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Sent via email to: amachado@portlandmaine.gov

City of Portland, Zoning Board of Appeals
c/o Ann Machado, Zoning Specialist,
City of Portland
Portland City Hall, Room 315
389 Congress Street
Portland, ME 04101

RE: Conditional Use Application, Verizon Wireless, 1877 Congress Street

Dear Chair Avery and Board Members:

I represent Charlton and Mary Smith, residents at 85 River's Edge in Portland. The Smiths reside in the River's Edge residential development. Their home is located in close proximity to the 1877 Congress Street property which is where Verizon Wireless seeks approval to install a 1,650 s.f. "Head End" telecommunications facility. The engineering plans Verizon Wireless submitted with its October 21, 2015 application calls the proposed structure a "Head End" facility. If the proposed Head End facility is permitted to be located at 1877 Congress Street, the Smiths will suffer a particularized injury as they will hear the proposed external industrial sized generator to be located on a 5' by 10' concrete pad and operated every single week. They will also see the proposed 55' by 30' building with a height of almost 18' housing a commercial use. This will result in a substantial diminution in value of the Smith property, along with other properties at River's Edge. Mr. Smith appeared and spoke at the Board's initial December 3, 2015 meeting on this matter.

Verizon Wireless has not provided any detail whatsoever about what will occur in the proposed 1,650 s.f. Head End facility. The applicant's October 21, 2015 cover letter submitted with the Conditional Use Application, on the first page, introductory paragraph, refers to the proposed building as a "wireless telecommunications facility." Later in the same cover letter, under "Project Description", the Head End building is described as an "equipment shelter." On the actual one page conditional use application form, as the type of conditional use proposed, Verizon Wireless states: "Utility substation/telephone electronic equipment enclosure."

As explained more fully below, Verizon Wireless is a telecommunications company that operates a wireless and fiber broadband network.¹ Verizon Wireless is not a public utility. Under the Land Use Code, only a public utility can obtain a conditional use permit to locate a “utility substation” in the R-2 residential zone. 1877 Congress Street is located entirely in the R-2 residential zone. While it is not entirely clear yet what will occur in the facility, any activity that occurs will be a commercial use because Verizon Wireless is not a public utility. Like AT&T, Sprint, and US Cellular, Verizon Wireless is a telecommunications company. What Verizon Wireless proposes, a telecommunications facility, is an expressly permitted use in the B-6 and B-7 zones and listed in those zones as a commercial use. *See* Sections 14-269 and 14-295 of the Land Use Code. Commercial uses, such as telecommunications facilities, are not however allowed in the R-2 residential zone, either as permitted or conditional uses.² Therefore the Board must deny Verizon Wireless’ conditional use application.

By its application, Verizon Wireless states that its proposed telecommunications facility constitutes a utility substation. Utility substations are conditional uses in the R-2 residential zone. Section 14-78.c.1 provides:

Utility substations, including sewage and water pumping stations and standpipes, electric power substations, transformer stations, telephone electronic equipment enclosures, and other similar structures, provided that such uses are suitably screened and landscaped so as to ensure compatibility with the surrounding neighborhood.³

For the Board to approve Verizon Wireless application to install the proposed Head End facility, the Board must first find that Verizon Wireless is a utility. This is so for two reasons.

First, section 14-78.c.1 permits in the R-2 residential zone “utility substations” as a conditional use, subject to suitable screening and landscaping. The general term “utility substation” is followed by specific examples plainly describing different types of public utility owned or operated substations, based on whether the utility is a sewer, water, electric or telephone utility. *See Wister v. Town of Mt. Desert*, 2009 ME 66, ¶ 17 (If an ordinance is unambiguous, plain meaning will govern.). The example given as a typical substation for a telephone utility, telephone electronic equipment enclosure, is what Verizon Wireless seeks a permit for. But Verizon Wireless is not a telephone utility.

¹ <http://www.verizon.com/about/our-company/verizon-glance>

² The purpose of the R-2 residential zone is to “provide for low-density residential development characterized by single-family homes on individual lots...”. Section 14-76.

³ Any applicant seeking conditional use approval for a utility substation to be located in the R-2 zone must also meet the standards in section 14-474. *See* section 14-78.

The Land Use Code definition of “utility substation” reinforces the requirement that to qualify as a “utility substation,” any such substation, whether it be a sewer or water pumping station, electric power substation, telephone equipment enclosure, or similar structure, must be “*owned or operated by a public utility.*” See section 14-47 for definition. So for Verizon Wireless to have standing to seek to obtain a conditional use permit for its proposed Head End facility, what Verizon Wireless also calls a “telecommunications facility”, it must first show it is a public utility. Verizon cannot make this showing because it is not a public utility.

