

Statement of Appeal by Monica Eisenstecken and David Benedict, individuals, Tahoe Stewards LLC, Tahoe for Safer Tech, and Environmental Health Trust (EHT) from Hearings Officer, Marsha Burch’s October 14, 2021 Decision Granting Verizon Special Use Permit

Before the Tahoe Regional Planning Agency, Hearings Officer in the Matter of the Verizon Wireless Special Use Permit Application for the 112 Foot Tall Monopine at 1360 Ski Run Boulevard - TRPA File # ERSP 2019-0389 1360 Ski Run Blvd.

SUMMARY

Appellants, Monica Eisenstecken, David Benedict, Tahoe Stewards LLC, Tahoe for Safer Tech, and Environmental Health Trust (EHT), hereby challenge the October 14, 2021 ruling made by Tahoe Regional Planning Agency (TRPA) Planning Department Hearings Officer, Marsha Burch, on a Verizon permit application (TRPA File Number ERSP2019-0389) for the installation and operation of a Verizon macro tower at 1360 Ski Run Boulevard, South Lake Tahoe, California.¹ This appeal urges that TRPA reverse this decision and table it until TRPA itself complies with the terms of the Interstate Compact (Compact) and its own Regional Plan. These require TRPA to prepare a Comprehensive Programmatic Environmental Impact Statement (EIS) covering the specific consequences of the present permit application. The EIS must also address the cascading and cumulative environmental effects on the entire Tahoe Region of hundreds of permits already allowed or envisioned under the Connected Tahoe Wireless Plan (“Connected Tahoe”)², of which the instant application is a prominent example.

This present Verizon application, if permitted, will establish a critical and irreversible precedent. It cannot legally, and must not, be treated in isolation. Over

¹ The Hearings Officer granted Verizon’s application for a 112 foot tall monopine cell tower with “faux” plastic branches and pine needles that will initially house Verizon antennas and accessory equipment. The tower will be capable of supporting the antennas and equipment of more carriers in the future. Additionally, a 30 kW back-up power generator and 132 gallon diesel fuel tank will also be installed and utilized. The tower is proposed on the snow play portion of the parcel at 1360 Ski Run Blvd. right above where children will be playing. See [2021-10-7 Staff Report Ski Run Tower.pdf](#) and this [Dropbox folder](#) for TRPA Hearing Materials hereby incorporated as a reference in this Appeal.

² [Connected Tahoe, Update: Connected Tahoe](#)

the coming years, unless reversed, the Hearing Officer's decision granting the permit will actively encourage hundreds, if not thousands of similar projects across Tahoe. Together, they will expose tens of thousands of residents and tourists to dangerous levels of Radiofrequency Radiation (RFR) and Electromagnetic Fields (EMF), contaminate Lake Tahoe's drinking water supply with well-established carcinogens and other toxic compounds, dramatically decrease the water quality and clarity of Lake Tahoe, increase the likelihood of major fires such as the Caldor conflagration, and consume inordinate amounts of energy. These terrible environmental injuries which will be inflicted upon the sensitive Tahoe Region are directly contrary to TRPA's mandate under the Compact, and are forbidden by TRPA's ordinances and federal and state laws. Moreover, they are exactly opposite of the goals being strongly encouraged by the Biden Administration to address the urgent and immediate global challenges of climate change.

TRPA has in recent years been the subject of continuing public criticism and investigation concerning conflicts of interest,³ which this present Appeal continues to challenge. In addition, Appellants allege that the applicant and its agents have submitted inaccurate, misleading, and false statements in its application, upon which the Hearings Office has relied. This basis alone is sufficient grounds for reversing the Hearings Officer Marsha Burch's arbitrary decision. Finally, Appellants request the following TRPA Board members: John Friedrich, Sue Novasel, Cindy Gustafson, and William Yeates to recuse themselves from the present hearing because they each have disqualifying conflicts of interest for the reasons herein stated.

³ See [Appendix I](#) for TRPA Board members as of 11/28/2021.

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I.

The October 14, 2021 Ruling by the Hearings Officer, Marsha Burch, is Arbitrary and Capricious.

The October 14, 2021 ruling by Hearings Officer Marsha Burch is arbitrary and capricious, and in violation of the Interstate Compact, the Regional Plan, the Administrative Procedure Act, and recent federal court decisions.

On October 13, 2021, Appellants submitted a detailed brief objecting to an October 7, 2021 report of TRPA Planning Department allowing Verizon a permit application (TRPA File Number ERSP2019-0389) in anticipation of the public hearing scheduled for October 14, 2021.⁴ Appellants presented legal arguments and an extensive record referencing over 4,000 pages of environmental and scientific studies detailing the harms from wireless radiation transmitted from cell towers and cell phones. These studies are directly applicable to the propriety of TRPA's issuance of permits for similar macro and small cell towers and antennas, which taken collectively, are inflicting tremendous harm upon the entire Tahoe Region and its fragile environment. Appellants urged Hearings Officer Burch to pause and to consider carefully the fundamental purpose of establishing the Tahoe Interstate Compact in the first place, before rendering a decision that could well have irreversible and disastrous consequences for the entire region.

On October 5, 2021 Appellants were notified that Andrew Strain was designated as the Hearings Officer in the present case. On October 8, 2021, Appellants, through co-counsel, Robert J. Berg, Julian Gresser, and Gregg Lien, objected to Andrew Strain's designation, based on his substantial and patent conflicts of interest. Counsel's letter is hereby incorporated in the record as [Appendix II](#). On October 11, 2021 TRPA acceded to Petitioners' request by appointing attorney, Marsha Burch, as TRPA's substitute Hearings Officer for this matter.

Directly at the end of the Hearing, Officer Burch issued her ruling and approved Verizon's application for the monopine tower at 1360 Ski Run Boulevard. She read a prepared statement adopting the TRPA Staff Report, but provided no other explanation. She did not address any of Appellants' arguments, including the lapse of the prerequisite City of South Lake Tahoe special use permit based upon Verizon's failure to "use" the City permit within one year after

⁴ [Opponents' Statement for Oct. 14 Hearing](#) is hereby incorporated into this Appeal.

issuance, gross failures within Verizon's application itself, and the grave environmental concerns raised by the Appellants. Although the Hearings Officer asserted that she had read all the papers submitted, such a feat was not humanly possible. Ms. Burch less than two days before the hearing had just received Appellants' extensive brief and record which contained over 4,000 pages of scientific and other studies on the adverse health and environmental effects of the telecom industry's Connected Tahoe Plan, along with voluminous public comments opposing the Verizon application and other materials demonstrating the visual blight the tower would cause. Instead of lying about reading all the materials on file regarding this application, the proper unbiased action by Ms. Burch would have been to postpone her decision and take adequate time to review and evaluate the materials and the law before issuing a decision. To date she has not even provided a reasoned written opinion. There is no way for Petitioners, the general public, or this Governing Board to understand the basis for her conclusions, except to understand them in the light of her arbitrary and capricious decision-making. Without any reasoned record, we may draw the plausible inference that her mind was made up before the October 14 Hearing even began.

An exchange exemplifying such conclusionary and arbitrary decision making occurred just before the Hearings Officer rendered her decision. At 16:53:41, Hearings Officer Marsha Burch said, "Okay, I also have a question related to the SEZ, there was a comment. There were actually a couple of comments suggesting that the tower will be located within the SEZ. And that is not how I'm reading that site plan and, and the depiction and it's just a clarification on that." At which point, there was the following response: "Yes, sorry, this is Bridget Cornell speaking again, you are correct this site is comprised of a combination of both class 1B land capability, which is Stream Environment Zone (SEZ) and Class 1A; and the proposed cell tower and the equipment shelter will only be in Class 1A. So, this will have there is actually there, [sic] there is nothing that will be happening within the Class 1B portion of this parcel related to this project. And in fact, some of the coverage that will be removed is closer to the Streaming Zone and will be located further away from that."

The above exchange is also an example of the TRPA Hearings Officer endorsing at a micro-level the same illegal practice of piecemealing and segmentation which Appellants describe in II. Essentially, the TRPA staff is factually incorrect by saying that there are no impacts on the SEZ on the Project parcel, and the immediately adjacent SEZ if the tower is located outside the SEZ. The TRPA Planning Department and Hearings Officer failed to cite any supporting evidence for this arbitrary decision. The specific development site and adjacent

SEZ are all still part of the “project area.” (See [TRPA Code Section 30.4.1.C.2](#) p.30-9). It is an accessory use, and the entire parcel must be evaluated as a whole. Inside or outside the SEZ, the impacts on the SEZ must be evaluated. They have not been. Impacts on adjacent parcels also must be evaluated. They have not been either. As a Staff Officer, Ms. Cornell has a responsibility to be so informed. As a Hearings Officer, Ms. Burch should have found material error because of Staff’s failure to consider the impact on the entire parcel and on adjacent parcels. The permit should not have been approved unless and until such showings were made.

This kind of arbitrary and capricious conduct by a public official charged with important responsibilities is violative of the federal Administrative Procedure Act and the August 13, 2021 decision of the DC Circuit Court of Appeals in *Environmental Health Trust and Children’s Health Defense v. FCC*, 9 F.4th 893 (D.C. Cir. 2021), which establishes a clear standard of review of actions by federal administrative agencies. This legal standard is equally applicable to TRPA, since TRPA was established by an Act of Congress. As TRPA itself has conceded in prior filings, it is bound by federal law. The applicable federal law is that neither the TRPA, nor any of its officers, are permitted simply to issue arbitrary conclusions. There must be a clear record of fair consideration and review, and a decision supported by the law and substantial evidence in the record.

[Environmental Health Trust/Children’s Health Defense v. FCC](#)

On August 13, 2021, the DC Circuit Court of Appeals established the appropriate legal standard under the Administrative Procedure Act which is directly applicable to the TRPA’s Hearings Officer and any subsequent administrative and judicial review of his decision.

The essence of the Court’s ruling is that an agency produce a record of reasoned decision making to support its conclusions, as the TRPA Staff Report has *not* done in this case. It cannot simply issue unfounded and unsupported decisions or recommendations.

The most pertinent ruling and explanatory obiter opinion is the following passage, 9 F.4th at 904-905:

“We do not agree that these statements provide a reasoned explanation for the Commission’s decision to terminate its notice of inquiry. Rather, we find them to be of the conclusory variety that we have previously

rejected as insufficient to sustain an agency’s refusal to initiate a rulemaking.

The statements from the FDA on which the Commission’s order relies are practically identical to the Secretary’s statement in *American Horse* and the Commission’s statement in *American Radio*. They explain that the FDA has reviewed certain information—here, “all,” “the weight,” or “the totality” of “scientific evidence.” And they state the FDA’s conclusion that, in light of that information, exposure to RF radiation at levels below the Commission’s current limits does not cause harmful health effects. But they offer “no articulation of the factual . . . bases” for the FDA’s conclusion. *Am. Horse*, 812 F.2d at 6 (internal quotation marks omitted). In other words, they do not explain why the FDA determined, despite the studies and comments that Opponents cite, that exposure to RF radiation at levels below the Commission’s current limits does not cause harmful health effects. Such conclusory statements “cannot substitute for a reasoned explanation,” for they provide “neither assurance that the [FDA] considered the relevant factors nor [do they reveal] a discernable path to which the court may defer.” *Am. Radio*, 524 F.3d at 241. They instead represent a failure by the FDA to address the implication of Opponents’ studies: The factual premise—the non-existence of non-thermal biological effects—underlying the current RF guidelines may no longer be accurate.”

As discussed in II.4, the very record upon which the TRPA staff based its recommendations was based on incomplete and blatantly false statements. Applicants are required to attest to the truthfulness of matters submitted in a permit application to the TRPA. This is a reversible error which the Hearings Officer failed to address and then remand to the TRPA staff to investigate and to correct.

In sum, TRPA cannot operate in a vacuum, as a law unto itself. It may not defy federal statutory law and court decisions, in this instance simply to advance the interests of its telecom company patrons.

II.

TRPA Continues to Violate its Sacred Public Trust to Protect the Tahoe Region as a National Treasure.

The Hearings Officer's action is only the latest example of a consistent, systematic, and continuing defiance and betrayal by TRPA of its Public Trust responsibilities to Congress and the American people. Public Law 96-551 which authorized the Interstate Compact establishes the highest fiduciary standard of a Public Trust, against which all other federal and state laws, as well as judicial decisions, must be interpreted. For the many reasons described below, the Hearings Officer's decision must be reversed.

Public Law 96—551

On December 19, 1980, the 96th Congress enacted Public Law 96—551 establishing the California/Nevada Interstate Compact. Public Law 96 is clear in its core mission which is to recognize and safeguard the Tahoe Region as a national treasure in Public Trust forever. The Mission of the Compact is set forth plainly in Article I which finds that:

- (1) The waters of Lake Tahoe and other resources of the region are threatened with deterioration or degeneration, which endangers the natural beauty and economic productivity of the region...

- (3) The region exhibits unique environmental and ecological values which are irreplaceable...

- (6) Maintenance of the social and economic health of the region depends on maintaining the significant scenic, recreational, educational, scientific, natural and public health values provided by the Lake Tahoe Basin...

- (7) There is a public interest in protecting, preserving and enhancing these values for the residents of the region and for visitors to the region...

- (8) Responsibilities for providing recreational and scientific opportunities, preserving scenic and natural areas, and safeguarding the

public who live, work and play in or visit the region are divided among local governments, regional agencies, the States of California and Nevada, and the Federal Government...

(9) In recognition of the public investment and multistate and national significance of the recreational values, the Federal Government has an interest in the acquisition of recreational property and the management of resources in the region to preserve environmental and recreational values...

(10) In order to preserve the scenic beauty and outdoor recreational opportunities of the region, there is a need to insure an equilibrium between the region's natural endowment and its manmade environment.

In brief, wise stewardship, balance, and care for this unique natural treasure are key. TRPA is in the process of systematically betraying and dismantling its Public Trust, expressed clearly in the Compact and embodied in great detail in its Regional Plan.

The concept of the Public Trust is also enshrined as part of the bedrock of California jurisprudence as articulated by the California Supreme Court in its seminal 1983 decision in *National Audubon Society v. Superior Court*, 33 Cal.3d 419 (Cal. 1983): "*The public trust... is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands...*" Another important case is [*Environmental Law Foundation v. State Water Resources Board*, 26 Cal. App.5th 844, 854 \(Ct. App. 2018\)](#)⁵ which recognized that counties share responsibilities for administering the Public Trust.

The following subsections provide specific examples of the systematic ways in which TRPA is betraying its Public Trust.

II.1. Unauthorized Discharge of Toxic Monopine Waste is Illegal.

This Verizon project approval, if sustained, will contribute to the already massive amount of polluting waste in the form of plastic monopine "pine needles" and "branches" which contain potentially toxic and carcinogenic chemical compounds, including epoxies, plastics, and other hazardous materials, to be

⁵ <https://www.leagle.com/decision/incaco20180829045>.

discharged into soil and pavement on and off the Project site, deposited by wind-borne dispersal to a Stream Environment Zone (SEZ) on and adjacent to the Project site, and thereafter to Lake Tahoe by way of ground water and/or storm water runoff. These plastic pine needles and branches are brittle and rapidly deteriorate in the harsh mountain environment surrounding Lake Tahoe. Subjected to high winds, extreme temperature variations, huge amounts of snow and ice, and high UV exposure, the monopines shed prodigious amounts of their faux branches and pine needles. The TRPA staff analysis in the October 7, 2021 staff report (Section F) mentions Special Condition 3.J requiring a “scenic monitoring fee” reviewing the quality of the branches and bark. The TRPA is acknowledging the tower’s leaves and bark can deteriorate, and will need to be maintained or replaced, but they make no discussion of solid waste management or disposal of the fallen plastic debris. The branches and pine needles fall from the towers, and depending upon the wind, they may be carried a considerable distance from the tower itself. Upon landing, the fragile needles and branches break up readily into ever smaller bits of plastic, and they either press into the soil, or get carried away in stormwater or snowmelt before winding up in short order in streams flowing into the Lake. The monopine plastic waste pollution will thereby contaminate Tahoe’s drinking water supply, and water used for sustenance by people, animals and plants, including endangered species and plants. This is an example of the dangers of piecemealing the dozens of monopine towers, with dozens more to come if it is not stopped.

The Clean Water Act of 1972 empowers the states to designate certain bodies of waters as “Outstanding National Resource Waters” (ONRWs). California has [recognized Lake Tahoe as an ONRW](#). ONRWs are high quality waters of the United States that are designated as a unique and precious National treasure, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance. As an ONRW, high quality water of this kind is afforded the greatest protection under the Clean Water Act through implementation of federal anti-degradation policy, 40 CFR131.12., which prohibits the degrading of water quality in an ONRW except to accommodate limited activities that result in temporary and short-term water quality change.

