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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SONOMA

EMF SAFETY NETWORK, and DOES 1 through 5, inclusive,

Petitioners,

v.

CITY OF SEBASTOPOL, and DOES 7 through 10, inclusive,

Respondents.

_____/

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

Real Parties in Interest.

_____/

CASE NUMBER SCV 250976

Assigned for All Purposes to the Hon. Elliot Lee Daum

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

[CEQA]

Date: December 7, 2012
Time: 9:00 a.m.
Dept: 16
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Case Law

California Case Law

Federal Case Law

Federal Rules

California Regulations

California Rules

I. INTRODUCTION

Real Parties in Interest GTE Mobilnet of California Limited Partnership, a California Limited Partnership d/b/a Verizon Wireless (Verizon) and Crown Castle GT Company LLC (Crown Castle) ask this Court to bypass judicial review of Respondent City of Sebastopol's approval of the Crown Castle Antenna Use Permit (project) in violation of the California Environmental Quality Act (CEQA).

Real parties first claim that this Court is banned from reviewing the state law claims based on a provision in the Federal Telecommunications Act prohibiting state or local government from regulating personal wireless service facilities on the basis of "environmental effects of radio frequency emissions." (47 U.S.C. § 332(c)(7)(B)(iv).) Real parties misconstrue the meaning of the term "environmental effects" as that term has been interpreted by case law to refer to human health effects as opposed to the physical environment.

Real parties then claim denial of the project would have unreasonably discriminated against Verizon in violation of federal law given the City previously approved "the substantially similar MetroPCS antennas on the same tower." In the first instance, that law states that local governments "shall not unreasonably discriminate among providers of functionally equivalent services." (47 U.S.C. § 332(c)(7)(B)(i)(I).) The MetroPCS service is not functionally equivalent to Verizon's proposed service. In any event, that law requires the provider of services to make two primary showings: one, it was discriminated and two, such discrimination was unreasonable. Also, this is a claim Verizon would make in the event of denial and its choice to sue the City; not a defense to a CEQA claim.

Real parties finally claim that a judgment and writ in favor of Petitioner EMF Safety Network (the Network) would be rendered "meaningless" by a federal law enacted after the filing of the petition which states 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.) This law does not change the requirement that a local government review such projects for compliance with CEQA.

There is no precedential, on point case law in support of real parties' claims; instead, they rely on inapposite, distinguishable cases. Real parties also cite to one unreported federal case without informing the Court of that fact. Although Rule 32.1 of the Federal Rules of Appellate Procedure provide that the Federal Circuit Courts may not prohibit the citing of an unpublished federal court opinion, it says nothing about citing the same in a state court.

II. STANDARDS OF REVIEW

Real parties do not dispute the CEQA standards of review discussed by the Network, i.e., when a court is interpreting the scope of a categorical exemption, it is considering a "question of law" and, therefore the review is *de novo*; whether a project factually fits within an exempt category is determined by the substantial evidence standard of review; and following the initial determinations of whether the project fits within the scope of the exemption and whether it is factually consistent with the exemption, the low-threshold "fair argument" standard applies as to whether a project meets an exception to the exemption. Real parties just claim that the discussion is irrelevant based on the City's separate and joined argument that the CEQA claim is barred for failure to exhaust administrative remedies. As discussed in petitioner's reply brief to the City's opposition, such is not true.

Real parties then claim that the Network "ignores [the] deferential nature"of the substantial evidence standard as it applies to the City's findings. Real parties do not dispute the discussion of the standard in *County of San Diego v. Assessment Appeals*

Bd. No. 2 (1983) 148 Cal.App.3d 548, cited by petitioner. The deferential nature of the standard does not equate to no judicial review. It requires the Court to "scrupulously enforce all legislatively mandated CEQA requirements." (*Citizens of Goleta Valley v. Board of Supervisors* (1992) 52 Cal.3d 553, 564.) Although deference is warranted, the court must

> "scrutinize the record and determine whether substantial evidence supports the [city's] findings and whether these findings support [the city's] decisions. In making these determinations, the reviewing court must resolve reasonable doubts in favor of the administrative findings and decision." (Cite) "[We] 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. [Citation.]" (Cite.) Further, we must deny the writ if there is any substantial evidence in the record to support the findings. (Cite.)

