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May 23, 2018

City of Beacon City Council
Beacon City Hall
1 Municipal Plaza
Beacon, New York 12508

RE: Proposed Local Law to Add Section 223-26.4 of the Code of the City of Beacon Concerning Small Cell Wireless Facilities

Dear Mayor Casale and Members of the City Council:

Our firm represents Orange County-Poughkeepsie Limited Partnership DBA Verizon Wireless ("Verizon Wireless"). Verizon Wireless appreciates the opportunity to provide the following comments and concerns relative to the above-referenced proposed local law under consideration by the City Council.

As the City Council is likely aware, Verizon Wireless previously submitted separate special use permit applications requesting permission to install and operate two small cell facilities within two city rights-of-way. These applications were submitted on November 17, 2017. Both applications involve installing equipment and a small antenna on utility poles owned by Central Hudson Gas & Electric ("CHGE"). No equipment will be located on the ground within such rights of way.

Based on the foregoing and because Verizon Wireless anticipates the need for future small cell facilities in the City of Beacon, Verizon Wireless has a significant interest in the adoption of a fair, reasonable and competitively neutral small cell local law. Verizon Wireless also believes that a fair, competitively neutral and non-discriminatory approach to small cell

deployment within the city will benefit the city by limiting the use of already scarce city resources for these relatively minor installations, which in many instances are extremely similar to traditional electrical utilities currently deployed in the public rights of way.

The following comments on the draft local law are respectfully provided below for your consideration.

1. Section 223-26.4(B)(2)(a). This subsection, as currently written, provides that the Planning Board may issue a permit for certain proposals, including a proposed modification of an existing tower or base station that does not involve a substantial change to the tower or base station or is a modification that qualifies as an "eligible facilities request" pursuant to the Middle Class Tax Relief and Job Creation Act of 2012 ("TRA").

   Comment. Verizon Wireless recommends that this provision be removed from the local law for the following reasons. First, by definition "eligible facilities requests" under the TRA are by definition minor in nature and do not involve substantial changes to an existing tower or base station. Moreover, according to federal law, an eligible facilities request must be approved and cannot lawfully be denied by the local municipality. Based on the foregoing, it would appear that these types of applications could easily be administered via the Building Permit process, which would have the effect of significantly reducing the Planning Board's case load with respect to these types of minor facilities.

2. Section 223-26.4(B)(2)(b). This subsection appears to require a permit for a simple collocation of a small cell facility on an existing tower, utility pole or streetlight not exceeding 50 feet in height in the public right-of-way.

   Comment. Due to the minor nature of a collocation of equipment on an existing tower, utility pole or streetlight, we believe it is appropriate for such projects to be approved administratively via a Building Permit, instead of requiring formal Planning Board review and approval. Administrating these types of minor projects through the Building Department will also free up limited city resources and will allow faster deployment of these facilities which will significantly enhance wireless service throughout the city.

3. Section 223-26.4(B)(2)(d). According to the proposed language in this subsection, the Planning Board is authorized to issue a permit for the replacement of an existing utility pole that does not result in a change from the original dimensions.

4. Comment. We question whether this is intended to apply to traditional utility company installations, such as "landline" telephone and electric poles also. It is possible to interpret the proposed local law to exclude such traditional utility company pole replacements. If that is the case, we feel that such interpretation is inconsistent with existing federal law.

Federal law prohibits state or local actions that would erect substantial barriers to wireless facilities deployment, including prevention of a wireless provider from competing on a level playing field with others.[1] Under federal law, regulation need not be an absolute preclusion to be found unlawful.[2] The law requires management of public rights-of-way to be conducted on a competitively neutral and non-discriminatory basis.[3] Thus, a wireless carrier can be neither denied access nor charged more for the same rights and services than a traditional utility. To be competitively neutral and non-discriminatory, the City of Beacon is required to treat the proposed VZW infrastructure improvements similar to the manner in which the traditional utilities (land-line telephone and electric, etc.) are treated relative to zoning permits and approvals.

