to provide high-speed data services to the growing number of its subscribers who use wireless Internet services. (AR 96, 101.)

The new antennas will be installed at 92 feet, the same height as the three existing Verizon Wireless antennas, and will be essentially the same size (eight feet high and approximately 12 inches wide) as the existing antennas. (AR 9-11, 20, 100-101, 292-94, 435-38.) The project includes remounting the existing three antennas (at the same height), the addition of diplexers (equipment that allows channel sharing) inside the existing equipment room, and two 6-inch diameter cable conduits to support the new antennas. (AR 16, 20, 101.)

II. PLANNING AND ENVIRONMENTAL REVIEW OF THE PROJECT

The project was heard and approved by a 6-1 vote of the City's Planning Commission on September 13, 2011. (AR 145-148.) This occurred following the recommendation of planning staff and the Planning Director, and consideration of all submitted information and public testimony, including the testimony of members of the petitioner, EMF. (AR 9-13, 145-148.) Crown Castle's submission included a May 20, 2011, report by David Cotton, a licensed electrical engineer employed by SiteSafe, an independent RF compliance firm. Mr. Cotton found that after adding the LTE antennas, cumulative RF energy from *all* antennas at the facility (those of Verizon Wireless, MetroPCS, and the City) would not exceed 2.214% of the FCC standard. (AR 28-50.)

In approving the Modification, the Commission found that it qualified for a Class 1 Categorical Exemption under CEQA, which includes the "minor alteration of existing public or private structures, facilities, [or] mechanical equipment . . . involving negligible or no expansion of [existing] use." (AR 10, 292-294, Guidelines § 15301.) Planning Staff noted that the "proposal constitutes a minor alteration of the existing substantial facility," and the Commission found that:

> The proposed use will not be detrimental to the health, safety, peace, comfort and general welfare of persons residing or working in the neighborhood of the proposed use, nor will it be detrimental or injurious to property and improvements in the neighborhood or to the general welfare of the City in that project consists of minor alterations to an existing major telecommunications facility; that it complies with relevant provisions of the City's Telecommunications Ordinance; that by virtue of the size, materials and height of the panel antennae, there would be minimal visual impacts; and that the project conforms to relevant FCC health standards. (AR 10, 12; 148, 292-94.)

III. EMF'S APPEAL TO THE COUNCIL

EMF filed its appeal of the Planning Commission's approval on September 21, 2011. (AR 295-316.) The appeal consisted of the City's appeal form, EMF's accompanying letter, and two

academic articles, one a survey of various studies on the impact of RF emissions on wildlife, and the other describing a method to assess cell stress in the vicinity of RF emissions sources. (AR 292-316.) The articles do not address or evaluate the proposed Modification, and EMF's appeal does not mention CEQA or allege any violation thereof. (AR 292-316.) Rather, the appeal is focused almost exclusively on EMF's belief that RF emissions may affect plants and wildlife in nearby wetlands. (AR 292-316.)

In letters to the City Council dated October 20, 2011, and November 18, 2011, Crown Castle and its counsel, respectively, responded to each point raised in EMF's appeal. (AR 328-331 & 409-414.) While disputing EMF's complaint that there was "insufficient RF data to properly inform the Commission," Crown Castle agreed to engage a second engineering firm "to take additional readings in order to assure residents that the site meets all FCC standards and does not present undue hazard to the health and safety of the public." (AR 329.)

The second RF report, dated November 14, 2011, was prepared by Hammett & Edison, another independent RF compliance firm. (AR 428-434.) This report concluded "the maximum projected cumulative level at ground, for the simultaneous operation of all three radio services, [i.e., Verizon Wireless, Metro PCS and City-owned antennas] would remain less than 1% of the public exposure limit." (AR 430.) The report states its results were based on "worst-case" assumptions, "and therefore are expected to overstate actual power density levels." (AR 430.)

On December 5, 2011, EMF's counsel sent correspondence to City Council and for the first time raised issues under CEQA, which was not part of the appeal filed by EMF. (AR 416-419.) The letter argued that the proposed addition of three panels significantly "expands the existing use" based solely on their power output (i.e., their RF emissions), yet offered no factual or legal support for this claim. It also argued that there was a "reasonable possibility the project will have significant impacts on the environment due to unusual circumstances related to its proximity to the…wetlands," but cited only the "appeal letter and attached studies" in support. (AR 418-419.)

