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May 11, 2017

Evan Maxim  
Planning Manager  
City of Mercer Island  
Development Services Group  
9611 SE 36<sup>th</sup> Street  
Mercer Island, WA 98040-3732

Re: **Crown Castle applications for installation of telecommunications equipment within the public ways of the City of Mercer Island (the “City”)**  
**ROW Permit Application Nos. 1701-126 through 1701-132;**  
**1701-134 through 1701-136; and 1701-138 through 1701-166 (the “Applications”)**

Dear Mr. Maxim:

Thank you for your letter dated April 4, 2017 and the subsequent meeting with Crown Castle’s representatives on April 21, 2017 to discuss these pending applications.

I am writing to address the City’s position that there is (1) inadequate evidence to justify the location of 11 nodes, (2) some of the equipment is not located in the communications space on the pole, and (3) there is inadequate evidence to justify the placement of certain antennas above the electrical conductor. As explained below, the record contains substantial evidence that all three of these criteria have been met.

We also believe the City is discriminating against Crown Castle by unreasonably refusing to approve our pending applications for the installation of fiber optic cables, and we respectfully request that the permits be issued immediately.

**Location of Nodes.** The City requested Crown Castle to provide additional justification for the locations of several nodes. As you are aware, Section 6.3.2 of the Franchise Agreement limits the alternate location analysis to those poles which are located within 100 feet of the proposed node. Of the list of nodes that the City referenced on Page 1 of the April 4, 2017 letter, only 3 of the nodes have alternate poles within 100 feet of the proposed node. For those 3 nodes, none of the alternate locations are acceptable alternatives under the Franchise Agreement. The following table summarizes the additional information we are filing electronically with the City along with a copy of this letter:

SEATTLE

LOS ANGELES

ATLANTA

DENVER

PORTLAND

BEND

<u>Node ID</u>	<u>Permit #</u>	<u>Additional Information</u>
MIN01	1701-126	Alternate Pole 1 is 240' from the selected pole. Alternate Pole 2 is 315' from the selected pole. Alternate Pole 1 will not decrease the visual impact as it affects the same number of houses as the selected pole.
MIN05	1701-130	Alternate Guy Pole 1 will visually impact the same number of houses. Alternate Guy Pole 2 is 150' from the selected pole. Alternate Pole 1 is 150' from the selected pole Alternate Pole 2 is 150' from the selected pole.
MIN08	1701-132	Alternate Pole 1 is 230' from the selected pole, and it has too many service drops which make installation and maintenance work infeasible. Alternate Pole 2 is 110' from the selected pole and will not propagate to fill the significant gap in coverage. Please see attached propagation map.
MIN12	1701-138	Alternate Pole 1 is 160' from the selected pole. Alternate Pole 2 is 150' from the selected pole.
MIN13	1701-139	Alternate Pole 1 is 195' from the selected pole. Alternate Pole 2 is 190' from the selected pole.
MIS02	1701-143	Alternate Pole 1 is 250' from the selected pole. Alternate Pole 2 is 160' from the selected pole. Neither Alternate Poles 1 nor 2 will propagate to fill the significant gap in coverage. Please see attached propagation map.
MIS12	1701-153	Alternate Poles 1 – 3 are all 120' or more from the selected pole. Alternate Pole 3 would require significant tree pruning. Alternate Pole 4 will not propagate to fill the significant gap in coverage. Please see attached propagation map.

<u>Node ID</u>	<u>Permit #</u>	<u>Additional Information</u>
MIS17	1701-158	Staff's Alternate Pole would require significant tree pruning. Alternate Pole 1 will have a visual impact on the same number of homes as the selected pole.
MIS18	1701-159	Alternate Pole 1 is 180' from the selected pole. Alternate Pole 2 is 130' from the selected pole, and is not structurally feasible because there are 3 transformers on the pole. Alternate Pole 3 is 180' from the selected pole. Alternate Pole 4 is 230' from the selected pole.
MIS21	1701-162	Alternate Pole 1 is 140' from the selected pole. Alternate Pole 2 is 140' from the selected pole.