In addition to being required by Federal law, evenhanded treatment of wireless providers is critical to the New York State's "Broadband for All" policy which promotes broadband access, including wireless access throughout the state.[4] Imposing greater burdens on wireless providers than on traditional utility providers is simply inconsistent with that policy.

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[1] The federal Telecommunications Act of 1996, codified at 47 U.S.C., was enacted "to open up markets to competition by removing regulatory barriers to entry... To provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced information technologies and services to all Americans by opening all telecommunications markets to competition." (Conference Report, telecommunications act of 1996, House of Representatives, 104th Congress, 2d Session, H. Rept. 104-458, at p.1). "Telecommunications" is not limited to wireless carriers/service (see 47 U.S.C. §153(50)). Specifically, 47 U.S.C §253(a) prohibits State and local statutes/regulations that "may prohibit or have the effect of prohibiting the ability of an entity to provide any interstate or intrastate telecommunications service." The federal statute places a similar prohibition on a State and/or local government's regulation of the "placement, construction, and modification" of wireless telecommunications facilities, requiring that such regulations "shall not prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. §332(c)(7)(B)(i)(II). Accordingly, a different regulatory framework, including access regulations and fees, for similar telecommunications technologies works to "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service" in violation of §253(a).

[2] "a regulation need not erect an absolute barrier to entry in order to be found prohibitive... It is enough that [the regulation] would 'materially inhibit' the provision of services." Quest Corp. the City of Santa Fe, 380 F. 3d 1258, 1267 (10th Cir. 2004), citing RT communications, Inc. v. FCC, 201 F.3d 1264, 1268-69 (10th Cir. 2000). In Quest Corp., the Court of Appeals found requirements placed on telecommunications providers by the city's ordinance with respect to both rent and construction costs to be "substantial," representing a "massive increase in cost," and thus were prohibitive under §253(a) of the telecommunications act and thereby unenforceable. Id. at 1271-75.

[3] "Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation for telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government." 47 U.S.C. §253(c). Notably, the courts and the FCC have interpreted this subsection to require regulations as to both the management of the rights-of-way and any required compensation to be "competitively neutral" and "non-discriminatory." Quest Corp., supra at 1271.

[4] See https://www.ny.gov/programs/broadband-all

We, therefore, believe that it is inappropriate to single out small cell facilities and impose different requirements on such facilities as compared to traditional utility infrastructure.

5. Section 223-26.4(B)(2)(e). This provision requires a permit for the installation of a monopole or utility pole intended for small cell or DAS facilities to be located in a public right-of-way that does not exceed 50 feet in height.

   Comment. We question whether this facility is intended to apply just to small cell facilities or whether it will apply equally to traditional utility installations. As indicated above, public rights-of-way must be managed in a competitively neutral and nondiscriminatory manner. If this provision is intended only to apply to utility poles for small cell facilities, and not traditional utility poles, we question whether this provision is competitively neutral and nondiscriminatory in nature.

6. Section 223-26.4(C)(6). This subsection would require issuance of a special use permit from the City Council for certain proposals, including a project which proposed the installation of equipment located on a pole less than 10 feet from the ground.

   Comment. Verizon Wireless is extremely cognizant of the need to attempt to keep equipment out of reach of the public, and attempts to do so when feasible. However, this specific provision could actually result in taller pole heights due to the fact that small cell equipment needs to maintain a certain separation distance from other pole attachments. There could be situations where equipment on existing poles would require the proposed small cell equipment to be located at a height of less than 10 feet from the ground. In order to install the proposed small cell equipment at a minimum height of 10 feet above ground, a taller tower may be required in certain circumstances. Is the city willing to accept this trade-off? Additionally, does this requirement apply equally to the traditional utility installation (i.e. non-wireless)?

7. Section 223-26.4(D)(3). This subsection exempts certain projects, including routine maintenance and the replacement or upgrade of a previously permitted facility with equipment that is the same as or smaller in size, weight and height at the same location from the requirement to obtain a permit under this proposed local law.