(*Breakzone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1244.) By the same token, if there is not substantial evidence (as defined in the Opening Brief, page 6) to support the findings, the writ must be granted.

III. ARGUMENT

A. This Court Has Jurisdiction to Review the CEQA Claims Regarding the Environmental Effects of the Project.

1. Federal Law Does Not Preempt the Type of Environmental Harm Claims Made in This Case.

In the first instance, real parties confuse the ban on local governments on establishing or enforcing technical standards for wireless service with the proscriptions in 47 U.S.C. 332(c)(7)(B)(iv), part of the Telecommunications Act. As explained in *New York SMSA Limited Partnership v. Town of Clarkstown* (2d Cir. 2010) 612 F.3d 97, when Congress passed the Communications Act of 1934 and created the Federal Communications Commission (FCC), it gave the FCC "exclusive authority over technical matters related to radio broadcasting." (*New York SMSA Ltd.*

Partnership, *supra*, 612 F.3d at 100 [cite omitted].) In 1996, Congress enacted the Telecommunications Act of 1996 which included "new provisions applicable only to wireless telecommunications service providers." (*Id.* at 101 [cite omitted].) "In section 332(c)(7) of the Act, Congress preserved the authority of state and local governments over zoning and land use issues, but imposed limitations on that authority." (*Ibid*; 47 U.S.C. § 332(c)(7)(A).)[1] Those limitations include the inability of local government to "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).)

Thus, the question is what is the meaning of "environmental effects" as that phrase is used in the code. In *PrimeCo Personal Communications, Ltd. Partnership v. City of Mequon*, 352 F.3d 1147 (7th Cir. 2003) the court explained that

> A reasonable decision whether to approve the construction of an antenna for cellphone communications requires balancing two considerations. The first is the contribution that the antenna will make to the availability of cellphone service. The second is the aesthetic or other harm that the antenna will cause. The unsightliness of the antenna and the adverse effect on property values that is caused by its unsightliness are the most common concerns, as in *VoiceStream Minneapolis, Inc. v. St. Croix County, supra,* 342 F.3d at 831–32, and *Southwestern Bell Mobile Systems, Inc. v. Todd,* 244 F.3d 51, 61–62 (1st Cir.2001). ***But adverse environmental effects are properly considered also***, *360 Degrees Communications Co. v. Board of Supervisors,* 211 F.3d 79, 82, 84 (4th Cir.2000); cf. *AT & T Wireless PCS, Inc. v. Winston–Salem Zoning Bd. of Adjustment,* 172 F.3d 307, 315 (4th

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[1]Section 332(c)(7), entitled "Preservation of local zoning authority," provides:

> 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.

> Cir.1999), and even safety effects: fear of adverse health effects from electromagnetic radiation is excluded as a factor, 47 U.S.C. 332(c)(7)(B)(iv), but not, for example, concern that the antenna might obstruct vision or topple over in a strong wind. [Cite]

(*PrimeCo*, *supra*, 352 F.3d 1147 at 1149 [emphasis supplied].) The court in *Helcher v. Dearborn County*, 595 F.3d 710 (7th Cir. 2010) confirmed this, stating

> Although the statute prohibits as a consideration the fear of adverse health effects of electromagnetic radiation from the towers, a local government may consider other safety factors, such as the harm to the environment, the obstruction of vision, and the risk of a tower falling due to wind or ice.

(*Id.* at 723 (substantial evidence existed to reject a permit on aesthetic grounds; *see also Voicestream Minneapolis v. St. Croix County*, 342 F.3d 818, 825 (7th Cir. 2003) (The environmental "assessment evaluated the environmental effects of the proposed installation in accordance with the requirements of" the National Environmental Policy Act (NEPA).); 831-832 (finding substantial evidence supported denial based on adverse aesthetic impact where documentation that 185-foot tower would be visible for several miles along the scenic riverway and testimony that tower would interfere with unique scenery of riverway)) Here, the Network's suit does not challenge the approval on the basis of health effects, but on the basis of effects on the physical environment and, thus, is valid.

