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SITING COUNCIL

Before The Connecticut Siting Council
Docket No. 360

In Re Application of Cellco Partnership, Etc. for a Certificate of Environmental Compatibility and Public Need

Intervenor's Response to Applicant's Motion to Preclude

Cellco Partnership d/b/a Verizon Wireless has moved to preclude any and all evidence about the effects of RF emissions. Intervenor Jaeger opposes this motion on the following grounds:

1. **Motion is untimely.**

A. Cellco had ample time to move to preclude the Intervenor's exhibits and evidence on the effects of RF emissions when it received Mrs. Jaeger's pre-filed testimony and pre-marked exhibits on June 6 and 7, 2008, when they were duly served by certified mail on Cellco Verizon and on Cellco Verizon's counsel. A total of more than seven weeks have passed since those documents were legally rendered to Verizon and its counsel, with a total of three weeks of those in advance of the time for motions at the outset of the published Hearing Program. Not a single objection was raised by Verizon in this appropriate time. Verizon has waived its right to object.

B. No "good cause" exists or has been demonstrated as required by Siting Council rules to hear an out-of-time motion. The time for filing motions has passed, and Applicant has not offered any "good cause" as required by the Council's regulations (Sec.

16-50j-3. "Waiver of rules.") for any variance from the long-published and consented to "Hearing Program" whose order was agreed to by Applicant's counsel multiple times:

First consent to order of Hearing Program by Applicant: The Council's "Hearing Program" for the public hearing on Docket 360 for Tuesday, July 1, 2008 at 3:00 pm and 7:00 pm was circulated by email to the Applicant and to Intervenor on June 24, 2008 -- a full month before the date of Applicant's Motion -- by CSC staff member Cariann Mulcahy who solicited "any questions or corrections" on the Program at that time.

On June 24, in response to this CSC solicitation of comments, Verizon's counsel suggested that a new section I.F. be added for municipal official statements.

Second consent to order of Hearing Program by Applicant: On June 30, 2008 the CSC complied with Applicant's suggestion, and staff member Cariann Mulcahy emailed a revised version of the now published "Hearing Program" document now containing Attorney Baldwin's suggested addition of "D.F. Municipal comments." At the same time, Ms. Mulcahy announced a "telephonic attorney's pre-hearing conference" to be held on that same day to cover

> 1. Any questions that you have with the Council's hearing program; and 2. Any anticipated preliminary motions that may be filed or orally made. This conference is not meant for argument of any such motions; only to determine whether there are such motions and thus whether the Hearing Program needs to be adjusted.
>
> (CSC Email of 6/30/08 to parties and intervenors.) (Emphasis added.)

The Council therefore expressly invited motions, of which Applicant had none. At this time, Intervenor declared her intention to make two motions at the appointed time in the published "Hearing Program," in accordance with the Council's directive.

Third consent to order of Hearing Program by Applicant: Upon the convening of the long-awaited, now published hearing, and in accordance with the agreed-upon order of "Hearing Program" for July 1, 2008 on Docket 360, after copies of the printed "Hearing Program" were distributed to all parties and Intervenor, the Siting Council Chairman adopted the "Hearing Program" and proceeded in order, at first passing over item "C. Motions (if any)."

Upon detecting that the opportunity to make her two disclosed motions was being passed over, Intervenor's counsel rose to object to the omission of the "Program Hearing" item, and indicated to the Chair that she had discussed her two motions with the Council's legal counsel, Assistant AG Marconi, the CSC Executive Director Phelps and Applicant Attorney Baldwin in the telephone conference of June 30 at 4pm and that all were apprised of and understood her intention to make the motions.

The Chairman accordingly returned to item "C. Motions (if any)" on the "Hearing Program" to entertain Intervenor's two motions.

At no time from the first moment that the formal Siting Council "Hearing Program" for Docket 360 was published, noticed and consented to, did Attorney Baldwin indicate any objection, or express any intention to make a motion.

At no time since Intervenor made formal service on Applicant by certified U.S. Mail on June 5, 2008 -- nearly two months ago -- of her voluminous set of marked hearing exhibits, did Applicant indicate any objection to the nature or substance of her exhibits, or of the substance of her pre-filed testimony, or indicate any intention to make a motion regarding them.

