RECEIVED
MAY 19 2017
TAHOE REGIONAL
PLANNING AGENCY

11 Dee Court
Smith, NV 89430
May 19, 2017

Governing Board
Tahoe Regional Planning Agency
c/o John Marshall
128 Market Street
Stateline, NV 89449

Re: Appeal of Dr. Gregory Garmong Regarding "Complete Wireless Monopine Project; 811 US Highway 50, Douglas County, NV; Assessor's Parcel No: 1318-03-000-001, TRPA File No: ERSP2015-0778"

To the Board:

REPLY TO LETTER OF MAY 5, 2017 FROM MacKENZIE & ALBRITTON LLP TO TRPA GOVERNING BOARD

Appellant Dr. Garmong responds to the letter dated May 5, 2017 from MacKenzie & Albritton LLP ("Letter") concerning this appeal.

MacKenzie & Albritton LLP has a complete misunderstanding about the nature of this Appeal and appeals generally. This appeal is from a decision of the Hearing Officer based upon the Project Record as it was constituted on February 23, 2017. The Appeal is concerned with whether the TRPA Staff and the Hearing Officer followed the laws and the TRPA Code of Procedures ("Code"), and had made the proper inquiries and "Findings" when the Hearing Officer made his decision to grant the Draft Permit on February 23, 2017, based upon the Project Record as of that date. It is also concerned with whether TRPA denied Appellant Dr. Garmong's Constitutional rights in the course of these proceedings.

MacKenzie & Albritton LLP attempts to submit Exhibits A-F to shore up the Project Record. Appellant Dr. Garmong has concurrently submitted a Motion to Strike Exhibits A-F, which must be done to avoid creating

confusion as to the state of the Project Record as of February 23, 2017.

The Statement of Appeal discusses the governing laws and Code regulations at length by way of demonstrating that the TRPA Staff Memorandum did not meet the governing laws and its own regulations found in the Code. The Letter's opposition has virtually no discussion of the governing laws and Code regulations, thereby conceding that the points raised in the Statement of Appeal are correct.

In its opening paragraph, MacKenzie & Albritton LLP attempts to divert attention from the fact that it does not address the failure of the Staff Memorandum and the Project Record to adhere to the governing laws and Code regulations, stating, "At the center of this appeal is Appellant's unsubstantiated fear that the proposed project will topple and land on the adjacent Douglas County water tower resulting in Titanic-level catastrophe." The Titanic example is not at the "center of this appeal." In fact, the Statement of Appeal focuses almost entirely on the failure of the Staff Memorandum to meet the requirements of the laws and the Code Regulations. The failure of the Staff Memorandum and the Project Record to consider the safety of the Project is found only under Issue 6. The Titanic is discussed there as an example of what happens when uncontrolled hubris leads to a refusal to consider the consequences of structural failure. Neither MacKenzie & Albritton LLP, nor its technical supporters, discuss the technical merits of the Titanic example, a subject apparently beyond their legal comprehension, or dispute it on the technical merits. Instead, they seek to ridicule it. As will be discussed below under Issue 6, the Titanic example is exactly on point as an illustration of overconfidence in engineering and, more significantly, the potentially dire consequences of that overconfidence.

The Letter at pg. 1 asserts that there Board should ignore the laws and rules for two reasons: (1) the project is "badly needed", i.e. the end justifies the means; and (2) the accusation that the Appeal is "frivolous," the usual law-firm approach to attacking the opposition when it has nothing constructive to add.

Appellant Dr. Garmong will address these two arguments in order, using the same identifiers found in the as-filed Statement of Appeal, except that some matters addressed in the Letter are not addressed in the Statement of Appeal.

I. The allegation that the project fills a critical gap in Verizon service along Highway 50 (Letter pg. 1-2) is without relevance to whether the Staff Memorandum and the Project Record reflect adherence to the law and TRPA's Code.

This section of the Letter might well be subtitled "If Verizon decides that a project is needed to increase its profits, any governing laws and regulations that stand in the way must be ignored."

This section relies on Exhibit A, an attempt to introduce new pseudo-factual material in support of Verizon's position. The attempt to introduce and rely upon new material is an admission that no support was present in the Project Record as of February 23, 2017.

The Statement of Appeal never argued that a new cell facility is not needed. There was no point to that, because all applicants believe their projects are needed. However, the governing law and TRPA Code place limitations on the nature of permits that TRPA may allow, regardless of how badly the applicants believe their projects are needed.

This Section I of the Letter seeks to justify the extensive failures of the Staff Memorandum to meet the requirements of the Statutes and Codes on the ground that "the end justifies the means."

Whether the Project is needed or not, it may not be permitted in violation of Statutes and Codes. The Statement of Appeal pointed out the many violations, and Section II of the Letter, discussed below, does not present any argument to dispute the violations. Neither TRPA Staff nor this Board may violate the laws and Codes in order to provide Verizon with enhanced profit, no matter how badly Verizon thinks it needs the Project.

The United States Supreme Court has addressed the Letter's approach of "the end justifies the means", and found against it. Ex parte Milligan, 71 U.S. 2, 76 (1866), does not treat the maxim "the end justifies the means" kindly:

> There has been and will be another quasi political argument,—necessity. If the law was violated because it could not be obeyed, that might be an excuse. But no absolute compulsion is pretended here. These commissioners acted, at most, under what they regarded as a moral necessity. The choice was left them to obey the law or disobey it. The disobedience was only necessary as means to an end which they thought

> desirable; and now they assert that though these means are unlawful and wrong, they are made right, because without them the object could not be accomplished; in other words, the end justifies the means. There you have a rule of conduct denounced by all law, human and divine, as being pernicious in policy and false in morals.
>
> Nothing that the worst men ever propounded has produced so much oppression, misgovernment, and suffering, as this pretence of state necessity. A great authority calls it the tyrant's plea; and the common honestly of all mankind has branded it with infamy.

The United States Supreme Court has reached the same conclusion in more recent cases as well, see for example Donnelly v. DeChristoforo, 416 U.S. 637, 650 (1974); Elkins v. U.S., 364 U.S. 206, 223 (1960).

The Ninth Circuit Court of Appeals has taken a similar position in Com. of Northern Mariana Islands v. Bowie, 236 F.3d 1083, 1091 (Ninth Cir. 2001) that "the end justifies the means" violates the Constitution, "This record emits clear overtones of the Machiavellian maxim: 'the end justifies the means,' an idea that is plainly incompatible with our constitutional concept of ordered liberty."

In short, the United States Supreme Court and the Ninth Circuit Court of Appeals both reject MacKenzie & Albritton LLP's approach of "the end justifies the means."

II. The allegation that the "Appeal is frivolous" (Letter pg. 2-9)

If the appeal were frivolous, the Letter would be able to address each Issue of the appeal, and show where its legal and factual contentions are wrong. It would show that the Staff Memorandum and the Project Record met every one of the laws and Code regulations raised in the Statement of Appeal. It does not even attempt to do that.

The accusation that the "Appeal is frivolous" is a standard big-law-firm approach when it does not know what else to say, and specifically when it does not have any viable substantive response. As will be demonstrated in the following subsections, that is the case here--there is no viable substantive response presented in the Letter.

At the outset of this section, the Letter apologizes, and well it should.

The Letter does not address the substance of the points raised in the Statement of Appeal.

The Letter also grouses that the "appeal itself suffers from excessive length and an 'everything-but the-kitchen-sink' approach." The length of the Statement of Appeal was necessitated by the numerous legal and factual errors in the Staff Memorandum and thence in the decision of the Hearing Officer. It was necessary to discuss all of the grounds for each of the points and Issues raised. Had the Statement of Appeal failed to do so, the Letter would have undoubtedly groused instead that the Statement of Appeal did not cite the support for its position. MacKenzie & Albritton LLP is able to avoid "excessive length" by not addressing the substance of the Issues.

DEMONSTRATION OF SUFFICIENT INTEREST IN THE OUTCOME OF THE APPEAL AND SUFFICIENT ALLEGATION OF ERROR

Statement of Appeal at pgs. 2-4 addresses this subject. The Letter does not address this subject at all, thereby conceding that the Statement of Appeal is correct.

WHAT IS A "FINDING"? THE REQUIRED "FINDINGS" WERE NOT MADE.

Statement of Appeal at pgs. 6-7 addresses the matter of exactly what a "finding" is under the TRPA Code. The Letter does not address this subject at all, thereby conceding that the Statement of Appeal is correct. And, as was demonstrated under the various Issues, in most cases "findings", as defined by the TRPA Code, were not made.

Code Sec. 4.3 and TRPA's definition of "Findings" ("A written statement supported by substantial evidence in the record of the ultimate facts and the rationale supporting a conclusion that applicable Code or Compact requirements are met.), were quoted in the Statement of Appeal. The only written statement upon which the decision of the Hearing Officer was based was the Staff Memorandum. The Staff Memorandum makes many allegations and unsupported statements, but makes very few "findings" supported by "substantial evidence in the record."

The Letter also avers many times that various statements by the Hearing Officer were based upon "substantial evidence," but never points out any of the "substantial evidence."

The only way for the advocates of the Project, Complete Wireless Consulting, Inc. and TRPA, to overcome the Statement of Appeal's many demonstrations of absence of findings is to show exactly where in the Project File or the Staff Memorandum the "substantial evidence" may be found. The Letter does not do so, nor does the Staff Position Paper filed by TRPA.

ISSUE 1
TRPA COULD NOT PROPERLY AWARD A PERMIT TO BUILD A CELLULAR FACILITY AT 811 HIGHWAY 50, DOUGLAS COUNTY, NV TO COMPLETE WIRELESS CONSULTING, INC.

Issue 1 is discussed at Statement of Appeal pg. 7 (and also pgs. 8-9) and Letter pg. 3.

The heading of this section at Letter page 3, line 3, "TRPA Did Not Award a Permit to Complete Wireless Consulting", is correct. It may have attempted to do so, but did not. Of course, it did not properly award a Permit to anyone else either.

"Complete Wireless" was identified as the proponent of the Project in the Subject line at the top of Staff Memorandum pg. 1. But even more importantly, in the Draft Permit at Staff Memorandum pg. 11/35, the Permittee is identified as "Complete Wireless (under lease to the United States Forest Service)" And "Complete Wireless" is identified as the "Permittee" in Exhibit E attached to the Letter, which the Letter claims is a "Final Permit."

The Letter argues that this repeated identification of the Permittee as "Complete Wireless Consulting, Inc." is a "clerical error." On the other hand, the Letter's candidate for Permittee, "Crown Castle", is not mentioned anywhere in the "Draft Permit," nor for that matter anywhere in the text of the Staff Memorandum. "Verizon" is not mentioned in the "Draft Permit." Attempting to introduce these other entities months after the Draft Permit was approved by the Hearing Officer, and the matter is on appeal, is an improper attempt to confuse the issue.

As discussed at Statement of Appeal pg. 2, the appeal is made from the "Hearing Officer's decision on February 23, 2017," which was based upon the content of the Staff Memorandum. If "Complete Wireless Consulting, Inc., "Crown Castle", "Verizon", TRPA Staff, or the Hearing Officer did not agree that the content of the "Draft Permit" and the identification of the Permittee as Complete Wireless Consulting, Inc. was correct, they should have said so

prior to, or at, the hearing of February 23, 2017, so that the change could be included in the scope of the appeal. No one from these entities appeared at the hearing on February 23, 2017, other than representatives of Complete Wireless Consulting, Inc. and TRPA Staff, and they did not say that the Permittee listed on the Draft Permit was wrong. TRPA Staff did not send in a written correction, if such had been proper, nor did anyone else. The "Permittee" of record, as stated by TRPA Staff, is clearly Complete Wireless Consulting, Inc.

This confusion is one primary reason that the Board may not approve the Hearing Officer's decision. Just exactly what entity was the hearing officer considering as the Permittee?

ISSUE 2
COMPLETE WIRELESS CONSULTING INC. IS NOT QUALIFIED TO DO BUSINESS IN NEVADA.

Statement of Appeal pgs. 7-9 points out that Complete Wireless Consulting, Inc. was not qualified to do business in Nevada. Consequently, its advocacy was not permitted by law. It also demonstrated that Complete Wireless Consulting, Inc. has been doing business illegally in Nevada on this Project for at least 4 years. A Maria Kim, identified as an employee of Complete Wireless Consulting, Inc. appeared at the hearing of February 23, 2017 as the sole advocate for the Project, other than TRPA Staff.

The Letter does not disagree that Complete Wireless Consulting, Inc. has been illegally doing business in Nevada for at least 4 years, conceding that Complete Wireless Consulting, Inc. was not qualified to do business in Nevada, and that its advocacy was not permitted by law.