   Comment. Verizon Wireless agrees that it is appropriate to exempt certain small cell projects from the need to obtain land-use and zoning permits. We also believe that it is appropriate to consider removing the reference to "weight" in section 223-26.4(D)(3). It is possible that replacement equipment could be equal in size and height, or smaller, but be heavier in weight, depending upon the design. We believe that the weight of the replacement equipment should not be a threshold for requiring an application, as long as the existing structure has adequate capacity to accommodate the replacement equipment.

8. Section 223-26.4(D)(4). This subsection requires a telecommunications provider to pay the city an application fee and administrative fee outlined in the proposed local law based upon the specific project proposed.

   Comment. While Verizon Wireless does not necessarily oppose the requirement for application or administrative fees, any such fees must be limited to the city's right of direct cost recovery for activities related to the application.

   Where a license or permit fee is imposed under the power to regulate, the amount charged cannot be greater than a sum reasonably necessary to cover the costs of issuance, inspection and enforcement. *New York Tel. Co*, 200 A.D.2d at 316; *Torsoe,* 49 A.D.2d at 465; *Orange & Rockland Utilities, Inc.*, 80 A.D.2d at 847; *Bally's Aladdin's Castle, Inc.*, 126 Misc. 2d at 545; *Mobil Oil Corp.*, 85 Misc. 2d at 806. Moreover, a properly imposed fee is one that has been determined on the basis of reliable factual studies or statistics. *Jewish Reconstructionist Synagogue of N. Shore v. Inc. Vill. of Roslyn Harbor,* 40 N.Y.2d 158, 163 (1976).

9. Section 223-26.4(E). This provision attempts to establish location priorities for the siting of small cell facilities. The proposed law attempts to give the highest priority to city-owned or federal, state or local government owned buildings or structures. In each instance, municipally owned structures or property are given preference over privately owned structures or property.

   Comment. We believe that an attempt to give priority to municipally owned structures or property represents an arbitrary and unlawful provision. Where a local law lists preferences for site location that involves ownership of land—specifically, municipally owned property—as opposed to location or zoning classification of land, it violates equal protection and police power principles. *Countryman v. Schmitt*, 176 Misc. 2d 736 (Sup. Ct. Monroe Cty. 1998) (holding that a town law governing grants of special use permits for communication towers, which prioritized location, and placed property owned by the town above residential land in priority, violated equal protection rights). The proposed provision, as currently written, inappropriately attempts to force applicants to municipally-owned properties and/or structures.

   As a result of the minor nature of the infrastructure associated with typical small cell facilities and the fact that such facilities are or will be needed in many areas within the city regardless of the zoning classification, it is more appropriate to simply create a hierarchy which gives preference to collocation on existing and/or replacement utility poles or structures. Under this scenario, a new utility pole or structure would not be permitted unless the applicant adequately demonstrates that collocation on an existing pole or structure is not a viable alternative.

10. Section 223-26.4(F). This provision establishes certain application and annual fees for the placement of small cell facilities on: (i) existing private utility poles; (ii) existing

city-owned buildings, utility poles, infrastructure or property; (iii) new poles in the right-of-way (presumably city-owned).

Comment. We have several concerns with this provision.

We also question whether the small cell permit application fee applies equally to traditional telephone and electric utility installations. In other words, is a telephone or electric utility company required to pay a $500 application fee to install a new pole? In order to maintain a competitively neutral and nondiscriminatory review process, as required by Federal law, the city is not permitted to treat licensed wireless communications providers differently from other traditional utility providers. To do so would constitute an unlawful barrier under the Telecommunications Act of 1996.

As set forth above in item number eight (8) above, for municipal application fees to be proper, the fees must be equal to a sum reasonably necessary to cover the costs of issuance, inspection and enforcement of the permit. Have the proposed fees been determined on the basis of reliable factual studies or statistics? If so, we respectfully request to be provided with a copy of such factual studies or statistics.

In addition to the above, we believe that the annual small permit fee schedule may be unlawful on its face. For example, Section 223-26.4(F)(3)(a) purports to require payment of a $1,000 annual small cell permit fee for placement of a small cell facility on an existing private utility pole. Is the $1,000 fee is intended to apply to collocation on an existing private utility pole located outside of a city-owned right-of-way? As currently written, an argument exists that such fee would in fact apply to collocations on existing private utility poles located on private property. The city has absolutely no right to impose an annual fee for a use limited to private property, in which it has no interest.