As noted above, the proposed Verizon monopine will produce substantial amounts of polluting waste. [Appendix IV](#) lists the potential contents of monopine waste, including various toxins. If uncollected, this waste will penetrate the Bijou Park Creek SEZ (as defined in the TRPA Code of Ordinances section 53.9), the

SEZ boundaries and setbacks, and the associated 100-year floodplain of Bijou Park Creek, and will eventually be discharged indirectly into Lake Tahoe by way of subterranean flow of groundwater, or more directly to Lake Tahoe, approximately one mile directly downslope from the Project, by way of storm water runoff from the Project site and surrounding areas through the City of South Lake Tahoe's municipal storm water system for Ski Run Boulevard, and the City's Bijou Park Creek conveyance system. The City's municipal storm water discharges are regulated pursuant to California law under Section 402 of the Clean Water Act through a National Pollutant Discharge Elimination System (NPDES) permit that prohibits trash discharges to the storm water system.⁶

The [Lahontan Water Board \(LWB\)](#) is a California state agency established by and charged to implement the [Porter-Cologne Water Quality Control Act of 1969](#), as amended, a predecessor of the Federal Clean Water Act (which has a similar regulatory structure), but notably extends protections to ground waters, a subset of "waters of the State" (as contrasted with surface "waters of the Nation"). Under Porter-Cologne, the Water Board implements both State and Federal laws through issuing permits (called waste discharge requirements or WDRs) in accord with both laws, which may also serve as NPDES permits under federal law. These laws prohibit certain defined and general "discharges" of "waste" and "pollutants" and "deleterious materials" in the absence of a permit, or waiver of a permit, as in many minor cases where Best Management Practices (BMP) or other conditions are applied. For example, discharges to state waters, both surface and ground, of toxic substances in toxic amounts, violating an adopted standard and degrading the water quality for "beneficial uses," such as drinking water supply or wildlife support or the protection of endangered species, are generally prohibited.

Porter-Cologne authorizes the Water Board to enforce numeric and narrative water quality objectives and prohibit waste discharges of certain types and/or in particular areas to support and maintain prescribed beneficial uses such municipal supply, wildlife-support purposes of various kinds and other uses. This program of control is implemented through its Water Quality Control Plan for the [Lahontan Region Basin Plan](#), and regulations and implementing permits (waste discharge requirements), where prohibition exemptions are allowed. Taken together, the objectives, beneficial uses, and prohibitions are considered water quality standards. The Basin Plan is certified by the US Environmental Protection Agency (EPA)

⁶ [Clean Water Act, Section 402: National Pollutant Discharge Elimination System.](#)

where applicable to “waters of the United States” under CWA section 208. TRPA has also been designated by US EPA as a CWA Section 208 [Water Quality Planning Authority](#).⁷

The principle of zero tolerance of discharges to the environment of solid wastes, litter and toxic waste is recognized not only by the LWB in its Regional Water Quality Control Plan (called Basin Plan), but also by TRPA, which has parallel and joint authority in its own Code of Ordinances and its Tahoe Regional Plan. The specific prohibitions, and the manner in which TRPA is legally mandated to implement the California water quality regulations, are set out in detail below.

As mentioned, at times, TRPA operates under a Code of Ordinances it has adopted for itself. Section 4.4.1. sets forth the “findings necessary to approve any project,” including letter C, which states:

“C. Wherever federal, state, or local air and water quality standards apply for the region, the strictest standards shall be attained, maintained, or exceeded pursuant to Article V(d) of the Tahoe Regional Planning Compact.”

Code section 16.10 augments this, as follows:

Pursuant to Article V(d) of the Tahoe Regional Planning Compact, TRPA shall provide for attaining and maintaining local, state, and federal air and water quality standards, whichever are strictest, in the portions of the region where they are applicable. To the extent that such standards are more stringent than the TRPA thresholds, TRPA shall monitor and ensure the attainment and maintenance of such standards consistent with the provisions of this chapter.

Note the use of the word “shall” in the requirements above; these are not discretionary requirements pursuant to Code section 90.1.10, which provides:

Mandatory and Discretionary Terms The words ‘shall,’ ‘will,’ and ‘must’ are always mandatory. The words ‘may’ and ‘should’ are advisory and discretionary terms.

⁷ See Certification Letter: <https://www.trpa.gov/regional-plan/#code>, and this letter: <https://www.trpa.gov/wp-content/uploads/documents/archive/US-EPA-208-Certification-Letter-June19-2013.pdf>.

Code section 60.1.3.D, prohibits the following:

The discharge of toxic or hazardous waste to Lake Tahoe, other lakes in the region, their tributaries, the ground waters of the Tahoe region, the lands of the Tahoe region, or the Truckee River within the Tahoe region is prohibited.

The language here is specific to “hazardous and toxic waste” as referenced to various legal definitions. However, the LWB Basin Plan, section 5.2, has among its prohibitions, the following no. 5: “The discharge of garbage or other solid waste to lands within the Lake Tahoe Basin is prohibited.”

No discharge of solid waste to the environment, which is precisely what the monopine plastic “needles” are, is allowed.

Since the LWB’s regulation is the more stringent prohibition and standard, that is the controlling regulation which TRPA must enforce. And we don’t have to concern ourselves here with the specifics of whether the solid wastes contain toxic or hazardous substances, or may result in a water quality objective being violated. **It is sufficient that the waste is solid to prohibit its discharge.** These prohibitions were enacted in recognition of issues with uncontrolled trash and litter, and with recognition of the absolute interconnection of ground water flows with Lake Tahoe, and Lake Tahoe’s extraordinary “residence time for water” where a drop of water may reside in the lake on average for 600 years.

Pollutants may also accumulate, so uncontrolled pollutant discharges of all kinds must be prevented entirely. All solid wastes collected are exported for proper disposal at authorized sites *outside* the Lake Tahoe watershed basin. **NO EXEMPTIONS. The discharge of solid wastes which will fall from the monopine tower will constitute an undisclosed and uncontrolled discharge of solid wastes in violation of the prohibition and must not be allowed.**

Lahontan Water Board and TRPA Memorandum of Understanding

In order to coordinate joint regulatory activities and prevent regulatory overlap and duplication, where possible, and/or prevent work at cross purposes, the LWB and TRPA Executive officers entered into a formal Memorandum of Understanding in 2003.⁸ In the MOU, the LWB generally defers to TRPA to make

⁸ https://www.waterboards.ca.gov/rwqcb6/board_decisions/adopted_orders/2003/docs/r6t-2003-0012_trpa_mou_resolution.pdf

the necessary findings to approve and permit minor projects, such as those involving land disturbance of less than one acre, such as the Verizon tower Project. However, there are many cases where permits and prohibition exemptions are issued by both LWB and TRPA for projects of all sizes involving waste or pollutant discharges to waters of the State or the nation, and SEZs and their 100-year floodplains or high water marks, as the case may be. Under the MOU, the LWB retains all of its authorities to regulate and control waste discharges that may affect Water Quality *independently* of what the TRPA may or may not do. The MOU is a convenience, which TRPA may choose to ignore, as it has shown a willingness to do this in other cases, such as the Angel's Roost telecommunications tower, which has been discovered to be a source of uncontrolled and unregulated solid waste, with potentially toxic and hazardous elements. This facility has nonetheless been allowed in violation of the prohibition, without LWB involvement because of LWB's expectation that TRPA will act in accordance with its legal duties.

In cases such as here, however, the LWB retains its full range of enforcement remedies under the CA Water Code, not limited to administrative Orders to cease and desist discharges, clean up and abate discharges, or require violators to pay administrative civil liabilities for damages to the environment and/or other enforcement purposes as a result of discharges. While the MOU expected TRPA to uphold its obligations to protect Lake Tahoe's water quality and to prevent solid waste discharges into the Lake, now it is coming to light that TRPA, in its primary-permitting role with the telecoms, is woefully failing to fulfill its duties on this and other monopine projects in the California portions of the Lake Tahoe watershed basin. Should the Governing Board fail to reverse the Hearing Officer's decision, the LWB will be petitioned to address the illegal solid waste discharges that will result from TRPA's permitting of monopine telecom towers in the California area of the Lake Tahoe Region, including, but not limited to removing and abating the sources of solid waste already unlawfully allowed by TRPA.

In Verizon's TRPA permit application and its Environmental Assessment Questionnaire responses for the subject tower, Verizon never disclosed the extent of maintenance and replacement activities associated with the upkeep of the "monopine" look desired and necessary to meet TRPA scenic-quality thresholds. Likewise, TRPA, in its application review, did not evaluate the Project and application for such prohibited waste discharges, or require additional information

in that regard within applicable time limits. As a result, the specifications regarding the materials to be used for *this* monopine tower are not disclosed with regard to their potential toxicity or breakdown products, the amount of materials requiring periodic and/or ongoing replacement. But the websites of commercial manufacturers of such faux branches and pine needles designed for cell tower monopines show that the branches and pine needles are composed of a variety of epoxies and plastics.⁹ As noted above, these materials deteriorate rapidly, fall from the towers, and remain as solid waste which eventually winds up in the Lake.¹⁰

The uncontrolled discharge of solid waste from the proposed monopine tower must be prohibited and requires reversal of the Hearing Officer's decision. The shards of litter from the proposed monopine tower will emit or discharge uncontrolled "garbage or other solid waste," showers of litter on the private and public lands on and off the Project site (streets, National forests, wetlands, SEZs, soil). Due to wind-borne dispersal in all directions, there will be, in essence, a "debris field" of monopine needle deposits extending hundreds of feet or more. The plastic fragments are extremely brittle, difficult to collect once deposited without causing more land disturbance and intrusion on neighboring properties, are friable and subject to deterioration into smaller and smaller particles identified as microplastics, which are prohibited from being discharged into the Lake.

Heavily-traveled Ski Run Blvd. is adjacent to the Project site, and it is not speculative to expect that monopine plastic needles from the tower will fall on that and other traveled ways, and be further pulverized and dispersed to the environment. Bijou Park Creek SEZ is the drainage adjacent to the tower at the corner of Needle Peak, and has an associated 100-year floodplain beyond the creek boundaries, more extensive and beyond what the City culverts can contain. The areas within these boundaries will be within the zone of the debris field, and where such discharges are further prohibited by the LWB regulations. Litter fall could also be swept away to Lake Tahoe during creek flooding erosion, and by scour of deposits in Bijou Park Creek and its 100-year floodplain. TRPA has floodplain and SEZ maps and has the responsibility to require the developer, in this case Verizon, to demonstrate there will be no or minimal impact as a result of prohibition violations. Neither TRPA nor the developer has done so.

⁹ [The bizarre history of cellphone towers disguised as trees](#): "plastic, fiberglass, or acrylic 'bark,' 'branches,' and 'needles'".

¹⁰ See this [movie](#) captured in Lake Tahoe on 11/4/21.

The Basin Plan has additional applicable prohibitions which must be addressed by TRPA on this and other monopine tower projects, including but not limited to, the following:

Discharge Prohibitions for the Lake Tahoe Hydrologic Unit (HU)

1. The discharge attributable to human activities of any waste or deleterious material to surface waters of the Lake Tahoe HU is prohibited.
2. An exemption to this prohibition may be granted whenever the Regional Board finds all of the following:
 - a. The discharge of waste will not, individually or collectively, directly or indirectly, adversely affect beneficial uses, *and*
 - b. There is no reasonable alternative to the waste discharge, and
 - c. All applicable and practicable control and mitigation measures have been incorporated to minimize potential adverse impacts to water quality and beneficial uses.
3. The discharge attributable to human activities of any waste or deleterious material to land below the highwater rim of Lake Tahoe or within the 100-year floodplain of any tributary to Lake Tahoe is prohibited.
4. The discharge attributable to human activities of any waste or deleterious material to Stream Environment Zones (SEZs) in the Lake Tahoe HU is prohibited.

The solid wastes are also potentially deleterious to water quality objectives, wildlife protection and other prescribed values. TRPA takes an approach through its regulation of principally examining the impacts of land disturbances like grading and excavation in surface waters, including wetlands and SEZ lands, and 100-year floodplains. The regulations TRPA is charged by law to implement require a broader look, such as has been pointed out above. The wind-borne dispersal of any solid waste must be prevented or controlled, if there is allowance for it at all, from this and all other monopine towers.

As noted in this Appeal and in the ongoing litigation *Einsenstecken et. al v. Tahoe Regional Planning Agency*, TRPA has the burden to make the required administrative findings that the proposed Permit, and other monopine permits it

has already approved for monopine towers in Lake Tahoe, are exempted under the Clean Water Act and the California implementing regulations, cited herein. It has not done so. A federal Interstate Agency, TRPA, charged with the highest public responsibility and trust by Congress, cannot simply issue a naked conclusion under *EHT v. FCC* without establishing the foundation in a considered record of careful deliberation on the adverse impacts upon the purpose of this trust, the preservation of Lake Tahoe.

For example, the Basin Plan requires findings for “public service facilities” like the tower, as follows:

(3) For public service facilities if all of the following findings can be made:

(a) The project is necessary for public health, safety or environmental protection;

(b) There is no reasonable alternative, including spans, that avoids or reduces the extent of encroachment;

(c) The impacts are fully mitigated;

(d) SEZ lands are restored in an amount 1.5 times the area of SEZ developed or disturbed by the project; and

(e) Wetlands are restored in an amount at least 1.5 times the area of wetland disturbed or developed. Certain wetlands may require restoration of greater than 1.5 times the area disturbed or developed.

Effects of Microplastics Pollutants on Water Clarity

Microplastics are breakdown products of manufactured materials of many types. As the name implies, “micro” particles are those on the micrometer (μm) scale, one millionth of a meter in diameter. This is important because this is the size scale of particles (generally clay and algae cells) that are significantly causing ongoing declines in Lake Tahoe water clarity. Particles less than 20 μm are of greatest effect on water clarity, down to smaller sizes in the nanoparticle range, billionths of a meter. Water clarity as measured by average secchi depth continues to decline in Lake Tahoe, with the last several years being among the worst on

record since 1968 (UC Davis, Tahoe Environmental Research Group, [Clarity/Secchi | Tahoe Environmental Research Center](#)).

Plastic product wastes discharged to the environment break down under the influence of weathering and oxidation by wind, water and ice, exposure to ultraviolet (UV) light, and attack by vermin, bacteria, etc. It is probable that uncontrolled microplastic pollutants will be both dissolved and suspended in waters. They will be discharged to soil, or travel with ground water, storm water runoff, or stream flows and thereby enter Lake Tahoe, the ultimate receiving water. Plastics products are of variable composition and properties may vary. They may be heavier or lighter than water, and thus float or sink, or may remain suspended in the water column in the case where the plastic microparticles are neutrally buoyant or have poor settling characteristics. These are the greatest threat to Lake Tahoe water clarity, as they may remain suspended for long periods, maintained in suspension by lake currents and upwellings, when waters from the bottom rise to the surface due to temperature effects. Particles that sink to the bottom will become mixed with natural sediments, or may return to the shoreline mixed with sand and other larger sand-like and colored plastic particles.

Thus, microplastics and nanoplastics may contaminate soil, ground and surface waters, and sediments, where they are subject to accumulation and biological uptake into the water supply and food web. Plastics are addressed in the US EPA's published "Priority Pollutant List" of toxic constituents ([Toxic and Priority Pollutants Under the Clean Water Act | US EPA](#)), 126 toxic items, of which plastics are a subset. The discharge of toxins to surface waters from plastics manufacturing is addressed in effluent guidelines for industrial permits issued under the NPDES, so this indicates that toxic constituents are involved in the manufacture of plastics of various types and may be associated with breakdown products.