Applicant has had more than sufficient notice and time to consider Intervenor's pre-filed hearing exhibits and testimony. If the Council should entertain the motion at the

'eleventh hour,' such special accommodation for counsel's failure to timely address issues he may have wished to raise in the proper, consented to, and timely, published order of Hearing would be a fundamental denial of equal protection in addition to other violations of legal provision for fairness in administrative proceedings.

Any waiver of the Siting Council's (CSC) orderly procedure on its long-published and consented to Hearing Program mid-hearing would not only prejudice Intervenor's case and her right to a full and fair hearing and her right to make a full record for appellate review; it would once again taint these proceedings by displaying a double-standard -- one for industry, and one for private citizens.

Most importantly, such a departure from the CSC's published rules, accepted and published, relied upon and in process "Hearing Program," during the very pending of these proceedings, to the detriment of Intervenor Jaeger, who has invested time, energy and personal resources in reliance upon the fairness of these proceedings, would be a violation of her right to petition the government under the First Amendment; would be a violation of her due process rights under the Fifth and Fourteenth Amendments, including protections afforded her under the Ninth and Tenth Amendments, which encompass her right to a full, fair and meaningful hearing on the issues she has raised; in addition to being a violation of the corresponding provisions of the Connecticut Constitution and state laws guaranteeing procedural fairness, specifically the Uniform Administrative Procedure Act.

The Council provided for the making of motions at the outset of the proceedings before any evidence was taken. Cellco Verizon had ample opportunity A) to express any objection or request opportunity to make motions after the opening of the hearing of evidence, and B) Cellco consented to every version of the published Hearing Program.

Cellco now makes this motion three weeks late and after extensive cross-examination of its witnesses. Cellco's last minute motion is prejudicial to the Intervenor and is another example of industry manipulation of the Council's procedures to ambush ordinary citizens and disrupt the orderly presentation of evidence.

Provisions of the Telecommunications Act (TCA) do not come as any surprise or new discovery to Cellco Verizon, an experienced and successful applicant for tower siting approvals, and therefore Cellco is estopped from claiming any prejudice itself at this late stage in the proceedings. Cellco has failed to adduce any evidence of "good cause" for waiver of orderly program already in process, and its motion should be denied.

2. The motion is without merit. The preemption provisions of the Telecommunications Act (TCA) relate solely to actions by state agencies in deciding on the placement of wireless transmitters. They do not prevent an agency from hearing testimony. Intervenor Jaeger has a right to make a full record before this Council so that it will be available for any reviewing tribunal to determine whether there was a substantial record to support the agency's decision.

3. The TCA preemption does not block consideration of harm to migratory birds or bald eagles. The Migratory Bird Treaty Act and the Bald Eagle Protection Act are of equal weight with the TCA and their specificity supersedes TCA's general provisions. Moreover, Article VI of the U.S. Constitution (Supremacy Clause) mandates that all treaties are the Supreme law of the land -- which includes treaties protecting migratory birds.

In pertinent part:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges

> in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.
>
> (United States Constitution, Article VI, excerpted.)
> (Emphasis added.)

To preclude or to omit from consideration substantial evidence of the effects on migratory birds protected under international law and a federal treaty would not only be a violation of federal "supreme" law, it would constitute arbitrary action by the Council and abuse of discretion as well as multiple violations of Intervenor's procedural and substantive rights and protections under the state and federal constitutions and state laws adopted to protect her, her family, property and wildlife of the state.

4. State law (C.G.S 26-310 Environmental Protection Act) Obligates all state agencies to protect wildlife, a provision which is not preempted by the TCA because the TCA preemption applies only to adverse effects on human health. The Siting Council's role as a state agency imposes the additional affirmative legal duty, as on all state agencies, to protect wildlife. (As to the importance of protecting these resources, See Connecticut Environmental Protection Act Sections 22a-1 – 22a-2a; 22a-36 – 22a-45; 23-5a – 23-5g; 23-8; 23-66; 26-303 – 26-314.) This duty is entirely consistent with the International and Federal Migratory Bird Treaty Act and the Bald Eagle Protection Act, and state statute binds the Connecticut Siting Council, since the preemptive provisions of the TCA have been held to apply only to human health.