That is, Complete Wireless Consulting, Inc. was and apparently still is, legally a nonentity in Nevada, and could not do business in Nevada, NRS 80.010(1).

Stated alternatively, the advocacy on behalf of the Project by Complete Wireless Consulting, Inc. was an *ultra vires* act that was void and illegal

Black's Law Dictionary, 10th ed., defines "Ultra vires" as "Unauthorized; beyond the scope of power allowed or granted by a corporate charter or by law." See also Shoen v. SAC Holding Corp., 122 Nev. 621, 643, 137 P.3d 1171, 1186 (2006), "Generally, a corporate act is said to be ultra vires when it goes beyond the powers allowed by state law or the articles of incorporation."

State law in the form of NRS 80.010 provides that it is beyond the power of a foreign corporation to do business in Nevada before it qualifies with the Secretary of State. Complete Wireless Consulting, Inc. is a foreign corporation that has not qualified to do business in Nevada, and therefore its acts in Nevada are *ultra vires*.

The *ultra vires* advocacy by Complete Wireless Consulting, Inc. is void. Miller Bros. Co. v. State of Md., 347 U.S. 340, 342, 74 S.Ct. 535, 537 (1954); Shoen, 122 Nev. at 643, 137 P.3d at 1187.

The Letter addresses this subject in two sentences on page 3, arguing that Complete Wireless Consulting, Inc. is not the permit-holder, and that therefore its illegal business and advocacy is "irrelevant." As discussed under Issue 1 above, "Complete Wireless Consulting, Inc." is identified in the Draft Permit and the Staff Memorandum (as well as Exhibit E) as the "permit-holder." The Letter does not disagree that Complete Wireless Consulting, Inc. was doing business in Nevada illegally in advocating the Project, and that its acts are *ultra vires* and void.

In taking this position, the Letter asserts that Verizon and Crown Castle may benefit from illegal activity of Complete Wireless Consulting, Inc., characterized and admitted by the Letter as "an agent." As stated by Justice Marshall in his concurring opinion in Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 151, 88 S.Ct. 1981, 1990-1 (1968), "The principle that a wrongdoer shall not be permitted to profit through his own wrongdoing is fundamental in our jurisprudence." This principle is sometimes also referred to as the "doctrine of unclean hands." Las Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern..., 124 Nev. 272, 182 P.3d 764 (2008).

ISSUE 3
THE HEARING OFFICER DID NOT MAKE THE REQUIRED MOTIONS

Issue 3 is discussed in the Statement of Appeal at pg. 9, and in the Letter at pg. 3. The Statement of Appeal pointed out that the Hearing Officer did not make the two required motions as set forth in the Staff Memorandum.

The Letter, having gotten the audio recording and had a transcript made, does not disagree, and concedes, that the Hearing Officer did not make the two required motions:

1. Motion to approve the required findings (Attachment A), including a finding of no significant effect; and
2. A motion to approve the proposed project subject to the special conditions contained in the draft permit (Attachment B).

Instead, it accuses Appellant Dr. Garmong of making a "frivolous argument that elevates form over substance." It then proposes a little dialog of "I hereby move...motion adopted." Dr. Garmong's response is, first, that the second paragraph on page 1 of the Staff Memorandum says that the two motions must be made; and, second, that if the formality is required, then it must be carried out.

If any body knows the necessity of following the formalities, it will be the members of this Board.

The question arises of whether the Hearing Officer's failure to make the two mandatory motions was an oversight, or because there were good reasons the Hearing Officer could not make the required motions.

As to the First Motion, the Hearing Officer could not make any "finding" of "no significant effect," because Appellant Dr. Garmong demonstrated at the hearing that there would be significant effects. The Second Motion refers to "special conditions contained in the draft permit," which provides that the Permittee is "Complete Wireless Consulting, Inc." and omits significant conditions such as noise limitations and safety issues.

When the Letter argues "form over substance" in respect to a legal requirement, as it does here and elsewhere, it concedes that the requirement was not met.

ISSUE 4
THE PROPOSED "WIRELESS MONOPINE PROJECT" IS NOT A PERMITTED USE IN PLAN AREA STATEMENT 060

The Statement of Appeal addresses Issue 4 at pgs. 10-11, and the Letter addresses it in a paragraph at pg. 4.

The Statement of Appeal pointed out that "Page 2 of Plan Area Statement 060-Genoa Peak sets forth several types of 'Public Service' permissible uses. Under that Public Service' major category, 'transmission and receiving facilities (S)' is listed." But because "transmission and

receiving facilities (S)" is a subcategory to the Public Service major category, any project that seeks to qualify as a "transmission and receiving facilit[y]" must meet the "Public Service" definition as well as the "transmission and receiving facilities (S)" definition. If that were not the intent of Plan Area Statement 060, "transmission and receiving facilities (S)" would be listed as a separate major category rather than a subcategory under the "Public Service" category, so that it did not have to meet the "Public Service" definition.

The Letter argues the "transmission and receiving facilities (S)" definition, but completely ignores the further requirement of "Public Service." If Appellant Dr. Garmong were wrong that the Project also had to qualify under the "Public Service" definition, the Letter could easily have addressed the further requirement and showed that the Statement of Appeal was wrong on this point. Another favorite big-law-firm trick is simply to ignore the issues for which it has no response.

ISSUE 5
REQUIRED FINDINGS FOR NOISE ARE NOT MADE

The Statement of Appeal addresses Issue 5 at pg. 12-16, and the Letter addresses this issue at pg. 4-5.

At the outset of this section of the response, it is necessary to address the so-called "Final Permit" that MacKenzie & Albritton LLP attempts to insert into the record as Exhibit E to its Letter. The alleged "Final Permit," was not part of the Project Record as of February 23, 2017, and therefore is not properly part of the record of the present appeal.

The attempt to introduce the beefed-up "Final Permit" does not substitute for the required findings, which must be made before the permit is issued. The Statement of Appeal at pg. 6 quoted Code Sec. 4.3.1, stating: "All required findings shall be in writing and shall be supported by substantial evidence in the record of review. The findings required by Section 4.4 shall be in writing prior to the approval of the proposed matter." MacKenzie & Albritton LLP cannot add new pseudo-factual argument after the hearing of February 23, 2017, and assert that the new material is the required "finding" of Sec. 4.4. That attempt is directly contrary to Code Sec. 4.3.1.

A comparison of the "Final Permit" of Exhibit E with the "Draft Permit" of Staff Memorandum pg. 9-15/35 reveals that a lot of new material has been added as "Special Conditions." As an example, underlined "Special Conditions" 4-5 on page 4 of Exhibit E are not found anywhere in the Staff

Memorandum or the Project Record. Adding in "Special Conditions," which may or may not be enforced, is not a substitute for the noise findings of Code Sec. 4.4.1, discussed at Statement of Appeal pgs. 12-16. TRPA Staff cannot ignore and sidestep the required findings of Code Sec. 4.4.1 by adding in "Special Condition."

Next consider what was in the Project Record as of February 23, 2017 in relation to the subject of "noise." To support its contentions about noise, Complete Wireless Consulting, Inc. submitted to TRPA an "Environmental Noise Analysis Lincoln Creek Cell Tower Site," "Prepared for Complete Wireless Consulting", and stating the Sacramento address of Complete Wireless Consulting, Inc., found in the project file. This document is dated February 20, 2013. This document employed an approach utilizing noise measurement at great distances from the project site, which is directly in conflict with the TRPA noise measurement approach specified in Code Ch. 68, specifically Code Sec. 68.5.3 (Code pg. 514/610).

Complete Wireless Consulting, Inc. straightforwardly sought to mislead TRPA into approving noise standards that are contrary to the Code. There is no other "substantial evidence" concerning "noise" in the Project file.

What is most disturbing is that MacKenzie & Albritton LLP seeks to perpetrate this same misleading approach on the Board, see Letter pg. 4, first paragraph under the section labeled "E. The Hearings Officer Made the Required Noise Findings Based On Substantial Evidence." The only evidence in the Project Record on the subject of noise was evidence directly contrary to the mandatory provisions of Code Sec. 68.5.3.

The Letter at pg. 8, second paragraph under Section E, argues "Appellant does not question any of this evidence." Appellant Dr. Garmong most certainly did question "this evidence," see the discussion above. The material submitted by Complete Wireless Consulting, Inc. concerning noise did not even attempt to comply with the requirements of Code Ch. 68, specifically Code Sec. 68.5.3 (Code pg. 514/610), specifying the placement of the microphone for noise measurement. Neither the "Draft Permit" nor the "Final Permit" nor the Staff Memorandum even mentions Code Sec. 68.5.3, much less compliance.

Regardless of the so-called "Final Permit," as discussed at Statement of Appeal pgs. 12-16 the Staff Memorandum does not make the required findings of Code Sec. 4.4.1.A-C. The Letter does not address this absence of

"findings" at all, conceding that the findings are not made.

The Letter asserts that "Appellant was satisfied with the conditions related to noise," because he allegedly stated "I'm glad you're putting on a condition that there will be monitoring. Because otherwise I would be concerned with the noise issue slipping through the cracks." Appellant Dr. Garmong was glad that some attention was finally being paid to noise, but adding a condition post-hearing is absolutely unacceptable from the standpoint of the required "Findings" of Code Sec. 4.4.1 and due process.

ISSUE 6
REQUIRED SPECIAL USE FINDINGS FOR SAFETY AND GENERAL WELFARE ARE NOT MADE

This Issue 6 is addressed at Statement of Appeal pgs. 16-27 and briefly by the Letter at pg. 5.

At the outset, Appellant Dr. Garmong again expresses his dismay that Complete Wireless Consulting, Inc., which had 10 years to evaluate the Project, and TRPA Staff, which had at least 16 months to evaluate the Project, either never noticed that when the monopine falls over it will crush the Skyland water tank, or noticed and suppressed that information. The drawing on page 31/35 of the Staff Memorandum provides the information.

Appellant Dr. Garmong observed the problem within a minute of first looking at page 31/35, and discussed it in his letter to the Hearing Officer of February 22, 2017. The Statement of Appeal at pgs. 16-18 sets forth the Code provisions that must be satisfied, including the required "Findings" of Code Sec. 21.2.2. Statement of Appeal pgs. 18-24 demonstrates that these "Findings" were not made, as "Findings" are defined by TRPA

This section of the Letter is truly conspicuous by its failure to address the Code and the facts, and Issue 6. Its primary approach is name calling about technical issues that the lawyers of MacKenzie & Albritton LLP do not seem to understand. The letter does not address at all Code Sec. 21.2.2 and the absence of the required "Findings" in the Staff Memorandum.

The Letter disparages Exhibits 6-7, but has no response. They were presented to demonstrate that the safety issue of the toppling tower is real and a valid concern. The Letter does not disagree that Exhibit 6 demonstrates that the proposed monopine tower is intentionally positioned so that it will fall into and destroy the Skyland water tank when it fails. The Letter does not disagree that Exhibit 7 demonstrates that cell towers may fail in this manner.

The Letter instead pulls another of the tricks of big-law-firm practice, by attempting to shift the burden of proof to the public in this case: "there is no evidence that the tower is at risk of falling or damaging the water tank." There are two responses.

The first response is that it is the duty of Staff to establish that there is no safety concern, see Code Sec. 21.2.2. Nothing in the Code provisions cited under Issue 6, or elsewhere, requires the public to prove or disprove the safety issue. It was not the job of the public, including Appellant Dr. Garmong, to prove that there is a danger. Instead, it is the duty of the TRPA Staff, as mandated by Code Sec. 21.2.2, to consider the safety issue and prove that it is not a concern, so that a proper "Finding" can be made. The Staff Memorandum does not mention the safety issue other than a conclusory statement, and with absolutely no support in the Project Record.

The second response is that, yes, there is evidence of risk. Exhibit 7 shows that monopole towers do fail in this manner, and Exhibit 6 shows that when the Project monopole does fail in this manner, it is intentionally positioned so that it will fall into and destroy the Skyland water tank. What is completely lacking is evidence that "the applicant has taken reasonable steps to protect against any such injury and to protect the land, water, and air resources of both the applicant's property and that of surrounding property owners." See Code Sec. 21.2.2.B.

The second paragraph under heading F on page 5 of the Letter makes a number of statements that are not supported in the Project Record, and which are apparently intended to supplement the Project Record. For example, there is a reference to an Exhibit A that purports to give evidence on the safety issue. That was not part of the Project Record and accordingly is not part of the evidence in this appeal. In any event, neither Exhibit A nor Exhibit D to the Letter addresses Exhibits 6 and 7 of the Statement of Appeal.

The second paragraph has a great deal of speculation about what Douglas County might do, which is, once again, not a part of the Project Record for the purposes of the appeal.