Microplastics, along with other human and natural sources of microparticles, will cause or contribute to ongoing clarity losses, and thereby long-term and ongoing degradation of Lake Tahoe water quality in violation of protection policies for this designated ONRW. The toxic contribution to declining water clarity, measured at 62.9 feet on average in 2020, from the subject Project and record of other prior monopine tower approvals, can't be ignored. Microparticulate and nanoparticulate pollution may also bioaccumulate in organisms, such as the mysid shrimp and daphnia (water fleas) that are part of the food web for lake trout and other fish. Fish are in turn eaten by people and other animals such as the American Bald Eagle which, like the osprey, is a "fish eagle," as fish is a major part of the

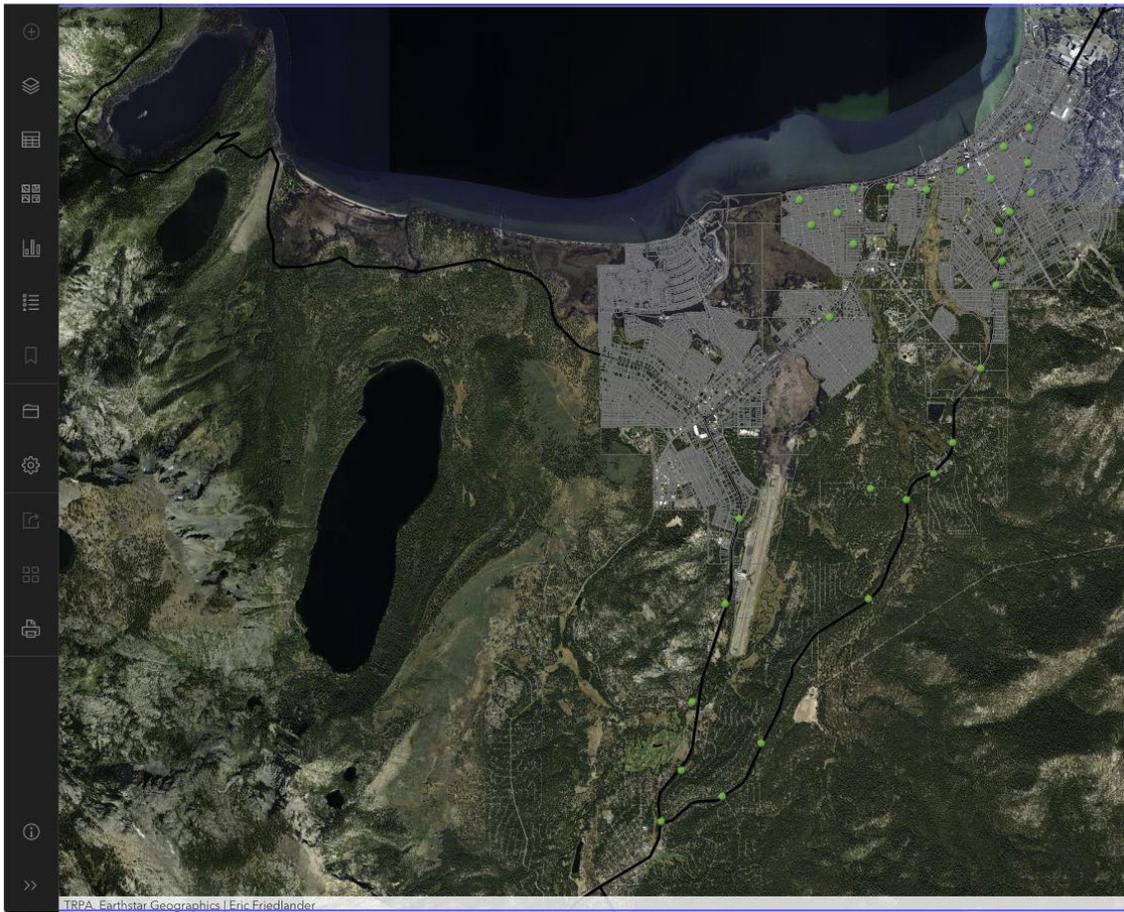
diet. Fish and other benthic organisms (bottom-dwellers) are also eaten by bears, shorebirds and water birds, and other animals and organisms.

Pollution of Lake Tahoe by plastics and other trash and wrecked equipment from uncontrolled sources is not an unknown problem at Lake Tahoe. Concerns with trash in the nearshore areas of Lake Tahoe has been in the regional press on repeated occasions in recent years and months due to the efforts of a private non-profit group, Clean Up The Lake (<https://cleanupthelake.org/>) which has to date removed over 18,000 pounds of trash of all types, including plastics, by painstaking SCUBA diving efforts along 43 miles of the 72-mile shoreline. Their leader, Colin West, reportedly spoke at a recent annual conference of the California Storm Water Quality Association concerning the problems with plastics pollution in municipal storm water runoff.

II.2. The Hearing Officer’s decision must be guided by and be consistent with a Comprehensive Programmatic Environmental Impact Statement (EIS), as required by Article VII of the Interstate Compact, and TRPA’s own Regional Plan and Code of Ordinances.

Background: The Connected Tahoe Wireless Plan

The present Verizon permit application, and the hundreds of other similar applications currently being approved piecemeal by the TRPA’s Planning Staff and Governing Board are part of a larger strategic, comprehensive action, the Connected Tahoe Wireless Plan, that has been, and is currently being implemented outside the public eye, without disclosure, transparency, public hearings, debate, or review. The Connected Tahoe Wireless Plan is itself an instrument designed to dovetail with Tahoe’s [2015 ITS Strategic Plan](#) which envisions autonomous vehicles and other 21st century technologies that will irreversibly transform the Tahoe Region. ([Appendix VII](#) references communications by Heidi Hill-Drum, TPC CEO, on this non-transparent Connected Tahoe Wireless Plan. Ms. Hill-Drum emphasizes that the Ski Run Tower must be built in that location because it is important for the Connected Tahoe Wireless Plan. Also reference this [video](#) by Hill-Drum of an April 2, 2019 presentation before the City of South Lake Tahoe City Council (starting at 24:30, slides are [here](#)). Below is a Liberty Utilities GIS map indicating some present installed small cell towers and possibly future cell towers under the Connected Tahoe Wireless Plan.)



From a legal perspective the Connected Tahoe Wireless Plan is fatally deficient because its formulation and implementation is being made in violation of federal and California state law, in particular well-established provisions and precedents that require a formal process of public disclosure, consultation, review, hearings, comprehensive environmental assessment and debate. Such public review is critical, especially because the TRPA has impermissibly delegated its Compact authority to the TPC, a private lobbying arm of the wireless telecom industry, effectively to become the lead agency in developing the Connected Tahoe Wireless Plan for the entire region.¹¹ High level public discourse on a matter which will determine the future of Tahoe lies at the core of TRPA’s highest Public Trust responsibilities noted above. It cannot be dismissed as window dressing, as the telecom industry and TRPA currently are doing. The Connected Tahoe Wireless

¹¹ See https://www.trpa.gov/wp-content/uploads/documents/archive/2/Adopted-Regional-Plan_20190722.pdf pg. 48 for flow chart showing the Prosperity Plan under External Factors. The regional plan of the TRPA incorporates by reference, thereby makes the TPC plan an integral part of the Regional Plan, with no authority to do so. This attempt to undermine and circumvent the Public Trust responsibilities in the Compact, without the consent of Congress, is blatantly illegal.

Plan is predicated on a series of unchallenged assumptions advanced solely by the wireless purveyors, without any fair consideration by the TRPA Planning Staff or Governing Board of immediately available, environmentally protective, more secure, balanced, energy efficient, and climate change friendly alternatives. This procedural defect is fundamental. It cannot be cured by being papered over. The only solution is for TRPA to comply with the law.

TRPA's Failure to Comply with the Charter and its Own Regional Plan and Code of Ordinances

TRPA has failed to prepare a Comprehensive Programmatic EIS on the overall Tahoe Wireless Plan in compliance with this basic protective requirement in its own Charter, Regional Plan, and Code of Ordinance. In their Opposition filed on October 13, 2021, Petitioners incorporated into the record over 4,000 pages of scientific studies and other references to the devastating environmental impacts of the proposed Verizon macro tower. The instant application exemplifies the basic tactic of piecemealing currently employed by telecom companies like Verizon. Applicants' clear intention is with TRPA's blessing to escape liability for the larger environmental devastation almost guaranteed by the Connected Tahoe Plan. These studies are incorporated by reference in this appeal to the TRPA.

Report on Significant Impact to the Human Environment

Pursuant to PUBLIC LAW 96-551 Art. VII, the Tahoe Regional Planning Agency shall utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment when acting upon matters that have a significant effect on the environment, and prepare and consider a detailed environmental impact statement before deciding to approve or carry out any project. In the spirit of the law, here is a report finding the significant effect(s) the 112-foot Ski Run cell tower, hereinafter, the "Antenna," will pose on the environment. In light of the issues raised in this report, TRPA's finding of no significant effect or impact (FONSE/FONSI) on the environment is unsubstantiated, entirely fails to consider an important aspect of the problem, offers no explanation for its decision that runs counter to the evidence before the agency, and is so implausible that it could not be ascribed to a difference in view or the product of agency expertise, if not outright conclusory. Moreover, any TRPA conclusion, or so-called "Negative Declaration" by TRPA must be supported by some plausible evidentiary basis, which is entirely

absent in the present case. Appellants’ “[Tahoe Report on Antenna’s Significant Impact to the Environment](#)” is hereby incorporated in its entirety.¹²

II.2.a. Special Note on the Disfavored Practice of Segmentation and Piecemealing

The Verizon application and its unquestioned acceptance by TRPA staff exemplify the practice of segmentation or piecemealing which is strongly disfavored under federal court decisions under NEPA and various California court decisions under the California Environmental Quality Act (CEQA).¹³ The central principle recognized in these cases and under CEQA regulations is to discourage the tactic by project promoters to divert administrative attention, in this instance TRPA’s attention, by representing a project as disconnected to a larger scheme, and thereby asserting that its environmental impacts are trivial and *de minimis*. This is precisely what is happening with the present Verizon application and the acceptance by the Hearings Officer of TRPA staff’s recommendations. This [CSLT Verizon-Liberty Cell Tower Project Map](#)¹⁴ shows the clear overall wireless tower plan for the region which is being piecemealed.

A major reason why segmentation and piecemealing is not permitted is that it distracts decision makers from scrutinizing cumulative impacts.¹⁵ Both federal and California state courts have called out this critical defect and insisted that cumulative impacts be directly addressed in any competent EIS process. TRPA’s own Regional Plan highlights the importance of examining cumulative impacts.

The present Verizon application blithely accepted by TRPA’s Planning Staff and Hearings Officer epitomizes the very worst example of piecemealing and the tendency to discount or ignore cumulative impacts.

¹² See

<https://www.dropbox.com/s/ad64cok6mkv7g1h/Antenna%27s%20Significant%20Impact%20on%20the%20Environment%20III.pdf?dl=0> for a comprehensive analysis.

¹³ e.g. [The Gap Between Informational Goals and the Duty to Gather Information: Challenging Piecemealed Review under the Washington State Environmental Policy Act; CEQA generally prohibits an agency from piecemealing](#); [EarthJustice v. CEQA](#); [Piecemealing Blog - Arthur F. Coon](#); [Project Segmenting Not Permitted](#).

¹⁴ Original at

<https://cslt.maps.arcgis.com/apps/mapviewer/index.html?webmap=a037fc6cd4db4a81b7854b0807c54070>

¹⁵ e.g. [NEPA | National Environmental Policy Act - Cumulative Effects](#); [TRPA SEC. 19 CUMULATIVE IMPACTS](#); [CA/Nevada Interstate Compact and Cumulative Impacts](#).

II.2.b. The Monopine’s Faux Branches and Pine Needles Shed Prodigious Quantities of Pollutants which enter the Lake.

TRPA’s allowance for monopine waste from Verizon’s macro tower, the subject of its present application, multiplied in hundreds of other sites, represents a major federal action as this term is defined by the Compact and the National Environmental Policy Act of 1970. As such it must be addressed by TRPA in a Comprehensive Programmatic Environmental Impact Statement as required by Article VII of the Compact and the TRPA’s own Regional Plan and Code of Ordinances.

This particular Verizon project, if sustained, will allow designated carcinogenic and other hazardous materials to be discharged into a Stream Environment Zone (SEZ) and thereafter into Lake Tahoe, thereby contaminating Tahoe’s drinking water supply. It is a particularly egregious example of what has become consistent, although illegal, TRPA practice.

II.2.c. The approved project and many others like it will create an imminent fire hazard, when Tahoe is especially vulnerable to fires and is just now recovering from the Caldor fire.

Macro cell towers on the scale proposed by Verizon present two classes of significant fire risks. First, as illustrated in [Fire Hazards of Cell Towers](#), hereby incorporated, cell towers themselves can explode or catch on fire, collapse and start fires, attract lightning, or overheat due to the large consumption of electricity.

Second, RFR/EMF emissions from cell towers, such as the Verizon tower, cause an increase in terpene production in plants.¹⁶ See [Appendix VI](#) for a memorandum from Dr. Martin Pall, Professor Emeritus of Biochemistry and Basic Medical Sciences, Washington State University.¹⁷ Trees produce terpenes, volatile oils and combustible compounds that are aerosols, under normal conditions. When trees are stressed or injured, they emit more terpenes. Increased volatile oils due to wireless radiation exposure will create a more flammable environment for fire.

¹⁶ [Influence of microwave frequency electromagnetic radiation on terpene emission and content in aromatic plants](#). Maria-Loredana Sorana, Manuela Stana, Ülo Niinemetsb, and Lucian Copolovicib. J Plant Physiol. 2014 September 15; 171(15): 1436–1443. doi:10.1016/j.jplph.2014.06.013.

<https://drive.google.com/file/d/1X4y238P1rQ28YYxBTfgpOxct4FvOwYN1/view?usp=sharing>

¹⁷ Also see [Pall Letter to TRPA - Feb. 25, 2020](#).

TRPA's failure to address the fire risks of macro towers, as in the present Verizon application, will place the entire Tahoe community at risk.¹⁸ (See [Alan Miller Letter Oct. 12, 2021](#), pg. 7: Threats Due to Fire Associated with the Tower Must Be Mitigated.) TRPA's failure even to consider, much less to assess the fire risks of cell towers in a Comprehensive Programmatic EIS is more than legally sufficient to justify an immediate moratorium on the implementation of the overall Connected Tahoe Plan.

II.2.d. TRPA's EIS Must Address Other Adverse Environmental Impacts on Endangered Species and Special Habitats.

The EIS must address the environmental impacts of the proliferation of macro cell towers throughout the Tahoe Region, of which the present Verizon application is a prominent example. These impacts include adverse scenic impacts, dangers to endangered species,¹⁹ riparian vegetation impacts, and adverse impacts on 128 threshold standards relevant to the Bijou region.²⁰

TRPA is not monitoring the Bijou Park Creek stream habitat, and likely has not been for decades. On January 10th 2014, the US FWS published in the Federal Register ([79 FR 1805 1810](#)) that it had adopted [endangered species status for the Sierra Nevada Yellow-legged Frog](#) (SNLF) ([50 C.F.R. § 17.11](#)). In the near decade since the status was [first proposed in 2013](#), TRPA has unconscionably still not designated threshold capacities for SNLF protection, despite maintaining protections for Goshawk, Osprey, Bald Eagle, Golden Eagle, Peregrine, and Waterfowl which are not endangered (Tahoe Regional Planning Agency, *Threshold Standards and Regional Plan*, [p.23](#) (2019)). It is evident that TRPA is not even monitoring the condition of the Bijou Park Creek habitat, which [it has identified as suitable habitat for SNLF](#). Gregory J. Cook's engineering survey (see [Appendix III](#)) documents some of the SEZ area that was previously neglected by the TRPA GIS department.

II.3. The Proposed Project Exceeds Land Capability and Coverage Limitations

¹⁸ E.g. [Fire Hazards of Cell Towers.pdf](#) and [Alan Miller Letter Oct. 12, 2021](#).

¹⁹ E.g. [Sierra's yellow-legged frog still threatened, but officials have hope](#) | Tahoe Daily Tribune.

²⁰ See [TRPA Threshold Standards and Regional Plan](#) https://www.trpa.gov/wp-content/uploads/documents/archive/Thresholds_Regional-Plan_Amended_2019_4_24.pdf.

The project area is already massively over-covered.²¹ In addition, the Applicant is attempting to characterize the demolition of a storage shed, and the construction of a radio equipment building, as a mere enlarging of an existing structure. It is not. The Verizon project contemplates the construction of a new building in steep "environmentally sensitive" Class 1A land directly above a SEZ.