Based on this additional information, the record demonstrates that all of the proposed nodes are situated in a location that complies with the terms of the Franchise Agreement.

**Equipment in Communications Space.** The City has taken the position that the equipment cabinets must be located within the communications space, and cites Section 6.4.4 of the Franchise Agreement. It appears that the City believes the communications space is limited to the 2' tall to 3' tall area that is just below the shaded area on the first page of Exhibit C.

We disagree with the City's interpretation of this sentence. The Franchise Agreement actually states: "The equipment cabinets for Small Cell Facilities shall be located below the antennas in the communications space of the PSE Pole *as illustrated in Exhibit C*" (emphasis added). We believe the parties' understanding when the Franchise Agreement was signed that Crown Castle's equipment cabinets would be located precisely as they are illustrated in Exhibit C to the Franchise Agreement, and the definition of communications space includes the area where the equipment cabinets are illustrated in Exhibit C.

First, every presentation that Crown Castle made to the City and the City Council included images of equipment shrouds installed with the base located between 9' and 12' above ground level. Please refer to AB 5220, Exhibit 2, Pages 8, 13 and 18, and AB5220 Exhibit 3, Pages 13-16. In addition, please refer to every drawing filed with every application, where the equipment cabinet is located between 9' and 12' above ground level.

Second, the words "communications space" is not a defined term in the Franchise Agreement. When a term is not defined by the parties, the courts will look to the parties' intent and the

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common usage of the term. It is clear that Crown Castle intended to include the location where the equipment shrouds will be installed as part of the communications space. And in our discussions with the City, the City likewise indicated that the location of the equipment shrouds as shown on the applications and in the presentations to the City Council were acceptable designs.

Third, the one page in Exhibit C which purports to show where the communications space is located on a utility pole is a general drawing that is intended to illustrate the National Electric Safety Code's (NESC's) designation of space where *cables* may be attached to utility poles. The NESC identifies that specific 2' tall to 3' tall portion of the utility pole for the attachment of communications cables to assure that the communications cables maintain a certain ground clearance as the cables sag between utility poles at different ambient temperatures up to 120 degrees Fahrenheit.

I have attached a copy of the actual drawing from **Section 2 Definitions of the NESC** which clearly shows that the description of the communications space in Exhibit C is limited to a *communication cable or conductor*, and not intended to describe the area where equipment boxes may be installed.

I have also attached a copy of the NESC's **Table 232-2 Vertical clearance of equipment cases, support arms, platforms, braces and unguarded rigid live parts above ground, roadway or water surfaces**. Table 232-2 clearly allows for the installation of equipment cases at heights above 9.0' above ground level (and in accordance with note 7 to Table 232-2 even lower provided it does not unduly obstruct a walkway).

As shown by the rest of Exhibit C, the term "communications space" as the parties used it in the Franchise Agreement must include what is illustrated in Exhibit C as the Communications Space and the Transition Space. If the parties were to have expressly defined the term "communication space", it is clear from the documents that the definition would have included both the communications space and the transition space, or "the space on the PSE Pole below the safety space where PSE will allow the installation of Small Cell Facilities".

Finally, at no time during any of our discussions with City Staff or with the City Councilmembers did anyone from the City state that the equipment shrouds were not in what the parties were considering to be the communications space, nor did anyone from the City state that the City intended to define communications space to be a 2' tall to 3' tall area where the communications cables are also located as shown on only one page of the 3 pages included in Exhibit C. If the City really intended to define the communications space as being limited to a 2' tall to 3' tall space where communications cables are currently located, the City should have made that subjective intent clear during negotiations and when assembling the exhibits to the Franchise Agreement. Quite simply, it is physically impossible to fit a 4'4" tall equipment

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shroud within a 2' tall to 3' tall space, especially when that 2' tall to 3' tall space is currently occupied by communications cables which prevents a carrier from installing equipment shrouds to the pole within that 2' tall to 3' tall space. Crown Castle would have never agreed to a definition of communication space that creates an impossibility. It is clear that a court would rule the "communications space on the PSE Pole as illustrated in Exhibit C" includes the locations where the equipment shrouds are illustrated in Exhibit C. To the extent there is any inconsistency between the one page in Exhibit C which highlights the NESC-defined space for communications cables to be attached to poles and the illustrations in the remaining portions of Exhibit C where the equipment shrouds may be installed, the remaining pages in Exhibit C will certainly control.