On December 6, 2011, EMF's appeal was heard by City Council. The matter was discussed for approximately three hours. The Council heard statements from EMF, members of the public,

counsel for Crown Castle, and the expert testimony of Bill Hammett, P.E., of Hammett & Edison, the author of the second RF compliance report. (AR 169-255.)[3]

The City Council thoroughly considered all the arguments raised by EMF and its supporters, which focused on legally irrelevant arguments criticizing the FCC's RF compliance standards, and unsubstantiated claims that RF emissions would possibly harm plants and wildlife located in wetlands approximately a half-mile away from the facility. (*E.g.*, AR 187:3-5, 208:2-6.) EMF member Sandra Maurer advised the Council that "the main evidence we have right now is a letter from our lawyer Rose Zoia, who is talking about the exemption, the CEQA exemption. And . . . there is a possibility of a CEQA exemption because we are adjacent to the wetlands." (AR 177:3-7.)

During the hearing, Ms. Maurer and others from EMF attempted to discredit the RF compliance reports submitted by Crown Castle. (AR 199:7-25, 200:1-25; 34:1-12.) Responding to these arguments, Bill Hammett – a licensed electrical and mechanical engineer and RF compliance expert – testified at length before the City Council. (AR 199:7-201:12; 232:13-234:6.) Mr. Hammett explained the basis for the FCC's RF compliance standards and corrected EMF's misstatements relating to those standards. (AR 232:5-234:4).

Thereafter, the City Council voted 2-2, resulting in denial of the appeal. (AR 255:2-18.)

STANDARD OF REVIEW

As EMF concedes (Opening Brief ["Op. Br."] at 6, lines 6-10), to prevail it must show a prejudicial abuse of discretion. While EMF discusses at considerable length how this standard applies in the CEQA context (Op. Br. at 6-7), that is irrelevant because – as discussed in the City's Brief – the CEQA claim is barred for failure to exhaust administrative remedies.

[3] At the hearing, EMF attempted to argue that the project description had changed from the installation of three antennas to six antennas due to an error in the November 18, 2011, letter from Crown Castle's counsel, which said the existing antennas would be replaced rather than re-mounted. (AR 134.) Crown Castle had previously advised staff of the error in that letter, and at the beginning of the appeal hearing, counsel for Crown Castle confirmed the project description had never changed, rendering the topic moot. (AR 386-388; 191:10-25; 192:1-21.) EMF continues to argue in its brief that there was other confusion relating to the project description, citing Crown Castle's letter to the City of May 3, 2011, which related to Crown's request to the City for consent to file the application in its capacity *as landlord* of the site. (AR 26.) Crown Castle's separate zoning application, filed *three months later*, accurately describes the project as adding only three antennas, and therefore, EMF's contention should be rejected as specious and irrelevant. (AR 16-19.)

EMF's remaining claim is that the City's findings are not supported by substantial evidence (Op. Br. at 14-15). While conceding that this claim is subject to the substantial evidence standard of review (*id*. at 7, lines 17-22), EMF completely ignores its deferential nature. The City's findings "are presumed to have been supported by substantial evidence," and *EMF* "bears the burden of establishing that the [City's] decision was invalid and should be set aside." *Breakzone Billiards v. City of Torrance* (2000), 81 Cal. App. 4th 1205, 1247. Under this standard, "the reviewing court must resolve reasonable doubts in favor of the administrative findings and decision," and "may reverse an agency's decision only if, *based on the evidence before the agency*, a reasonable person could not reach the conclusion reached by the agency." *Id*. at 1244 (emphasis in original) (citations omitted).

This deference is based on the courts' recognition that land use decisions are "best left to the local zoning agencies" because "they are in the best position to exercise sound judgment as to appropriate uses for sites within the zoning classifications which they establish." *Id*., at 1248.

ARGUMENT

EMF's claims are preempted by federal law in three ways: (a) all claims related to the environmental effects of RF emissions are expressly preempted by 47 U.S.C. § 332(c)(7)(B)(iv); (b) the relief EMF seeks would require the City to discriminate unreasonably against Verizon Wireless, in violation of 47 U.S.C. § 332(c)(7)(B)(i)(I); and (c) under a newly enacted statute, the City no longer has discretion to deny the application for the Modification. *See* 47 U.S.C. § 1455. In Addition, for the reasons stated in the City's Brief, EMF's claims are defective even when judged solely on state-law grounds.