Importantly, the land capability mapping has a complex history, but it appears that the SEZ boundary was moved in a way more favorable to the Applicant. In investigating further, the latest TRPA Land Capability and Coverage Verification was done for Hansen's Resort in 2005. The Cook survey depended on the very rough handwritten SEZ line from the 2005 Verification, but the land capability was [verified](#) and documented with different "internal" [data](#). The net result is that there are major inconsistencies in the excess land coverage assessment. The TRPA GIS file is "[Land Capability Verification](#)"²²

If for some reason, the TRPA actually moved the "1A-1B" land verification boundary assessment on Hansen's Resort parcel, as indicated in that odd hand-drawn marker line, then under the Administrative Procedure Act (APA) TRPA ought to provide some sort of "reasoned analysis for the change" (*Motor Vehicle Manufacturers Association v. State Farm Auto Mutual Insurance Co.*, 463 U.S. 29, 42 (1983). See also, *FCC v. Fox Television Stations*, 556 U.S. 502, 515-516 (2009)). If this change happened for no reason other than to allow this tower to get approved, that is arbitrary and capricious decision making.²³

II.4. Verizon Has Presented Misleading and Erroneous Evidence in its Application.

Verizon has inserted questionable, if not outright erroneous, evidence into the record. [Appendix V](#) presents an inventory of these misleading and false statements. An application replete in this way with inaccuracies, misleading and false statements is invalid on its face and must be denied. TRPA has failed to do so.

²¹ The parcel is only allowed 1% coverage (any surface that prevents water from percolating in). Anything over that is over allowed coverage. But what was legally existing prior to 1986 is grandfathered in. Hence, hugely over-covered.

²² See also <https://www.tahoependata.org/datasets/stream-environment-zone-sez/explore?location=38.936919%2C-119.949945%2C16.62>)

²³ Upon reviewing TRPA's "Threshold Evaluations"; it appears that [Bijou Park Creek was not even given a stream habitat rating](#).

Verizon's simulations misrepresent the proposed Ski Run cell tower's location by over 2,000 feet and hence are patently incorrect. [Appendix V](#) includes photos substantiating this assertion. TRPA Staff and Hearings Officer have a legal duty to investigate obvious misleading and false claims being presented by an applicant, and certainly are obliged to discount such claims when they are documented to be untrue or misleading. See [State Farm Auto Mutual Insurance Co.](#), 463 U.S. 29, 42-44 (holding an agency decision is arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise; a court should [...] invalidate agency determinations that fail to "examine the relevant data and articulate a satisfactory explanation for [the] action including a 'rational connection between the facts found and the choice made.'" When reviewing that determination, courts must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment").

II.5. TRPA and Tahoe Prosperity Center (TPC) Have Made Misleading, Unsubstantiated, and/or False Claims relating to the Purported Benefits of Wireless Networks on Climate Change.

Recently, the wireless industry and its proponents have begun to assert that wireless networks, including macro cell towers, will actually enhance environmental quality, save energy, and contribute to ameliorating climate change.

There is considerable evidence that such claims are without scientific merit. In fact, just the opposite is the case. The [IEEE](#) has been studying this issue for some years, and has expressed serious concerns with how energy wasteful wireless networks are.

A recent Swedish study reaches the staggering conclusion that 5G will necessitate an increase of energy consumption by 160% in 10 years. According to this [joint study](#) by InterDigital, a mobile and video technology research and development company, and ABI Research, the 5G ecosystem alone will require the

expected equivalent of all the energy consumption of Sweden.²⁴ Similar findings are described in Tim Schoechle’s [Reinventing Wires](#) (Chapter 6). The critical point is this: TRPA must not accept either view on blind faith. It has a legal obligation, especially given that climate change policy is now of highest national priority, to address the climate change challenge as it applies to the proliferation of wireless devices and antennas throughout the Tahoe Region. TRPA is obligated to do this without bias and as part of its Compact Article VII obligation to prepare a Comprehensive Programmatic EIS.

II.6. TRPA Has Responsibility to Study Immediately Available Alternatives to the Connected Tahoe Plan.

There is no evidence whatsoever that the TRPA Hearings Officer or TRPA itself has been interested to inquire, much less have assessed, as part of its EIS process, immediately available, more environmentally protective, balanced, energy efficient, cost effective, climate change friendly alternatives to the Connected Tahoe Plan. A careful cost/benefit analysis of viable alternatives is a basic requirement of any competent EIS process. An essential first step would be for TRPA in its EIS to consider the benefits and cost savings of optical fiber broadband networks to the premises, which is already designated a high priority in the Biden Administration’s new Critical Infrastructure Plan.²⁵ In collaboration with the Tahoe Prosperity Center, which has just received a \$165,000 grant to support Tahoe’s resilience, TRPA should also assess the benefits of vigorously implementing [Intelligent Solar Microgrids](#) that can effectively address five critical challenges for Tahoe simultaneously: a) grid power outages; b) fire; c) climate change risks resulting from over dependence on non-sustainable and energy wasteful energy sources; d) resident health and safety jeopardized by RFR/EMF; and e) cyber-insecurity and invasion of personal privacy. These are all fatal weaknesses of the Connected Tahoe Plan.

In sum, if TRPA properly complies with its environmental responsibilities as set forth in the Compact, its Regional Plan, and Code of Ordinances, it is almost certainly would not — and cannot — legally approve the present Verizon cell

²⁴ (pg. 3): “This would be equivalent to the total energy consumption of Sweden or Norway, or roughly the same amount consumed by all the households in Australia or the United Kingdom in 2030.” [ABI Environmentally Sustainable 5G Deployment 1 Nov2020.pdf](#).

²⁵ See [Connecting America: The National Broadband Plan](#) and [Making the technical personal: How fiber is changing communities](#).

tower application which, for the additional reasons cited in Appellants' Opposition, is invalid on its face.

III. Several TRPA Governing Board Members Must Recuse Themselves

Summary. City Council Member John Friedrich, who is also the City representative to TRPA, must recuse himself from the present TRPA Governing Board Hearing on this appeal. Mr. Friedrich has been employed and is currently actively engaged with both the Tahoe Prosperity Center and Liberty Utilities, which is partnering with Verizon on the small cell wireless deployment. Other conflicted members who share responsibilities on both TRPA and Tahoe Prosperity Center (TPC) Boards are Sue Novasel and Cindy Gustafson, who must also recuse themselves. Appellants believe that Board Member Bill Yeates is also conflicted because he has previously owned stock in a telecommunications company(ies) and on this basis has in the past recused himself from an important TRPA Board decision. (Appellants have not been able to determine whether Mr. Yeates currently owns the stock of public telecommunications companies.) Appellants hereby request that all other Board members of TRPA or [TPC](#) who are currently owners of stock in public telecommunications companies also disclose their ownership and recuse themselves.

Appellants allege that these named persons have collaborated with and supported telecom companies in developing the "Connected Tahoe Wireless Plan." That Plan, as noted, is currently being implemented by discrete individual piecemeal actions, as exemplified in the present application for a 1360 Ski Run Blvd Tower. The TPC has lobbied for this particular Verizon tower, and others, to realize its Plan.

Detailed Analysis of Conflicts of Interest

Appellants believe that if any comprehensive planning was done at all in the Tahoe Region with regard to wireless facilities, it was done behind closed doors under the auspices of Tahoe Prosperity Center ("TPC"). TPC, which purports to be a federally registered 501(c)(3) not-for-profit organization, is funded in part directly by governmental entities with regulatory authority in the Tahoe Region, including TRPA, El Dorado County, Placer County, and the City of South Lake Tahoe. TPC's Board of Directors included (until January 2021) two members of TRPA Board, Sue Novasel (currently an El Dorado County Supervisor) and Marsha Berkbigler (who, until 2021, was a member of TRPA's Board and also a Washoe County Supervisor; she lost her re-election bid for Washoe County

Supervisor in the November 3, 2020 election, and thus lost her Board seat on TRPA's Governing Board as well). TRPA's Executive Director, Defendant Marchetta, and a former TRPA employee and current member of the City Council of the City of South Lake Tahoe, Devin Middlebrook, who also serves as Mayor Pro Tem, also are TPC Board Members, among others. The Verizon tower project at 1360 Ski Run Boulevard is located in the City of South Lake Tahoe. TPC has as a core part of its primary mission reflected in its "Connected Tahoe" Project, the goal to bring the highest levels of broadband and cellular service to the Tahoe Region. As part of its planning process, TPC solicited each of the primary telecoms, including Verizon, to provide TPC with the telecoms' preferred locations for all cell towers and other facilities. This information was provided on the understanding that it would not be made public to protect the competitive advantage of each telecom. TPC then prepared internal documents, including maps, which included the aggregated wish lists of each telecom in terms of project sites, and their priority in terms of timing.

For at least the past several years, TPC has actively lobbied the regulators in the Tahoe Region, including the City of South Lake Tahoe, and TRPA, to streamline their regulatory processes to allow each telecom, including Verizon, to implement their projects as quickly as possible. Moreover, TPC, by its Chief Executive Officer, Heidi Hill Drum, has aggressively campaigned for the approval of specific cell towers and wireless transmission facilities throughout the Tahoe Region, including the proposed Verizon cell tower at 1360 Ski Run Boulevard. For example, on August 5, 2019, the day before the scheduled South Lake Tahoe City Council hearing on Plaintiff Eisenstecken's appeal of the Planning Commission's granting of the special use permit for the Verizon cell tower at 1360 Ski Run Boulevard, Heidi Hill Drum sent an email to members of the City Council, including Devin Middlebrook, who simultaneously serves as a Director of TPC (and who, despite this obvious conflict of interest, never recused himself from the decision-making). In her email, Ms. Drum writes:

I somehow missed this on my agenda review when I sent my support letter for the other items. *But I wanted to express my sincere hope that you uphold your planning commission's approval of the cell tower on Ski Run Boulevard.* As you are well aware it is almost impossible to send a text in the heavy summer visitation periods. Cell coverage has diminished greatly over the past couple of years. In addition, many members of our community no longer have a landline and rely solely on cell phone service as their only means of communication.

You will recall from our presentation in April with the cell phone providers that many people are using cell phones as their means of downloading data as well as phone service. This means that we are in a challenging situation when cell towers are not approved as it puts lives in danger. Two independent experts also testified that there are no health ramifications from the towers and there is no cause for concern in that regard. Your planning commission thoroughly reviewed this cell tower site and approved it appropriately. To reverse their decision diminishes their authority and we hope that you uphold their decision.

Finally, and most importantly, I hope you consider the public safety ramifications of reversing the installation of the cell tower that is so desperately needed. With people using their cell phones only and not having land lines, in the event of a wildfire or other public emergency people would not be able to reach their families to let them know about the danger. That could cause catastrophic harm and loss of life. Your fire department brought this up during their codes of coverage issue previously as well.

The Tahoe Prosperity Center supports this cell tower and site for a monopine that will fit well into the area and provide the much-needed coverage for our residents, businesses and community. (Emphasis added).

Notably, the April presentation referred to in Ms. Drum's August 5, 2019 email was a lengthy April 2, 2019 presentation Ms. Drum organized for the South Lake Tahoe City Council to address broadband and wireless communications in the Tahoe Region and TPC's Connected Tahoe project to expand such coverage. At this presentation, Ms. Drum spoke along with Tellus Venture Associates, who Ms. Drum introduced as TPC's independent expert, and representatives from Verizon, T-Mobile, and AT&T. Ms. Drum stated that the three telecommunications companies are all TPC's "partners" in the Connected Tahoe project. Ms. Drum and TPC serve as the telecommunications companies' cheerleader to the regulators, legislators, and the public, touting and seeking approval of their expansive wireless infrastructure deployment plans.

Ironically, when publicly challenged by residents concerned about the dangerous "rubber-stamping" of permit approvals for cell towers and other wireless infrastructure facilitated by TPC's "unholy" seeding of several of its Directors on the TRPA Board and Executive staff and the South Lake Tahoe City

Council, TPC cried foul. In a press release reported in South Tahoe [Now.com](#), dated April 16, 2021, Frank Gerdeman, TPC's Chairman, asserted: "The Tahoe Prosperity Center believes that adding a small number of strategically located, environmentally appropriate cell towers to improve coverage for our community is an important goal for public safety and improved communications. We shared that in public comment in January 2020 at a City Council meeting and for that, we were sued. Our CEO has been continually harassed since then and this lawsuit is another attempt at silencing our organization on this important matter." Mr. Gerdeman protests too much. He admits TPC's pro-telecom pro-cell tower expansion platform. He freely acknowledges TPC pushed this platform before the City Council on which TPC's own Director, City Councilman Devin Middlebrooks, orchestrated the majority vote which resulted in the issuance of the special use permit by the City of South Lake Tahoe for the 112 foot tall cell tower at 1360 Ski Run Boulevard which was opposed by Appellants Eisenstecken and Benedict and by hundreds of other South Lake Tahoe residents.

In that same press release, Ms. Drum complains: "I have been publicly attacked for more than a year -- simply for doing my job and communicating an opinion that differs from plaintiffs in this case. This intimidation has also continued against TPC board members, as well as numerous other community leaders since each of us spoke up at a City Council meeting and stated that better cell coverage is needed in the Lake Tahoe Basin." Ms. Drum, too, is mistaken. Public officials simply have no business sitting as directors of organizations which lobby aggressively before them in their official capacities. That's just basic ethics, enforced by conflict-of-interest policies and laws of TRPA, the City of South Lake Tahoe, the Compact, and federal and state law.

TPC, through its CEO, certainly has a First Amendment right to lobby government, though as a 501(c)(3) not-for-profit organization, it needs to tread very carefully when engaging in political activity lest it jeopardize its tax-deductible status with the Internal Revenue Service. Nevertheless, when TPC and its CEO actively lobby before government regulators and urge them to approve specific cell projects -- and those same government regulators include current TPC Board members, such as Devin Middlebrook, the sitting City of South Lake Tahoe Councilman, Mr. Middlebrook faced a blatant conflict of interest and he was required to recuse himself from participating in the proceeding at hand -- in this case, the appeal of the Planning Commission grant of the special use permit. However, Mr. Middlebrook failed to recuse himself. Indeed, at the January 12, 2020 hearing when the City Council denied the appeal, Mr. Middlebrook took a

lead role in persuading a majority of the Council to join him in voting to deny the appeal.

TPC seeds its Board of Directors with Directors who simultaneously are employed by government regulators and legislative bodies that issue the necessary permits for wireless infrastructure, including cell towers and small cell facilities in the Tahoe Region. Besides Mr. Middlebrook, TPC's Board includes Joanne Marchetta, the Executive Director of TRPA, and Sue Novasel, El Dorado County Supervisor. Until January 2021 (following her November 2020 election loss), Marsha Berkbigler, served as a Washoe County Supervisor while she was both a TPC Director and a Director of TRPA. None of these TPC Directors recused themselves from permit decision-making or legislating regarding cell towers and wireless infrastructure when sitting in their official government capacities. Given TPC's strong positions supporting ever-expanding wireless infrastructure deployment throughout the Tahoe Region and equally strong support for Verizon, T-Mobile, and AT&T, TPC's Directors should have recused themselves from any participation in all such matters when sitting in their official government capacities because of the blatant conflict of interest presented, but they each failed to do so. Sue Novasel, a sitting Governor of TRPA and a current Director of TPC, must recuse herself from these proceedings on appeal. Joanne Marchetta, Executive Director of TRPA and a current Director of TPC, must recuse herself from these proceedings on appeal.

John Friedrich, a current South Lake Tahoe City Councilmember and a Governor on the Board of TRPA, until recently was employed by Liberty Utilities, where he managed renewable energy, energy efficiency, and electrical vehicle programs. Liberty Utilities is public utility which provides electric power to the Tahoe Region. As such, Liberty Utilities has, for many years, been involved with each of the telecom companies that has erected and operated wireless telecommunications facilities in the Tahoe Region because all such facilities are powered by electricity. Given Mr. Friedrich's lengthy executive level employment at Liberty Utilities for years during the deployment of the Region's wireless infrastructure, Mr. Friedrich must recuse himself from these proceedings on appeal.

The TRPA Compact, at Article III(a)(5) sets forth standards to govern conflicts of interests by its Board members and employees:

- 5) Each member and employee of the agency shall disclose his economic interests in the region within 10 days after taking his seat on

the governing board or being employed by the agency and shall thereafter disclose any further economic interest which he acquires, as soon as feasible after he acquires it. As used in this paragraph, “economic interests” means:

(A) Any business entity operating in the region in which the member or employee has a direct or indirect investment worth more than \$1,000.

(B) Any real property located in the region in which the member or employee has a direct or indirect interest worth more than \$1,000.

(C) Any source of income attributable to activities in the region, other than loans by or deposits with a commercial lending institution in the regular course of business, aggregating \$250 or more in value received by or promised to the member within the preceding 12 months; or

(D) Any business entity operating in the region, which the member or employee is a director, officer, partner, trustee, employee or holds any position of management.

No member or employee of the agency shall make, or attempt to influence, an agency decision in which he knows or has reason to know he has an economic interest. Members and employees of the agency must disqualify themselves from making or participating in the making of the agency when it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the economic interests of the member or employee.”