Connecticut Environmental Protection Act Section 26-310 provides:

> "Sec. 26-310. Actions by state agencies which affect endangered or threatened species or species of special concern or essential habitats of such species. (a) Each state agency, in consultation with the commissioner, shall conserve endangered and threatened species and their essential habitats, and shall ensure that any action authorized, funded or performed by such agency does not threaten the continued existence of any endangered or threatened species or result in the destruction or

adverse modification of habitat designated as essential to such species, unless such agency has been granted an exemption as provided in subsection (c) of this section. In fulfilling the requirements of this section, each agency shall use the best scientific data available."

(Emphasis added.)

Consideration of Intervenor's exhibits constituting substantial evidence of risk to wildlife is therefore mandatory for this agency in this proceeding, and the Council may not preclude it, fail to consider it or take it into consideration in the decision the Council renders on this Docket.

5. **TCA Preemption applies only "to the extent that" the FCC has issued safety regulations.** The preemption provision of the Telecommunications Act of 1996 states:

> 47 U.S.C. § 332 (c)(7)(B)(iv), provides; (iv) 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.

(Emphasis added.)

The "extent" of the FCC's regulations concerning emissions is specifically and exclusively limited to human health. (See description of the FCC regulations on the FCC's own website, headed "RF SAFETY PROGRAM" and found at

http://www.fcc.gov/oet/rfsafety/rf-faqs.html#Q10) to wit:

> The FCC guidelines for human exposure to RF electromagnetic fields were derived from the recommendations of two expert organizations, the National Council on Radiation Protection and Measurements (NCRP) and the Institute of Electrical and Electronics Engineers (IEEE). Both the NCRP exposure criteria and the IEEE standard were developed by expert scientists and engineers after extensive reviews of the scientific literature related to RF biological effects. The exposure guidelines are based on thresholds for known adverse effects, and they incorporate appropriate margins of safety. In adopting the most recent RF exposure guidelines, the FCC consulted with the EPA, FDA, OSHA and NIOSH,

> and obtained their support for the guidelines that the FCC is now using. * * * The NCRP, IEEE and ICNIRP exposure guidelines identify the same threshold level at which harmful biological effects may occur, and the values for Maximum Permissible Exposure (MPE) recommended for electric and magnetic field strength and power density in both documents are based on this threshold level. The threshold level is a Specific Absorption Rate (SAR) value for the whole body of 4 watts per kilogram (4 W/kg). In addition, the NCRP, IEEE and ICNIRP guidelines are different for different transmitting frequencies. This is due to the findings (discussed above) that whole-body human absorption of RF energy varies with the frequency of the RF signal. The most restrictive limits on whole-body exposure are in the frequency range of 30-300 MHz where the human body absorbs RF energy most efficiently when the whole body is exposed. * * *The exposure limits used by the FCC are expressed in terms of SAR, electric and magnetic field strength and power density for transmitters operating at frequencies from 300 kHz to 100 GHz.
>
> (Emphasis added.)

The FCC states that its RF emissions rules "are designed to protect public health" and to constitute "limits for human exposure to RF emissions."

The Federal Courts have squarely held that the FCC's preemptive rules are limited to "health risks." Cellular Phone Taskforce, 205 F.3d 82, at 88 (2d Cir. 2000):

> The Act preempted state and local governments from regulating the placement, construction or modification of personal wireless service facilities on the basis of the health effects of RF radiation where the facilities would operate within the levels determined by the FCC to be safe.
>
> (Emphasis added.)

For a comprehensive discussion of the relevant principles of Federal preemption as they relate to the Telecommunications Act, see the Second Circuit decision in Sprint Spectrum LP v. Mills, 283 F3d 404, 414-416 (2d Cir. 2002). The Court points out that the TCA preserves the authority of state agencies [such as the CSC] over decisions regarding "placement, construction, and modification" of wireless facilities – exactly the issue that is before the CSC in this proceeding.

> With respect to wireless telephone communications, the Telecommunications Act, which is part of the FCA, has similarly given the FCC "broad," albeit "somewhat"

more "circumscribed," preemption authority. Cellular Phone Taskforce v. FCC, 205 F.3d 82, 96 (2d Cir. 2000), cert. denied, 531 U.S. 1070 (2001); see generally City of New York v. FCC, 486 U.S. 57 (1988); Capital Cities Cable, Inc., v. Crisp, 467 U.S. 691, 698-700 (1984). To the extent pertinent here, the TCA section dealing with "[r]egulatory treatment of mobile services," 47 U.S.C. § 332(c), in its paragraph (7) entitled "Preservation of local zoning authority," id. § 332(c)(7), provides as follows:

> (A) General authority
>
> Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities. Id. at 416.
>
> (Emphasis added.)