The second paragraph admits that the Project as presented to TRPA is not the project that is being pursued by Complete Wireless Consulting, Inc.: "It is also engineered to support the additional weight of future collocations." If Complete Wireless Consulting, Inc. contemplates "future collocations," why was this expansion not presented to TRPA as the actual project? As was pointed out in the Statement of Appeal, the Applicant had the materials from

the US Forest Service file, but did not submit them to TRPA because the project proposed to the Forest Service, which included the expansion and was different from that proposed to TRPA. The expansion is what was presented to the Forest Service as its version of the Project. See Statement of Appeal pg. 37 and Exhibit 10. That is the real reason that Complete Wireless Consulting, Inc. concealed the content of its proposal to US Forest Service and pushed TRPA's acquisition of that information to after the Permit is approved, See Exhibit E, page 3, para. 3D.

Maria Kim of Complete Wireless Consulting, Inc., the Project's only advocate other than TRPA Staff and the Hearing Officer, in a moment of candor readily admitted that the cellular tower can fail in exactly the manner depicted in Exhibits 6 and 7.

Applicant Dr. Garmong must address the Titanic issue, which is the main source of attempted ridicule in the Letter. MacKenzie & Albritton LLP attempt to substitute ridicule for engineering principles, reason, and law, the "big firm" approach when there is no intelligent response. The ridicule is directed toward the Titanic example, which actually is quite valid and which, like the present Project, exemplifies the arrogance of engineering design, the refusal to accept the possibility of failure, and the potentially disastrous consequences of a low-probability failure. The Titanic example is used in engineering courses to illustrate these points. The Titanic example was one minor part of Issue 6 of the Statement of Appeal, which had far more discussion of the failure of TRPA to follow its own regulations. But even then, the folks at MacKenzie & Albritton LLP never show that the Titanic example is faulty, only that as lawyers they do not understand its significance.

Appellant Dr. Garmong presented the Titanic example under this Issue 6, at Statement of Appeal pgs. 21 and 26. The direct relevance of the Titanic example is that the ship was carefully engineered to be "unsinkable." That the Titanic might strike an iceberg and sink was a very-low-probability event, according to its builders, much as the toppling failure of the monopine is a low-probability event according to Complete Wireless Consulting, Inc. The builders of the Titanic were confident that these low-probability events would not happen. Consequently, the decision makers included lifeboats for only about half the souls on board. Nevertheless, the low-probability collision occurred on Titanic's very first trip. Titanic did hit an iceberg and sank, and over half the people on board perished as a result of engineering

overconfidence, some would say arrogance and recklessness, in not including sufficient lifeboats.

Engineers learn lessons from examples like this, whose conceptual teachings are directly applicable to other engineering projects like the present one. Apparently lawyers paid to advocate a dangerous project do not learn such lessons, or if they do their instinct is to attempt to poke fun at them. Couldn't happen here!

The lesson is this: no matter how carefully a structure is designed and built, intentional placement in a position where a failure can lead to disaster is tantamount to criminal negligence. It's that simple, but the lawyers of MacKenzie & Albritton LLP cannot comprehend that simple engineering principle. They find that making fun of the engineering and design principles is easier than trying to understand them. If only we could build cellular monopoles towering over the homes of the lawyers of MacKenzie & Albritton LLP and the other advocates of this project, they might change their minds.

Again, it must be asked. Why risk severe destruction to life and property when selection of an alternative site would avoid the risks?

ISSUE 7
LAND COVERAGE LIMITS FOR THE PROJECT ARE EXCEEDED, AND NO EXCEPTIONS APPLY

The Statement of Appeal addresses coverage at pgs. 27-33. The Letter address Issue 7 at pg. 5-6. The letter does not disagree with the analysis of Issue 7 found in the Statement of Appeal, and thence concedes it.

The first paragraph of the Letter pg. 6 asserts that the Letter addresses the matter of whether the Project is a "public service facility" under TRPA's definitions, in "section II.D. above." That is another false statement by MacKenzie & Albritton LLP intended to mislead the Board into believing that the Letter addresses this subject. The concept of "public service facility" does not appear at all in Letter Sec. II.D.

The second paragraph of Letter pg. 6 argues that "none of his proposed alternatives were feasible." There is a reference to Exhibit D, but that was not evidence in the record, from which the hearing officer could have made a finding. There is not one bit of evidence in the Project Record that alternative sites were considered by TRPA Staff prior to the hearing of February 23, 2017, even though consideration of alternative sites for the Project is expressly mandated by Code. Sec. 37.7.7 Finding 7 and Code Sec. 30.5.1.C.2.

It is not the public's job to identify feasible alternative sites, but it is the Code-mandated duty of TRPA staff to identify and consider alternatives prior to the preparation of the Staff Memorandum. The advocates of the project, Complete Wireless Consulting, Inc. and TRPA Staff, cannot avoid this duty by pushing it off to the public in the form of Appellant Dr. Garmong.

ISSUE 8
PERMISSIBLE CELL TOWER HEIGHT LIMITS ARE EXCEEDED

Issue 8 is discussed at Statement of Appeal pgs. 33-39, and Letter pg. 6-8.

While Statement of Appeal focused very precisely on Code. Sec. 37.7.7 Findings 4 and 7, the Letter does not mention these Code sections at all.

The Letter's discussion of Issue 8 is built around the same tactic used earlier, attempting to turn the burden of proposing and evaluating sites onto the Appellant: "The problem is that Appellant has not identified a single *feasible* alternative site." That is not what Code. Sec. 37.7.7 Finding 7 requires. It requires TRPA to identify and evaluate alternatives and make "Findings" based in evidence in the project record, which it refused to do on the theory that such alternatives constitute a different project. They are not a different project, but instead a required part of the evaluation process for the current Project. In any event, no alternatives are identified or evaluated in the Project Record as of February 23, 2017, nor does the Letter point to any such alternatives identified in the Project Record as of February 23, 2017.

In regard to identifying alternatives, it may be recalled that the public, including Appellant Dr. Garmong, had 1-6 hours to evaluate the Staff Memorandum together with the Project file, as discussed under Issue 9 at Statement of Appeal pg. 41. The point of identifying some alternatives in the letter to TRPA of February 23, 2017, was that there are alternatives that need to be evaluated, not that Appellant Dr. Garmong was proposing specific alternatives. The Letter's attempt to turn the tables to put the burden of identifying and evaluating alternatives, when the public had 1-6 hours access to the Project Record to identify alternatives, is a transparently dishonest tactic to attempt to avoid the requirement of Code Sec. 37.7.7 Finding 7. It is part of the reason that Appellant Dr. Garmong was denied due process, see the extensive authority from the US Supreme Court cited at Statement of Appeal pgs. 43-45. It also highlights the denial of due process inherent in TRPA's Code procedural provisions in relation to the public.

Most of the discussion of Issue 8 in the Letter is alleged statements of what "was explained to Appellant at the hearing repeatedly" and what the hearing officer speculated at the hearing. None of this is evidence or "findings." Evidence in the Project Record is required to make "findings", as in "Finding 4" and "Finding 7."

The discussion of alternatives at Letter pages 7-8 is sheer sophistry. For example, the statement "Placing a 120-foot tall cell tower upon a ridgeline would make it visible from almost every vantage point" does not reflect the alternative that Appellant Dr. Garmong proposed. He proposed a monopine that would be much shorter than 120 feet yet still reach over the tops of the trees, and would be camouflaged completely. The argument of MacKenzie & Albritton LLP that placement of the monopine on the top of the ridge would still require a 120-foot-tall monopine is not technically correct. If a 120-foot-tall monopine placed at the bottom of a valley reaches over the tops of the adjacent trees, and the ridge is 70 feet tall, a tower on the top of the ridge would only have to be 50 feet tall to clear the tops of the same trees. MacKenzie & Albritton LLP proposes an overly tall monopine to make the alternative site appear to be infeasible. And, if the representations of Complete Wireless Consulting as to the efficacy of its camouflage practices are truthful, the 50 foot tall monopine would be fully camouflaged and indistinguishable from the surrounding natural trees.

Similarly, placement of the project on the public-lands Dreyfus Estate would overcome virtually all of the objections. There is already a paved circular driveway that allows vehicle turnaround and easy access so that Verizon's profits could be as high as they are with the proposed Project. The cellular facility would be built next to the paved driveway, and very little additional land coverage would be required. Specifically, no fire-department turnaround with additional land coverage is necessary. Power is available to the site. The land is virtually flat, and little if any environmentally sensitive Type 1a land would be involved, in contrast with the present Project which is virtually all Type 1a land. The argument that there would be greater visual impact also is contrary to the representations of the Staff Memorandum that the monopine antenna camouflaged as a tree is virtually not visible. And, best of all, the cell tower would be placed so that it did not endanger any homes and property when it topples over, and would not fall into and destroy the Skyland water tank.

ISSUE 9
TRPA VIOLATED DR. GARMONG'S CONSTITUTIONAL RIGHTS

Issue 9 is discussed at Statement of Appeal pgs. 39-48, and at Letter pg. 8.

The Letter in the first paragraph under Subheading I on page 8 makes a half-hearted attempt to address the requirements of "due process," arguing that Appellant Dr. Garmong has no "life" interest in his personal safety from fire, and no "property" interest in the fire safety of his person and his home, and the water supply to his home. It asserts that the toppling of the proposed cellular tower onto the Skyland water tank "does not pose a credible threat to his water supply." (Similarly, hitting an iceberg did not pose a credible threat to the Titanic.) But of course the likelihood of the destruction of his home and loss of his life by fire resulting from the proposed Project is not germane to whether he has a property interest. Appellant Dr. Garmong has a "life" interest in his personal safety as jeopardized by fire caused by the Project, and a "property" interest in his water supply and his home related to the same cause.

The Letter in the second paragraph under Subheading I on page 8 then argues that Appellant Dr. Garmong had plenty of time--in fact all of 1-6 hours--to learn about the Applicant's case, while not disputing the fact that Complete Wireless Consulting, Inc. had 10 years to develop the Project and TRPA Staff had 16 months or more to evaluate the Project.

In the third paragraph after Subheading I on page 8, the Letter argues that the appeal does not present any legitimate issue of Code compliance, environmental impacts, or other grounds to overturn the Hearing Officer's decision. Appellant Dr. Garmong relies on the Statement of Appeal, this letter, and any other response that he may make to disprove that conjecture.

The third paragraph also argues, without citing any authority, that "[A]ny issue of notice, preparation time, or other procedural issues will be rendered moot by this Board's consideration of the appeal." That argument is directly contrary to the principle that deprivation of Constitutional rights, for any amount of time, is still a forbidden Constitutional violation. See Melendres v. Arpaio, 695 F.3d 990, 1002 (9th Cir 2012), involving a claim of violation of Fourteenth Amendment rights, and citing Elrod v. Burns, 427 U.S. 347, 373, 96 S.Ct. 2673, 2690 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes

irreparable injury".) Deprivation of Constitutional Rights cannot be "mooted." Further, there is no principle of law suggesting that a failure to give proper notice of a hearing can be remedied by the time period after the evidentiary hearing and before the appeal hearing.

RELATED CONSIDERATIONS

The related considerations are discussed in the Statement of Appeal at pgs. 50-51 and in the Letter at pg. 8-9.

A. Complete Wireless Consulting, Inc.'s concealment of the Forest Service lease from TRPA and the public.

As discussed at Statement of Appeal pg. 49-50, the project as presented to TRPA differs from that presented to the Forest Service. This difference was concealed from TRPA, and apparently TRPA Staff, in adopting its position of advocacy of the Project, did not request it from Complete Wireless Consulting, Inc.

B. The risks to TRPA and the public of issuing the Permit.

As discussed at Statement of Appeal pg. 50-51, the Permittee Complete Wireless Consulting, Inc. has no showing of sufficient financial assets to indemnify TRPA when the cell tower fails, topples into the Skyland water tank, the water supply of Skyland is disrupted, a major forest fire occurs simultaneously, and an estimated $183 million damages are done to Skyland homes, and people are killed. TRPA will be responsible for the damages.

To conclude that an indemnification by Complete Wireless Consulting, Inc. (or Crown Castle, for that matter) is sufficient to protect the public and TRPA would be an abandonment of responsibility by TRPA. Only a cash deposit or a fully paid bond, of for example $250 million, will satisfy the indemnification.