Chapter 8 of TRPA’s Rules of Procedure echo the above requirements, and at Section 8.4, at least as to employees, clarifies that the intent is to prevent anything that gives rise to “an actual conflict of interest, or that creates the appearance of an actual conflict of interest.” TPC functions as a business entity, notwithstanding its non-profit status, at least in part to advance the interests of the telecom industry. As members of TPC’s Board of Directors, Ms. Marchetta and Ms. Novasel owe a fiduciary duty to TPC that creates an actual conflict and/or an appearance of a conflict of interest with their fiduciary duties as members of the Board or employees of TRPA to follow the dictates of the Compact and the Regional Plan.

TRPA's Rules of Procedure also prohibit ex-parte communications for its Board members when they act upon a matter in their quasi-judicial capacity. To the extent that a TPC Board member, or any other TRPA Board member, receives specific information about preferred wireless sites and the reasoning therefore, prior to a hearing in their capacity as a TRPA Board member, that information must be disclosed or the TRPA Board member is in violation of Section 2.15.1 of the Rules of Procedure. That provision requires "Prior to taking action on a quasi-adjudicative matter, a Board member shall publicly disclose on the record the existence and essential content of any material ex parte communications on the matter under consideration." TPC and its CEO, Heidi Hill-Drum received proprietary information from at least Verizon, T-Mobile, and AT&T about each of their preferred sites for cell towers in the Tahoe Basin. Ms. Drum agreed to keep the identities of the companies anonymous, but prepared for internal use a map of these preferred cell tower sites. Ms. Drum set forth this information in an email to Appellant Eisenstecken, dated October 15, 2019 (See Appendix VII), in which she wrote:

"Hello Monica. The cell tower maps are not printed and they are for internal use only as part of our Connected Tahoe project. I can share the screen shot of the green dot (#11) on the image below, which is the tower at 1360 Ski Run Blvd. Green dots means a priority site. None of the dots, nor numbers outline which provider, because, in order to ensure that each provider was able to maintain their competitive business advantage, we agreed to code them. I am happy to meet with you in person (as I also offered to do with Ben) and show you the maps on my computer, but they are for internal planning use only. They are also a few years old now as we started this project five years ago."

Appellants believe that Berkbigler and Novasel and any other TRPA Board members that have received such information have not complied with this requirement.

Marchetta is TRPA's Executive Director, and therefore an employee of TRPA. According to TRPA's Rules of Procedure, the Executive Director administers all affairs of TRPA, directs and hires staff, directs Legal Counsel for TRPA, and creates the staff summary for projects to be heard, including recommendations for approval or rejection. (Rules of Procedure at Section 1.5, and Section 5.11.) Because Marchetta is also on the Board of TPC, her recommendations to approve applications by telecoms, at the very least, "create the appearance of an actual conflict of interest" (Rules of Procedure at Section 8.4).

Appellants believe that paid elected government officials, appointed government officials, and key TRPA staff members believe it is in their best interests to appear to support TPC's agenda in order to maintain the economic advantages of employment and the support of the pro-economic growth faction in the community who are politically powerful with regard to winning elections and plum political appointments. This inherent conflict of interest is magnified by voluntarily agreeing to be on the Board of an unapologetically pro-telecom lobbying business entity like TPC. Once again, the façade of TPC as a publicly-spirited, tax-exempt, non-profit entity is directly contradicted by the promotional actions TPC takes on behalf of the telecom companies. Indeed, TPC is the telecom companies' regional cheerleader-in-chief.

By way of example, this conflict of interest likely inhibits conflicted individuals from calling for a proper needs assessment, including a forensic audit of the extent of existing fiber optic infrastructure, who owns it, who paid for it, and whether such data and communications services can be provided without more wireless facilities that create adverse impacts. Under Subsection (D) of Article III(a)(5), therefore, Marchetta and Novasel have an economic interest that is required to be disclosed. Appellants believe that no such disclosures have been made as required. Finally, Marchetta has an economic interest in keeping her job. It appears she has been installed to do the telecom companies' bidding and likely would be immediately replaced if they started to act independently.

Appellants' Due Process and Other Rights and TRPA's and the Tahoe Prosperity Center's (TPC) Open Meeting Responsibilities

Appellants' basic due process right to an unbiased tribunal has been recognized by several courts. (See *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, n.14 (1961) ("no man can serve two masters")). TRPA is a political subdivision of CA ([GOV § 67040](#); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979) ("TRPA is described in Art. III(a) as a 'separate legal entity' and in Art. VI(a) as a 'political subdivision'").²⁶

²⁶ For additional cases, see: *Snyder v. Massachusetts*, 291 U.S. 97, 116, 117 (1934)(Due process of law requires that the proceedings shall be fair).

See also *Buchalter v. New York*, 319 U.S. 427, 429 (1943).

Lisenba v. California, 314 U.S. 219, 236 (1941)(denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice).

Smith v. Phillips, 455 U.S. 209 (1982) (juror had job application pending with prosecutor's office during trial); *Remmer v. United States*, 347 U.S. 227 (1954) (bribe offer to sitting juror); *Dennis v. United States*, 339 U.S. 162, 167-72 (1950) (government employees on jury).

TRPA must be in harmony with and not be in a conflict with laws prohibiting vote trading and use of public funds for political purposes and holding incompatible offices (Cal. Penal Code §86; Cal. Gov. Code §§ 1099, 1126 & 8314). *Petrovich Development Company, LLC v. City of Sacramento*, 48 Cal.App.5th 963, 973 (2020) (The law does not require the disappointed conditional use permit applicant to prove actual bias; rather, there must not be an unacceptable probability of actual bias on the part of a municipal decision maker; A party must show either actual bias on the part of an administrative decision maker or show a situation in which experience teaches that the probability of actual bias on the part of the decision maker is too high to be constitutionally tolerable); *Clark v. City of Hermosa Beach*, 48 Cal.App.4th 1152, 1170-1171 (1996) (“A public officer is impliedly bound to exercise the powers conferred on him with disinterested skill, zeal, and diligence and primarily for the benefit of the public. Actual injury is not the principle the law proceeds on. Fidelity in the agent is what is aimed at, and as a means of securing it the law will not permit him to place himself in a position in which he may be tempted by his own private interests to disregard those of his principal. This doctrine is generally applicable to private agents and trustees, but to public officers it applies with greater force, and sound policy requires that there be no relaxation of its stringency in any case that comes within its reason....”; Common-law doctrine against conflict of interest, prohibiting public officials from participating in governmental decision in which they know they have interest, extends to noneconomic conflicts of interest, while Political Reform Act focuses on financial conflicts of interest); *People v. Honig*, 48 Cal.App.4th 289, 313-314 (1996) (“The conflict-of-interest statutes are based upon the truism that a person cannot serve two masters simultaneously, which is regarded as a self-evident truth, as trite and impregnable as the law of gravitation. The duties of public office demand the absolute loyalty and undivided, uncompromised allegiance of the individual who holds the office”); *Thomson v. Call*, 38 Cal.3d 633 (1985); *Stigall v. City of Taft*, 58 Cal.2d 565 (1962); *Stockton Plumbing & Supply Co. v. Wheeler*, 68 Cal.App. 592 (1924); *President and Trustees of City of San Diego v San Diego and Los Angeles R Co*, 44 Cal. 106 (1872) (The general principle is, that no man can faithfully serve two masters, whose interests are or may be in conflict).

The Tahoe Prosperity Center's Connected Tahoe Plan was developed clandestinely by the telecom companies working in concert with the TPC and TRPA . (With regard to rules for open meetings, see Cal. Gov. Code §§

Rippo v. Baker, 239 U.S. 807 (2017)(Due Process Clause may sometimes demand recusal even when a judge 'ha[s] no actual bias').

54952(c)(1)(B), 54953, & 54959.)²⁷ As TPC is functioning as a parallel quasi-governmental organization, it is bound to hold open meetings (see *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986) (the Court extended the right of access to preliminary proceedings in addition to trials, and introduced a two-part test considering whether "the place and process have historically been open to the press and the general public," and whether "public access plays a significant positive role in the functioning of the particular process in question"). An executive agency, board, or commission (such as TRPA or City of SLT) cannot avoid the application of state open meetings laws simply by delegating their fact-finding authority to a proxy (such as TPC) (Christopher B. McNeil, [*The Public's Right of Access to "Some Kind of Hearing": Creating Policies that Protect the Right to Observe Agency Hearings*](#), 68 La. L. Rev. 1121,1125 (2008)).

IV. Requested Relief

Appellants make the following requests:

1. TRPA Governing Board must reverse the Hearings Officer October 14, 2021 decision.
2. TRPA must publicly recognize and call out the inaccurate, misleading, and false claims made by the Applicant Verizon and inserted in the public record.
3. TRPA must declare a moratorium on all new cell tower permits until it has completed a Comprehensive Programmatic Environmental Impact Statement on the "Connect Tahoe Wireless Telecommunications Facilities Deployment Plan" and ensured consistency with its EIS findings, its own Regional Plan, and Code of Ordinances.

²⁷ Under the California Government Code Sections 54952(c)(1)(B) and 6252(a), the Tahoe Prosperity Center is "a legislative body" subject to the Brown Act and Public Records Act. As a nonprofit corporation it "[r]eceives funds from a local agency and the membership of whose governing body includes a member of the legislative body of the local agency appointed to that governing body as a full voting member by the legislative body of the local agency." It is long overdue for TRPA and for a reviewing federal court to shed light upon and to correct the self-dealing mess that is placing Tahoe's unique national treasure on the chopping block.

4. TRPA must recognize the public health hazard of unpermitted discharges of toxic materials in waste discharges into Lake Tahoe from Verizon and other cell towers, and take immediate measures to ensure full compliance with all federal and state water quality, clarity objectives and clean drinking water laws.
5. As a condition of all permit applications, TRPA must require full disclosure by permit applicants of any toxic chemicals, compounds and materials contained in monopines.
6. TRPA must make specific findings, supported by convincing scientific evidence based on peer reviewed studies, that macro and small cell towers and other wireless devices either constitute, or do not constitute, an imminent hazard to the health and wellbeing of Tahoe's residents and environment.
7. TRPA must immediately assess and determine the viability of optical fiber to the premises, paved optical fiber, intelligent solar microgrids, and other immediately available alternative technologies in establishing the Tahoe Region as a climate change friendly, resilient showcase for the country and the world.

Respectfully submitted,

Julian Gresser
Gregg Lien
Robert J. Berg
Counsel for Appellants

APPENDIX I

TRPA Board Members (as of 11/28/2021)

Mark Bruce – Chair
Cindy Gustafson – Vice Chair
Shelly Aldean
Barbara Cegavske
Ashley Conrad-Saydah
Belinda Faustinos
John Friedrich
A.J. Bud Hicks
Alexis Hill
Vince Hoenigman
James Lawrence
Sue Novasel
Wesley Rice
Hayley Williamson
Bill Yeates

TRPA Governing Board Staff

Joanne Marchetta, TRPA Executive Director
John Marshall, TRPA General Counsel
Marja Ambler, Clerk to the Board

APPENDIX II

Appellants' Request To Remove Andrew Strain As Hearings Officer

<p>ATTORNEYS AT LAW</p> <p>SWANKIN & TURNER</p> <p>5614 CONNECTICUT AVE., N.W. #339 WASHINGTON, D.C. 20015 TEL. 202 462-8800 FAX 202 315-2501</p>	<p>DAVID A. SWANKIN JAMES S. TURNER BETSY E. LEHRFELD CHRISTOPHER B. TURNER JULIAN GRESSER, of Counsel (California only)</p>
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October 7, 2021

BY E-MAIL

Joanne S. Marchetta Executive
Director, TRPA John L.
Marshall, Esq.
TRPA General Counsel
P.O. Box 5310
Stateline, Nevada 89449

**Re: TRPA File # ERSP2019-0389
Proposed Verizon monopine cell tower at 1360 Ski Run Boulevard**

Dear Ms. Marchetta and Mr. Marshall:

As you know, we represent Monica Eckenstein, David Benedict, the Environmental Health Trust, Tahoe Stewards, LLC, and Tahoe for Safer Tech in proceedings in opposition to TRPA File # ERSP2019-0389, the proposed Verizon monopine cell tower at 1360 Ski Run Boulevard, South Lake Tahoe City.

We understand that Andrew Strain has been assigned as the TRPA Hearings Officer for the October 14, 2021 Public Hearing on this file. Due to Mr. Strain's current simultaneous employment as both TRPA Hearings Officer and Vice President of Development at the Tahoe Beach Club, and his position as a Member of the Government Affairs Committee of the Tahoe Chamber of Commerce, Mr. Strain has extremely serious conflicts of interest that preclude his serving as a TRPA Hearings Officer on this file. We hereby request that the TRPA immediately appoint a truly independent Hearings Officer whose impartiality cannot be reasonably questioned.

The conflict-of-interest provisions of the Bi-State Compact relevant to TRPA employees such as TRPA Hearings Officer Strain are set forth in Article III(a)(5) of the Bi-State Compact which provide, in relevant part:

(5) Each member and employee of the agency shall disclose his economic interests in the region within 10 days after taking his seat on the governing board or being employed by the agency and shall thereafter disclose any further economic interest which he acquires, as soon as feasible after he acquires it. As used in this paragraph, “economic interests” means:

(A) Any business entity operating in the region in which the member or employee has a direct or indirect investment worth more than one thousand dollars (\$1,000).

(B) Any real property located in the region in which the member or employee has a direct or indirect interest worth more than one thousand dollars (\$1,000).

(C) Any source of income attributable to activities in the region, other than loans by or deposits with a commercial lending institution in the regular course of business, aggregating two hundred fifty dollars (\$250) or more in value received by or promised to the member within the preceding 12 months.

(D) Any business entity operating in the region in which the member or employee is a director, officer, partner, trustee, employee or holds any position of management.

No member or employee of the agency shall make, or attempt to influence, an agency decision in which he knows or has reason to know he has an economic interest. Members and employees of the agency must disqualify themselves from making or participating in the making of any decision of the agency when it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the economic interests of the member or employee. (Emphasis added).

Mr. Strain, when he serves as a TRPA Hearings Officer, is an employee of the agency. The Compact language above emphatically prohibits TRPA employees, including Mr. Strain, “from making or participating in the making of any decision of the agency when it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the economic interests of the member or employee.”

At the same time as he serves as a TRPA Hearings Officer, Mr. Strain remains employed as Vice President of Development at the Tahoe Beach Club, a 143-unit ultra-luxury condominium project with a private members’ club on the shores of Lake Tahoe in Stateline, Nevada. This high-end real estate development enjoyed a record price-setting condominium sale this past summer of \$6 million for a unit located at 17 Beach Club Drive. As the Vice President of Development, Mr. Strain’s duties undoubtedly involve development matters and projects that implicate the TRPA Code of Ordinances and/or require TRPA permitting. As a senior executive of a major real estate developer in the Lake Tahoe Region, it’s rather astonishing, then, that Joanne Marchetta, TRPA’s Executive Director, has appointed Mr. Strain as a TRPA Hearings Officer, given the obvious inherent conflicts of interest between the two simultaneously-held positions.

Mr. Strain’s decisions as a TRPA Hearings Officer, even in matters ostensibly unrelated to those directly affecting his employer, inevitably have a material financial effect on the economic interests of his employer, and therefore, upon himself. To the extent Mr. Strain’s hearing decisions establish TRPA precedent, they affect the course of development of the lands within TRPA’s jurisdiction, including, of course, the properties owned by the Tahoe Beach Club. So it’s difficult to understand how Mr. Strain can serve as a TRPA Hearings Officer in any matter.

But the conflict-of-interest situation is even more egregious in connection with TRPA File # ERSP2019-0389. That’s because Mr. Strain’s boss, Patrick Rhamey, the Chief Executive Officer of the Tahoe Beach Club, has publicly expressed his support for expanding cell tower deployment in the Lake Tahoe Region. Indeed, Mr. Rhamey submitted a written public comment to the City Council of the City of South Lake Tahoe, in an email on May 11, 2020, in advance of the May 12, 2020 City Council meeting. Mr. Rhamey’s written public comment was directed to Agenda Item #12, “Policy Document for Wireless Facility Colocation Modification Submitted for Eligible Facilities Requests.” Mr. Rhamey’s written public comment states as follows:

From: Patrick Rhamey
To: Public Comment
Subject: Support for Agenda Item #12
Date: Monday, May 11, 2020 6:51:50 PM

Please vote yes on Agenda Item #12, cell tower ordinance. It is important for the safety of our residents, visitors, and first responders that they have reliable cell service.