The FCC itself acknowledges that its safety regulations regarding RF emissions apply only to thermal effects on human beings, and not to non-thermal biological effects. Therefore, in the absence of such standards, the Connecticut Siting Council is not only not preempted from consideration of these effects, documented in generally accepted scientific studies as substantial evidence in Intervenor Jaeger's marked and pre-filed exhibits, but is mandated under its own guiding statute, state statutes as described herein, and under its obligations under UAPA and as an agency with a specific charge given to it by the Connecticut legislature, and under Amendment X to the U.S. Constitution:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.
>
> United States Constitution, Amendment X

The Council must therefore consider the effects of RF emissions since the FCC has failed to set such safety standards and preemption does not exist.

6. The function of the Siting Council is to decide on the placement of wireless antennas consistent with public health, safety and welfare, and specifically to

protect Connecticut's environment and citizens. The Council was expressly created for the purpose of protecting Connecticut's environment and citizens:

> Sec. 16-50g. Legislative finding and purpose. The legislature finds that power generating plants and transmission lines for electricity and fuels, community antenna television towers and telecommunication towers have had a significant impact on the environment and ecology of the state of Connecticut; and that continued operation and development of such power plants, lines and towers, if not properly planned and controlled, could adversely affect the quality of the environment and the ecological, scenic, historic and recreational values of the state. The purposes of this chapter are: To provide for the balancing of the need for adequate and reliable public utility services at the lowest reasonable cost to consumers with the need to protect the environment and ecology of the state and to minimize damage to scenic, historic, and recreational values; to provide environmental quality standards and criteria for the location, design, construction and operation of facilities for the furnishing of public utility services at least as stringent as the federal environmental quality standards and criteria, and technically sufficient to assure the welfare and protection of the people of the state; to encourage research to develop new and improved methods of generating, storing and transmitting electricity and fuel and of transmitting and receiving television and telecommunications with minimal damage to the environment and other values described above; to promote energy security; to promote the sharing of towers for fair consideration wherever technically, legally, environmentally and economically feasible to avoid the unnecessary proliferation of towers in the state particularly where installation of such towers would adversely impact class I and II watershed lands, and aquifers; to require annual forecasts of the demand for electric power, together with identification and advance planning of the facilities needed to supply that demand and to facilitate local, regional, state-wide and interstate planning to implement the foregoing purposes.
>
> C.G.S. Chapter 277a Public Utility Environmental Standards Act, §16-50g. (Emphasis added.)

Section 16-50j of this chapter establishes the Connecticut Siting Council, with the following specific directive, in pertinent part:

> Sec. 16-50j. Connecticut Siting Council. Regulations. Consultation with state agencies. State agency agreements with parties to proceeding. (a) There is established a "Connecticut Siting Council", hereinafter referred to as the "council", which shall be within the Department of Public Utility Control.* * * (g) The council shall, in addition to its other duties prescribed in this chapter, adopt, amend, or rescind suitable regulations to carry out the provisions of this chapter and the policies and practices of the council in connection therewith, and appoint and prescribe the duties of such staff as may be necessary to carry out the provisions of this chapter. The chairman of the council, with the consent of five or

> more other members of the council, may appoint an executive director, who shall be the chief administrative officer of the Connecticut Siting Council. The executive director shall be exempt from classified service.
>
> C.G.S. Chapter 277a Public Utility Environmental Standards Act, §16-50j. (Emphasis added.)

These responsibilities require the Council to act with prudence and appropriate precautions to avoid unnecessary risks and hazards to Connecticut's environment, including wildlife, in addition to residents, and especially children. Therefore all exhibits pertaining to such considerations are relevant and provide substantial evidence to a necessary record.

7. The Council Has Both the Power and the Duty to Minimize the Impact of Cell Tower Placement on the Environment, to Preclude Substantial Evidence Offered for the Purpose of Fulfilling that Duty Is a Violation of State and Federal Law.