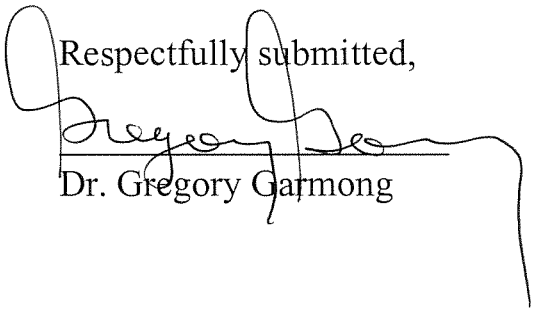
C. The Parting Shot of MacKenzie & Albritton LLP

The Letter at pg. 9 in closing has one final shot of mudslinging by accusing Appellant Dr. Garmong of being an "hysteric" because he advocates the rule of law against those who seek to overturn it, and wants to protect his home and person against those who seek to endanger them in the name of Verizon's profit. Appellant Dr. Garmong is not ashamed to advocate law over irrational greed, and to want to protect his life and property.

The undersigned hereby affirms this document does not contain a social security number.

Dated: May 19, 2017

Respectfully submitted,



Dr. Gregory Garmong

11 Dee Court
Smith, NV 89430
May 19, 2017

Governing Board
Tahoe Regional Planning Agency
c/o John Marshall
128 Market Street
Stateline, NV 89449

RECEIVED
MAY 19 2017
TAHOE REGIONAL
PLANNING AGENCY

Re: Appeal of Dr. Gregory Garmong Regarding "Complete Wireless Monopine Project; 811 US Highway 50, Douglas County, NV; Assessor's Parcel No: 1318-03-000-001, TRPA File No: ERSP2015-0778"

To the Board:

MOTION TO STRIKE EXHIBITS A-F OF LETTER OF MAY 5, 2017 FROM MacKENZIE & ALBRITTON LLP TO TRPA GOVERNING BOARD

Appellant Dr. Gregory Garmong moves to strike Exhibits A-F of the Letter of May 5, 2017 from MacKenzie & Albritton LLP to TRPA Governing Board ("Letter").

MEMORANDUM OF POINTS AND AUTHORITIES

MacKenzie & Albritton LLP has a complete misunderstanding about the nature of this Appeal and appeals generally. This appeal is from a decision of the Hearing Officer based upon the Project Record as it was constituted on February 23, 2017. The Appeal is concerned with whether the TRPA Staff and the Hearing Officer followed the laws and the TRPA Code of Procedures ("Code"), and had made the proper inquiries and "Findings" when the Hearing Officer made his decision to grant the Draft Permit on February 23, 2017, based upon the Project Record as of that date. It is also concerned with whether TRPA denied Appellant Dr. Garmong's

Constitutional rights in the course of these proceedings.

Stated another way, Dr. Garmong's Appeal is not presented as an opportunity for MacKenzie & Albritton LLP to supplement the Project Record, or to present arguments that are not based upon the Project Record as of February 23, 2017, in an attempt to buttress the unsupported decision of the Hearing Officer. The decision was made on the basis of the record as of February 23, 2017, not on an improperly supplemented record as it might exist at a later date.

The Letter includes Exhibits A and C-F whose sole purpose appears to be, from the text of the Letter, to attempt to supplement the Project Record to provide missing pieces and information that were simply not present as of the time the Hearing Officer made his decision to approve the Draft Permit. The only pertinent record is that existing as of the hearing on February 23, 2017. The Project Record as of February 23, 2017 cannot be supplemented retroactively for the purposes of this Appeal to provide the admittedly missing parts, any more than a party in an appellate court may supplement the record made before the lower court with additional information to help support its case. Exhibit B, which might otherwise be admissible, is not properly signed and certified, and is contrary to a commitment of TRPA Staff that there would not be a transcript.

Indeed, the attempt to supplement the Project Record is an admission that it was not complete and sufficient to support the findings and decision of the Hearing Officer as of the date of the hearing, February 23, 2017.

MacKenzie & Albritton LLP also misunderstands the concepts of authentication and admissibility of evidence. It cannot throw just any collection of paper in front of an adjudicative body and expect that it will be treated as evidence.

SUMMARY OF ARGUMENT

A primary basis of this Motion is that Exhibits A and C-F submitted as part of the Letter are not relevant to the appeal. If they remain part of the Letter, they may be misused during the appeal process, as they are misused by the Letter, to suggest that the information in the Exhibits was part of the Project Record as of February 23, 2017. Specifically, Exhibits A and C-F that are the subject of this Motion were not part of the Project Record as of the time the Staff Memorandum was prepared, and were not part of the Project

Record as of the hearing on February 23, 2017. This appeal is taken from the decision of the Hearing Officer announced at the hearing of February 23, 2017, not from some moving target that changes at the will of the advocates of the project, TRPA Staff, the Hearing Officer, and Complete Wireless Consulting, Inc. There are other grounds for exclusion of Exhibits A and C-F, as will be discussed below. Exhibit B that is the subject of this Motion is a collection of paper that is not admissible evidence, because it is not a certified transcript.

The individual exhibits and the requested action are addressed in the following discussion.

A. Exhibit A, Strike in its Entirety

Exhibit A is a Declaration of Molly Kales that purports to address various matters relating to the Project, and is dated May 4, 2017. From its date, Exhibit A was clearly not part of the Project Record as of February 23, 2017, nor was the information in Para. 3-10 of Exhibit A part of the Project Record as of February 23, 2017. Exhibit A does not aver that any portion of the material referred to therein was part of the Project Record as of February 23, 2017. Accordingly Exhibit A has no relevance to this appeal or probative value.

Exhibit A is not relevant under NRS 48.015. The pertinent question is the content of the Project Record at the time the Hearing Officer made his determination on February 23, 2017. Exhibit A can have no tendency to make the existence of any fact in the Project Record as of February 23, 2017, that is of consequence to the determination of the action, more or less probable than it would be without Exhibit A. Exhibit A never contends that any of the statements made or information contained therein were part of the Project Record as of February 23, 2017. Exhibit A is not relevant, is inadmissible, and should be excluded as prejudicial pursuant to NRS 48.025(2). Even if Exhibit A were found to be relevant, it should be excluded pursuant to NRS 48.035 as prejudicial, because Appellant Dr. Garmong is severely prejudiced by having newly introduced material available to the Board that was not in the Project Record as of February 23, 2017, and upon which he based his Appeal, but could be easily recalled improperly by Board members as being part of the record as of February 23, 2017.

B. Exhibit B, Strike in its Entirety

Exhibit B purports to be a "transcript" of the hearing of February 23, 2017.

Exhibit B is not properly evidence before this Board.

The Certification at page 69 of Exhibit B is not signed, nor is the person identified, one Sonya Ledanski Hyde, asserted to have any qualifications for making transcripts for legal proceedings, such as being a certified reporter.

On May 16, 2017, Appellant Dr. Garmong searched the online records of the reporter licensing agencies of both the State of California and the State of Nevada. See Para. 3-4 of attached Declaration of Gregory Garmong.

There is no listing for a Sonya Ledanski Hyde in either the California or Nevada records as being a certified reporter. Accordingly, there is no basis for any "certification" by that person, even if Exhibit B were signed.

The admissibility, veracity, and accuracy of the "transcript" are therefore doubtful.

Equally compelling as a reason that Exhibit B should be struck, at the start of the appeals process, in response to a query from Appellant Dr. Garmong, TRPA's counsel straightforwardly stated "No transcript of the public hearing will be prepared." See Exhibit 5 to the Statement of Appeal, para. 4. Appellant Dr. Garmong relied on this representation and did not pursue the matter of obtaining a properly certified Transcript that would be admissible. TRPA is now estopped to rely on an unsigned, unauthenticated purported Transcript, after having made this representation to Appellant Dr. Garmong. The transcript may not be used and should therefore be excluded as inadmissible and prejudicial.

C. Exhibit C, Strike in its Entirety

Exhibit C is six "photosimulations" each bearing a date of February 25, 2017 in the upper right hand corner. Inconsistently, each "photosimulation" bears a copyright date of 2012 at the lower left hand corner. February 25, 2017 is after the Hearing date of February 23, 2017, and accordingly the "photosimulations" of Exhibit C could not have been part of the Project record as of February 23, 2017.

There is no identification of the person who prepared the "photosimulations", and there is no authentication of the "photosimulations" as required by NRS as required by NRS 52.015 as to what they might depict.

These "photosimulations" are apparently computer-generated images produced out of the imagination of the computer operator. Computer-generated images are notoriously easy to falsify with commercially available image-manipulation computer programs.

Exhibit C is not relevant under NRS 48.015. The pertinent question is the content of the Project Record at the time the Hearing Officer made his determination on February 23, 2017. Exhibit C can have no tendency to make the existence of any fact in the Project Record as of February 23, 2017, that is of consequence to the determination of the action, more or less probable than it would be without Exhibit C. Exhibit C never contends that any of the "photosimulations" were part of the Project Record as of February 23, 2017. Exhibit C is not relevant, is inadmissible, and should be excluded as prejudicial pursuant to NRS 48.025(2). Even if Exhibit C were found to be relevant, it should be excluded pursuant to NRS 48.035 as prejudicial, because Appellant Dr. Garmong is severely prejudiced by having newly introduced material available to the Board that was not in the Project Record as of February 23, 2017, but could be easily recalled improperly by Board members as being part of the record as of February 23, 2017.

D. Exhibit D, Strike in its Entirety

Exhibit D is a Declaration of one Maria Kim. Exhibit D is dated May 5, 2017, well after the hearing date of February 23, 2017. It could not have been part of the Project Record as of February 23, 2017, and accordingly is irrelevant to the appeal. The information in Para. 4-6 and 9-13 was not part of the Project Record as of the hearing on February 23, 2017, and accordingly is not relevant to the appeal. The purpose of Para. 4-6 and 9-13 is to suggest that alternatives were properly considered in the Project Record, and such a suggestion is false and without support in the Project Record. Indeed, the attempt to introduce such an argument is an admission that alternatives were not considered as part of the Project Record.

Additionally, Para. 2 identifies the Declarant as an employee of "Complete Wireless Consulting, Inc." As explained in Issue 2, pages 7-9 of the Statement of Appeal, "Complete Wireless Consulting, Inc." is not qualified to do business in Nevada. Consequently, the attempt of an employee of "Complete Wireless Consulting, Inc.", Maria Kim, to submit declaration evidence in support of the Project, and thence do yet further business in Nevada, is a violation of the law of Nevada. Violators cannot

properly benefit from the fruits of their violations.

This advocacy by "Complete Wireless Consulting, Inc." was an *ultra vires* act that was void.

Black's Law Dictionary, 10th ed., defines "Ultra vires" as "Unauthorized; beyond the scope of power allowed or granted by a corporate charter or by law." See also Shoen v. SAC Holding Corp., 122 Nev. 621, 643, 137 P.3d 1171, 1186 (2006), "Generally, a corporate act is said to be ultra vires when it goes beyond the powers allowed by state law or the articles of incorporation."

State law in the form of NRS 80.010 provides that it is beyond the power of a foreign corporation to do business in Nevada before it qualifies with the Secretary of State, and therefore is an *ultra vires* act. Complete Wireless Consulting, Inc. is a foreign corporation that has not qualified to do business in Nevada.

The *ultra vires* advocacy by "Complete Wireless Consulting, Inc." is void. Miller Bros. Co. v. State of Md., 347 U.S. 340, 342, 74 S.Ct. 535, 537 (1954); Shoen, 122 Nev. at 643, 137 P.3d at 1187. As stated by Justice Marshall in his concurring opinion in Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 151, 88 S.Ct. 1981, 1990-1 (1968), "The principle that a wrongdoer shall not be permitted to profit through his own wrongdoing is fundamental in our jurisprudence." This principle is sometimes also referred to as the "doctrine of unclean hands." Las Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern..., 124 Nev. 272, 182 P.3d 764 (2008).

Any act of "Complete Wireless Consulting, Inc." and its employees in Nevada, such as the Declaration Exhibit D, is *ultra vires* and void. Miller Bros. Co. v. State of Md., 347 U.S. 340, 342, 74 S.Ct. 535, 537 (1954); Shoen v. SAC Holding Corp., 122 Nev. 621, 643, 137 P.3d 1171, 1187 (2006).

E. Exhibit E, Strike in its Entirety

Exhibit E is a collection of paper self-described as a "permit and attachments for the project referenced above." It should be struck for two reasons.

1. Exhibit E is not relevant to this appeal, which is taken from the Hearing Officer's decision of February 23, 2017. The Project record as of that date included a Staff Memorandum dated February 16, 2017, of which pages 9-15/35 are a "Draft Permit." It is this "Draft Permit" that was before, and

apparently approved by, the Hearing Officer and is the subject of this appeal, not Exhibit E.

There is no authentication of Exhibit E or demonstration that Exhibit E was part of the Project record at the time the Hearing Officer made his decision on February 23, 2017, contrary to NRS 52.015.