It’s reasonable to infer from Mr. Rhamey’s public comment supporting a wireless telecommunications facility resolution that promotes the expanded deployment of such installations that Mr. Rhamey is predisposed to support the monopine cell tower proposed at 1360 Ski Run Boulevard. Mr. Strain can be expected to act in the interests of his boss and to follow his boss’s lead with respect to Mr. Rhamey’s desire for more reliable cell service in the Lake Tahoe Region. Mr. Strain’s conflict – his need to uphold Mr. Rhamey’s position that the Tahoe Region must support a massive increase in mobile device coverage by approving more cell towers, imposes a fatal bias that poisons his ability to carry out his duty to act as an impartial TRPA Hearings Officer. This bias prevents Mr. Strain from acting in any balanced way as a TRPA Hearings Officer to protect the Public Trust enshrined in the Compact.

Moreover, Mr. Strain may well have an ownership interest in the business that owns/operates the Tahoe Beach Club, and pursuant to Article III(a)(5)(A)-(D), you need to disclose to us Mr. Strain’s “economic interests” in the region immediately.

To make matters even worse, Mr. Strain currently serves as a Member of the Government Affairs Committee of the Tahoe Chamber of Commerce. The Tahoe Chamber partners with the Tahoe Prosperity Center, and the Tahoe Chamber supports and facilitates the Connected Tahoe Initiative, a goal of which is increased cell tower densification in the Lake Tahoe region, no matter the health risks to people and the environment.

Given Mr. Rhamey's public comments supporting an ordinance that furthers expansion of the cellular network footprint in the region, and in particular, cell towers to improve cell service, Mr. Strain's contemporaneous position as Vice President of the Tahoe Beach Club, and his active involvement on the Government Affairs Committee of the Tahoe Chamber, we respectfully demand that Mr. Strain be disqualified from participating in this matter as the TRPA Hearings Officer.

Please let us know immediately whether you intend to replace Mr. Strain as the TRPA Hearings Officer for this matter, and if so, who the new TRPA Hearings Officer will be.

Very truly yours,

/s/Julian Gresser

Robert J. Berg

Gregg R. Lien

APPENDIX IV Further Explanation of Toxic Chemicals and Compounds Associated with Monopines

Dear Heather Segale, M.S., Education and Outreach Director of Tahoe Environmental Research Center, all other addressed, copied, or otherwise interested parties;

It has come to my direct awareness that a concealment technique used to camouflage monopole cell towers to disguise them as a pine tree—named by the portmanteau word "monopine"—has become a prolific source of microplastics (MP) pollution in the Tahoe Basin. We have actually collected pounds of microplastics ribbons below the so-called "monopines." The culprit is a specialized type of plastic that can be manufactured to mimic pine needles, but is also transparent to cell tower radio-frequency radiation (RF). Here is a vendor's image of the material:

- RF-friendly materials yield extremely low insertion and return loss properties.



Comparison of foliage colors and diameters.

Like actual pine needles, these plastic ribbons are continuously and pervasively shed from their support branches. In fact, continuously [replacing "monopine" branches](#) is a cottage industry in and of itself; there are nearly a hundred branches on a 15-story tall "monopine." Each branch in turn contains several pounds worth of plastic ribbons, which completely "defoliate" over a period of two or three years. However, unlike pine needles, the faux plastic ribbons are not compostable and merely degrade into smaller and smaller particles. Moreover, because of strong opposition to the placement of cell towers in residential neighborhoods, political expedience has dictated these "monopines" be placed in parklands and areas with no residential development value—usually because of environmental sensitivity such as a stream environmental zone (SEZ). *E.g.*, there is a proposed "monopine" adjacent to Bijou Park Creek at 1360 Ski Run Blvd in South Lake Tahoe. The continuous and pervasive shedding of brittle plastic ribbons into a debris field that completely spans a stream zone, creates a direct and foreseeable source of microplastic (MP) introduction into the lake. Research has repeatedly shown that tiny plastic particulates, with their enhanced surface area, are particularly effective at leaching toxins into the water and microplastic particles also get directly ingested by fish, wildlife, and then enter the food chain, which eventually results in human consumption.[1] Toxins in plastic can have a wide range of effects from cancer to reproductive harm (*e.g.*, Bisphenol A (BPA)).

In Lake Tahoe, we have a more rarefied and cleaner atmosphere than the rest of the nation, often with a highly reflective snowpack, which yields intense levels of ambient ultraviolet light which is commonly known to degrade plastic. We also have extreme mountain winds—we get dozens of wind events each year with ridgetop winds in excess of 120-140 mph. This cumulatively results debris fields under each "monopine" of individual plastic ribbons, branch tips, and occasionally parts of the antenna sock. In one well documented example, a ridgetop cell tower at 8,371 ft (Angel's Roost), had a debris field with a radius in excess of 700 feet. The plastic ribbons get brittle and decompose on the tower as well as further degrade after they fall onto the ground.



Branch Replacement
Before and After

"Monopines" are generally inaccessible to equipment required to perform cosmetic maintenance for most of the winter. It is not uncommon for "monopines" to resemble the below left image in the spring:

I hope I have provided you with a good overview of the problem sufficient enough for you to take interest in the pounds of microplastics we have collected from the base of local "monopines." Perhaps we could provide you samples, for which Professor Jenessa Gjeltrema[2] could oversee identification of toxins[3][4][5][6][7] in the plastics, and perhaps assess their degradation into smaller particles[8]—rating their threat to dust aerosolization[9] or fine particle hydrologic suspension.

Your expert findings could have tangible public policy ramifications in the appropriate performance of environmental assessment for "monopines" under the National Environmental Policy Act (NEPA), and help characterize the extent to which this concealment technique may have a significant effect on the environment.[10] I look forward to your response. Thank you for your time and consideration.

Monica Eisenstecken

Footnotes

[1] *Infra* notes 3-7.

[2] Jenessa Gjeltrema, Principal Investigator, Optimization of Raman Analysis for Evaluation of Microplastic Particles, Small Grants in Aid of Research, (Principal Investigator), University of California Davis Committee on Research.

- [3] Fen Wang, Charles S. Wong, Da Chen, Xingwen Lu, Fei Wang, Eddy Y. Zeng, "Interaction of toxic chemicals with microplastics: A critical review," *Water Research*, Volume 139, 2018, pp. 208-219, ISSN 0043-1354, <https://doi.org/10.1016/j.watres.2018.04.003>.
- [4] Jingyi Li, Huihui Liu, J. Paul Chen, "Microplastics in freshwater systems: A review on occurrence, environmental effects, and methods for microplastics detection," *Water Research*, Volume 137, 2018, Pages 362-374, ISSN 0043-1354, <https://doi.org/10.1016/j.watres.2017.12.056>.
- [5] Gallo, F., Fossi, C., Weber, R. et al. "Marine litter plastics and microplastics and their toxic chemicals components: the need for urgent preventive measures." *Environ Sci Eur* 30, 13 (2018). <https://doi.org/10.1186/s12302-018-0139-z>
- [6] Pauline Pannetier, Bénédicte Morin, Florane Le Bihanic, Laurence Dubreil, Christelle Clérandeau, Fannie Chouvellon, Kim Van Arkel, Morgane Danion, Jérôme Cachot, "Environmental samples of microplastics induce significant toxic effects in fish larvae," *Environment International*, Volume 134, 2020, 105047, ISSN 0160-4120, <https://doi.org/10.1016/j.envint.2019.105047>.
- [7] Rios Mendoza Lorena M., Jones Patrick R. (2015) "Characterisation of microplastics and toxic chemicals extracted from microplastic samples from the North Pacific Gyre." *Environmental Chemistry* 12, 611-617. <https://doi.org/10.1071/EN14236>
- [8] Win Cowger, Andrew Gray, Silke H. Christiansen, Hannah DeFrono, Ashok D. Deshpande, Ludovic Hemabessiere, Eunah Lee, Leonid Mill, Keenan Munno, Barbara E. Ossmann, Marco Pittroff, Chelsea Rochman, George Sarau, Shannon Tarby, and Sebastian Primpke, "Critical Review of Processing and Classification Techniques for Images and Spectra in Microplastic Research," *Appl. Spectrosc.* 74, 989-1010 (2020).
- [9] Razegheh Akhbarizadeh, Sina Dobaradaran, Mehdi Amouei Torkmahalleh, Reza Saeedi, Roza Aibaghi, Fatemeh Faraji Ghasemi, "Suspended fine particulate matter (PM2.5), microplastics (MPs), and polycyclic aromatic hydrocarbons (PAHs) in air: Their possible relationships and health implications," *Environmental Research*, Volume 192, 2021, 110339, ISSN 0013-9351, <https://doi.org/10.1016/j.envres.2020.110339>.
- [10] 42 U.S.C. §§ 4331 *et seq.*; 15 U.S.C. §§ 2601 *et seq.*; 33 U.S.C. §§ 1251 *et seq.*; 42 U.S.C. §§ 7401 *et seq.*; 40 C.F.R. §§ 1501.1 *et seq.*; **47 C.F.R. § 1.1307**; 50 C.F.R. §§ 17.11 & 402.01 *et seq.*

APPENDIX V

Monica Eisenstecken and Alex Mackenzie

A. Misleading and False Claims by Applicant Verizon

Misrepresentations of Gap Coverage

Verizon misrepresented the viability of alternative sites in its analysis²⁸ that it presented to the city, and hid or failed to disclose²⁹ the extent of the cell coverage by its existing tower sites;³⁰ there are omitted material facts that are fatal to Verizon’s material claims that “there are no superior alternatives to the approved facility.”³¹ Verizon has “demonstrated a significant gap in service,”³² and “the approved facility is the least intrusive means to fill the significant gap in service.”³³ Macro cell towers have a powerful broadcast radius potential of 30 km (18.5 mi), but more commonly reach to 20 km (12 mi) because of terrain, capacity, energy, and radiation exposure issues.³⁴ It is unconvincing for Verizon to claim huge coverage differences between potential sites that are within a two-mile radius to service two gap areas within a one-mile radius; this is especially so without a substantial difference in elevation, aspect, or obstructive terrain on the proposed sites to service this “gap.” Verizon is simply minimizing its own internal cost of implementing cell coverage with callous disregard of the real transfer of these costs to neighboring residences—with the obvious ancillary benefit of permanent right-of-way acquisitions in a very valuable real estate market. Verizon stated it will need to trench fiber optic cable to the tower,³⁵ and hence construction will be less expensive for them to deploy a tower in a residential neighborhood adjacent to an arterial roadway.

To visualize this issue with RF propagation modeling,³⁶ there are several coverage images appended to EXHIBIT A. The Longley-Rice Irregular Terrain

²⁸ See [Verizon’s Alternative Cell Tower Sites Analysis](#)

²⁹ See [Verizon’s purported Coverage Maps](#)

³⁰ Cellmapper.net. See [public information on the surrounding cell towers](#), including antenna orientation (azimuth).

³¹ SLT Verizon Wireless Response to Appeal, File 19-026, [page 3](#).

³² SLT Verizon Wireless Response to Appeal, File 19-026, [page 8](#).

³³ [Ibid.](#)

³⁴ See [JPL’s Wireless Communication Reference Website](#)

³⁵ SLT General Planning Application, Ski Run Tower, [Page 3](#).

³⁶ For a brief overview of RF modeling methods, [follow this link](#).

Model (ITM)³⁷ shows the viability of “*Angels Roost*,” and the “*Water Tower*” sites as superior options in terms of minimizing injury to wetlands and neighborhoods, while servicing their so-called “gap in coverage.”¹¹ The “*Bat Yam*” site modeling also shows that a viable tower could be built there without needing to be a prohibitive 180-foot tall tower as purported by Verizon.¹² EXHIBIT A’s “Best Sites for Coverage of Bijou Park and Heavenly Valley” grades the landscape on its potential to cover Verizon’s alleged “significant gap” on a 90% to 100% coverage scale.³⁸ As should be expected, there is a large area in which placement of a macro tower would cover this gap. There is a sizable subset within this area that is far away from residences, and within the jurisdiction of city limits; there is also a very large portion of this area that is within US Forest Service jurisdiction and is very far away from any residence. Furthermore, when AT&T evaluated and declined the Ski Run site in 2013,³⁹ they subsequently placed their Macro Tower at 1066 Lyons Avenue⁴⁰— the north end of the South Tahoe Middle School⁴¹—which is on the edge of the land zone able to provide 100% coverage to both *Bijou Park* and *Heavenly Valley*.⁴²

Distortions of Data

Second, Verizon’s modeling appears to have used defective antenna orientations, heights, and receiving antenna sensitivity at the alternative sites⁴³ in order to support their preferred outcome—this is material fraud.

Verizon failed to disclose, hid, or misrepresented the existing level of service in its alleged coverage cap.⁴⁴ Residents performed their own signal measurements tests and were continuously able to make calls throughout the entire areas that Verizon claimed to the City did not have service.⁴⁵ The RF modeling of cell coverage by existent towers⁴⁶ exposes the current coverage of the “gap,” and the

³⁷ The [ITM was federally developed](#) by the National Telecommunications and Information Administration (NTIA). ¹¹ See EXHIBIT A(e) ¹² *Ibid*.

³⁸ See EXHIBIT A(c)

³⁹ ASR Registration [No. 1287635](#)

⁴⁰ See SLT [Wireless Telecommunications Facility Table](#)

⁴¹ See SLT [Wireless Telecommunications Facility Map](#)

⁴² See EXHIBIT A(c)

⁴³ SLT Verizon Ski Run Blvd Coverage maps, File 19-026, [all page](#).

⁴⁴ See MyStreetMyChoice [“Proof of No Significant Gap in Verizon Wireless Telecommunications Coverage”](#)

⁴⁵ *Ibid*.

⁴⁶ See EXHIBIT A(A)(e)

empirical call tests⁴⁷ validate the model output. Verizon appears to have altered and hid the orientations of its existent cell panel antennas in its own analysis— which substantially differ from that in the public record²³—in a material misrepresentation contributing to the City government’s belief that the Ski Run macro tower site is necessary to close its contrived “service gap.”

Misrepresentations of Visual Impact

Third, Verizon grossly misrepresented the visual impact the proposed tower would have on the neighborhood in its photo simulations.⁴⁸ This crucial point is material to a determination by city planners that the tower would not be injurious to the neighborhood, is consistent with its existing character, or otherwise “will pose only minimal impact on neighboring properties.”^{49,50} The tower will initially be 112-feet tall, with statutory²⁶ allowance for extension to 132 feet that the lessee intends to implement. The tallest trees are all located substantially downhill from the tower, giving them a relative height that is substantially below the purported maximum height of 82 feet.^{51,52} Verizon led the city to believe the tower will only extend 30 feet above the treeline, but because it appears to have fabricated tree heights⁵³ of the steep slope, it will effectively outlie by nearly 50-feet, before the inevitable co-location extension to a functional 70-foot height differential.³⁰ This gross misrepresentation is material to the city’s findings on negligible impact and injury to neighborhood.

Misrepresentations of SEZ Impacts

Fourth, it appears that Verizon failed to disclose, hid, and misrepresented descriptions of the construction project that are material to whether the facility would have “a potentially substantial adverse change in the environment.”⁵⁴ Verizon completely neglected the legal significance of a Stream Environment Zone

⁴⁷ See MyStreetMyChoice “[Proof of No Significant Gap in Verizon Wireless Telecommunications Coverage](#)”

²³ See [Cell Tower Mapper](#)

⁴⁸ SLT Verizon Wireless Response to Appeal, File 19-026, [Exhibit A](#)

⁴⁹ SLT Verizon Wireless Response to Appeal, File 19-026, [page 4](#)

⁵⁰ U.S.C. § 1455(a)

⁵¹ SLT Verizon Wireless Response to Appeal, File 19-026, [Exhibit D](#).

⁵² See EXHIBIT A(A)(a)

⁵³ See EXHIBIT A(A)(a). See also TRPA LiDAR tree heights, and 2013 AT&T measured tree heights

³⁰ See EXHIBIT A(A), Figure a.