The Second Circuit's decision in Sprint Spectrum v. Willoth, 176 F.3d 630 (2d Cir. 1999) held that a state agency has a duty under state law to minimize the impact of the erection of a proposed cell tower. In that case the issue was the aesthetic impact of the proposed site; in this case it is the impact on bird and wildlife habitats and children. The facts are different but the legal principle is the same:

> A local government may reject an application for construction of a wireless service facility in an under-served area without thereby prohibiting personal wireless services if the service gap can be closed by less intrusive means. See Town of Amherst, 173 F.3d at 14 ("[I]ndividual denial is not automatically a forbidden prohibition," but disallowing "the only feasible plan...might amount to prohibiting personal wireless service."). There are numerous ways to limit the aesthetic impact of a cell site. It may be possible to select a less sensitive site, see Geardon & Co. v. Fulton County, 5 F.Supp. 2d 1351, 1355 (N.D. Ga. 1998), to reduce the tower height, see Town of Amherst, 173 F.3d at 14-15, to use a preexisting structure or to camouflage the tower and/or antennae, see, e.g., Cellco Partnership v. Town Plan & Zoning Comm'n of Farmington, 3 F.Supp. 2d 178, 185, 186 (D. Conn. 1998) (describing antennae placed on water tower, and permitting applicant to reconstruct church steeple with six antennae placed inside); Smart SMR of New York, Inc. v. Zoning Comm'n of Stratford, 995 F.Supp. 52, 59 (D. Conn. 1998) (describing an antenna placed on a billboard and current applicant seeking to conceal tower with seven evergreen trees). See also

> Nancy D. Holt, Developments: It May Be Art, But Can You Hear Me?, Wall St. J., Dec. 10, 1997, at B14 (describing a multitude of camouflaged towers ranging from artful designs to silos, windmills, cactuses and pine trees). A local government may also reject an application that seeks permission to construct more towers than the minimum required to provide wireless telephone services in a given area. A denial of such a request is not a prohibition of personal wireless services as long as fewer towers would provide users in the given area with some ability to reach a cell site." Id. at p. 643.

Following this decision, the Third Circuit stated in APT Pittsburgh Limited Partnership v. Penn Township, 196 F.3d 449 (3d Cir. 1999):

> In order to show a violation of subsection 332 (c)(7)(B)(i)(II) under Willoth, an unsuccessful provider applicant must show two things. 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. [Fn omitted.]
>
> 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 antennae on existing structures, etc. Id. at 480.

(Emphasis added.)

The Siting Council has an affirmative duty under General Statutes Section 16-50k to require telecommunications companies such as Cellco Verizon to obtain a "certificate of environmental compatibility and public need" with full notice and public hearing (in compliance with Section 16-50l) for any proposed tower construction or modification. The only exception to this requirement is when the Council makes an express finding that the construction or modification will not "have a substantial adverse environmental effect in the state." Any such finding by the Council must be based on "substantial evidence,"

in order to comply with State and Federal law. See 47 U.S.C. Section 332(c)(7); Cellular Telephone Co. v. Town of Oyster Bay, 166 F.3d 490 (2d Cir. 1999).

The Council is therefore required to consider all effects of the proposed installation on the environment in order to fulfill its statutory obligation of review in order to properly consider the site's eligibility for such certification. Without a full and fair hearing and a complete record, the Council may not issue the certificate, because it would, by such action, have limited the record in abuse of its discretion and compromised the substantial evidence necessary to form a basis for its decision.

Environmental Considerations

In its Application under Docket 360 submitted on March 28, 2008, Cellco Partnership d/b/a Verizon asserts under "Environmental Reviews and Agency Comments":

> The USFWS has determined that there are no federally-listed or proposed, threatened or endangered species or critical habitat known to occur at the Property that might impact the Falls Village Facility (See Attachment 11 - USF&W response letter dated October 4, 2007).
>
> In its comment letter dated November 15, 2007, the DEP stated that there are records of a State Endangered Lota Lota (burbot) from the "nearby Hollenbeck River". The DEP also stated that there were records for Special Concern species (Savannah Sparrow) from this part of Canaan.
>
> (Application at p. 14)

The section goes on to say that certain state commission reviews minimize the impact of the site, saying in conclusion: "This review by state administrative agencies furnishes ample expert opinion on the potential environmental impacts from the Falls Village Facility, in the context of the criteria which the Council must consider." (Emphasis added.)