I. ALL CLAIMS REGARDING THE ENVIRONMENTAL EFFECTS OF RADIO-FREQUENCY EMISSIONS ARE PREEMPTED.

A. Federal Law Preempts All Local Regulation Based Directly *or Indirectly* on Concerns About RF Emissions.

EMF concedes, as it must, that "local governments have no authority to establish or enforce technical standards for wireless service," and claims that it "is not challenging technical and operational standards for wireless communications service promulgated by the [FCC]." (Op. Br. at

1, n. 1.) Yet that is *exactly* what EMF is doing. In fact, this suit is nothing but a thinly disguised effort to circumvent the FCC's exclusive authority to regulate RF emissions from wireless facilities. This federal preemption is set forth explicitly in the Telecommunications Act of 1996:

> No 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 [FCC]'s regulations concerning such emissions.

(47 U.S.C. 332(c)(7)(B)(iv).)

The courts have rejected both direct and indirect challenges to the FCC's plenary authority to regulate RF emissions. *See, e.g., Cellular Phone Taskforce v. F.C.C.* (2nd Cir. 2000) 205 F.3d 82 (rejecting broad-based challenge to FCC RF emissions standards), *cert. denied* (2001) 531 U.S. 1070; *Farina v. Nokia, Inc.* (3rd Cir. 2010) 625 F.3d 97 (affirming dismissal of state-law tort suit alleging that RF emissions from cell phones were unsafe; suit preempted due to conflict with FCC's RF safety regulations for handsets), *cert. denied* (2011) 132 S. Ct. 365; 181 L. Ed. 2d 231.

The courts have also been quite clear that where such standards are met – as in this case – *all* local regulation of RF emissions is preempted. *See, e.g., MetroPCS, Inc. v. City & County of San Francisco* (9th Cir 2004) 400 F.3d 715, 736 ("localities may not base zoning decisions on concerns over radio frequency emissions"); *Nextel of N.Y., Inc. v. City of Mt. Vernon* (S.D.N.Y. 2005) 361 F. Supp. 2d 336, 341 (in light of federal preemption, "health concerns expressed by residents cannot constitute substantial evidence").

Similarly, federal preemption applies not only to regulation that is explicitly based on RF emissions, but also to efforts to circumvent such preemption through some proxy such as aesthetics or property values. *See, e.g., AT&T Wireless Servs. of Cal. LLC v. City of Carlsbad* (S.D. Cal. 2003) 308 F. Supp. 2d 1148, 1159 (in light of federal preemption, "concern over the decrease in property values may not be considered as substantial evidence if the fear of property value depreciation is based on concern over the health effects caused by RF emissions"); *Calif. RSA No. 4, d/b/a Verizon Wireless v. Madera County* (E.D. Cal. 2003) 332 F. Supp. 2d 1291, 1311 ("complaints about property values were really a proxy for concerns about possible environmental effects of RF [emissions], which cannot provide the basis to support a decision").

Given the plenary federal authority in this area, the only legitimate question about RF emissions for the City in reviewing the application was whether the facility will continue to operate within the FCC's limits. The answer is clearly "yes." Crown Castle submitted two separate reports from independent engineers, each of which concluded that the facility will operate at a tiny fraction of the FCC limits after the proposed modifications are completed. (AR 263-86, 428-34.)

While EMF complains of certain inconsistencies between the two reports (Op. Br. at 8:11-9:2), it neither claims that the FCC limits will be exceeded, nor provides any evidence that would support such a conclusion. As Bill Hammett noted in response to the same argument at the Council hearing, "[t]he key, of course, is, in both cases, whether using their assumptions or our assumptions, you're hundreds of times below the standard." (AR 201:6-12.) In short, there is no question that federal law preempts any decision by the City based on the alleged environmental impacts of the facility's RF emissions.

B. Neither RF Emissions Nor The Type of Wireless Services Provided by the Facility Are Relevant to the City's CEQA Determination.

In an effort to get around this clear-cut federal preemption of its claims, EMF attempts to dress up its RF concerns in CEQA clothing. First, EMF claims that by increasing RF emissions, adding frequencies, and enabling more advanced wireless services, the Modification "expands" the existing use, and thus precludes use of the Class 1 CEQA exemption. (Op. Br. at 8:2-11:2.) As explained in the City's Brief, however, the CEQA claim is barred for failure to exhaust administrative remedies.

In any event, as long as the RF emissions stay below FCC limits – as will plainly be the case – they are irrelevant to *any decision* by the City as a matter of federal law. This includes the City's determination that the CEQA exemption applies. In *Bell Atlantic Mobile of Rochester, L.P. v. Town of Irondequoit* (W.D.N.Y. 2012) 2012 U.S. Dist. LEXIS 11420, the court expressly rejected the argument that RF emissions could justify expanded environmental review. In holding that a city's attempt to require an environmental impact statement (New York's equivalent of an EIR under CEQA) was unlawful, the court observed:

> As Verizon points out . . . the statute prohibits regulation of wireless "on the basis of the environmental effects of radio frequency emissions. . . ." Thus, Defendants' concern about

> the perception that radio frequency transmissions from the tower are harmful, *cannot be properly considered*.