The record before the City demonstrates that every equipment shroud is properly located on the PSE Pole as allowed by the Franchise Agreement when the Franchise Agreement is read as a whole, including all of the illustrations in Exhibit C.

**Antennas in Communications Space**. The City has taken the position that the Franchise Agreement "establishes a clear design requirement and priority to locate small cell antennas within the communications space". The City's summary of the requirements of the Franchise Agreement is incorrect. The Franchise Agreement actually includes a hierarchy of two approved alternative designs, with the first preference to place the antennas in the communications space and the second preference to place the antennas at the top of the pole.

While the City and Crown Castle were negotiating the Franchise Agreement, PSE had indicated to Crown Castle that PSE would consider allowing the placement of antennas within the communications space. In reliance upon PSE's statements, Crown Castle designed the Small Cell Facilities with as many of the antennas within the communications space as was feasible. When the Franchise Agreement negotiations concluded and the parties signed the Franchise Agreement, PSE was still willing to consider allowing the installation of antennas in the communications space.

It wasn't until after the Franchise Agreement was signed that PSE notified Crown Castle that PSE would not allow the installation of antennas in the communications space. At that time, Crown Castle was forced to redesign its Small Cell Facilities at significant expense to comply with the alternate designs that are expressly allowed under the terms of the Franchise Agreement. We've continued to discuss this topic with PSE, but they have refused to change their position and have definitively indicated that they will not allow the installation of antennas in the communications space when their workers might pass in front of the antennas. We have been informed that PSE will communicate its decision directly to the City in writing.

We are equally frustrated that PSE has refused to allow us to install the antennas in the communications space, but the reality is that Crown Castle is prohibited by the pole owner from

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installing antennas in the communications space. The Franchise Agreement expressly allows the installation of the antennas above the conductor as the second preference, and all of the applications are in compliance with the express terms of the Franchise Agreement. Therefore, the record before the City clearly establishes that all of the antennas comply with the requirements of the Franchise Agreement and we expect all of the applications will be approved promptly.

**Fiber Optic Cable Applications.** As you are aware, Crown Castle filed separate permit applications for the installation of fiber optic cables to serve the Small Cell Facilities. To date, the City has not issued the permits. In a meeting with Crown Castle's representatives on Friday, April 21, 2017, the City indicated that it would re-consider issuing the fiber optic cable permits if Crown Castle provided written assurance that the issuance of the permits would in no way guarantee that the City would issue any of the permits for the Small Cell Facilities.

Crown Castle hereby acknowledges that if the City issues the permits for the fiber optic cables, the City is not guaranteeing that the City will approve any of the applications for the small cell nodes, and both parties are not waiving any rights under the Franchise Agreement or applicable law relating to the small cell nodes.

Crown Castle believes the City's refusal to issue the permits for the fiber optic cables violates the City's obligation under Federal law to issue permits to all telecommunications service providers on a non-discriminatory basis. 47 U.S.C. Section 253(c). The City issues permits on a regular basis without delay to CenturyLink and Comcast for the installation of communications facilities in the right of way without regard to whether any other projects or commercial relationships affected by the communications facilities will proceed. The City's refusal to issue the permits to Crown Castle for the installation of the fiber optic cables is a violation of federal law and we respectfully request that the City issue the permits immediately.

A copy of this letter and the additional information will be filed electronically per your request.

Very truly yours,



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