STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL

IN RE:	:	
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APPLICATION OF CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED FOR THE CONSTRUCTION, MAINTENANCE AND OPERATION OF A WIRELESS TELECOMMUNICATIONS FACILITY ON PROPERTY OF THE FALLS VILLAGE VOLUNTEER FIRE DEPARTMENT, INC., 188 ROUTE 7 SOUTH, FALLS VILLAGE, CONNECTICUT	:	DOCKET NO. 360
	:	JULY 24, 2008

MOTION TO PRECLUDE

Cellco Partnership d/b/a Verizon Wireless ("Cellco") hereby moves the Connecticut Siting Council ("Council") to preclude any and all evidence, whether 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"). Such evidence is irrelevant to this proceeding because: (1) consideration by the Council of issues related to health and environmental effects from RF emissions is preempted under federal law; and (2) the Council's authority over such issues is proscribed by Connecticut law. Therefore, consideration of RF Evidence would exceed the Council's jurisdiction and is properly excluded. As such, the Council should preclude all RF Evidence in this proceeding.

BACKGROUND

On March 28, 2008, Cellco filed an Application with the Council for a Certificate of Environmental Compatibility and Public Need ("Certificate") for the construction, maintenance and operation of a telecommunications facility located at 188 Route 7 South, Falls Village (Canaan), Connecticut (the "Application"). On June 2, 2008, Dina Jaeger filed a Request for

Intervenor Status in this proceeding ("Request"), which the Council granted on June 19, 2008. The Council convened an evidentiary hearing on July 1, 2008, which has been continued until July 31, 2008. On July 1, 2008, the Council also conducted a public hearing, which was concluded that same day. Prior to July 1, 2008, Ms. Jaeger filed 69 documents with the Council that she intends to have admitted as full exhibits in the Docket No. 360 record. These documents include reports, studies, and statements regarding the effects of RF emissions. On July 3, 2008, the Council issued a notice to all parties in this proceeding encouraging the parties to exchange pre-hearing interrogatories and other evidentiary materials. On July 10, 2008, Ms. Jaeger propounded interrogatories to Cellco. Several of these interrogatories relate to the environmental and/or health effects of RF emissions. For the reasons set forth below, certain of Ms. Jaeger's exhibits, written testimony, interrogatories and oral testimony that was offered or is reasonably expected to be offered, should be excluded from the record in this proceeding.

ARGUMENT

I. The Council Should Preclude Any and All Evidence Relating to Health and/or Environmental Effects of RF Emissions.

A. Consideration of RF Evidence is Preempted by Federal Law.

The Supremacy Clause of the United States Constitution provides that "this Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . ." U.S. Const. art. VI, cl. 2. Pursuant to this clause, Congress may, within the limits set forth elsewhere in the Constitution, enact legislation that preempts state law. *See Pacific Gas & Electric Co. v. State Energy Resources Conservation Comm'n*, 461 U.S. 190, 203-04 (1983).

The Telecommunications Act of 1996 ("Telcom Act") expressly preempts state and local governments from regulating wireless service facilities on the basis of the effects of RF emissions. Under the Telcom Act, "[n]o 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." 47 U.S.C. § 332(c)(7)(B)(iv). In other words, state and local governments cannot regulate wireless facilities "that conform to the FCC Guidelines on the basis of environmental effects of RF radiation." *Cellular Taskforce*, 205 F.3d at 96; *see also* "Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation," 11 FCC Rcd 15123 (1996) ("FCC Guidelines"). As a result of this "broad preemption authority under the Telecommunications Act," the Council cannot exercise its regulatory power on the basis of the effects of RF emissions. *See Cellular Phone Taskforce v. Federal Communications Commission*, 25 F.3d 82, 96 (2d Cir. 2000); *see also* 47 U.S.C. § 332(c)(7)(B)(i)–(iv).

The Telcom Act's preemptive effect is well-known to the Council. As aptly summarized by Chairman Caruso at the beginning of the July 1 hearing:

> I also wish to note the specific ways that the Federal Telecommunications Act of 1996 restricts this Council's actions. This Act states, and I quote, '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,' end quote. The Commission referred to in that passage is the Federal Telecommunications Commission, also called the FCC, and that passage is found at 47 U.S.C. Section 332(c)(7)(iv). This Council is, of course, an instrumentality of Connecticut State government for purposes of this Act.

July 1, 2008 Hearing Transcript ("Tr.") at 5:6-19.

The FCC's broad preemptive effect does not, however, leave the Council powerless. State or local governments may regulate the *placement, construction and modification* of personal wireless facilities, *Cellular Taskforce*, 205 F/3d at 96 (quoting 47 U.S.C. § 332(c)(7)(A) (italics in original), but they may not do so on the basis of the effects RF emissions. 47 U.S.C. §

332(c)(7(B)(iv). As Chairman Caruso has recognized in this docket, "this Council has important decisions to make, including, but not limited to weighing whether . . . the applicant's proposal, including its form and height . . . will solve [a] coverage problem, and we must examine whether better alternatives exist, including better available alternative sites." July 1, 2008 Tr. at 6:6-15. As such, the Council can address safety concerns such as the structural integrity of a tower, but "fear of adverse health effects from electromagnetic radiation is excluded as a factor." *Prime Co Personal Communications, L.P. v. City of Mequon*, 352 F.3d 1147, 1149 (7th Cir. 2003) (*citing* 47 U.S.C. § 331(c)(7)(B)(iv)).