While the term “utility” is not defined, its common definition is “public utility.”⁴ Verizon Wireless is a non-regulated facilities based wireless service provider doing business in the State of Maine. It competes with businesses such as AT&T, Sprint and US Cellular, all of which offer wireless services in the City. Verizon Wireless has not presented any information to the Board showing that it is a public utility in Maine. The information available shows that it is not.

In Maine, a “public utility” is defined by statute as follows:

“Public utility” includes every gas utility, natural gas pipeline utility, transmission and distribution utility, telephone utility, water utility and ferry, as those terms are defined in this section, and each of those utilities is declared to be a public utility. “Public utility” *does not include* the operation of a radio paging service, as that term is defined in this section, *or mobile telecommunications services...*”

35-A M.R.S. §102(13) (emphasis added).⁵

Verizon Wireless is a provider of wireless, or more specifically, “mobile telecommunications services,” and therefore, by definition, is decidedly not a “public utility.” This conclusion should be determinative as to Verizon Wireless’ status in Maine, and should end the inquiry on whether Verizon Wireless may receive the benefits associated with public utility status under the Land Use Code. By contrast, for example, FairPoint is a “public utility” under the statutory definition because it is a “telephone utility.”

A “telephone utility” is defined in the statute to include every person, its lessees, trustees, receivers or trustees appointed by any court, that provides telephone service for compensation

⁴ http://www.oxforddictionaries.com/us/definition/american_english/utility

⁵ The same statute defines a “Mobile telecommunications services” as a provider of telecommunications services licensed by the Federal Communications Commission for mobile use.” 35-A M.R.S. § 102(9-A). It cannot be disputed that Verizon Wireless provides telecommunications services licensed by the FCC for mobile use. For the record, Verizon Wireless is also not a mobile telecommunications service provider who has exclusive control over the radio frequency spectrum assigned by the FCC to provide mobile service to the service area. There is no evidence that Verizon Wireless possesses monopoly control over the radio frequency spectrum in its service area, which evidently includes most if not all of Maine. 35-A M.R.S. §102(13).

inside this State” excluding those entities that are excluded from the definition of “public utility,” such as a provider of mobile telecommunications services. 35-A M.R.S. §102(19). It goes without further explanation that, as a provider of mobile telecommunications services, Verizon Wireless is not a “telephone utility.”

Verizon Wireless does not hold itself as a public utility, whether in its website, advertising literature, or before the Maine Public Utilities Commission (the “Commission”), which regulates Maine public utilities under Title 35-A of the Maine Revised Statutes. Verizon Wireless is content to avoid the label “public utility” perhaps for reasons that benefit the Verizon Wireless. Because Verizon Wireless is not a “public utility” and provides wireless service the company is not currently required to seek Commission approval to provide service in Maine and is excluded from the regulation of its rates and terms of customer service and other matters which apply to public utilities in Maine. *See, e.g.*, 35-A M.R.S. § 2101 (requiring a public utility seeking to serve in a municipality to obtain a certificate of need); 35-A M.R.S. § 301(fundamental requirement imposed on public utilities under Maine law requires the utility to provide services safely and at just and reasonable rates, subject to Commission review and approval). As a non-public telecommunications provider, Verizon Wireless avoids a multitude of other Maine utility regulatory requirements regarding its services, ownership and operations.

Telephone public utilities have universal service obligations that guarantee affordable phone service to all and are subject to other rules that promote competition and consumer choice. In exchange, telephone public utilities, in common with other public utilities, are granted certain kinds of legal immunity, easements over private property and public rights of way, pole attachment rights, access to the phone number system, and the right to take property. A utility’s obligation to serve the public within a defined service territory coupled with the right to take property is why utility substations are conditional uses in all of the City’s residential zones. Without the ability to locate substation facilities in residential zones, a utility, whether it is water, sewer, gas, electric, or telephone, would be unable to meet its legal obligations to serve those living within its service territory. And as is readily observable in Portland, utility substations in residential zones in Portland are much smaller than the Verizon Wireless proposed 55’ by 30’ Head End building with a height of almost 18’.

