Date: November 29, 2019

From: Lena Pu

To City of xxxxx Council Members:

To City of xxxxx Planning Commissioners:

To City of Davis Staff:

To City Legal Counsel:

Re: Notice of Appellate Decision relevant to, and Notice of Cease and Desist from, Processing and Approving Applications pertaining to all 5G/4G "Small Wireless Telecommunications Facilities" (sWTF), and from any placement, construction, modification and operations thereof, as non-compliant with 8/9/19 Ruling in Case 18-1129

SENT BY EMAIL

[Clerical: Please place this letter into the public records under the subject wireless telecommunications facilities agenda, thank you.]

*Notice to Agent is Notice to Principal; Notice to Principal is Notice to Agent*

Dear City Manager, Assistant City Manager, City Counsel, et al.:

Previously, I have sent a cease and desist letter to you and your staff entitled, “Request for Toll Agreement on Shot Clocks Regarding All 5G/4G “Small” Wireless Telecommunication Facilities Pending Receipt of Environmental Assessment et al.", dated November 1, 2019, of which date you had also received that letter.  It is now November 29, 2019, exactly four weeks from the date of that first letter’s submittal, and I have not received any response regarding that letter from the City of xxxxx Council, Legal Counsel, management or staff.  This is a follow up letter.

This letter is your second notification to cease and desist on the continuance of the processing of any current and future applications submittals regarding all 5G/4G Wireless Telecommunications Facilities (WTF) and 5G/4G Small Wireless Telecommunications Facilities (sWTF) applications submitted to you and/or your staff requesting authorization to place, construct, modify and/or operate WTF and sWTF, which have been branded as “small cells” by the Wireless Industry, on street lights, utility poles or other street furniture in the public rights-of-way, to facilitate the deployment of a close-proximity, microwave-irradiating network enabling telecommunications, data harvesting, surveillance and electronic trespassing onto private property.

We advise you that on August 9, 2019, the DC Circuit Court of Appeals in its Ruling in [Case 18-1129](https://www.cadc.uscourts.gov/internet/opinions.nsf/4001BED4E8A6A29685258451005085C7/$file/18-1129-1801375.pdf) (a copy of which is attached hereto) **vacated**[**FCC Order 18-30**](https://www.fcc.gov/document/fcc-acts-speed-deployment-next-gen-wireless-infrastructure-0)**‘s deregulation of sWTFs and remanded** this to the Federal Communications Commission (“FCC”).

In case 18-1129, the judges said that “the FCC failed to justify its determination that it is not in the public interest to require review of [sWTF] deployments” and ruled that “the Order’s deregulation of [sWTFs] is arbitrary and capricious.”

**The DC Circuit judges published the following reasons for their**[**8/9/19 Ruling**](http://https/www.cadc.uscourts.gov/internet/opinions.nsf/4001BED4E8A6A29685258451005085C7/$file/18-1129-1801375.pdf)**, concluding:**

* The FCC failed to address that it was speeding densification “without completing its investigation of . . . health effects of low-intensity radiofrequency [microwave] radiation”
* The FCC did not adequately address the harms of deregulation
* The FCC did not justify its portrayal of those harms as negligible
* The FCC’s characterization of the Order as consistent with its longstanding policy was not “logical and rational.” . . . because the FCC mischaracterized the size, scale and footprint of the anticipated nationwide deployment of 800,000-unit network of sWTF
* Such sWTF are “crucially different from the consumer signal boosters and Wi-Fi routers to which the FCC compares them”
* “It is impossible on this record to credit the claim that [sWTF] deregulation will ‘leave little to no environmental footprint.'”
* The FCC fails to justify its conclusion that sWTF “as a class” and by their “nature” are “inherently unlikely” to trigger potential significant environmental impacts.

**Therefore, this 8/9/19 DC Circuit Ruling renders every sWTF application in the City of xxxxx, xxxxx incomplete** in that the FCC has not yet addressed the remanded issues. The Court set expectations that the FCC write rules specific to sWTF “as a class” that address the need for the FCC and the Wireless Industry to complete Environmental Assessments (“EA”) and / or Environmental Impact Statements (“EIS”) for the anticipated nationwide deployment of an 800,000-unit network of sWTF. Such rules, in addition to analyses and potential environmental reviews appear to be required by the National Environmental Policy Act of 1969 (NEPA). This 8/9/19 Ruling pertains to the class of sWTF that includes the antennas, radios, and ancillary equipment that are often attached to utility poles, light poles and other street furniture.

As printed in the [Federal Register on 11/5/19](https://www.federalregister.gov/documents/2019/11/05/2019-24071/accelerating-wireless-broadband-deployment-by-removing-barriers-to-infrastructure-investment), the repeal of FCC 18-30 — a section of the Commission’s rules implementing the small Wireless Telecommunications Facilities exemption — will cause a lack of sWTF-specific rules on the effective date of Dec 5, 2019.