In the case of Cellco's Application, the proposed tower will emit radio frequencies at multiple levels of magnitude below the FCC's maximum permissible exposure limits. Specifically, Cellco has calculated a conservative, cumulative worst-case approximation of power density levels from the facility for a point at the base of the tower and determined it to be 18.8% of the FCC standard. More than five times below the established FCC safety standard under these worst-case conditions. (*See* Cellco Exhibit 7 - Supplemental Information at 2; Pre-filed Testimony of Alejandro Restrepo; Pre-filed Testimony of Anthony Wells, Exhibit 1). Emissions levels at the Intervenor's residence, a distance of 1290 feet from the base of the tower, have been calculated to be significantly lower – approximately 0.25% of the FCC standard. *See* Pre-filed Testimony of Anthony Wells, Exhibit 1. As such, because Cellco's proposed Falls Village facility will emit radio frequencies well below and in compliance with the FCC's safety standards, the Council is preempted by federal law from considering the effects of RF emissions. Thus, any evidence relating to RF emissions would be irrelevant to the issues before the Council, and the Intervenor should therefore be precluded from introducing RF Evidence in this proceeding.

B. The Council Lacks Jurisdiction Under Connecticut Law Over The Effects of RF Emissions.

Under the Public Utility Environmental Standards Act ("PUESA"), Conn. Gen. Stat. §§ 16-50g *et seq.*, the Connecticut General Assembly granted the Council broad powers with respect to the siting of certain defined "facilities" in the state. Conn. Gen. Stat. § 16-50i(a)(6) (authorizing the Council's regulation of telecommunication towers and associated equipment used in a cellular system as defined in the Code of Federal Regulations Title 47, Part 22). As a creature of statute, the Council's jurisdiction is necessarily limited by PUESA.

Just this year, the Connecticut Supreme Court noted that PUESA does not confer jurisdiction on the Council to consider the effects of RF emissions. *Bornemann v. Conn. Siting Council*, 287 Conn. 177, 183 (2008). Specifically, the Supreme Court ruled that "the biological effects of high frequency radio wave emissions on wildlife" are "beyond the statutory authority" of the Council. *Id.* Thus, the state's highest court has explicitly addressed the precise issue presented by the Intervenor in this docket and has concluded that the Council has no jurisdiction to consider the effects of RF emissions. Because Connecticut law limits the Council's jurisdiction and does not grant the authority to consider RF emissions, the Intervenor should be precluded from introducing RF Evidence in this proceeding.

C. The Intervenor Has Attempted and Is Expected to Continue to Introduce RF Evidence.

At the July 1, 2008 hearing, the Intervenor, through cross-examination of Cellco's witnesses, attempted to lay a foundation for the introduction of RF Evidence. Specifically, Mr. Alejandro Restrepo, one of Cellco's witnesses, was questioned by the Intervenor as follows:

> MR. SEYMOUR: -- let me try -- I'll tell you what's behind my question. I've been told -- and I'm a layman, so I don't purport to know the answer to this or understand it, but I've been told that the reason telecommunication companies keep down into a small percentage of what

> they are actually allowed under the FCC regulations is that if they went above that, *the person receiving the signal -- the phrase I heard was it would fry their brains. Is there -- forgiving the slang, is there anything to the proposition that the higher you go at the base station, the greater risk to the phone user?*

July 1, 2008 Tr. at 80:14-24; 81:1 (emphasis added).

The Intervenor also stated the following:

> MR. SEYMOUR: Let me ask, Mr. Baldwin, are any of your witnesses in a position to say that they have walked around some of the -- particularly the natural sites in the coverage area to see which ones are going to be receiving signals and which ones are not? *And this is a foundation for some later questions I want to ask that has to do with impact on birds and wildlife.*

July 1, 2008 Tr. at 88:14-20 (emphasis added).

In addition, the Intervenor has produced numerous documents, reports and exhibits in this proceeding that also clearly constitute RF Evidence. *See, e.g.*, Exhibits IJ1-IJ7; IJ34-IJ46; IJ51; IJ65. Moreover, the Intervenor has propounded at least four interrogatories to Cellco that constitute an attempt to introduce RF Evidence. *See* Intervenor Interrogatory Nos. 22-25. All of this evidence would be irrelevant to any issue that the Council may properly consider. Therefore, such evidence should be excluded from the record.

CONCLUSION

For all of the foregoing reasons, Cellco respectfully requests that the Council make a finding, prior to the July 31, 2008 continuation of the evidentiary portion of the hearing that any and all evidence related to the effects of RF emissions is precluded from this proceeding.

Respectfully submitted,

CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS

By _____

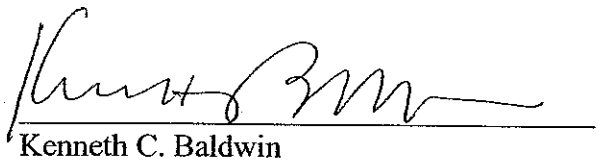
Kenneth C. Baldwin, Esq.
John A. Poakeart, Esq.
Robinson & Cole LLP
280 Trumbull Street
Hartford, CT 06103-3597
Its Attorneys

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of July, 2008, a copy of the foregoing was sent via Federal Express and by electronic mail to:

Gabriel North Seymour, P.C.
200 Route 126
Falls Village, CT 06031
certiorari@earthlink.net

Whitney North Seymour, Jr.
425 Lexington Avenue
New York, NY 10017
wseymour@stblaw.com



Kenneth C. Baldwin