Nowhere does Cellco Verizon mention the existence of such major environmental considerations as UCONN's Department of Ecology and Evolutionary Biology report (Intervenor Exhibit IJ 30) citing what they believe to be "the most significant ecological community in the State of Connecticut and arguably one of the most important conservation targets in the Northeast" (Emphasis added.) citing endangered butterflies (the Columbine Duskywing and Northern Metalmark, IJ 32, IJ 33), or bird nesting areas and recognized wildlife habitats including Robbins Swamp, a significant inland fresh water wetland, extensive state preserves or state-listed amphibians including the blue spotted salamander -- observation of which is already a matter of record on this Docket, and a study of the effects of radio frequencies on which is offered by Intervenor Jaeger (see IJ 26, Balmori Study on Amphibians) -- all of which are located within the tower's proposed coverage area. The Council has a statutory obligation to hear and to consider such evidence.

Nor does the Applicant mention the applicability of the International Migratory Bird Treaty, the U.S. Migratory Bird Treaty Act or the Bald Eagle Protection Act. In the absence of evidence offered by the Applicant, the Council must make independent inquiry into the applicability of these laws to the species found in the unique natural area in the vicinity of the proposed tower, in fulfillment of the Council's specific statutory mandate. Exhibits marked and offered by Intervenor Jaeger are of assistance to the Council in fulfilling that mandate, and any preclusion or failure to consider them would constitute a dereliction of duty, a violation of constitutional administrative procedure, be arbitrary and capricious agency action and abuse of discretion, in addition to violating multiple state and federal laws.

The white stork study marked and pre-filed by Intervenor Jaeger at Exhibit IJ 6 shows that increased distance from the proposed tower may reduce the impact of Cellco's transmissions on nesting birds and other wildlife, but the distances at which harmful effects are documented are not great. The Council has an obligation to consider such evidence of biological harm under the influence of the proposed frequencies.

The Siting Council has notice now of the application of Federal and International law providing that the Migratory Bird Treaty Act of 1918 U.S.C Title 16, Chapter 7, Subchapter II, section 703 holds:

> it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or eggs of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof, included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916 (39 Stat. 1702), the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936, the United States and the Government of Japan for the protection of migratory birds and birds in danger of extinction, and their environment concluded March 4, 1972 and the convention between the United States and the Union of Soviet Socialist Republics for the conservation of migratory birds and their environments concluded November 19, 1976.
>
> (Emphasis added.)

This is international law, binding on the states through the Supremacy Clause, and it must be considered through the substantial evidence that will form the basis for decision in Docket 360.

The Connecticut Siting Council has an affirmative duty, therefore, under state and federal law to hold a full, fair and meaningful hearing on these issues, for which Intervenor has provided substantial evidence for the Council's benefit. To preclude their

admission or her testimony at this late hour, when the evidentiary hearing is already under way is a dereliction of specific state statutory mandates on the agency, and of state environmental protection laws, federal environmental protection laws, at least one international treaty and Intervenor's First Amendment, due process, equal protection, Ninth, Tenth and Fourteenth Amendment rights.

The Connecticut Siting Council's Statutory Mandates

In addition to the express purpose for which the Council was established under state law to:

> "protect the environment and ecology of the state and to minimize damage to scenic, historic, and recreational values; to provide environmental quality standards and criteria for the location, design, construction and operation of facilities for the furnishing of public utility services at least as stringent as the federal environmental quality standards and criteria, and technically sufficient to assure the welfare and protection of the people of the state;"
>
> (C.G.S. Sec. 16-50g. Legislative finding and purpose, supra.)(Emphasis added.)

The Council is charged with the following statutory mandates:

The Council's Statutory Obligation to Protect Inland Wetlands

It is the public policy of the State of Connecticut to protect inland wetlands and watercourses and "prevent loss of fish and other beneficial aquatic organisms, wildlife and vegetation and the natural habitats thereof." General Statutes Section 22a-36. Robbins Swamp and the Hollenbeck River constitute Connecticut's largest inland wetland, located directly in the coverage area proposed by Cellco Verizon in Docket 360, but given the following passing reference in Verizon's Application: "The Hollenbeck River is located approximately 2 miles north of the FVFD site. In a letter dated March 18, 2008, the DEP confirmed that due to the distance from the Hollenbeck River, the FVFD site will not effect (sic) the State Endangered burbot. (See Attachment 11 VHB

Letter dated January 24, 2008 and DEP letter dated March 18, 2008)." (Application, p. 15)

