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 30, 2008

REPLY BRIEF IN SUPPORT OF MOTION TO PRECLUDE

Cellco Partnership d/b/a Verizon Wireless ("Cellco") hereby respectfully submits this reply brief in support of its July 24, 2008 Motion to Preclude ("Motion"). For the reasons more particularly set forth below, the Connecticut Siting Council ("Council") should overrule Intervenor Dina Jaeger's objection and grant Cellco's Motion.

The basis of Cellco's Motion is simple: the Council is preempted under federal and state law from considering evidence related to any effects of radio frequency ("RF") emissions associated with telecommunications facilities ("RF Evidence"). This well-established rule notwithstanding, the Intervenor essentially makes two arguments in her July 28, 2008 Objection to Cellco's Motion (hereinafter "Objection"): (1) the Motion is untimely; and (2) the Council is not preempted from hearing RF Evidence.

As discussed more fully in the Motion, the Council is expressly preempted under The Telecommunications Act of 1996 ("Telcom Act") from considering any evidence relating to any effects of RF emissions associated with telecommunications facilities. (*See* Motion at 2-4.) In addition, the Council is limited under Connecticut law from considering RF Evidence. (*See* Motion at 5.) Nevertheless, the Intervenor asserts that the Council can and must consider

evidence relating to harm to migratory birds and bald eagles from RF emissions, *see* Objection at 5-6, and that the Telcom Act does not preempt the Council from considering effects of RF emissions because it only applies to adverse effects on human health. (*See id.* at 6-9.) This is simply inaccurate. The Intervenor also claims that the Motion was untimely. Again, the Intervenor is mistaken.

I. The Council Cannot Consider RF Evidence.

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). This is an express preemption by the federal government over state and local government regulation of wireless service facilities on the basis of the effects of RF emissions. Indeed, "Congress enacted the [Telcom Act] . . . to promote competition and higher quality in American telecommunications services and to 'encourage the rapid deployment of new telecommunications technologies' . . . . One of the means by which it sought to accomplish these goals was *reduction of the impediments* imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers." *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005) (emphasis added). The language of the Telcom Act could not be clearer and the decisions of the courts are in accord – the Council is simply without power to deny Cellco's Application based on the effects of RF emissions as long as the proposed facility meets the Federal Communications Commission's RF emissions standard. *See Cellular Phone Taskforce v. Federal Communications Commission*, 25 F.3d 82, 96 (2d Cir. 2000); *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 412, 417 (2d Cir 2002); *see also* 47 U.S.C. § 332(c)(7)(B)(i)–(iv).

The Intervenor claims that the preemption provisions of the Telcom Act "relate solely to actions by state agencies in deciding on the placement of wireless transmitters. They do not prevent an agency from hearing testimony." (Objection at 5.) However, the Council is legally precluded from considering RF Evidence – therefore, it is nonsensical and against the Telcom Act's goal to reduce impediments to the proliferation of telecommunications services to ask the Council to hear evidence that it cannot consider in deciding the Application. Incredibly, this is exactly what the Intervenor is asking the Council to do, without citing any legal authority and without regard to the futility or resulting waste of the Council's time and resources.

In fact, the Council has already acknowledged that it cannot consider RF Evidence, stating that the Telcom Act restricts the Council's actions by prohibiting it from regulating 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 FCC's regulations concerning such emissions. *See* July 1, 2008 Hearing Transcript ("Tr.") at 5:6-19 (*quoting* 47 U.S.C. § 332(c)(7)(iv)). As such, the Council has essentially validated Cellco's Motion. Tellingly, the Council's pronouncement is not mentioned anywhere in the Intervenor's Objection.

The Intervenor also claims, again without citing any legal authority, that the "specificity" of the Migratory Bird Treaty Act and the Bald Eagle Protection Act "supersedes" the Telcom Act's "general provisions." (Objection at 5-6.) This is also inaccurate. As discussed above, the Telcom Act's "general" provisions and established precedent on the issue could not be clearer: state and local governments may regulate the *placement, construction and modification* of personal wireless facilities, but they may not do so on the basis of the effects RF emissions. *See Cellular Taskforce*, 205 F.3d at 96 (*quoting* 47 U.S.C. § 332(c)(7)(A)). In short, "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)).