Exhibit E is not relevant under NRS 48.015. The pertinent question is the content of the Project Record at the time the Hearing Officer heard the matter on February 23, 2017. Exhibit E can have no tendency to make the existence of any fact in the Project Record as of February 23, 2017, that is of consequence to the determination of the action, more or less probable than it would be without Exhibit E. Exhibit E never contends that any of the arguments set forth in Exhibit E were part of the Project Record as of February 23, 2017. Exhibit E is not relevant, is inadmissible, and should be excluded as prejudicial pursuant to NRS 48.025(2). Even if Exhibit E were found to be relevant, it should be excluded pursuant to NRS 48.035 as prejudicial, because Appellant Dr. Garmong is severely prejudiced by having newly introduced material available to the Board that was not in the Project Record as of February 23, 2017, but could be easily recalled improperly by Board members as being part of the record as of February 23, 2017.

2. The TRPA pre-hearing package provided to Appellant Dr. Garmong on May 17, 2017 includes both "Exhibit E" dated February 23, 2017, which purports to be a "Final Permit", and an "Attachment A" dated February 23, 2017, which also purports to be a "Final Permit." These two purported "Final Permits" are different and inconsistent. Exhibit E lists "Complete Wireless" and United States Forest Service as the Permittee(s), and Attachment A lists "Crown Castle" and United States Forest Service as the Permittee(s). The original Draft Permit, which is not included with the Staff Position Paper but is part of the record for this appeal, and was attached to the Staff Memorandum, listed Complete Wireless (under lease to the United States Forest Service) as the Permittee(s). Exhibit E and Attachment A differ in other provisions from the Draft Permit.

Neither Exhibit E nor Attachment A was part of the Project Record as of the time of the Hearing on February 23, 2017, although they have both been dated February 23, 2017 to give the appearance that they were somehow connected to the Hearing and the Project Record as of that date.

There are three separate versions of the "Permit" now floating around, including Exhibit E and Attachment A, both dated February 23, 2017 and

both purporting to be the "Final Permit." TRPA's attempt to create this kind of confusion and deception in the Appeal Record, and its attempt to improperly supplement the Project Record, cannot be condoned.

Only the Draft Permit was approved by the Hearing Officer on February 23, 2017. Neither Exhibit E nor Attachment A was approved by the Hearing Officer on February 23, 2017. Their presence in the Appeal Record is designed to create confusion, and their presence is therefore irrelevant and prejudicial. They must be struck pursuant to NRS 48.015, 48.025(2), and NRS 48.035.

Exhibit E must be struck, as must Attachment A, as being without relevance.

F. Exhibit F, Strike in its Entirety

Exhibit F is a Memorandum dated May 4, 2017. It is not relevant to the present appeal, which is taken from the Hearing Officer's decision on the record as of February 23, 2017, nor is it probative of anything in the record as of February 23, 2017.

Exhibit F is not relevant under NRS 48.015. The pertinent question is the content of the Project Record at the time the Hearing Officer made his determination on February 23, 2017. Exhibit F can have no tendency to make the existence of any fact in the Project Record as of February 23, 2017, that is of consequence to the determination of the action, more or less probable than it would be without Exhibit F. Exhibit F never contends that any of the arguments set forth in Exhibit F were part of the Project Record as of February 23, 2017. Exhibit F is not relevant, is inadmissible, and should be excluded as prejudicial pursuant to NRS 48.025(2). Even if Exhibit F were found to be relevant, it should be excluded pursuant to NRS 48.035 as prejudicial, because Appellant Dr. Garmong is severely prejudiced by having newly introduced material available to the Board that was not in the Project Record as of February 23, 2017, but could be easily recalled improperly by Board members as being part of the record as of February 23, 2017.

There is no authentication of Exhibit F or demonstration that Exhibit F was part of the Project record at the time the Hearing Officer made his decision on February 23, 2017, contrary to NRS 52.015. Exhibit F is not sworn.

Exhibit F is presented in an attempt to demonstrate that alternatives were considered as required by mandated by Code Sec.30.5.1.C.2 and Code

37.7.7. Finding 7. Such alternatives were not considered as of the time the Hearing Officer heard the matter on February 23, 2017.

SUMMARY AND CONCLUSION

All or the indicated portions of Exhibits A-F of the Letter are not properly considered by the Board for the reasons stated. Accordingly, they must be stricken from the record.

The undersigned hereby affirms this document does not contain a social security number.

Date: May 19, 2017

Respectfully submitted,

Dr. Gregory Garmong
Appellant

DECLARATION OF GREGORY GARMONG

I, Gregory Garmong, declare the following facts, knowing them to be true and correct of my own personal knowledge, except for those stated to be "on information and belief", and I believe those to be true.

1. I am the Appellant in the matter identified as TRPA Project Number 1318-03-000-001/File Number ERSP2015-0778.

2. This Declaration is submitted in support of Appellant's "Motion to Strike Exhibits A-F of Letter of May 5, 2017 from MacKenzie & Albritton LLP to TRPA Governing Board" in TRPA Project Number 1318-03-000-001/File Number ERSP2015-0778.

3. On May 16, 2017, I searched the on-line internet records of the State of Nevada Certified Court Reporter--Directory for Licensing Year July 1, 2016-June 30, 2017 for the name "Hyde" and the name "Ledanski", two possible variants of the name "Sonya Ledanski Hyde" appearing on page 69 of Exhibit B to the Letter of May 5, 2017 from MacKenzie & Albritton LLP to TRPA Governing Board. There was no indication that either a person named "Hyde" or a person named "Ledanski" was a certified court reporter in Nevada.

4. On May 16, 2017, I searched the on-line internet records of the State of California Department of Consumer Affairs, Court Reporters Board of California, database on Certified Shorthand Reporter for the name "Hyde" and the name "Ledanski", two possible variants of the name "Sonya Ledanski Hyde" appearing on page 69 of Exhibit B to the Letter of May 5, 2017 from MacKenzie & Albritton LLP to TRPA Governing Board. There was no indication that either a person named "Hyde" or a person named "Ledanski" was a certified court reporter in California.

The undersigned hereby affirms this document does not contain a social security number.

This Declaration is made pursuant to 28 USC 1746 and NRS 53.045.

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 19, 2017 at Smith, Nevada.

Gregory Garmong

11 Dee Court
Smith, NV 89430
May 19, 2017

Governing Board
Tahoe Regional Planning Agency
c/o John Marshall
128 Market Street
Stateline, NV 89449

RECEIVED
MAY 19 2017
TAHOE REGIONAL
PLANNING AGENCY

Re: Appeal of Dr. Gregory Garmong Regarding "Complete Wireless Monopine Project; 811 US Highway 50, Douglas County, NV; Assessor's Parcel No: 1318-03-000-001, TRPA File No: ERSP2015-0778"

To the Board:

REPLY TO TRPA STAFF POSITION PAPER OF MAY 17, 2017 FILED IN SUPPORT OF TRPA OPPOSITION TO THE APPEAL

Appellant Dr. Garmong replies to the Staff Position Paper of May 17, 2017.

The Statement of Appeal deals almost solely with the need of TRPA to follow the rules--the statutes, case authority, and TRPA's own Rules in the form of the Code of Procedures ("Code"). The Staff Memorandum and the Staff Position Paper say almost nothing about the necessity of following the rules. There is a good reason why the law requires following the rules, and TRPA Staff refuses to follow the rules. When rules are followed, there is uniformity of decision and due process. Decisions are not "arbitrary"--decisions must be based upon factual "findings."

As discussed at Statement of Appeal pgs. 45-46, one of the key features of "Due Process" is that a governmental decision maker must give valid reasons for, and evidence supporting, its conclusions. There is no mention of this legal requirement in the section of the Staff Memorandum dealing with Due Process and other Constitutional violations. It is an alien concept to the authors of the Staff Position Paper.

The Staff Position Paper has very little to say about whether specific

rules were followed, for good reason. They were not followed.

ADMINISTRATIVE AGENCIES MUST FOLLOW THE LAW AND THEIR OWN SELF-MADE RULES, EVEN WHERE RULES ARE "GRATUITOUS"

A short discussion of the law governing the discretion of a government agency to ignore its own rules is appropriate.

At several locations, the Staff Position Paper suggests that Staff may elect not to follow its own rules, or change the interpretation of its own rules, if it so chooses. That position is wrong and contrary to law.

It is apparent that TRPA Staff and the Governing Board must follow the publicly enacted law, in the form of Constitutional mandates, statutes, and controlling authority interpreting them.

However, much of the Statement of Appeal deals with the failure of the Staff to follow TRPA's own Code of Procedures ("Code"). The legal question may arise whether the Board may waive or disregard "gratuitous" regulations found in the Code, where "A 'gratuitous' regulation is a self-imposed binding substantive or procedural rule that limits an agency's discretion, one that was not required by any constitutional or statutory provision." After all, if the TRPA Governing Board created the regulations of the Code, should it and the Staff not be able to waive or disregard that law for a particular project?

The short answer is that it may not. TRPA is required to follow the rules and regulations that it has created itself, such as the Code of Procedures, until they are changed or invalidated. Charles H. Koch, Jr., "Administrative Law and Practice," perhaps the leading treatise on administrative law, is unequivocal as to the general rule: "One of the most firmly established principles in administrative law is that an agency must obey its own rules." Sec. 4:22. As to state agencies, "It is well recognized in the state law that an agency must obey its own rules...An agency must comply with its own procedural rules." Sec. 4:71.

In federal agencies, this principle has come to be called the *Accardi* doctrine established by the US Supreme Court. See United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 74 S.Ct. 499 (1954); and as discussed, for example in U.S. v. Calderon-Medina, 591 F.2d 529, 531 (9th Cir. 1979), Smith v. State of Ga., 684 F.2d 729 (11th Cir. 1982), Wilkinson v. Legal Services Corp., 27 F.Supp.2d 32 (D. Ga. 1998) ("The Due Process Clause establishes that public officials are bound to follow the law. Agency

regulations intended to be binding are law—or, if qualification need be made, have the force and effect of law as applied to the agency. Therefore, the Due Process Clause requires that agency officials follow their own rules, even those promulgated gratuitously." and "a right to judicial review extends to those adversely affected by an agency's violation of 'gratuitous' regulations.'")

As to state agencies, State ex rel. Nevada Tax Com'n v. Saveway Super Service..., 99 Nev. 626, 629, 668 P.2d 291, 294 (1983) held for Nevada:

> A properly adopted substantive rule establishes a standard of conduct which has the force of law. [citations omitted] Rules adopted by an agency are binding on the agency until the agency repeals them or a court declares them invalid."

Appellant Dr. Garmong has found no California authority on this point, but in light of the comments of Prof. Koch and the nearly universal adherence to this principle, it would be expected to take the same approach.

WHAT IS A "FINDING"? THE REQUIRED "FINDINGS" WERE NOT MADE.

The Code makes very specific requirements concerning "Findings." But a concern arising from the Staff Memorandum and the Staff Position Paper are their casual attitude toward "Findings." The Staff Position Paper confuses "Findings" with unsupported opinions. It is therefore necessary to restate the nature of "Findings" as defined by the Code.

Statement of Appeal discusses the meaning of "Findings" at pgs. 6-7. The Staff Position Paper does not address this topic at all. Statement of Appeal pgs. 6-7 quotes Code Sec. 4.3 and TRPA's definition of "Findings". As defined, a "Finding" is "A written statement supported by substantial evidence in the record of the ultimate facts and the rationale supporting a conclusion that applicable Code or Compact requirements are met." For threshold-related findings, "The findings required by Section 4.4 shall be in writing prior to the approval of the proposed matter." (Code Sec. 4.3.1)

Much of the discussion of the Staff Position Paper does not meet either the TRPA definition or the requirement of Sec. 4.3.1.

To be clear, the only written statement upon which the decision of the Hearing Officer was based was the Staff Memorandum of February 16, 2017. The Staff Memorandum and the Staff Position Paper make many allegations

and unsupported statements, but very few references to written findings or "substantial evidence in the record."

The only way for the advocates of the Project, Complete Wireless Consulting, Inc. and TRPA, to overcome demonstrations of absence of findings is to show exactly where in the Project file or the Staff Memorandum the "substantial evidence" may be found. TRPA's Staff Position Paper does not do so.

DEMONSTRATION OF SUFFICIENT INTEREST IN THE OUTCOME OF THE APPEAL AND SUFFICIENT ALLEGATION OF ERROR

The Staff Position Paper recommends that the Board hear the appeal, based upon "frequent hiking." (The Memorandum of February 16, 2017 will be identified as "Staff Memorandum.")