While real parties conspicuously ignore the meaning of these cases as well as the *Primeco-Helcher-Voicestream* line of cases, the other cases they do rely on are inapposite. *Nextel of N.Y., Inc.*, *supra*, 361 F.Supp.2d 336, supports petitioner's position. Citing to 47 U.S.C. § 332(c)(7)(B)(iv), the court stated that "health concerns expressed by residents cannot constitute substantial evidence." (*Id.* at 341.) Similarly, the *AT&T Wireless Servs. of Cal. LLC v. City of Carlsbad*, 308 F. Supp. 2d 1148 (S.D. Cal. 2003), and *California RSA No. 4 v. Madera*

County, 332 F.Supp.2d 1291 (E.D. Cal. 2003) courts interpreted the phrase "environmental effects" in the Act to mean health effects. In *Cellular Phone Taskforce v. F.C.C.*, 205 F.3d 82 (2nd Cir. 2000), *cert. denied* (2001) 531 U.S. 1070, petitioners challenged FCC orders which promulgated guidelines for health and safety standards of radio frequency radiation, established streamlined procedures for meeting requirements under NEPA for FCC licensees that comply with guidelines, and retained exclusive ability to regulate relevant radio facility operations under various statutory schemes. None of the issues related to the environmental effects of an on-the-ground wireless service project relative to CEQA.[2] In *Farina v. Nokia, Inc.* (3rd Cir. 2010) 625 F.3d 97, *cert. denied* (2011) 132 S. Ct. 365, a consumer brought a class action against various cell phone manufacturers and retailers of wireless handheld telephones claiming use of cell phones exposes the user to dangerous amounts of radio frequency ("RF") radiation. While the court held that the claims were preempted by certain FCC regulations not applicable here, it found that 47 U.S.C. § 332(c)(7)(B)(iv) does not apply to cell phones, but only to the physical location of cell phone facilities. (*Farina*, *supra*, 625 F.3d at 119.) Thus, the claims in that case were not preempted by 47 U.S.C. § 332(c)(7)(B)(iv). (*Farina*, *supra*, 625 F.3d at 133-134.) Nothing in *MetroPCS, Inc. v. City & County of San Francisco*, 400 F.3d 715 (9th Cir 2005) disagrees with the findings in *Primeco*, *Helcher*, and *Voicestream*, *supra*. (*MetroPCS*, *supra*, 400 F.3d at 736-737.) The court there upheld a summary judgment that denial of a permit to mount antennas on the roof of a parking garage was supported by substantial evidence that area already served by other service providers (*id.* at 724) and remanded to determine if the denial was discriminatory.

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[2] The NEPA issue was whether the FCC was required to undergo formal NEPA review for its rulemaking. The court concluded that the procedures followed satisfied the "functional compliance" test for conformity with NEPA. (*Id.* at 94.)

(*Id.* at 729-730.)

Real parties also rely on an unreported case, *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. Although FRAP 32.1 provides that the Federal courts of appeal may not prohibit the citing of an unpublished federal court opinion, the federal rule says nothing about citing the same in a state court. (*But see* Cal. Rules of Ct., Rule 8.1115.) Should this court decide to consider the merits of the *Jaeger* case, it is distinguishable. In that case, petitioner challenged the state agency's siting determination on the basis of RF emissions and the court's specific holding was that the agency was preempted "from rendering a siting decision on the basis of the health effects of RF emissions on widlife, including migratory birds and bald eagles." (*Id.* at p. 10.) The claims in *Jaeger* presupposed that the cellular tower in that case will result in harm to protected fowl in violation of the Migratory Bird Treaty Act (MBTA) and the Bald and Golden Eagle Protection Act (BGEPA). Here, on the other hand, the Network claims that the City failed to subject the project to environmental review under CEQA, i.e., to consider it's environmental effects and mitigate for those effects. Also, there is nothing in *Jaeger* to suggest that it attempts to overrule the *Primeco-Helcher-Voicestream* line of cases.

2. Whether the Project Fits into the CEQA Exemption is Not Preempted.

Real parties claim that as long as the project's RF emissions are below FCC limits, CEQA review would be irrelevant. If that were the case, once Verizon submitted reports stating that the emissions will be below FCC limits, the City would have foregone CEQA review. There is no preemptive bar to the claim that the project does not fit into the exemption. By determining whether the project fits into the exemption does not equate to regulating the technical or operational aspects of wireless service or controlling the technology used by wireless companies. There is no preemption to applying CEQA.