Bell Atlantic, 2012 U.S. Dist. LEXIS 11420 at *25 - *27 (emphasis added).

Similarly, whether Verizon Wireless offers 3G or 4G services, or what frequencies it uses to provide those services, is completely irrelevant to any decision by the City, including its CEQA determination. As EMF concedes, local governments have no authority to regulate the technical or operational aspects of wireless service (Op. Br. at 1, n. 1). This means that local governments may not control the technology used by wireless companies. *See New York SMSA Limited Partnership v. Town of Clarkstown* (2d Cir. 2010) 612 F.3d 97, 105 ("provisions setting forth a preference of 'alternate technologies' are also preempted because they interfere with the federal government's regulation of technical and operational aspects of wireless telecommunications technology, a field that is occupied by federal law").

C. Federal Preemption Applies to *All* Environmental Impacts of RF Emissions, Not Just Human Health.

While properly conceding that "human health effects . . . may not be the subject of CEQA review due to Federal preemption" (Op. Br. at 5, n. 5), EMF argues that CEQA requires the City to review the impact of RF emissions on wetlands, birds, and plants. (Op. Br. at 12:6-13:11.) This argument is refuted by the plain language of the Telecommunications Act, which preempts all regulation "on the basis of the *environmental effects* of radio frequency emissions," with no mention of human health effects. 47 U.S.C. 332(c)(7)(B)(iv) (emphasis added). While the courts have held that this language *includes* human health effects, it is not limited to such effects. In fact, the first – and apparently only – court to consider the issue rejected the very argument advanced by EMF here:

> Jaeger's interpretation of "environmental effects" as limited only to humans would result in an application of section 332(c)(7)(B)(iv) that is clearly at odds with Congressional intent and FCC policy on RF emissions. The plain meaning of the term "environmental effects" incorporates adverse effects on all biological organisms. Accordingly, the Council is preempted, under the TCA, from rendering a siting decision on the basis of the health effects of RF emissions on widlife, including migratory birds and bald eagles.

Jaeger v. Cellco Partnership (D. Conn. 2010) 2010 U.S. Dist. LEXIS 24394, *29-*30, *affirmed* (2d Cir. 2010) 402 Fed. Appx. 645, 2010 U.S. App. LEXIS 25014, *cert. denied* (2011) 131 S. Ct. 3068,

180 L. Ed. 2d 889.

In sum, the federal government has exclusive authority to regulate all environmental impacts of RF emissions, and the Court should reject EMF's effort to circumvent this clear-cut preemption.

II. DENIAL WOULD HAVE UNLAWFULLY DISCRIMINATED AGAINST VERIZON WIRELESS.

In addition to preempting RF-based regulation, the Telecommunications Act also provides that local governments, in applying their zoning regulations to wireless facilities, "shall not unreasonably discriminate among providers of functionally equivalent services." 47 U.S.C. § 332(c)(7)(B)(i)(I). This provision also precludes the relief EMF seeks in this action. In 2005, the City approved a use permit authorizing MetroPCS to install a new array of three antennas on the existing tower at the 85-foot level. (AR 261-2.) MetroPCS and Verizon Wireless both provide personal wireless services, and the addition of a new array of MetroPCS antennas – where none existed before – had at least as much visual impact as placing three new antennas among an existing array of Verizon Wireless antennas. Given this history, the City would have discriminated unlawfully by denying the application for the Modification at issue here. *See, e.g., Nextel West Corp. v. Town of Edgewood* (D.N.M. 2007) 479 F. Supp. 2d 1219, 1232 (town discriminated unreasonably in violation of TCA where "Plaintiff only seeks to co-locate an additional antenna array on the existing tower without increasing its height"); *Nextel Partners, Inc. v. Town of Amherst* (W.D.N.Y. 2003) 251 F. Supp. 2d 1187, 1194-95 (town discriminated unreasonably where "Nextel . . . simply sought a special permit to collocate its antennae on an existing tower that already has antennae from three different wireless services providers").