The anticipated nationwide deployment of an 800,000-unit network of sWTF is clearly a federal undertaking because the Wireless Industry licenses its wireless spectrum frequencies from the federal government. That makes every single sWTF planned for the City of xxxxx, xxxxx part of this federal undertaking. Until such time as the applicants for any and all sWTF in City of xxxxx, xxxxx place substantial written evidence in the public record proving that the FCC has written its rules specific to sWTF “as a class” and complete any required EA and/or EIS for the anticipated nationwide deployment of an 800,000-unit network of sWTF, every sWTF application in City of xxxxx, xxxxx remains incomplete, stopping all shot-clocks.

In addition, the DC Circuit Court of Appeals further ruled against FCC overreach on October 1, 2019. In [Case 18-1051](https://www.cadc.uscourts.gov/internet/opinions.nsf/FA43C305E2B9A35485258486004F6D0F/$file/18-1051-1808766.pdf), on page 146, re: Restoring Internet Freedom, 33 FCC Rcd. 311 (2018) (“2018 Order”) the Ruling states:

*"[Because] the Commission’s Preemption Directive, see 2018 Order ¶¶ 194–204, lies beyond its authority, we vacate the portion of the 2018 Order purporting to preempt ‘any state or local requirements that are inconsistent with [the Commission’s] deregulatory approach[,]’ see id. ¶ 194."*

This letter therefore demands that the City of xxxxx, xxxxx cease and desist from:

1. the processing of any and all sWTF applications,
2. the placement of any new sWTF,
3. the construction of any new sWTF, and
4. the modification of any sWTF that would result in the addition of any antenna, or in the increase in any Effective Radiated Power from the sWTF.

In connection with the above-ceased activities, you may wish to inform applicants of the DC Circuit Court Case 18-1129 requirement to comply with the above Rulings and NEPA. The Court repealed the NEPA preemption in FCC Order 18-30. sWTF shot-clocks can be tolled by the City of xxxxx, xxxxx until further notice.

The following testimony from Attorney Edward B. Myers, an intervenor in Case 18-1129, was delivered at an 11/19/19 hearing in Montgomery County, Maryland and in a 11/20/19 San Francisco hearing. The testimony was entered into the respective public records at each of these hearings:

*“I am an attorney and was an intervenor in the DC Circuit Case 18-1129. I worked closely with the Natural Resources Defense Council on the briefs filed with the Court. My reading of the Court decision is summarized in the following:*

*The Federal Communications Commission issued a rulemaking order on March 30, 2018 to expedite the deployment of Densified 4G/5G and other advanced wireless facilities (what the FCC called “small cell” facilities). The FCC’s order exempted all of these 4G/5G facilities from two kinds of previously required review: historic-preservation review under the National Historic Preservation Act (NHPA) and environmental review under the National Environmental Policy Act (NEPA).*

*On August 9, 2019, the US Court of Appeals for the District of Columbia Circuit vacated the FCC’s rulemaking order. The legal effect of vacating the FCC’s rule necessarily means that the prior rule was reinstated: any actions taken on the basis of the vacated rule must be reconsidered under the terms of the prior rule.*

*The prior rule required the FCC to apply NEPA to the construction of 4G/5G facilities. Consequently, it is not lawful that any such facility be constructed without prior NEPA review. While other actions of Congress and the FCC have attempted to circumscribe local authority over the construction of Densified 4G/5G facilities, in light of the Court’s decision, the localities are, nevertheless, within their rights to****require the sponsors****of Densified 4G/5G facilities to provide evidence that the FCC has conducted a NEPA review prior to approving any request for construction.*

*Moreover, in as much as the Court’s decision vacated the FCC’s rule, the decision applies nationwide: its effect is not limited to the District of Columbia.”*

**Attorney Ingrid Evans**[**testified**](https://youtu.be/IKEtqSRmt1g?t=24m55s)**in a Nov 20, 2019 San Francisco Board of Appeals Hearing:**

*"I would also like to add that this case that came up earlier, the United Keetowah vs the FCC case, which was recently decided by the DC Circuit is very instrumental here and I think it is going to change the game on this and I think it is something to which the Board should pay attention.****It is going to be required that these small cell towers and these wireless permits be required to do an Environmental Impact and that is something that should be done****. I would request that all of these permits be delayed until DPH has gotten back to you on the health effects and an environmental impact study has been done. Thank you."*

Kindly remember that the Telecommunications Act of 1996 (“1996-TCA”), 47 U.S. Code § 332(c)(7)(B)(iv), recognizes the actual environmental effects of radiofrequency radiation from Wireless Telecommunications Facilities, indicating by extension its recognition of actual health effects. This Act left regulation of the health effects of WTFs' RF radiation entirely within state and local officials’ authorities, *obligating* said officials to protect its residents from health effects with regard to the placement, construction, modification and operations of WTF. In plain reading

*“No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission’s regulations concerning such emissions.”*

Finally, please note that the infrastructural copper wires and fiber-optic cables already in place were financed with public money, reside in public conduit or on poles in the public rights-of-way, and cannot lawfully be claimed or used by unregulated private Wireless companies as if they were private property purposed for private profit.

I, Lena Pu, a living woman residing in the City of xxxxx, xxxxx, United States, do not consent to the irradiation by any 5G/4G sWTF and WTF’s of any kind placed within residential, commercial and industrial areas of my town.  Kindly inform me of your intent to cease and desist from the above-listed activities.  This is your second notice.

Sincerely,

Lena Pu