The Intervenor also claims that the Telcom Act preemption only applies to adverse effects on human health. This is also inaccurate and unsupported by legal precedent. Again, the language of the Telcom Act is clear: no state or local government may regulate wireless service facilities "on the basis of the *environmental effects of radio frequency emissions* . . . ." 47 U.S.C. § 332(c)(7)(B)(iv) (emphasis added). Nowhere in the Telcom Act does it suggest that this provision only applies to human health. If Congress had meant to create such a limited provision, it could have done so. Instead, the provision applies to environmental effects of RF emissions. There is no distinction made between human health effects and anything else.

Finally, on the issue of RF emissions, the Intervenor misreads the language of section 332(c)(7)(B)(iv) by reading the phrase "to the extent that" the FCC has issued safety regulations to mean "provided that" the FCC has issued safety regulations. (*See* Objection at 7.) The Intervenor claims that the "'extent' of the FCC's regulations concerning emissions is specifically and exclusively limited to <u>human health</u>." *Id.* (emphasis in original). However, as discussed, above, the FCC <u>has</u> issued safety regulations that apply to effects of RF emissions and the record shows that the proposed telecommunications facility will emit radio frequencies at multiple levels of magnitude below the FCC's maximum permissible exposure limits. (*See* Cellco Exhibit 7 - Supplemental Information at 2; Pre-filed Testimony of Alejandro Restrepo; Pre-filed Testimony of Anthony Wells, Exhibit 1). As such, the Intervenor's point is without merit.

II. <u>The Motion Was Not Untimely</u>.

The Intervenor claims that Cellco's Motion is untimely. (*See* Objection at 1.) The Intervenor has failed, however, to provide any support, whether in the form of the Council's regulations or otherwise, to support her claim. In fact, *there are no such rules* governing the

order or timing of motions before the Council.

The Intervenor also claims that Cellco has not shown good cause for the Council to hear an "out-of-time" motion, *see* Objection at 1, and that Cellco has somehow "waived" its right to object due to the passage of time. (*See id.* at 1-5.) Here too, the Intervenor has failed to offer any support for her claim. Indeed, the Intervenor has failed even to explain what an "out-of-time" motion is, since there are no rules governing the timing of motions before the Council, nor has the Intervenor cited any legal authority to support its claim that Cellco has "waived" its right to file it Motion. Therefore, the Intervenor's position has no merit.

III. Cellco Does Not Dispute The Council's Ability to Consider Non-RF Environmental Impacts.

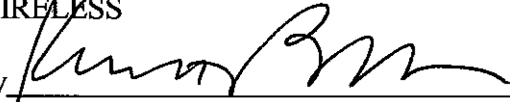
The balance of the Response is devoted to the Intervenor's claims that the Council is obligated by statute to protect the environment and ecology of the state. (*See* Objection at 9-23.) Cellco has not, in the Motion or at any other time in this proceeding, suggested anything to the contrary. Indeed, Cellco believes that the Council may properly consider potential safety and environmental impacts in connection with the Application. Cellco's Motion confirms that position. (*See* Motion at 3-4.) The Council's obligation to consider safety and environmental impact does not, however, change the fact that the Public Utility Environmental Standards Act ("PUESA"), Conn. Gen. Stat. §§ 16-50g *et seq.*, does not confer jurisdiction on the Council to consider the *effects of RF emissions*. *Bornemann v. Conn. Siting Council*, 287 Conn. 177, 183 (2008) (finding that "the biological effects of high frequency radio wave emissions on wildlife" are "beyond the statutory authority" of the Council). Indeed, RF emissions are expressly outside the Council's jurisdiction both with respect to the environment and human health. Therefore, although the Council is not powerless, it simply does not have jurisdiction to consider the effects of RF emissions.

CONCLUSION

For all of the foregoing reasons, Cellco respectfully requests that the Council preclude the inclusion of any and all evidence related to the effects of RF emissions from the record in this proceeding.

Respectfully submitted,

CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS



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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of July 2008, a copy of the foregoing was sent via electronic mail to:

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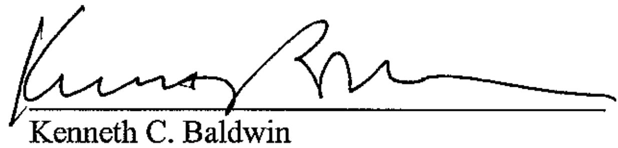

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