⁵⁴ [CA. PRC. § 21068](#)

(SEZ)⁵⁵ within 120 feet directly downhill of the site. There will be construction, a permanent diesel tank⁵⁶ which runs against the city’s stream/water quality/HAZMAT policy,⁵⁷ pertaining to a stream which flows directly into Lake Tahoe. This is material to whether a study under the California Environmental Quality Act (CEQA)⁵⁸ is a prerequisite to permit approval and commencing construction. California regulation sets threshold requirements for exemptions for “residential infill projects,” one of which is that the site of the project “does not contain wetlands.”⁵⁹ The parcel certainly contains wetlands and demolition and construction are planned to occur in the SEZ in order to reallocate TRPA coverage⁶⁰ therein to the tower facility. It would be absurd to conclude there is no potential for substantial, adverse change in the environment,⁶¹ as a leak or spill from the diesel tank would foreseeably seep down the steep slope, contaminating the soil, the upper streambed of the Bijou Park Creek Watershed and SEZ Restoration Project⁶²—within which is an apparent TRPA-designated waterfowl population site,⁶³ and then inevitably Lake Tahoe. Whatever the risk, the consequence would be *catastrophic*. Additionally, substandard, ignorant, or unmitigated construction practices could leave loose or contaminated soil that would cause toxic turbidity⁶⁴ in the creek.

False Claims

Fifth, Verizon claimed the nearest home is 250 feet away,⁶⁵ but it measures around 89 feet away. This is close enough to have adverse insurability and FHA loan implications⁶⁶—which is material to the issue of injury. Having been

⁵⁵ SLT General Plan, [Policy NCR-2](#)

⁵⁶ SLT Verizon Wireless Response to Appeal, File 19-026, [GPA Page 4](#)

⁵⁷ SLT General Plan, [Policy NCR-2.2](#)

⁵⁸ [California Public Resources Code § 21000 et seq.](#), and [California Code of Regulations Title 14 § 15000 et seq. 14 CCR § 15192](#)

⁵⁹ *Ibid.*

⁶⁰ Land coverage is an essential element of the TRPA’s environmental plan to protect Lake Tahoe. See [link](#).

⁶¹ [CA. PRC. § 21068](#)

⁶² Upper Bijou Park Creek Watershed and SEZ Restoration Project, [TRPA Project No. 01.01.01.0118](#)

⁶³ TRPA 2015 Threshold Evaluation – Wildlife, [Page 8-6](#)

⁶⁴ EPA website on [Water Monitoring & Assessment](#)

⁶⁵ SLT Verizon Wireless Response to Appeal, File 19-026, [GPA Page 4](#)

⁶⁶ See EXHIBIT A, Campanelli Brief, [page 9 & footnote 5](#)

challenged, Verizon then blatantly misinformed the City⁶⁷ by trying to spin the distance *exclusive* of homes into an *inclusive range*,⁶⁸ which is clearly not what they initially claimed.

Finally, Verizon frivolously asserted the Ski Run cell tower will cause no increase in emissions, and that opponents are confused about the difference between particle and radiation emissions.⁶⁹ Federal, state, and local governments^{70,71} are allowed to regulate *particle* emissions which do impact the environment. Dirty diesel generators certainly release noxious particle emissions,⁴⁹ as well as electrically associated greenhouse gas emissions to continuously run a transmitter with 47,090 watts⁷² of *effective* radiative power (or 187.2 kilowatt-hours per day)—a sizeable fraction per day of the power a household will use in an entire month.⁷³ The city policy is to reduce net power consumption,⁷⁴ and there was no analysis of the impact on the city’s energy consumption goals.⁵³

B. VERIZON’S PRESENTATION OF MISLEADING AND FALSE EVIDENCE

Below is a presentation which shows that Verizon presented false and misleading evidence from its “expert witnesses” and reports. It also demonstrates that neither the TRPA staff officer nor the Hearings Officer performed due diligence. At a minimum, the staff officer or the hearings officer ought to have physically printed-out [Verizon's visual simulations](#) and actually taken them to the physical vantage points for an actual comparison. They would have discovered that the simulations misplace the Cell Tower's location by over 2,000 feet, and hence are patently untrue:

⁶⁷ SLT Verizon Wireless Response to Appeal, File 19-026, [GPA Page 4](#)

⁶⁸ SLT Verizon Wireless Response to Appeal, File 19-026, [page 6](#)

⁶⁹ *ibid.*

⁷⁰ SLT General Plan, [Policy NCR-5](#)

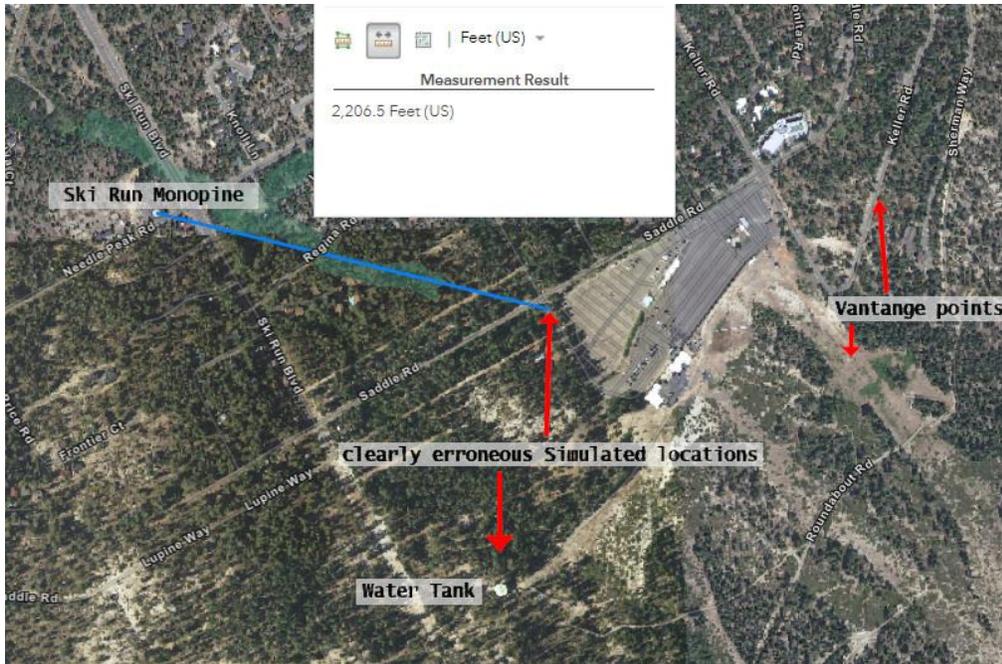
⁷¹ [U.S.C. §7412\(b\)](#)

⁷² See Exhibit A(g)(iv), Hammett & Edison, Inc., [evaluation of 1360 Ski Run Blvd small cell](#).

⁷³ US Energy Information Administration reports [average monthly electricity consumption as 914 kWh per home](#).

⁷⁴ SLT General Plan, [Policy NCR-5.12](#) *et. seq.*⁵³

SLT General Plan, [Policy NCR-6](#)



The photo simulations ought to appear **clearly erroneous** even to the layperson such as a jury; whereas Verizon has long made its bread and butter counting on public officials not being able to recognize highly technical electrical and network engineering falsehoods that are **clearly erroneous** to the "technically literate." This erroneous photo impeaches the veracity of Verizon's experts, including its electrical and network engineers who are engaging in the same conduct. In any case, the TRPA may not rely on **clearly erroneous** or outright **implausible** assertions of fact by the applicant in making its own findings:

See, [*Motor Vehicle Manufacturers Association v. State Farm Auto Mutual Insurance Co.*](#), 463 U.S. 29, 42-44 (1983) (holding an agency decision is arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise; a court should [...] invalidate agency determinations that fail to “examine the relevant data and articulate a satisfactory explanation for [the] action including a ‘rational connection between the facts found and the choice made.’” When reviewing that determination, courts must “consider whether the decision was based

on a consideration of the relevant factors and whether there has been a clear error of judgment”).

See also, United States v. Dierckman, 201 F.3d 915, 926 (7th Cir. 2000) (quoting *Bagdonas v. Dep’t of the Treasury*, 93 F.3d 422, 426 (7th Cir. 1996)); *Allied-Signal, Inc. v. Nuclear Reg. Comm’n*, 988 F.2d 146, 152 (D.C. Cir. 1993) (agency must be able to provide the “essential facts upon which the administrative decision was based” and explain what justifies the determination with actual evidence beyond a “conclusory statement”).

Also, [the staff officer wrongly stated](#), "TRPA has not received any such proof of adverse impacts of RF particular to Tahoe and therefore will not reexamine the determinations of the FCC." (TRPA staff recommendation to hearings officer, p.4). Notwithstanding the legal threshold of "proof," the TRPA **does not** need us to prove certainty to show that RF radiation or microplastic pollution will or actually is affecting the environment—under NEPA:

[40 C.F.R. § 1508.1\(b\)](#) (Affecting means will or may have an effect on); [American Bird Conservancy, Inc. v. F.C.C.](#), 516 F.3d 1027, 1033-1034 (2008) (a precondition of certainty before initiating NEPA procedures would jeopardize NEPA's purpose to ensure that agencies consider environmental impacts before they act rather than wait until it is too late); [Sierra Club v. Norton](#), 207 F.Supp.2d 1310, 1336 (2002) (Under NEPA, an agency cannot use the lack of existing information as a basis for acting without preparing an EIS).

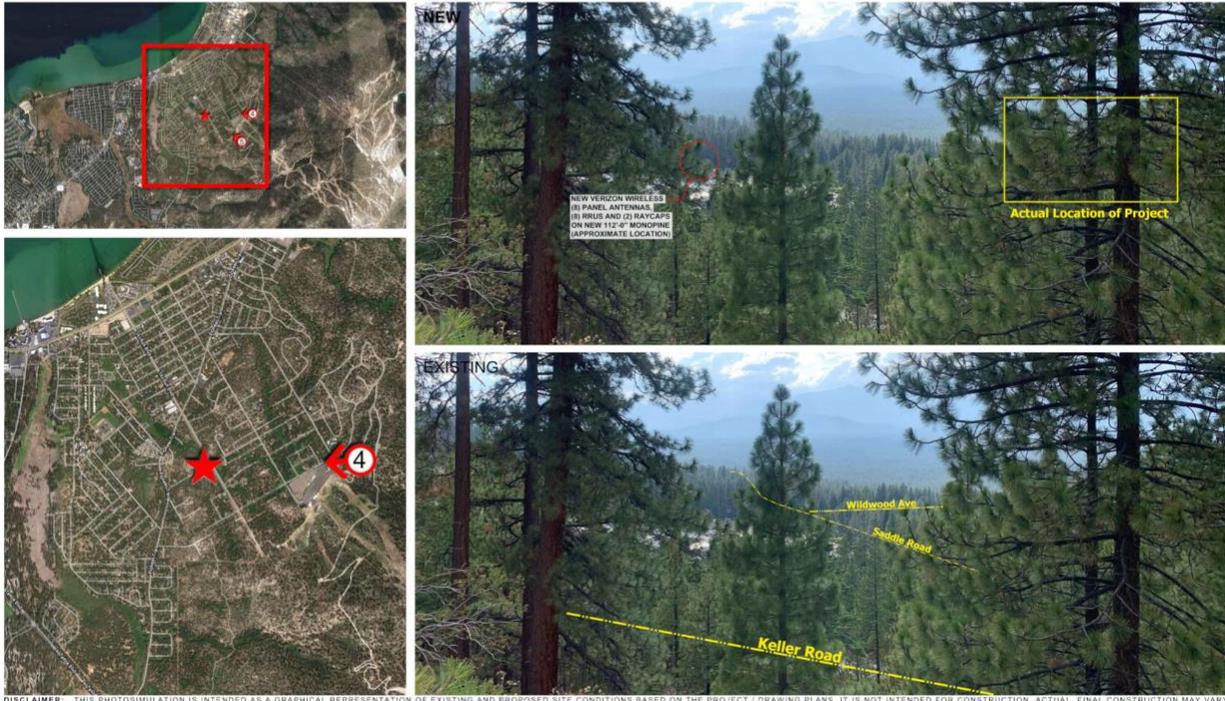
The TRPA uploaded, at the last moment before the October 14 hearing, [new photosimulations \(Oct. 12, 2021\)](#) to the [hearings materials](#). These simulations are not only deficient, but patently false. We point out the outrageous errors:

DATE: 10/12/2021

verizon
SKI RUN BLVD
PSL # 444780
1360 SKI RUN BLVD
SOUTH LAKE TAHOE, CA 96150

SAC
W I R E L E S S
3455 ACTIVITY ROAD
SAN DIEGO, CA 92118
www.sacwireless.com

PHOTOSIMULATION VIEWPOINT 4



The photo simulations (above and below), by [SAC Wireless](#) were rushed out recently. It is unclear whether or not the company took these photographs themselves or were provided the photographs by local Verizon employees or the Tahoe Prosperity Center, but what is indisputable is that: (1) they did not know the location of the proposed site from the vantage point and their photographer did not know how to use a map and compass or a [theodolite app](#) to take a basic bearing to the well mapped intersection of Ski Run and Needle Peak, and did not care; or (2) they intentionally made a false claim. It is astonishing how a photosimulation by a so-called visual expert could be so recklessly inaccurate, and calls into grave doubt the validity of any of the testimony by their so-called experts. The TRPA Governing Board and the District Court should know that Verizon will put their expert's credibility on the line by paying them to make outrageously false claims.

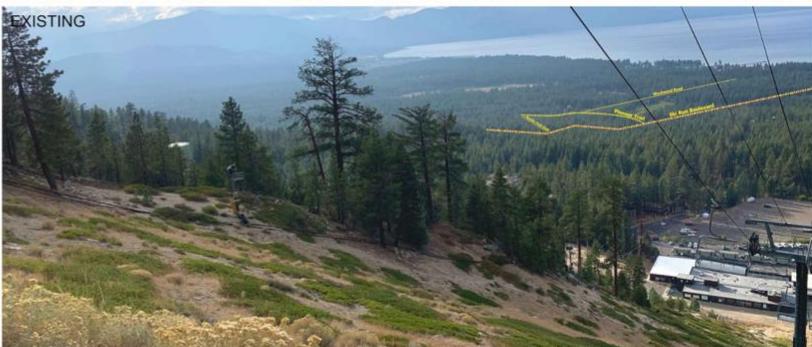
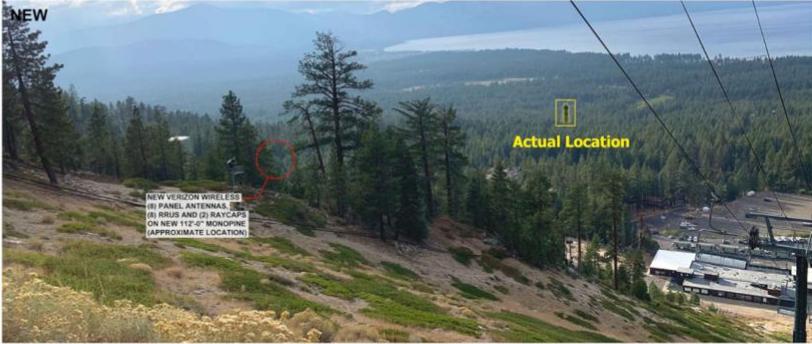
We have drawn the roads onto their photo simulations as a georeference, to show just how incredibly inaccurate their testimony is:

DATE: 10/12/2021

verizon
SKI RUN BLVD
PSL # 444780
1360 SKI RUN BLVD
SOUTH LAKE TAHOE, CA 96150

SOC
WIRELESS
3455 ACTIVITY ROAD
SAN DIEGO, CA 92130
www.soc.com

PHOTOSIMULATION VIEWPOINT 5



DISCLAIMER: THIS PHOTOSIMULATION IS INTENDED AS A GRAPHICAL REPRESENTATION OF EXISTING AND PROPOSED SITE CONDITIONS BASED ON THE PROJECT / DRAWING PLANS. IT IS NOT INTENDED FOR CONSTRUCTION. ACTUAL FINAL CONSTRUCTION MAY VARY.

This is not a new playbook. The federal caselaw is full of evidence where telecoms have presented photographs from carefully selected angles that would minimize the tower's apparent visibility in the neighborhood, which were dispelled by photo simulations from the vantage point of adjacent residences proving actual injury (*AT&T Wireless PCS, Inc. v. Winston-Salem Zoning Bd. of Adjustment*, 172 F.3d 307, 315-316 (4th Cir. 1999)):

[11] The record indicates that the Zoning Board, in its denial of AT & T's application, considered the tower's visual impact on the surrounding neighborhood and its effect on the historical value of the Hanes House. As to visibility, the record shows that the tower would only be 500 feet away from the nearest residence. The 148-foot tower would be the first of its kind in the area and would rise well above the tree line of 60-85 feet in the neighborhood. Eight neighborhood residents testified that the tower would have negative impact on the aesthetics and overall integrity of the neighborhood. They expressed their legitimate concern that the neighborhood would become less desirable with the tower and that there would be a detrimental impact on local homeowners. One resident testified that, in his experience as a mortgage banker, the tower would adversely affect the resale value of the homes surrounding it.⁵ The record shows *316 that, AT & T's evidence to the contrary, the tower would become increasingly visible as one moved farther away from the site or if one viewed the tower from the local roads. There was evidence that AT & T took photographs from carefully selected angles that would minimize the tower's apparent visibility in the neighborhood and that, in reality, the tower would be in plain sight from neighborhood homes. There was testimony that the tower's visibility would increase during the winter months as the local, deciduous trees lost their leaves. And, the Zoning Board considered a petition signed by 145 local residents who opposed AT & T's application.