The Statement of Appeal at pgs. 2-3 lists other, more substantial, reasons that lead to the same conclusion, including the interest in Appellant Dr. Garmong's life and property not being damaged, denial of "full and fair hearing", and the general right of all citizens to have the law obeyed.

Issue 1 is a summary issue, and was not discussed by the Staff Position Paper.

ISSUE 2
COMPLETE WIRELESS CONSULTING INC. IS NOT QUALIFIED TO DO BUSINESS IN NEVADA.

This issue is discussed at Statement of Appeal pgs. 7-9 and in the Staff Position Paper on the second page.

The Staff Position Paper starts off this section by incorrectly asserting that "Garmong incorrectly identifies the agent Complete Wireless Consulting as the applicant and permittee," by way of foundation for the argument that Complete Wireless Consulting, Inc.'s lawbreaking is "irrelevant." The quoted statement is incorrect in part. The Statement of Appeal never identifies Complete Wireless Consulting, Inc. as the "Applicant." It does correctly identify "Complete Wireless Consulting, Inc." as the Permittee. See the First Page of the Draft Permit in the Staff Memorandum at 11/35, and the document identified by Exhibit E to the letter of May 5, 2017 of MacKenzie & Albritton LLP, both of which identify "Complete Wireless" as the Permittee.

This same section of the Staff Position Paper refers to the "validity of TRPA's permit to Crown Consulting (and the U.S. Forest Service as land owner)." Both the Draft Permit and Exhibit E identify "Complete Wireless" (presumably meaning Complete Wireless Consulting, Inc.) as the Permittee. The Staff Position Paper is attempting to rewrite the permits at a late stage of the appeal. The Staff Position Paper has attempted to insert an inconsistent Attachment A to alter the Project Record. Appellant Dr. Garmong has moved to strike this inconsistent Attachment A.

It does the Staff Position Paper no good to make intentional misstatements of fact that are so easily disproved.

Turning to the point of Issue 2, the Staff Position Paper does not disagree that the Permittee Complete Wireless Consulting, Inc. has been doing business illegally in Nevada now for at least several years, while not licensed and qualified to do business in Nevada.

Whether the Agent for Crown Castle, the Permittee Complete Wireless Consulting, Inc., is licensed and qualified to do business in Nevada is highly relevant.

"Complete Wireless Consulting, Inc." was, and apparently still is, legally a nonentity in Nevada, and could not do business in Nevada, NRS 80.010(1). Stated alternatively, its advocacy on behalf of the Project was illegal. This advocacy by "Complete Wireless Consulting, Inc." was an *ultra vires* act that was void.

Black's Law Dictionary, 10th ed., defines "*Ultra vires*" as "Unauthorized; beyond the scope of power allowed or granted by a corporate charter or by law." See also Shoen v. SAC Holding Corp., 122 Nev. 621, 643, 137 P.3d 1171, 1186 (2006), "Generally, a corporate act is said to be ultra vires when it goes beyond the powers allowed by state law or the articles of incorporation."

State law in the form of NRS 80.010 provides that it is beyond the power of a foreign corporation to do business in Nevada before it qualifies with the Secretary of State, and therefore is an *ultra vires* act. "Complete Wireless Consulting, Inc." is a foreign corporation that has not qualified to do business in Nevada.

The *ultra vires* advocacy by "Complete Wireless Consulting, Inc." is void. Miller Bros. Co. v. State of Md., 347 U.S. 340, 342, 74 S.Ct. 535, 537 (1954); Shoen, 122 Nev. at 643, 137 P.3d at 1187.

Complete Wireless Consulting, Inc. was serving as agent for someone,

perhaps Verizon and perhaps Crown Castle. In that role, it apparently did not disclose that it is not qualified and licensed to do business in Nevada. Whoever is the alleged principal of Complete Wireless Consulting, Inc. shares the liability for this fraudulent failure to disclose that it is not qualified and licensed in Nevada. A principal is liable in a civil action for the fraudulent acts and conduct of his agent acting under actual or apparent authority, American Soc. of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 565-6, 102 S.Ct. 1935, 1342 (1982), Hoover v. Wise, 91 U.S. 308, 311 (1875).

The principal may avoid liability if he renounces the activities of the agent. Conversely, retention by the principal of the benefits of the misdeeds of the agent constitutes affirmance of the acts of the agent, and results in liability of the principal. Rest (Second) Agency Sec. 99. Silence by the principal when he should have spoken to repudiate the misrepresentations of the agent, where the principal retains the benefits achieved by the agent's misrepresentations, constitutes misrepresentation by the principal. Goldstein v. Hanna, 97 Nev. 559, 560-1, 635 P.2d 290, 291 (1981); Curtis, Collins & Holbrook Co. v. U.S., 262 U.S. 215, 221-4, 43 S.Ct. 570, 572-3 (1923). The principal may not benefit from the misdeeds of the agent, see the concurring opinion by Justice Marshall in Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 151, 88 S.Ct. 1981, 1990-1 (1968), "The principle that a wrongdoer shall not be permitted to profit through his own wrongdoing is fundamental in our jurisprudence." This principle is sometimes also referred to as the "doctrine of unclean hands." Las Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern..., 124 Nev. 272, 182 P.3d 764 (2008)

ISSUE 3
THE HEARING OFFICER DID NOT MAKE THE REQUIRED MOTIONS

Issue 3 is discussed in the Statement of Appeal at pg. 9, and on the second page of the Staff Position Paper.

The Staff Position Paper mischaracterizes Issue 3 as "Garmong asserts that the Hearing Officer did not make the necessary findings to approve the project." This is not at all what Issue 3 states, which is: "The Hearing Officer Did Not Make the Required Motions." In view of the fact that the Staff Position Paper has attempted to revise Issue 3 to something it likes better and thinks it can prevail on, and does not mention the actual Issue 3 at all, it must

be concluded that the Staff Position Paper concedes that the Statement of Appeal is correct as to Issue 3.

The is the first section where the Staff Position Paper attempts to rely on the "Hearing Transcript." It may not do so here, or anywhere else, for two reasons. First, the purported hearing transcript is not signed and authenticated by a properly qualified reporter, and Appellant has moved to strike it for those reasons, see pages 3-4 of Motion to Strike Exhibits A-F of Letter of May 5, 2017 from Mackenzie & Albritton to TRPA Governing Board," which seeks to introduce an exhibit characterized as a hearing transcript. Second, and equally compelling, at the start of the appeals process, in response to a query from Appellant Dr. Garmong, TRPA's counsel straightforwardly stated "No transcript of the public hearing will be prepared." See Exhibit 5 to the Statement of Appeal, para. 4. Appellant Dr. Garmong relied on this representation and did not pursue the matter of obtaining a properly certified Transcript that would be admissible. TRPA is now estopped to rely on an unsigned, unauthenticated purported Transcript, after having made this representation to Appellant Dr. Garmong. The proponents of the Project, TRPA and Complete Wireless Consulting, Inc., cannot rely on such an improper transcript after having assured Appellant Dr. Garmong that there would not be a transcript.

ISSUE 4
THE PROPOSED "WIRELESS MONOPINE PROJECT" IS NOT A PERMITTED USE IN PLAN AREA STATEMENT 060

Issue 4 is discussed in Statement of Appeal pgs. 10-11, and on the third page of the Staff Position Paper.

At the outset, Appellant Dr. Garmong notes yet another attempt to capitalize on the denial of Due Process. Footnote 2 at the bottom of the third page of the Staff Position Paper observes that "Garmong did not raise this issue to the Hearing Officer." While that point is not pertinent to the appeal, it is another attempt to prejudice the Board against Appellant Dr. Garmong because he was denied sufficient time to prepare his case to present to the Hearing Officer.

Moving on, Issue 4 is enough to require the Board to reverse the holding of the Hearing Officer and invalidate the approval of the Draft Permit. If ever there were an application of the authority requiring a governmental agency to obey its own regulations, this is it.

The analysis may be briefly summarized. The Statement of Appeal demonstrated that Plan Area Statement 060-Genoa Peak lists permitted uses including the category "Public Service", and, as one of the several subcategories under "Public Service", "transmission and receiving facilities (S)".

The Staff Position Paper concedes that Appellant Dr. Garmong's interpretation of "Public Service" is correct, as defined by Code Sec. 90.2 (Code pg. 596/610), including the limitation: "It does not include such uses or activities that are primarily involved in commercial enterprises." The Staff Position Paper also concedes that the proposed Project is "primarily involved in commercial enterprises."

The argument of the Staff Position Paper is that TRPA's own Code is inconsistent and contradictory--that Chapter 21 (Code pg. 178-181/610) includes some applications under "Public Service" that are inconsistent with the Definition of "Public Service" at Code Sec. 90.2 (Code pg. 596/610). That TRPA, after years of experimenting with the provisions of the Code, cannot describe uses in Chapter 21 that are consistent with the Definition in Sec. 90.2 raises a significant legal issue for resolution by the federal courts. According to TRPA, TRPA does not consistently employ its own definitions.

The argument "TRPA has never interpreted its permissible use classification in the manner Garmong suggests[.]" really means that TRPA has never interpreted its permissible uses consistent with its own definition in Code Sec. 90.2 (Code pg. 596/610).

TRPA may alter seek to change its definition of "Public Service." However, for the evaluation of the application for the present Project, it is stuck with its own definition under authority such as Accardi and State v. Saveway.

ISSUE 5
REQUIRED FINDINGS FOR NOISE ARE NOT MADE

The Statement of Appeal addresses Issue 5 at pg. 12-16, and the Staff Position Paper addresses it at the third-fourth pages.

The argument of the Staff Position Paper on this point evidences a complete misunderstanding of the nature of "Findings" as set forth in Code Sec. 4.3.1:

4.3.1. Written Findings

All required findings shall be in writing and shall be supported by substantial evidence in the record of review. The findings required by Section 4.4 shall be in writing prior to the approval of the proposed matter. [emphasis added]

The definition of "Finding" in Code Sec. 90.2 (pg. 580/610) is consistent with Code Sec. 4.3.1.

A condition in a Draft Permit or Final Permit is not a finding, and does not substitute for a finding.

In the section near the bottom of the third page, the Staff Position Paper states, "The applicant submitted information that the noise level of these tests would not exceed the applicable Community Noise Equivalent Level (CNEL) *at the property edge.*" [italicization emphasis added] This is a true statement, but the applicant's approach is contrary to, and inconsistent with, the applicable Code provision. The information provided by the Applicant, the Staff Memorandum, and the Hearing Officer's approval do not properly apply the requirements of Code Secs. 4.4.1 and 4.4.2, and Code Ch. 60. Specifically, Code Sec. 68.5.3.B (Code pg. 514/610) requires for noise measurements that "The microphone shall be placed on the property line closest to the noise source or at the nearest point where the general public is legally entitled to congregate, whichever is closer to the noise source." [emphasis added] In the present case, the public is allowed to congregate on the hiking trail that is immediately adjacent to the fence that would surround the proposed Project, which is much closer to the noise source than the "property edge." The information submitted by the Applicant did not include any information concerning noise at the "nearest point where the general public is legally entitled to congregate." See Staff Memorandum at pgs. 27-28/35. Additionally, by having concealed from TRPA the version of the Project proposed to the Forest Service, Complete Wireless Consulting, Inc. concealed the fact that it plans four generators, not one, producing four times the noise of a single generator when all are operating. The Staff Position Paper ignores this complete failure of relevant evidence in the Project Record, and the requirements of Code Sec. 4.4.1 for "Findings."

The Staff Position Paper then discusses at the top of the fourth page a proposed amendment to the Draft Permit. Putting aside for the moment that the present appeal is from the decision to allow the Draft Permit, this addition

of more conditions to the Permit is not the same as a "Finding", see the quotation from Code 4.3.1 above. A "Finding" "shall be supported by substantial evidence in the record of review" and "shall be in writing prior to the approval of the proposed matter." An additional condition to the permit does not constitute a "Finding." Instead, it is an attempt to sidestep the requirement of "Findings."

ISSUE 6
REQUIRED SPECIAL USE FINDINGS FOR SAFETY AND GENERAL WELFARE ARE NOT MADE

Issue 6 is addressed at Statement of Appeal pgs. 16-27 and at the fourth page of the Staff Position Paper.

The Staff Position Paper does not disagree that, when the monopine topples, it will fall into and likely destroy the Skyland water tank. The Staff Position Paper does not disagree that the people of Skyland will be deprived of all or most of their water supply until the water tank is repaired, which will likely take months. The Staff Position Paper does not disagree that the lives and property of the people of Skyland will be in jeopardy from fire when this happens, as a direct result of TRPA's approval of the Project and the construction of the monopine. The Staff Position Paper does not disagree that the drawing Exhibit 6 to the Statement of Appeal was available to TRPA Staff for months prior to the Hearing, and that the Staff did absolutely nothing to evaluate the safety risk and risk to the general welfare.