A further concern involves the fact that many small cell facilities involve the use of replacement utility poles. Many existing utility poles are located in acceptable locations but are not tall enough to accommodate small cell facilities. In these instances, Verizon Wireless typically proposes to install a replacement utility pole which is taller in height than the existing pole. Section 223-26.4(F) does not appear to address this situation.

11. Section 223-26.4(G). Section 223-26.4(G)(1)(a) provides that new small cell facilities shall not be located in the Historic District and Landmark Overlay Zone. Section 223-26.4(G)(1)(b) provides that wherever possible, new small cell facilities shall include stealth technology designs. Section 223-26.4(G)(1)(c) requires all small cell facilities located on a roof to be set back at least 15 feet from the edge of the roof along any street frontage. Section 223-26.4(G)(1)(f) requires small cell facilities to be designed and placed in an aesthetically pleasing manner to the reasonable satisfaction of the approving agency.

Historic District and Overlay Zone

Banning small cell facilities (i.e. utilities) from the Historic District and Landmark Overlay Zone is problematic on several fronts. First, such a ban ignores the fact that these types of facilities are required to be located in areas where the wireless service will be utilized, including historic districts. And, due to the nature of the service provided by a small cell facility, it is often not feasible to design a small cell facility outside historic districts if that is the area in need of such service.

If this provision survives and becomes law, it would require wireless communications providers to seek a use variance from the Zoning Board of Appeals to be able to install a small cell facility in a historic district. This requirement would simply add another bureaucratic layer to the overall process. Moreover, given the existing public utility variance standard adopted by the New York State Court of Appeals, it is very unlikely that a use variance would be lawfully denied for such zoning district. In light of this, we respectfully recommend that the City Council consider revising this provision to allow for the installation of small cell facilities in the Historic District and Landmark Overlay Zone provided that an applicant provide adequate justification as to the need for the facility in such a zoning district.

Banning small cell facilities from the Historic District and Landmark Overlay Zone also runs the risk of being in violation of the Telecommunications Act of 1996 which prohibits local municipalities from taking actions that prevent wireless communications providers from competing on a level playing field with traditional utilities. By allowing traditional utilities to locate in the Historic District and Landmark Overlay Zone, while preventing wireless communications providers from installing small cell facilities in such district, the City Council is not treating the wireless communications providers on a competitively neutral and non-discriminatory manner. This is inconsistent with the Telecommunications Act of 1996.

Banning small cell facilities from the Historic District and Landmark Overlay Zone, with an implied desire to maintain a perceived notion of historic accuracy, may actually be ignoring history. Attached are three photographs taken from the early 1900s which depict areas within the city of Beacon and the Poughkeepsie-Wappinger Falls trolley. All pictures include prominent and significant utility structures, cables and related improvements along the right-of-way. To attempt to ban small cell facilities from a particular zoning district to maintain a perceived aesthetic view shed appears to be historically inaccurate.

Stealth Design

Although incorporating stealth design into new small cell facilities sounds good on paper, there are significant issues with such requirement. With the move towards newer technology, including the anticipated deployment of 5G service, the use of camouflage materials will actually negatively impact the signals from the antenna.

The antennas used, or to be used in the future, with small cell facilities will not be able to be camouflaged without significant signal degradation. As a result, the proposed provision which requires new small cell facilities to include stealth technology designs when possible, will likely result in significant service issues that could lead to the need for a substantial amount of additional small cell facilities.

Roof Set Back

The requirement that all small cell facilities shall be set back at least 15 feet from the edge of a roof along any street frontage presents the following concerns. Based on the manner in which this provision is written, any small cell facility that fails to comply with the 15 foot setback requirement would require an area variance from the Zoning Board of Appeals. There may be instances where a lesser setback is not objectionable depending upon the design of the small cell facility and/or the surrounding neighborhood. For such situations, it would appear to be more appropriate for the law to allow the reviewing board to allow for a lesser setback if the reviewing board determines that such lesser setback is no less protective of the surrounding environment.