III. CHANGES IN FEDERAL LAW HAVE RENDERED THE CASE MOOT.

After this case was filed, Congress passed and President Obama signed The Middle Class Tax Relief and Job Creation Act of 2012 (the "Act"), which includes several provisions related to wireless spectrum and facilities deployment. Section 6409 of the Act provides, in relevant part:

> (1) IN GENERAL- *Notwithstanding section 704 of the Telecommunications Act of 1996 (Public Law 104-104) or any other provision of law*, a State or local government *may not deny, and shall approve*, any eligible facilities request for a modification of an existing wireless tower or base station that *does not substantially change the physical dimensions of such tower* or base station.

> (2) ELIGIBLE FACILITIES REQUEST- For purposes of this subsection, the term 'eligible facilities request' means any request for modification of an existing wireless tower or base station that involves--
>
> (A) collocation of new transmission equipment;
> (B) removal of transmission equipment; or
> (C) replacement of transmission equipment.

Public Law 112-96, § 6409, codified at 47 U.S.C. § 1455 (emphasis added).

This change in the law has rendered the case moot, because it would make the outcome of any remand a foregone conclusion. Under any fair reading, the minor modification of the Existing Facility at issue here falls squarely within the terms of Section 6409. Therefore, Verizon Wireless and Crown Castle have the clear right to make the proposed Modification, and the City no longer has discretionary permitting authority. In short, a remand would serve no purpose because the City would be required to approve the application. Furthermore, CEQA would not even apply because it is limited to discretionary approvals.[4]

IV. EMF'S CLAIMS ARE DEFECTIVE EVEN WHEN EVALUATED UNDER STATE LAW.

Quite apart from federal preemption, EMF's claims are defective as a matter of state law, for all the reasons set forth in the City's brief.

CONCLUSION

The fundamental problem with the claims of petitioner EMF Safety Network is that they were presented to the wrong forum. All of its claims are based – either directly or indirectly – on EMF's overriding concern with the alleged environmental impacts of RF emissions, and its disagreement with the FCC's RF emissions standards. Such claims are not properly raised in this Court, as they are entirely preempted by federal law. In addition, as set forth in the City's Brief, EMF's claims are fatally flawed even when judged on purely state-law grounds. The Court should deny the writ.

[4] *See* Pub. Res. Code §§ 21080(a) (CEQA applies to "discretionary projects proposed to be carried out or approved by public agencies"), 21080(b)(1) (CEQA not applicable to ministerial projects).

DATED: August 22, 2012

MACKENZIE & ALBRITTON LLP

By: _____
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DATED: August 22, 2012

SHUSTAK FROST & PARTNERS, P.C.

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PROOF OF SERVICE

I, James A. Heard, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the within entitled action. My business address is 220 Sansome Street, 14th Floor, San Francisco, California 94104.

ON AUGUST 23, 2012, I SERVED THE FOREGOING: **JOINT MEMORANDUM OF REAL PARTIES IN INTEREST VERIZON WIRELESS AND CROWN CASTLE IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS**

on the interested parties in said action, by placing a true copy thereof in sealed envelope(s) addressed as follows: **SEE ATTACHED SERVICE LIST**

and served the named document in the manner indicated below:

☐ **BY MAIL**: I caused true and correct copies of the above document(s) to be served by mail on the above date by personally placing and sealing said document(s) in an envelope or package suitable for mailing, addressed to the addressee(s) and including this firm's return address, and then, following ordinary office practice, placing said sealed envelope in the office's usual location for collection and mailing with the United States Postal Service.

☐ **BY NEXT-DAY OVERNIGHT SERVICE**: I caused true and correct copies of the above document(s) to be placed within a sealed envelope or other package suitable for overnight shipment, addressed to the addressee(s) and including this firm's return address, and delivered on the date stated above to an overnight delivery service for delivery to the addressee(s) on the following business day.

☐ **BY HAND DELIVERY**: I caused true and correct copies of the above document(s) to be placed within a sealed envelope or other package suitable for handling by a messenger or courier service and then caused the package to be hand-delivered by a same-day messenger service to the addressee(s) on this date.

☐ **BY FACSIMILE**: I caused true and correct copies of the above document(s) to be sent via facsimile to the addressee(s) on this date. The facsimile machine used complies with California Rule of Court 2003(3) and no error was reported by the sending facsimile machine. The transmission record for this facsimile complies with California Rule of Court 2003(6).

☒ **BY EMAIL**: I caused true and correct copies of the above document(s) to be sent via email to the addressee(s) on this date.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed August 23, 2012, at San Francisco, California.

Jim Heard

James A. Heard

SERVICE LIST
EMF Safety Network v. City of Sebastopol, et al.
(Sonoma County Superior Court Case No. SCV 250976)

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