Verizon Wireless is a wholly owned subsidiary of Verizon Communications.⁶ Board members will recall that in 2009, Verizon Communications wholly owned subsidiary, Verizon New England, Inc., sold to FairPoint Communications, Inc. its local exchange and long distance business operation in Maine.⁷ At that time Verizon New England, Inc. obtained Commission approval for the discontinuance of its “regulated telephone utility service” in Maine. *See In Re Verizon New England Inc. d/b/a Verizon Maine*, Amended Stipulation dated Dec. 21, 2007 filed

⁶ http://verizon.api.edgar-online.com/EFX_dll/EdgarPro.dll?FetchFilingHTML1?SessionID=W_C5e7_Q9z9amEN&ID=10506387

⁷ https://www.verizon.com/about/sites/default/files/Verizon_Corporate_History.pdf

in MPUC Docket No. 2007-67. That is, Verizon Communications sold its regulated telephone “public utility” business to FairPoint. Having discontinued its telephone public utility service in Maine, Verizon Communications, through its wholly owned subsidiary Verizon Wireless, cannot claim to be a public utility telephone company and call its proposed Head End telecommunications facility a “utility substation.” Verizon Wireless would need Commission approval before it could gain status as a telephone utility. There are no records of the Commission showing that such approval has been obtained.

Also, the services provided by Verizon Wireless are dissimilar to services considered utility services in Maine. The Commission has explained in the past that the “basic regulatory framework in Maine, as in most jurisdictions, is that utilities have an obligation to serve customers in defined service territories at rates that are regulated; in return, competition within utility service territories is restricted.” *Central Maine Power Company, Boralex Investigation*, Docket No. 2000-653 (April 6, 2001). “This policy is embodied in 35-A M.R.S.A. §2102, which requires Commission authority before a second utility can provide service in the territory of an existing utility.” *Id.* (referencing the Law Court’s interpretation of a public utility in *Dickinson v. Maine Public Service Co.*, 223 A.2d 435, 438-439 (Me. 1966)). By contrast, unlike FairPoint, Verizon Wireless has no obligation to serve in any particular defined area and is not the server of last resort. Unlike FairPoint, Verizon Wireless’ charges are not subject to review and approval. Verizon Wireless is not subject to the requirement that its rates be just and reasonable. Verizon Wireless does not provide monopoly services at regulated rates; rather, the company operates as one of many providers of mobile telecommunications providers (US Cellular, Sprint, AT&T, among others) in a competitive, unregulated environment.

As confirmation of the fact that Verizon Wireless is not a utility in Maine, it is not listed on the Commission’s website as a telephone utility. *See* <http://www.maine.gov/mpuc/telecom/telcos1.htm> (listing of telephone utilities authorized to do business in Maine, and other non-utility communications carriers providing telephone service as eligible telecommunications carries; *Verizon Wireless is not listed as either a telephone utility or as a providing telephone service as an eligible telecommunications carrier*).

In sum, for the proposed Head End telecommunications facility to be eligible under the R-2 residential zone conditional use standard for a “utility substation”, it must be owned or operated by a telephone public utility. Since Verizon Wireless is not telephone public utility in Maine, it lacks any basis to seek a conditional use permit to install a utility substation in the R-2 residential zone.

As noted above, both in the B-6 and B-7 zones, “telecommunication facilities” are permitted uses in those zones. *See* Section 14-269.a.13 295.a.15 (listing under permitted “commercial” uses, “telecommunication and broadcast and receiving facilities”) and Section 14-295.a.15 (same). The fact that “telecommunication facilities” are listed under “commercial” uses in the B-6 and B-7 zone reinforces the point that Verizon Wireless’ proposal cannot be approved

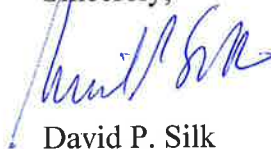
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since commercial uses are prohibited in the R-2 residential zone. The applicant's cover letter to the Board, dated October 21, 2015, first page, first paragraph, makes clear that what Verizon Wireless seeks to build is a "telecommunications facility." It states: "Enclosed please find ... Application for a *proposed Verizon Wireless' wireless telecommunications facility* at 1877 Congress Street..." (emphasis added). Verizon Wireless therefore should look to locate its Head End facility in the B-6 or B-7 zones.

In sum, because Verizon Wireless is not a public utility, its proposed Head End telecommunications facility is prohibited in the R-2 residential zone. The Board should deny Verizon Wireless' permit application without reaching the merits of whether Verizon Wireless has met the specific conditional use standards set forth in section 14-474 of the Land Use Code. My clients reserve all rights on this later issue and reserve the right to provide additional material to the Board on whether Verizon Wireless' proposal complies with the conditional use standards and/or section 14-78.c.1.

Thank you for your consideration of this letter.

Sincerely,

A handwritten signature in blue ink, appearing to read "David P. Silk", is written over a vertical line.

David P. Silk

DPS/ml