Aesthetically Pleasing Design

Section 223-26.4(G)(1)(f) which requires all small cell facilities to be designed and placed in an aesthetically pleasing manner to the reasonable satisfaction of the approving agency appears vague and open ended. Without specific criteria to guide the reviewing board, it is possible that this provision could be the source of dispute as to what constitutes an aesthetically pleasing design and location.

12. Section 223-26.4(I). This provision confirms that an application shall not be required for routine maintenance or the replacement or upgrade of a previously approved small cell facility.

    Comment. This provision is duplicative. See Section 223-26.4(D)(3).

13. Section 223-26.4(J). This section requires a wireless telecommunications provider to provide a list of existing small cell locations within the city on an annual basis.

    Comment. This appears to be overly burdensome since each application under this section requires a list of existing small cell facilities and anticipated small cell facilities to be developed in the future. The requirement to include these lists in the application materials should obviate the need for an annual requirement to provide essentially the same lists to the city.

14. Section 223-26.4(K)(2). This subsection provides that the city retains the right and privilege to cut or move any small cell telecommunications facility located in the

public right-of-way as the city may determine to be necessary, appropriate or useful in response to any public health or safety emergency.

Comment. Although Verizon Wireless appreciates the need for the city to protect the public health and safety of his residents, cutting or other rise significantly altering a small cell wireless telecommunications facility could be considered an unlawful interference with the right to broadcast pursuant to an existing Federal Communications Commission license.

On behalf of Verizon Wireless, we extend our appreciation to the City Council for the opportunity to provide the above comments on the proposed local law to regulate small cell facilities. We are happy to answer any questions the City Council may have with respect to this letter or our concerns in general.