The letter does not address the proximity of Robbins Swamp, described in Intervenor's Exhibit IJ 12, The Nature Conservancy's description of its "Northwest Highlands" conservation program as the Hollenbeck River's watershed, and

> Conecticut's largest inland wetland. Robbins Swamp represents one of the region's most significant environments: calcareous wetlands. These open wetlands are influenced by underlying marble bedrock, making them alkaline, unlike most New England wetlands, which are acidic. Calcareous wetlands provide an uncommon environment and host a number of rare plants and animals. Nearby Wangum Lake Brook, which drains into the Hollenbeck River, is also part of this calcareous wetland complex. Together, Canaan Mountain and Robbins Swamp are home to a variety of rare animals and plants, including the endangered timber rattlesnake and northern metalmark butterfly, three rare bird species, and 23 rare species of plants, including a variety of trees, flowering plants, grasses and sedges.

Nor does the DEP letter explain the scientific basis of the determination that there might be no effect on the State Endangered burbot. Intervenor Jaeger's exhibits document generally accepted scientific studies that show that even at great distances, harm to organisms under the influence of RF emissions such as those proposed by Verizon and those sought to be precluded from consideration by Verizon, is complete devastation. (see "RF Radiation-Induced Changes in the Prenatal Development of Mice," marked as IJ 7, see also Exhibit IJ 5.)

Under this mandate "to prevent loss," the Connecticut Siting Council has a statutory obligation to consider the proffered evidence.

The Council's Statutory Obligation to Protect Natural Areas

State law also provides for protection of Natural Area Preserves "of outstanding scientific, educational, biological, geological, paleontological or scenic value." General Statutes Section 23-5a et seq. Cellco Verizon does not discuss the state and privately-

owned natural conservation preserves in the coverage area. In light of the substantial evidence of harm resulting from the influence of RF signals indicated by Intervenor Jaeger's marked pre-filed exhibits, the Council has a statutory obligation to consider the areas and the potential for harm represented by the evidence offered by the Intervenor.

The Council's Statutory Obligation to Protect Endangered Species

General Statutes Section 26-310 requires state agencies to protect endangered or threatened species or species of special concern and their essential habitats:

> **Sec. 26-310. Actions by state agencies which affect endangered or threatened species or species of special concern or essential habitats of such species.** (a) Each state agency, in consultation with the commissioner, shall conserve endangered and threatened species and their essential habitats, and shall ensure that any action authorized, funded or performed by such agency does not threaten the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat designated as essential to such species, unless such agency has been granted an exemption as provided in subsection (c) of this section. In fulfilling the requirements of this section, each agency shall use the best scientific data available.
>
> (Emphasis added.)

The sole mention of the presence of any state-listed species in the affected area in the Cellco Application is that on page 14, the State Endangered Lota Lota (burbot) and the state Special Concern species Savannah Sparrow.

But State DEP NDDB maps (Intervenor Jaeger marked pre-filed Exhibits IJ 9, IJ 10, IJ 11) conflict with Cellco's limited inquiry and disclosure, and according to the Connecticut Chapter of the Nature Conservancy, among the state-listed species in the Robbins Swamp-Hollenbeck River area are:

Blue Spotted Salamander (Ambystoma laterale)

Red-bellied Snake (Storeria occipitomaculata)

Northern Leopard Frog (Rana pipiens)

Cerulean Warbler

Bobolink

Meadowlark

Raven

Burbot (Lota lota).

The Connecticut Siting Council therefore has notice of the presence of more species than just the Lota lota, and it must consider the effects of the proposed tower on these species. Statutory language such as "shall conserve" is not precatory. It is mandatory.

Substantial Evidence of Harm to Nesting Birds

The Council has before it marked and pre-filed by Intervenor Jaeger substantial evidence that major harm is done to nesting birds in habitats close to cell towers (Exhibit IJ 6, Balmori Study of White Storks, 2005. See also IJ 5, Study on House Sparrows, 2007.). The highlights of that evidence are:

> The numeric tendency of the populations of birds is of particular interest in the conservation of nature....Animals are very sensitive electrochemical complexes that communicate with their environment through electrical impulses. Ionic currents and electric potential differences exist through the cellular membranes and corporal fluids. The intrinsic electromagnetic fields from the biological structures are characterized by certain specific frequencies that can be interfered with by the electromagnetic radiation, through induction and causing modification in their biological responses....The low intensity pulsed microwave radiation from cellsites produces subtle athermal influences in the living organisms...Some effects are manifested exclusively with a certain power density, while others are manifested after a certain duration of the irradiation, which indicates long-term cumulative effects....Research has shown such effects on the living organisms at molecular and cellular levels on immune processes, in DNA, on the nervous, cardiac, endocrine, immune and reproductive systems, modification of sleep and alteration of the cerebral electric response, increase of the arterial pressure and changes in the heart rhythm, and an increase in the permeability of the blood brain barrier.