Instead, the Staff Position Paper attempts to shift the responsibility of TRPA onto the public, stating, "[Garmong] articulated no deficiency in the actual design of the proposed tower or that this tower in this location presents any significant failure risk." Even though it was not his responsibility, Garmong presented evidence that when the monopine topples downhill to the west, it will hit and destroy the Skyland water tank, Exhibit 6 to the Statement of Appeal. He also presented evidence that toppling failures of this type of monopole antenna can occur, Exhibit 7 to the Statement of Appeal. Remarkably, this possibility had apparently never occurred to TRPA Staff, as it is not even mentioned in the Staff Memorandum. Or, if it did occur, the information was suppressed. As a result, there were no written "Findings" that address this safety and general welfare issue at all, evaluating the likelihood of failure, and, if failure were to occur, the effect on the Skyland water tank and the people and homes of Skyland.

Once again the Staff Position Paper confuses arm waving with "Findings." At the risk of over-repetition, Code Sec. 4.3.1 states:

> **4.3.1. Written Findings**
> All required findings shall be in writing and shall be supported by substantial evidence in the record of review. The findings required by Section 4.4 shall be in writing prior to the approval of the proposed matter. [emphasis added]

The arguments made by the Hearing Officer and referenced in the next-to-last paragraph on the fourth page of the Staff Position Paper do not constitute the required "Findings" of Code Sec. 21.2.2 dealing with safety and general welfare, see Statement of Appeal pg. 17.

The Staff Position Paper then sets out its own argument, one that is not made in the Staff Memorandum, concerning the "pole" extending 38 feet below ground level. The Staff Position Paper argues near the bottom of the fourth page, that

> In order for the pole to tip far enough to hit the existing water tank, the portion that continues beneath the ground would have to rotate nearly 80 degrees, moving that much earth in its path.
>
> Sufficient evidence therefor supports the Hearing Officer's finding that the location of the cellular tower next to the water tank does not cause adverse impacts to the health, safety, and general welfare of the Skyland neighborhood.

It is unclear whether the author of these two sentences didn't bother to study the design of the monopine, is technically utterly naive, is attempting to inject some humor into an otherwise deadly serious business, or likely all three. As shown in drawings in the Project Record, the proposed monopine is not one continuous piece of steel 109 feet (above ground) + 38 feet (below ground) = 147 feet long (total), so that it would topple in the manner contemplated by the quoted sentences, "moving that much earth in its path." This "reasoning", as the primary basis for the conclusion of the Staff and the Hearing Officer that the monopine is safe, is frighteningly wrong and contrary to the actual design of the monopine, and renders the conclusions of the Hearing Officer on safety and Issue 6 absolutely invalid.

The drawings in the Project File depict the monopine as formed of multiple sections bolted together end-to-end. When the monopine fails at any of the bolted flanges, the toppling collapse will occur, destroying the Skyland water tank, and endangering the lives and property of Skyland's residents. The 38-foot length below ground will stay undisturbed, and the toppling failure will result from a failure of the bolted flanges at ground level or above.

Besides being technically baseless, the "reasoning" of the Staff Position Paper completely and utterly refuses to address the real issue, that there are alternatives which do not endanger the Skyland water tank and the people and homes of Skyland at all. Complete Wireless Consulting and TRPA Staff assembled a Project that will maximize profit for the cellular companies, at risk to the public. There is not one bit of evidence in the Project Record that alternative sites were considered by TRPA Staff prior to the hearing of February 23, 2017 and included in written "Findings", even though consideration of alternative sites for the Project is expressly mandated by Code. Sec. 37.7.7 Finding 7 and Code Sec. 30.5.1.C.2. It is not the public's duty to identify feasible alternative sites. Instead, it is the Code-mandated duty of TRPA staff to identify and consider alternatives and to report and evaluate them in writing in the Staff Memorandum or elsewhere. The advocates of the project, Complete Wireless Consulting, Inc. and TRPA Staff, cannot avoid this duty by suggesting that the public must this work.

The final sentence of this section, at the bottom of the fourth page of the Staff Position Paper, "Sufficient evidence therefor supports the Hearing Officer's finding that the location of the cellular tower next to the water tank does not cause adverse impacts to the health, safety, and general welfare of the Skyland neighborhood." is based upon completely faulty non-engineering arm waving.

ISSUE 7
LAND COVERAGE LIMITS FOR THE PROJECT ARE EXCEEDED, AND NO EXCEPTIONS APPLY

The Statement of Appeal addresses Issue 7, coverage, at pgs. 27-33, and the Staff Position Paper addresses this subject at the fifth-sixth pages.

TRPA's approach to coverage has always been a touchy subject with the public, because arbitrary Staff decisions in this area can give Staff great power over the public. The Staff Position Paper reaches the zenith of its plea for arbitrary Staff power over the public in this section, unconstrained by the

provisions of the Code. In the third paragraph on the fifth page, the Staff Position Paper states, "Garmong argues that staff incorrectly calculated the base allowable coverage because elsewhere in the staff report, staff refers to the area of the cellular tower installation as the 'project area.' (Statement of Appeal at pg. 30. However, Garmong presents no argument why under the relevant code factors, TRPA could not have chosen the parcel as the project area for coverage calculation purposes."

Actually, Appellant Dr. Garmong did present more than an argument, he presented the governing Code section and a quote from the Staff Memorandum as to exactly what it considered the "project area." As discussed at Statement of Appeal pgs. 27-28,

> Code Sec. 30.4.1.C (Code pg. 209/610) requires that the "land coverage" must be calculated on the basis of the "project area", not the size of the parcel:
>
> > Base allowable land coverage shall be determined by application of the base land coverage percentages set forth in subparagraph A above to the project area. [emphasis added]

Then, the Statement of Appeal at pg. 29 applies Code Sec. 30.4.1.C to the "project area" as selected by Staff and written in the Staff Memorandum,

> Directly contrary to the requirements of Code Sec. 30.4.1.C, the Staff Memorandum at pg. 19/35 confusingly mixes concepts of "project area" and parcel size in calculating "allowable coverage", stating:
>
> > 1) Project Area: The proposed project will include a 2,500 square-foot "leasable area," on a total parcel size of 124 acres (5,397,532 square feet).
> > 2) Allowable Coverage: Parcel is made up of four land capability districts, and has a total base allowable coverage of 312,608 square feet. Allowable coverage in land capability district 1a (where most of the new proposed coverage will be) is 39,539 square feet. Below is a summary of total

base allowable coverage on the parcel: [emphasis added]

That is Appellant Dr. Garmong's answer why "TRPA could not have chosen the parcel as the project area for coverage calculation purposes." Code Sec. 30.4.1.C says that the "project area," not the parcel size, must be used. **THE CODE SAYS THAT THE "PROJECT AREA" MUST BE USED IN THE COVERAGE CALCULATION, NOT THE PARCEL SIZE.** The use of "parcel size" is in violation of TRPA's own Code Sec. 30.4.1.C. The violation, however, does not even give pause to the Staff Position Paper, which argues that either the "project area" or the "parcel size" may be used, at the Staff's whim.

The Staff Position Paper adds insult to injury, stating, "[A]t least one prior project on the water tank site calculated allowable coverage based on the entire parcel; that using the foot print for disturbance area for monopine cellular towers is too restrictive given the small size; that, as a result, there is no other logical 'project area' for coverage purposes[.]" That is, Staff decided that Code Sec. 30.4.1.C would not be used because it is "too restrictive," and that another measure of coverage could be used. Staff's theory is that because Staff got away in the past with violating TRPA's own Codes by substituting its own judgment for the Code mandates, it should be able to get away with violating its own Codes again. The position of the Staff Position Paper is that TRPA Staff need not follow Code Sec. 30.4.1.C if it does not want to, in order to serve its chosen role as an advocate for the cellular companies.

In this example of the "prior project," the proper result would have been to conclude that the proposed project area was simply unsuitable for the proposed project, and to reject the proposed project. The proper course was not that taken, to decide to ignore the Code and use a fudged concept of coverage. What power the Staff must feel when it can ignore the Code.

Similarly, the project area for the present Project is simply not suitable. The proposed Project must be rejected.

The paragraph bridging the fifth and sixth pages of the Staff Position Paper discusses the alternatives raised by Appellant Dr. Garmong at the Hearing, and states, "TRPA staff rejected these locations as creating more land disturbance..." This statement is intended to give the false impression that TRPA Staff did in fact consider alternatives and that comparative factual evidence on relative disturbance may be found in the Project Record. In point

of fact, the Staff Memorandum says absolutely nothing about "Findings" for alternatives nor does the Project Record, even though Code. Sec. 37.7.7 Finding 7 and Code Sec. 30.5.1.C.2 mandate consideration of alternatives.

The Statement of Appeal at pgs. 30-32 demonstrates that the exceptions of Code Sec. 30.5.1 are not applicable here. The Staff Position Paper does not disagree, conceding that the exceptions of Code Sec. 30.5.1 do not apply in this case.

ISSUE 8
PERMISSIBLE CELL TOWER HEIGHT LIMITS ARE EXCEEDED

Issue 8 is discussed at Statement of Appeal pgs. 33-39, and the Staff Position Paper at the sixth page.

Once again, the Staff Position Paper seeks to change the discourse away from that actually presented in the Statement of Appeal, to something that it can justify by arm waving: "Garmong argues that evidence does not support the Hearing Officer's findings for the 120-foot tower." No, the Statement of Appeal demonstrates that the necessary "Findings" to support the Hearing Officer's decision were not made. The Hearing Officer made no "Findings," because "Findings" are written statements supported by evidence in the Project Record.

The discussion of Issue 8 also employs the same tactic used earlier, attempting to turn the burden of proposing and evaluating sites onto the Appellant. That is not what Code. Sec. 37.7.7 Finding 7 requires. It requires TRPA to identify and evaluate alternatives, which it refused to do on the theory that such alternatives constitute a different project. They are not a different project, but instead a required part of the evaluation process for the current Project. In any event, Staff refused to evaluate alternatives and prepare the required written findings based upon evidence in the Project Record.

In regard to identifying alternatives, it may be recalled that the public, including Appellant Garmong, had only 1-6 hours to evaluate the Staff Memorandum together with the Project file, as discussed under Issue 9 at Statement of Appeal pg. 41. That is part of the reason that Appellant Dr. Garmong was denied due process, see the extensive Constitutional authority from the US Supreme Court cited at pgs. 43-45.

ISSUE 9
TRPA VIOLATED DR. GARMONG'S CONSTITUTIONAL RIGHTS

Issue 9 is discussed at Statement of Appeal pgs. 39-48, and at the sixth-eighth pages of the Staff Position Paper.

The Courts have recognized a protectable Constitutional interest in personal safety: "The Supreme Court has held that the right to personal safety is an historic liberty interest protected substantively by the Due Process Clause." Boyle v. Turnage, 798 F.2d 549, 552 (1st Cir. 1986). And of course the protectable Due Process property interest is well established.

The Statement of Appeal at the bottom of pg. 38 lists six different reasons for concluding that TRPA violated Appellant Dr. Garmong's Constitutional rights, which were addressed in detail in the respective sections that followed. The Staff Position Paper only address one of these, item A, and fills in the argument by discussing at length a non-issue that was never asserted by the Statement of Appeal. The Staff Position thus concedes that reasons B-F establish violations of Constitutional rights. Because these violations are conceded, and because the conceded Constitutional violations B-F are adequately addressed in the Statement of Appeal at pages 45-48. Appellant Dr. Garmong need not discuss them further here.

The long paragraph bridging the sixth-seventh pages of the Staff Position Paper discusses whether the Notice of Application and Public Hearing Letter of February 9, 2017 was sufficient. Appellant Dr. Garmong never contended that it was not sufficient under the TRPA regulations as they exist now. However, the secrecy of the proceedings prior to February 9, 2017 and the short notice period, taken together with the other violations including violations A-F, are a straightforward violation of his Constitutional Due Process rights. That the Staff Position Paper spends so much time on this point while ignoring reasons B-F clarifies that TRPA agrees that it violated Appellant Dr. Garmong's Constitutional rights for reasons B-F.

But a comment is appropriate regarding Constitutional violation F, discussed in detail at Statement of Appeal pg. 48. Constitutional violation F deals with the prejudice to the public, including Appellant Dr. Garmong, and the lack of prejudice to the Project advocates, Complete Wireless Consulting, Inc. and TRPA, of allowing another few weeks for the public to study the Staff Memorandum and Project Record in order to have an opportunity to make a full-and-fair presentation at the Hearing. In assessing available time

in relation to Due Process, Courts often examine this question of prejudice to the party requesting more time, compared to the lack of prejudice to the party resisting (and in this case, refusing) more time. Neither the Hearing Officer nor the Staff Position Paper addresses this matter of prejudice, conceding the point.