Very truly yours,
YOUNG SOMMER, LLC

Scott P. Olson

SPO/
enclosure

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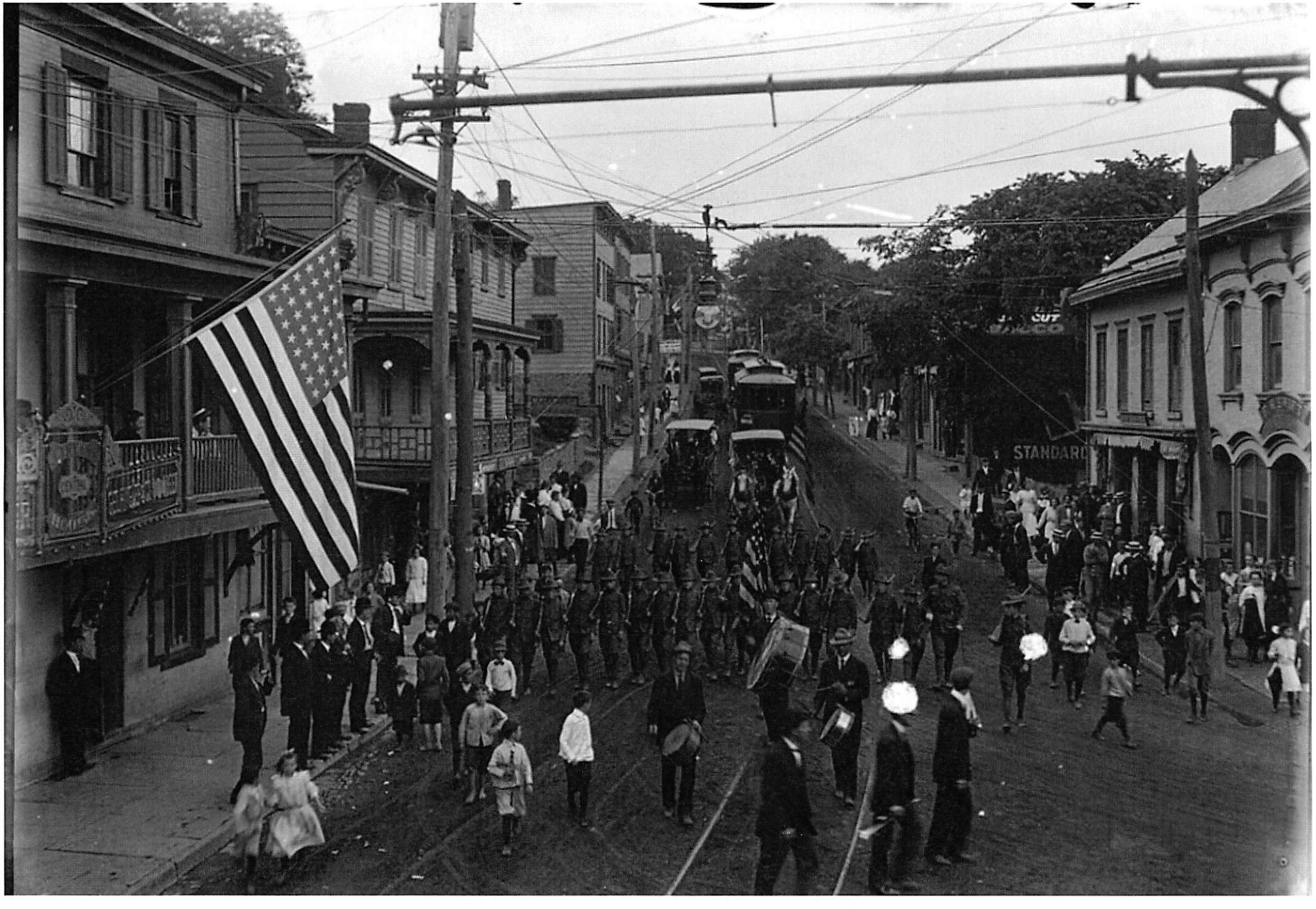
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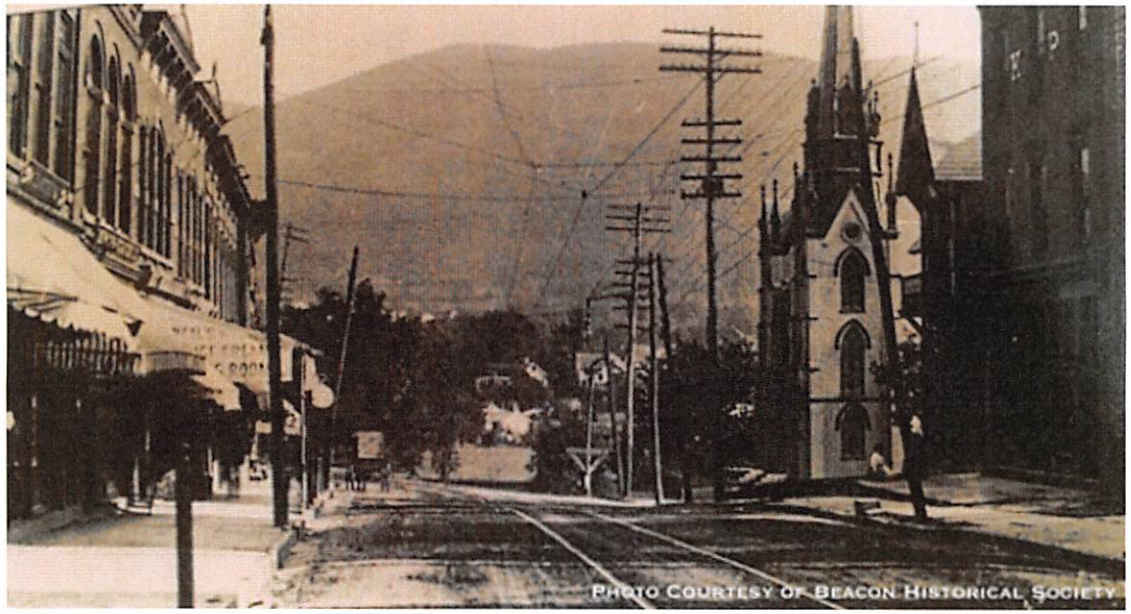
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