Bell Atlantic Mobile of Rochester, L.P. v. Town of Irondequoit, 848 F.Supp.2d 391 (W.D.N.Y. 2012) is inapposite. In that case, the court held that, based on the specific facts of the case, the Town's requirement that the project undergo review under the State Environmental Quality Review Act (SEQRA) was done merely to delay the permitting process in contravention of different subsections of the Act, to wit, sections 332(c)(7)(B)(ii) and 332(c)(7)(B)(i)(II). (*Bell Atlantic*, *supra*, 848 F.Supp.2d at 398, 400-403.) *New York SMSA Limited Partnership*, *supra*, 612 F.3d 97, also is factually inapposite. In that case, the court held a town's ordinance governing installation of wireless telecommunication facilities was preempted by the Act because the ordinance sought to regulate RF interference.

Here, there is no dispute that the City was entitled to review the project under CEQA. It's determination that it was exempt is being challenged. Submitting the project to CEQA review -- i.e., not exempting it from review under a negative declaration or Environmental Impact Report -- is not the same as regulating the technical or operational aspects of wireless service or controlling the technology used by wireless companies.

B. The City May Review the Project Under CEQA Without Discriminating Against Verizon

Real parties again miss the point with their discrimination argument. They claim that because the City issued a use permit to MetroPCS in 2005, if it had denied the subject project it would have automatically discriminated against Verizon in violation of section 332(c)(7)(B)(i)(I) of the Act. Real parties only basis for this claim is their unsubstantiated statement that the MetroPCS antennas "had at least as much visual impact" as the project. (RP Opp:11:12-13.)

That section of the Act states that "[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof– . . . shall not unreasonably discriminate among providers of functionally equivalent services; . . . ." Requiring the applicant to prepare a negative

declaration or EIR for the project would not run afoul of the federal mandate. Such does not regulate "the placement, construction, and modification" of the project but only evaluates the environmental effects of the project. It cannot be established in this CEQA case that if the City would have denied the application, it would have discriminated against Verizon. This CEQA case does not ask for the remedy of denial of the application. It asks that the project not be held exempt from CEQA review.

Real parties' reliance on *Nextel West Corp. v. Town of Edgewood*, 479 F. Supp. 2d 1219 (D.N.M. 2007) and *Nextel Partners, Inc. v. Town of Amherst,* 251 F. Supp. 2d 1187 (W.D.N.Y. 2003) is not helpful as those cases are based on facts in a different context, i.e., the denial of wireless service providers' applications to add antenna to a tower. In both cases, the court found that substantial evidence did not support denial of the permits. Both cases are inapplicable here in that the City did not deny the subject application.

C. Changes in Federal Law Do Not Moot the Current CEQA Claims

The hidden provision relating to wireless facilities in the omnibus Middle Class Tax Relief and Job Creation Act of 2012 does not moot this case. The provision states that a local government shall approve "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(a)(1).[3] The last phrase – "does not substantially change the physical dimensions of such tower" – requires a showing of proof. In fact, petitioner here argues that the project is not a "minor alteration of existing public or private structures, facilities, mechanical equipment" as required to be exempt

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[3] (2) 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.

under Class 1 projects (Guidelines (14 Cal. Code Regs.), § 15301).

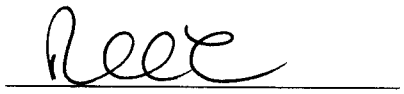
Real parties leave out the subsection that provides that nothing in the statutes shall relieve the FCC "from the requirements of the National Historic Preservation Act or the National Environmental Policy Act of 1969." Whether this language includes "baby NEPA's", i.e., state environmental protection laws such as CEQA, is a question for another day.

IV. CONCLUSION

Based on the above, the administrative record, and the files and argument and evidence presented at oral argument, Petitioner requests the Court issue a Peremptory Writ of Mandate, ordering respondent to set aside and void its approvals of the project and to comply with all provisions of CEQA, the City's Telecommunication Ordinance, and other applicable laws prior to further consideration of the project.

Dated: October 1, 2012

Law Office of Rose M. Zoia



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I am a citizen of the United States and a resident of the County of Sonoma. I am over the age of eighteen years and not a party to the within entitled action. My business address is 50 Old Courthouse Square, Suite 401, Santa Rosa, California 95404.

On October 1, 2012, I served one true copy of

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

by emailing, per stipulation, to the persons, entities, and email addresses listed below:

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

Executed on October 1, 2012, at Santa Rosa, California.

Rose M. Zoia