Complete Wireless Consulting, Inc. had over 10 years to develop its position. TRPA Staff, in conjunction with its partner Complete Wireless Consulting, Inc., had at least 16 months, and in actuality 36 months or more, to evaluate the Project and present its case. The general public and Appellant Dr. Garmong in particular only had 1-6 hours prior to the day when the comments were due, February 22, 2017, when both the Staff Memorandum and the Project File were available to the public. Appellant Dr. Garmong faxed a detailed 5-page letter (Exhibit 12 to the Statement of Appeal) to the Hearing Officer on February 20, 2017, requesting a continuance in the Hearing and explaining why more time was needed for him to make a reasoned evaluation of the proposed Project and have a full and fair opportunity to present his case. This faxed letter further explained why there was prejudice to him in denying the request for a continuance, and no prejudice to the advocates of the Project, Complete Wireless Consulting, Inc. and TRPA Staff, in granting a continuance. Appellant Dr. Garmong did not get the courtesy of a reply from the Hearing Officer, who turned down the same request made orally at the Hearing without stating any reason.

There really is only one explanation for the totality of TRPA's acts and Constitutional violations. TRPA has structured a set of procedural rules that are expressly designed to deny a full-and-fair hearing to the public. Secrecy and short notice times are integral to this strategy. Consistent with this approach, the Staff Position Paper twice comments that "Garmong did not raise this issue to the Hearing Officer," see footnotes 2 and 3. Of course not, he did not have a fair opportunity to assess the case that the advocates of the Project had prepared, and to present all of the issues at the Hearing.

The Staff Position Paper addresses only Constitutional violation "A. Dr. Garmong was not allowed sufficient time to prepare for the February 23, 2017 hearing" in the paragraph bridging the seventh-eighth pages, and the first paragraph on the eighth page.

This discussion of Constitutional violation A reads almost like a parody. None of the cases cited and legal principles deal with TRPA Codes, none deal with projects in Nevada, non deal with intentional violations of

Constitutional rights by a public agency, and none deal with personal and property safety issues. The several case authorities cited deal with subjects like visual impact (American Tower Corp. v. City of San Diego, 763 F.3d 1035 (9th Cir. 2014); the Douglas County sustainable growth initiative where the Nevada Constitution had controlling provisions (Garvin v. Ninth Judicial Dist. Court ex rel. County of Douglas, 118 Nev. 749, 59 P.3d 1180 (2002); legislative action regarding land development in Ventura County, California governed by California law (Horn v. County of Ventura, 24 Cal.3d 605, 596 P.2d 1134 (1979); notice regarding decision on installation of wireless antennas on existing telephone poles, where an impact on property value was alleged (Robinson v. City and County of San Francisco, 208 Cal.App.4th 950, 146 Cal.Rptr.3d 1 (2012); allegation of diminution in value of property rights (Sierra Nevada SW Enterprises, Ltd. v. Douglas County, 506 Fed.Appx. 663 (9th Cir. 2013); and installation of lights at a football field (Taxpayers for Accountable School Bond Spending v. San..., 215 Cal.App.4th 1013, 156 Cal.Rptr.3d 449 (CA court of appeals, 2013).

None of the authority cited by the Staff Position Paper deals with physical safety to persons and property, the concerns here.

In the paragraph bridging the seventh and eighth pages, the Staff Position Paper argues, based upon no evidence, that the 7-day notice provision prior to the Hearing on February 23, 2017 was sufficient and was met, contrary to the facts of Exhibit 1, *inter alia* Para. 16, and Exhibit 12 to the Statement of Appeal. The Staff Position Paper argues that posting of the Staff Memorandum less than 7 full calendar days prior to the hearing meets the 7-day notice requirement, without any legal support. If posting in less than 7 full days is sufficient to meet a 7-day notice requirement, would posting in 2 days be sufficient, or 1 day?

The first paragraph on the eighth page of the Staff Position Paper seeks to justify TRPA's attempt to prevent meaningful public participation in the Hearing and denial of Due Process rights. It presents some "shoulda, coulda, woulda" arguments as to why 1-6 hours of opportunity to view both the Staff Memorandum and the Project Record should be sufficient. For example, in response to the Notice Letter of February 9, 2017 that the Project Record was available at the TRPA front desk and that the front desk was not open on Tuesdays, it argues absolute nonsense such as "Garmong could have called and made an appointment to view the file but he did not," when the Notice Letter did not indicate that such a call could be made or give anyone to call.

The Staff Position Paper then claims that the 1-6 hours was sufficient because "Garmong produced a 12-page single spaced comment letter[.]" On the other hand, when given a bit more time and a chance to study the Staff Memorandum and the Project Record, Garmong produced the 52-page single-spaced Statement of Appeal and 7-page single spaced Declaration for this appeal. Time to prepare an appeal is not the same as time to prepare for the Hearing.

The big issue that the Staff Position Paper absolutely refuses to address is why the Project was kept secret for years, then the public given 1-6 hours to assess the Staff Memorandum and the Project Record, and then to prepare its position for the Hearing, when TRPA Staff and its confederate Complete Wireless Consulting, Inc. had 16-36 months to prepare their position.

RELATED CONSIDERATIONS

The related considerations are discussed in the Statement of Appeal at pgs. 50-51. The Staff Position Paper ignores them, and does not respond at all. TRPA Staff does not dispute the points made on this subject in the Statement of Appeal, and they are therefore accepted as true and correct.

CONCLUSION OF THE STAFF POSITION PAPER

In the middle of the eighth page, the Staff Position Paper, states its Conclusion. The first sentence of this Conclusion requires a response: "Dr. Garmong has heartfelt concerns locating a cellular tower nearby a water tank that serves his Lake Tahoe property."

Appellant Dr. Garmong appreciates the recognition that he has concerns, but does not appreciate the condescending tone of this sentence, which suggests that his concerns are emotional and not legal/factual. Never once in the Statement of Appeal or this Reply does Appellant Dr. Garmong communicate any emotion or emotional argument. His positions are based entirely in the failure and refusal of TRPA Staff to follow the laws and TRPA Codes, and the denial of Constitutional rights.

Since Staff has raised this subject, Appellant Dr. Garmong will respond that yes, he does not want his personal safety and home endangered solely so that Complete Wireless Consulting, Inc. and Verizon can increase their profits.

SUMMARY, CONCLUSION, AND RECOMMENDATIONS

TRPA's record on this case is so badly flawed that the Permit cannot be granted.

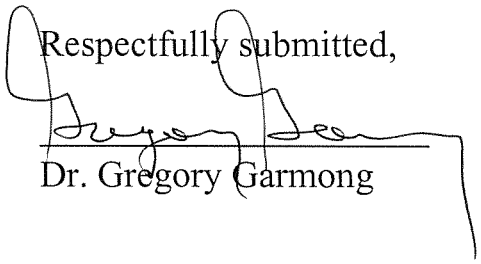
Accordingly, Appellant Dr. Garmong urges the Board to

1. Sustain, allow, and grant this appeal.
2. Cancel with prejudice any Permit that has been issued.
3. Order that TRPA Staff follow the substantive requirements of the laws and the TRPA Code in the future.
4. Adopt new provisions in the Code to avoid future denials of Constitutional rights and Due Process to the public.

The undersigned hereby affirms this document does not contain a social security number.

Dated: May 19, 2017

Respectfully submitted,



Dr. Gregory Garmong

RECEIVED
MAY 19 2017
TAHOE REGIONAL
PLANNING AGENCY

11 Dee Court
Smith, NV 89430
May 19, 2017

Governing Board
Tahoe Regional Planning Agency
c/o John Marshall
128 Market Street
Stateline, NV 89449

Re: Appeal of Dr. Gregory Garmong Regarding "Complete Wireless Monopine Project; 811 US Highway 50, Douglas County, NV; Assessor's Parcel No: 1318-03-000-001, TRPA File No: ERSP2015-0778"

To the Board:

MOTION TO STRIKE ATTACHMENT A OF MEMORANDUM OF MAY 17, 2017, WHICH HAS BEEN INTRODUCED INTO THE APPEAL RECORD

Appellant Dr. Gregory Garmong moves to strike Attachment A of the Memorandum of May 17, 2017, from TRPA Staff to TRPA Governing Board, and that is included in the pre-hearing package provided to Appellant Dr. Garmong at about 3:45pm on May 17, 2017

MEMORANDUM OF POINTS AND AUTHORITIES

Attachment A is a collection of paper described as a "Final Permit". It should be struck for two reasons.

1. Attachment A is not relevant to this appeal, which is taken from the Hearing Officer's decision of February 23, 2017. The Project Record as of that date included a Staff Memorandum dated February 16, 2017, of which pages 9-15/35 are a "Draft Permit." It is this "Draft Permit" that was before, and apparently approved by, the Hearing Officer and is the subject of this appeal, not Attachment A.

Attachment A is not relevant under NRS 48.015. The pertinent

question is the content of the Project Record at the time the Hearing Officer heard the matter on February 23, 2017. Attachment A can have no tendency to make the existence of any fact in the Project Record as of February 23, 2017, that is of consequence to the determination of the action, more or less probable than it would be without Attachment A. Attachment A never contends that any of the material set forth in Attachment A was part of the Project Record as of February 23, 2017. Attachment A is not relevant, is inadmissible, and should be excluded as prejudicial pursuant to NRS 48.025(2). Even if Attachment A were found to be relevant, it should be excluded pursuant to NRS 48.035 as prejudicial, because Appellant Dr. Garmong is severely prejudiced by having newly introduced material available to the Board that was not in the Project Record as of February 23, 2017, but could be easily recalled improperly by Board members as being part of the record as of February 23, 2017.

2. The pre-hearing package also includes a letter of May 5, 2017 from MacKenzie & Albritton LLP to the Governing Board, having an "Exhibit E". "Attachment A" is dated February 23, 2017 and purports to be a "Final Permit", and "Exhibit E" is also dated February 23, 2017 and also purports to be a "Final Permit." These two purported "Final Permits" are materially different and inconsistent. Exhibit E lists "Complete Wireless" and United States Forest Service as the Permittee(s), and Attachment A lists "Crown Castle" and United States Forest Service as the Permittee(s). The original Draft Permit, which is not included with the Staff Position Paper but is part of the record for this appeal, and was attached to the Staff Memorandum, listed "Complete Wireless (under lease to the United States Forest Service)" as the Permittee(s). Exhibit E and Attachment A differ in other provisions from the Draft Permit.

Neither Attachment A nor Exhibit E was part of the Project Record as of the time of the Hearing on February 23, 2017, although they have both been dated February 23, 2017 to give the appearance that they were somehow connected to the Hearing and the Project Record as of that date.

There are three separate versions of the "Permit" now floating around, including Exhibit E and Attachment A, both dated February 23, 2017 and both purporting to be the "Final Permit." TRPA's attempt to create this kind of confusion and deception in the Appeal Record, and its attempt to improperly supplement the Project Record, cannot be condoned.

Only the Draft Permit was approved by the Hearing Officer on

February 23, 2017. Neither Attachment A nor Exhibit E was approved by the Hearing Officer on February 23, 2017. Their presence in the Appeal Record is designed to create confusion, and their presence is therefore irrelevant and prejudicial. They must be struck pursuant to NRS 48.015, 48.025(2), and NRS 48.035.

Attachment A must be struck, as must Exhibit E, as being without relevance and prejudicial.

Early in the Appeal process, Appellant Dr. Garmong asked TRPA's counsel to take physical possession of the Project Record so that it would not be corrupted by additions or deletions after the hearing date of February 23, 2017. Counsel refused, see Exhibit 5 to the Statement of Appeal, item 1. The status of the appellate record is now uncertain.

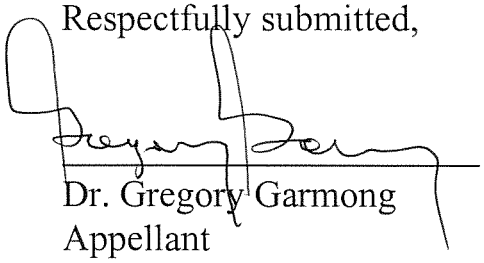
SUMMARY AND CONCLUSION

Attachment A must be struck from the record as without irrelevance and prejudicial.

The undersigned hereby affirms this document does not contain a social security number.

Date: May 19, 2017

Respectfully submitted,



Dr. Gregory Garmong
Appellant