(Exhibit IJ 6, page 110)
(Footnotes Omitted. Emphasis added.)

The monitoring of the nesting white storks in the study attached as Exhibit IJ 6 showed that birds nesting within 200 meters of antennae had a reproduction rate close to half that of birds nesting further than 300 meters from the antennae. [Id. at 111] Such effects on a population of listed species of birds in Connecticut has the potential of devastating a population.

The results of the study cited reflect the potential harm to the reproductive viability of birds nesting near cell towers. In the study,

> Twelve nests (40%) located within 200m of the antennae never had any chicks, while only one (3.3%), located further than 300m never had chicks.....behavioral observations of the white stork nesting sites located within 100m of one or several cellsite antennae and on those that the main beam impacted directly (EFI>2V/m) included young that died from unknown causes. Also within that distance, couples frequently fought over the nest construction sticks and failed to advance the construction of the nests. (Sticks fell to the ground while the couple tried to build the nest.) Some nests were never completed and the storks remained passively in front of cellsite antennae. [Id. at 113.] [Emphasis added.] ....Birds are especially sensitive to the magnetic fields. Ibid.
>
> Because of their thinner skull, their greater mobility and the fact that they use areas with high levels of microwave electromagnetic radiation, birds are very good biological indicators. [Id. 114-115.]....In the United Kingdom, where the allowed radiation levels are 20 times higher than those of Spain, a decline of several species of urban birds has recently taken place, coinciding with the increasing installations of cellsites....the biological mechanisms of the effects of these waves are still ignored, although the athermal effects on organisms have been sufficiently documented....For this reason the reports related to animals are of special value, since in this case it can never be alleged that the effects are psychosomatic. [Id. at 115]

It would be a gross dereliction of the Council's statutory duties -- including the very statute under which the Council was created -- and would constitute arbitrary and capricious action, abuse of discretion and multiple violations of state and federal

constitutional guarantees for the Connecticut Siting Council to preclude this substantial evidence that the potential for major environmental impacts exists in this proposed tower site.

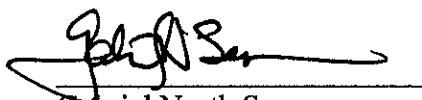
It would also be a violation of state law, arbitrary and capricious action and abuse of discretion, were the agency to affirm the gross understatement by Cellco Verizon of evidence of environmental impacts averred to in Verizon's Application by granting its motion. In the face of substantial evidence to the contrary, the Connecticut Siting Council has an affirmative duty to admit, to hear, to consider and weigh all the evidence proffered, including all evidence "in the form of exhibits, written testimony, oral testimony or other, regarding, related to or otherwise associated with any effects of radio frequency ('RF') emissions associated with telecommunications facilities ('RF Evidence')," (Applicant's Motion to Preclude dated July 24, 2008, at 1), just as it has an affirmative duty to provide Intervenor Jaeger a full, fair and meaningful hearing and opportunity to make her record.

The Council's consideration of Intervenor's evidence is not preempted under federal law; the Council's authority over such issues raised by Intervenor's evidence is not proscribed by Connecticut law, but is, rather, mandated thereby.

For all the foregoing reasons, the Council should deny the Motion to Preclude in its entirety and direct that the duly noticed and duly consented and published public Hearing Program that is already in process proceed in accordance with the Program adopted by the Council and agreed to by the parties.

Wherefore Intervenor Jaeger urges the Connecticut Siting Council to deny Applicant's Motion to Preclude in its entirety.

Respectfully submitted,



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Falls Village, CT, July 28, 2008

CERTIFICATION

I certify that on July 28, 2008, a copy of the foregoing Intervenor's Response to Applicant's Motion to Preclude was emailed to the Connecticut Siting Council and to the following parties. A hard copy was also mailed by certified first class mail, return receipt requested, to the following:

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July 28, 2008