TO: Nevada City Planning Commission
FROM: David Adams, Richard Cristdahl, Paula Orloff, and Group of Concerned Citizens, Businesses, and Property Owners
DATE: June 14, 2016
RE: Legal Aspects of Demonstrating a "Significant Gap in Coverage" of Cell-Phone Service

We want to point out something we believe to be important and relevant to the June 16 considerations of the use-permit application from Verizon for 8 new rooftop cellular antennas on the building at 109 N. Pine Street. It appears from what has been submitted and stated so far, that this use-permit application from Verizon is not because of any proven gap in cell-phone coverage in downtown Nevada City (where reception is generally very good), but rather for capacity and/or commercial competition reasons.

The issue of "significant gap" is one of the most important issues in any cell antenna application. The burden of proof for significant gap is on the carrier. If a significant gap is not proven, then cities do not have to grant access or approve a use-permit application. **The following are some relevant court cases where judgments were in favor of local governments because a significant gap was not proven.** We would like to ask that you please review these cases prior to the June 16 meeting. Also, we would like to point out that a "*significant* gap" needs to be proven, not just a gap, per court rulings.

1) The U.S. Court of Appeals for the Third Circuit in *APT v. Penn Township* [http://www2.ca3.uscourts.gov/opinarch/983519.txt] found (skip to p. 18):
"First, the provider must show that its facility will fill an existing significant gap in the ability of remote users to access the national telephone network. In this context, the relevant gap, if any, is a gap in the service available to remote users. Not all gaps in a particular provider's service will involve a gap in the service available to remote users. The provider's showing on this issue will thus have to include evidence that the area the new facility will serve is not already served by another provider.

"Second, the provider applicant must also show that the manner in which it proposes to fill the significant gap in service is the least intrusive on the values that the denial sought to serve. This will require a showing that a good faith effort has been made to identify and evaluate less intrusive alternatives, e.g., that the provider has considered less sensitive sites, alternative system designs, alternative tower designs, placement of antennas on existing structures, etc."

The Third Circuit has used its definition of a significant gap in many decisions. One of these decisions, *Omnipoint v. Newtown (Pennsylvania)*, was appealed by Omnipoint to the U.S. Supreme Court. The key objection by Omnipoint was the Third Circuit's definition of "significant gap." The Supreme Court refused to hear that appeal, thereby letting the Third Circuit's decision stand.

2) The US Court of Appeals for the Ninth Circuit found Sprint's projected coverage maps unclear in *Sprint vs. Palos Verdes* in defining "significant gap." In any event, that there was a "gap" is certainly not sufficient to show there was a "significant gap" in coverage. In addition, the Court noted how Sprint already had existing cell towers throughout the city. It also acknowledged that public remarks and residents' drive test results contained in the staff report further illustrate that Sprint's existing network was, at the very least, functional. (*Sprint vs. PV* also allowed cities to regulate cell towers based on aesthetics, so long as there is no prohibition of providing wireless services to fill a "significant gap.") Skip to page labeled 14552 to read more about "significant gap":
http://cdn.ca9.uscourts.gov/datastore/opinions/2009/10/13/05-56106.pdf

3) The Ninth Circuit Court of Appeals found, in *Metro PCS vs. San Francisco*, 2005, that *"[t]he TCA does not assure every wireless carrier a right to seamless coverage in every area it serves,* and that *the inability to cover a few blocks in a large city is, as a matter of law, not a significant gap.*" While we recognize that the

TCA (Telecommunications Act) does not guarantee wireless service providers coverage free of small "dead spots," the existing case law amply demonstrates that "significant gap" determinations are extremely fact-specific inquiries that defy any bright-line legal rule.
http://cdn.ca9.uscourts.gov/datastore/opinions/2005/03/07/0316759.pdf

4) The Ninth Circuit Court of Appeals found, in *Sprint vs. the County of San Diego* (2008) that, based on 6 specific criteria a local government ordinance specifying that the location, size, design, and operating characteristics of the proposed use will be compatible with adjacent uses, residents, buildings, or structures, allows them "to *retain discretionary authority to deny a use permit application or to grant an application conditionally."* Furthermore, "a plaintiff must establish either an outright prohibition or an effective prohibition on the provision of telecommunications services; a plaintiff's showing that a locality could *potentially* prohibit the provision of telecommunications services is insufficient."
http://scholar.google.com/scholar_case?about=4912072400026586345&hl=en&as_sdt=2,48&as_vis=1

At the June 16 Planning Commission meeting, we would like to request that the planning commissioners question thoroughly any information that Verizon has presented on a "significant gap." Unless there is clear evidence of a "significant gap," as well as for other reasons, Nevada City does not have to approve the use-permit for these rooftop cellular antennas at this location, which is against the wishes of many residents and businesses.

One more relevant court case for your review: In *AT&T vs. City Council of Virginia Beach*, the US Court of Appeals for the Fourth District ruled that placing a cell tower is a commercial endeavor, and that the city has ultimate authority over aesthetic considerations. Read the full court decision here:
http://www.ca4.uscourts.gov/Opinions/Published/972389.P.pdf

Lastly, a rejection requires evidence documented in a written record, much of which our group has already tried to provide, with additional pieces to be presented at the June 16 meeting.