APPENDIX VI
Memorandum From Dr. Martin Pall

Role of low intensity electromagnetic fields (EMFs) on levels of plant terpenes and terpene peroxides: Probable role in California and other “wildfires.”

Document prepared by Martin L. Pall, Professor Emeritus of Biochemistry and Basic Medical Sciences, Washington State University.

There are two main concerns explored here:

1. EMFs can raise the levels of terpenes in plants, including the levels of monoterpenes and sesquiterpenes which are highly volatile and highly flammable. Consequently EMF exposed plant materials may burn at much higher temperatures than would non-exposed plant materials.
2. EMFs also raise oxidative stress in plants and the free radicals involved in oxidative stress can, in the presence of molecular oxygen from the air, cause terpenes to undergo autoxidation to form terpene hydroperoxides which are explosive. Consequently, EMF exposed plant materials may burn explosively, leading to extremely rapid spread of fires.

Accordingly, the primary mechanism of action of low intensity EMFs in plants will be discussed, how that mechanism leads to increased terpene production in plants and also how that primary mechanism can lead to the production of terpene hydroperoxides which can burn explosively.

The primary mechanism by which EMFs produce effects in plants:

Goldsworthy 2006 reviewed studies showing that many EMF plant effects involved increased intracellular calcium. Pall, 2016 showed that calcium influx through a channel produced those EMF effects.

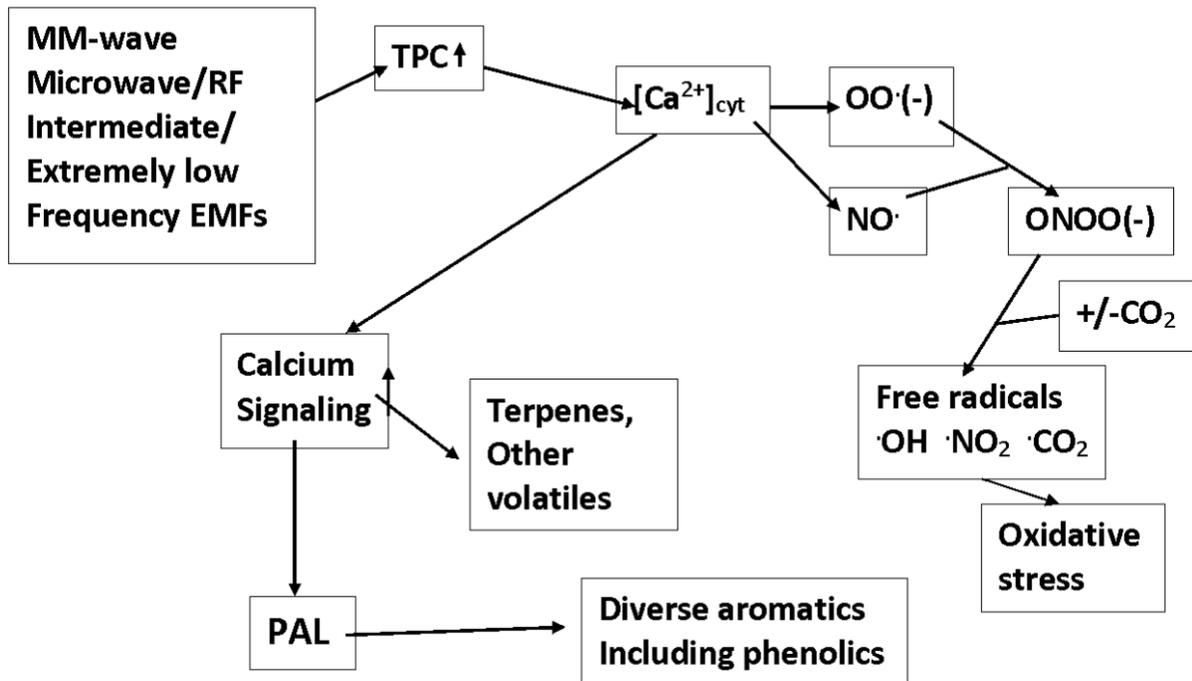


Figure 1. Several responses produced by EMFs in plants that relate to flammability and fires.

[Ca²⁺]_{cyt} = intracellular calcium; NO· = nitric oxide; OO·(-) = superoxide; ONOO(-) = peroxynitrite; ·OH = hydroxyl radical; ·NO₂ = NO₂ radical.

The parts of this Figure most relevant to this document are the increased production of terpenes and the peroxynitrite/free radical/oxidative stress pathway.

Pall, 2016 showed that EMF effects in plant cells and tissues could be blocked by putting cells into calcium-free medium or by putting a calcium chelator into the medium or by using a calcium channel blocker. These findings showed that EMF effects in plants acted by activating a plasma membrane calcium channel, a conclusion also supported by findings that EMF exposures in plant cells and tissues produced large increases in measured intracellular calcium levels. It has been shown that electronically generated low intensity EMFs are coherent, producing vastly higher electric and magnetic forces than do natural, incoherent EMFs (Pall, 2021). Those forces act on the voltage sensor controlling voltage gated calcium channels (VGCCs) in animal cells, opening up the VGCCs and producing increased intracellular calcium. The plant findings (Pall, 2016) were interpreted, suggesting that the so-called TPC channels in plants which contain a similar voltage sensor were also activated by electronically generated EMFs such that EMFs act in plants, similarly to how they act in animals.

Several effects of EMFs in plants are diagrammed in Fig. 1, showing how increased intracellular calcium levels in plants produce each effect shown.

Review articles on EMF-caused effects in plants cited here show that low intensity EMF produce large increases in calcium signaling (Kaur et al 2021, Vian et al, 2006 & 2016), increases in

oxidative stress (Halgamuge 2017, Kaur et al 2021, Vian et al, 2006 & 2016), increases in terpenes and other volatiles (Halgamuge 2017, Kaur et al 2021, Vian et al, 2006 & 2016).

Calcium in plants act to increase the enzyme activity of enzymes involved in terpene synthesis (Hu et al, 2015; Mohanta et al, 2012; Pintus et al, 2010; Vian et al, 2006 & 2016). It follows from this that we not only know that EMFs acting via increased intracellular calcium to produce increased terpenes, and we also know how the increased terpene levels are produced.

EMFs Greatly Increase the Production of Terpene Hydroperoxides and Secondary Oxidized Terpene Metabolites

Terpenes are very highly susceptible to autoxidation (also known as peroxidation) in the presence of oxygen in the air, forming high amounts of hydroperoxyl radicals and also hydroperoxides, each of which can break down to form secondary oxidation metabolites (Bäcktorp et al, 2008; Christensson et al, 2010; Calandra & Wang, 2020). The chemistry of terpene autoxidation is particularly well described by (Bäcktorp et a, 2008). The initial step is that a CH group in the hydrocarbon chain undergoes hydrogen abstraction cause by attacks of free radical. Hydroxyl radicals are particularly active in producing hydrogen abstraction. Hydroxyl radicals are breakdown products of peroxyxynitrite whose levels are very greatly elevated by EMFs acting via excessive intracellular calcium in plants, as shown in Fig. 1. Other free radicals including carbonate radical and peroxy radicals can cause hydrogen abstraction, as well. CH bonds, when they occur in CH groups adjacent to carbon-carbon double bonds in 5 carbon rings are extraordinarily susceptible to hydrogen abstraction because of the stresses on the structures involved. These and other stressed structures in terpenes are what makes them especially susceptible to hydrogen abstraction causing terpenes, in turn, to be very highly susceptible to autoxidation (peroxidation). As discussed in Bäcktorp et a, 2008, the terpene carbon centered radicals produced by hydrogen abstraction react with molecular oxygen (O₂) from the air to produce a terpenoid peroxy radical. The peroxy radical can subsequently produce hydrogen abstraction from another terpene, producing large chain reactions (Bäcktorp et a, 2008). Secondary oxidation products including terpenoid epoxides and formates are also produced from the terpene hydroperoxides.

A very large number of organic peroxides are explosive and how explosive they are when they burn can be predicted from their chemical structure (Sato et al, 2011; Yoshida et al, 1985). The hydroperoxides produced from monoterpenes and sesquiterpenes can be predicted to be quite explosive from the ratio of reductive to oxidative activity of these terpene hydroperoxides (Sato et al, 2011; Yoshida et al, 1985).

Citations:

Bäcktorp C, Hagvall L, Börje A, Karlberg A-T, Norrby P-O, Nyman G. 2008. Mechanism of air oxidation of the fragrance terpene geraniol. *J Chem Theory Comput* 4:101-106.

Calandra MJ, Wang Y. 2020. Oxidative decarboxylation of 2-oxoacids by hydroperoxides can be used to lower peroxide values in citrus oils. *Flavour Fragr J* 35: 107-113.

Christensson JB, Matura M, Gruvberger B, Bruze M, Karlberg AT. 2010 Linalool--a significant contact sensitizer after air exposure. *Contact Dermatitis* 62:32-41.

Goldsworthy A. 2006. Effects of electrical and electromagnetic fields on plants and related topics. Chapter 11 in *Plant Electrophysiology – Theory and Methods* (Volkov, ed.), Springer-Verlag Berlin Heidelberg, 2006, pp 247-267.

Halgamuge MN, 2017. Review: weak radiofrequency radiation exposure from mobile phone radiation on plants. *Electromag Biol Med* 36: 213-235.

Hu ZH, et al. 2015. Ca²⁺ signal contributing to the synthesis and emission of monoterpenes regulated by light intensity in *Lilium 'siberia.'* *Plant Physiol Biochem* 91: 1-9.

Kaur S, Vian A, Chandel, S, Singh HP, Batish DR, Kohli RK. 2021. Sensitivity of plants to high frequency electromagnetic Radiation: cellular mechanisms and morphological changes. *Rev Environ Sci Biotechnol* 20: 55-74.

Mohanta TK, et al. 2012. *Ginkgo biloba* responds to herbivory by activating early signaling and direct defenses. *PLOS One* 7(3), e32822.

Pall ML. 2016. Electromagnetic fields act similarly in plants as in animals: Probable activation of calcium channels via their voltage sensor. *Curr Chem Biol* 10: 74-82.

Pall ML. 2021. Millimeter (MM) wave and microwave frequency radiation produce deeply penetrating effects: the biology and the physics. *Rev Environ Health*

Pintus F et al. 2010. *Euphorbia latex* biochemistry: Complex interactions in a complex environment. *Plant Biosys* 144: 381-391.

Sato, Y; Akiyoshi, M; Miyake, A Matsunaga, T. 2011. Prediction of explosibility of self-reactive materials by calorimetry of a laboratory scale and thermochemical calculations. *Science Technol Energetic Mater* 72: 97-105.

Vian A, Roux D, Girard S, et al 2006. Microwave irradiation affects gene expression in plants. *Plant Signal Behav* 1: 67-70.

Vian A, Davies E, Gendraud M, Bonnet P. 2016. Plant responses to high frequency electromagnetic fields. *BioMed Res Int* 2016; Article ID 1830262.

Yoshida T, Muranaga K, Matsunaga T, Tamura M. 1985. Evaluation of explosive properties of organic peroxides with a modified MK-III ballistic mortar. *J Hazard Mater* 12: 27-41.

APPENDIX VII

Heidi Hill-Drum Email October 15, 2019

Subject: Heidi Hill-Drum to Monica Oct. 15, 2019 re: Cell Tower Maps
Date: Wednesday, December 1, 2021 at 10:19:05 AM Mountain Standard Time
From: Ben Levi
Attachments: image001.png, image002.png

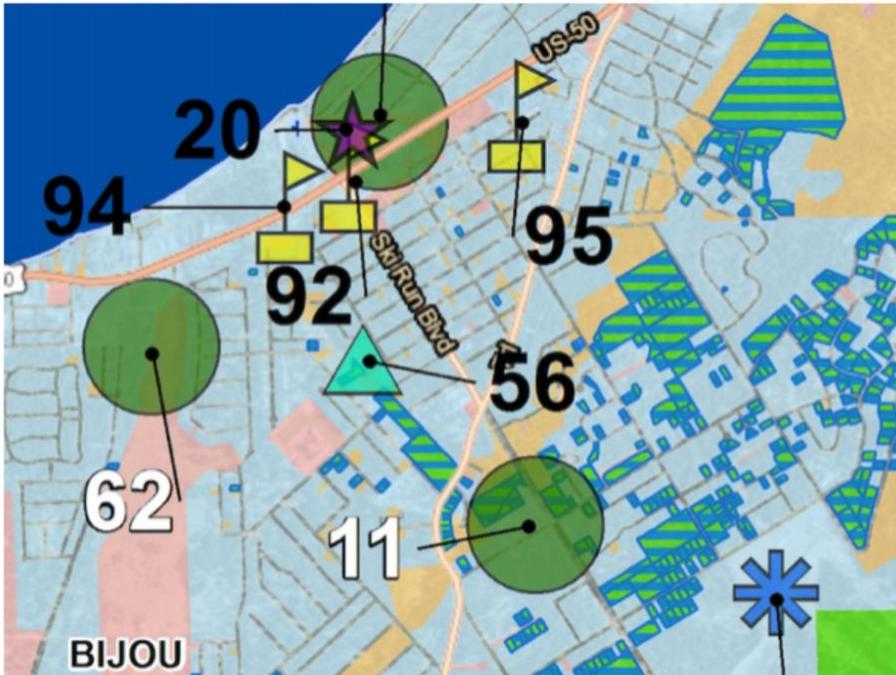
From: Heidi Hill Drum <heidi@tahoeprosperty.org>
To: Monica Eisenstecken <monicalaketahoe@yahoo.com>
Cc: Frank Rush <frush@cityofslt.us>; Ben Lebovitz <benjaminlebovitz@gmail.com>
Sent: Tuesday, October 15, 2019, 03:25:56 PM PDT
Subject: Re: Maps

Hello Monica,

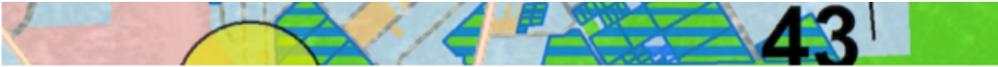
The cell tower maps are not printed and they are for internal use only as part of our Connected Tahoe project. I can share the screen shot of the green dot (#11) on the image below, which is the tower at 1360 Ski Run Blvd. Green dots means a priority site. None of the dots, nor numbers outline which provider, because, in order to ensure that each provider was able to maintain their competitive business advantage, we agreed to code them. I am happy to meet with you in person (as I also offered to do with Ben) and show you the maps on my computer, but they are for internal planning use only. They are also a few years old now as we started this project five years ago.

For reference:

Site 43 on the map is an existing tower at Heavenly, but does not provide coverage to all of Ski Run or inside the buildings. It is a co-located tower, which we required as part of our agreement with the providers. The yellow flags are micro-towers on rooftops, but they do not provide the level of coverage needed for everyone, nor the capacity for our heavy visitation periods. Site 56 (teal triangle) is a KRLT radio tower. You will also note that the other green dots (62 and 20) are priorities as this part of town is generally underserved. I can speak to that as my kids attended Bijou and none of our cell phones worked inside the school.



Page 1 of 2



Expansion Site Priority

-  Long Term
-  Medium Term
-  Short Term
-  Site ID Code
-  Tower Site ID Code

Again, as Frank has mentioned, we are working with other property owners to see if we can find a suitable, alternate location for Verizon and move the tower away from your neighborhood. But, if we are unsuccessful, I hope at least you know that much time, research and thought has gone into each proposed site. It has been an ongoing project for us for five years with, unfortunately little success due to the lengthy permit process, additional TRPA regulations, and the normal engineering and planning that happens here in Lake Tahoe.

Heidi Hill Drum

CEO, www.tahoeprosperty.org



T: 775-298-0265

M: 530-545-9095

E: heidi@tahoeprosperty.org



Uniting Tahoe's Communities to Strengthen Regional Prosperity