

**STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL**

**RE: APPLICATION OF SBA TOWERS II, LLC
FOR A CERTIFICATE OF ENVIRONMENTAL
COMPATIBILITY AND PUBLIC NEED FOR
THE CONSTRUCTION, MAINTENANCE AND
OPERATION OF A TELECOMMUNICATIONS
FACILITY AT ONE OF TWO ALTERNATE SITES AT
RABBIT HILL ROAD, WARREN, CONNECTICUT**

DOCKET NO. 378

Date: May 19, 2009

MOTION TO PRECLUDE

SBA Towers II, LLC (“SBA”) 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 either of the proposed alternate telecommunications facilities proposed in this Application. Such evidence is properly precluded from this proceeding because: (1) consideration by the Council of issues related to health and environmental effects from RF emissions is preempted under federal law, under the Telecommunications Act of 1996; and (2) the Council’s authority over such issues is proscribed by the Council’s prior actions. Therefore, consideration of such evidence would exceed the Council’s jurisdiction and should be precluded from entry as evidence in this proceeding.

I. BACKGROUND

On February 27, 2009, SBA filed this application for a certificate of environmental compatibility and public need in connection with the proposed construction and operation of a telecommunications facility located at one of two alternate sites on Rabbit Hill Road in the Town of Warren (the “Property”). There are numerous parties and intervenors involved in this proceeding. Both AT&T Wireless (“AT&T”) and Verizon Wireless (“Verizon”) have been

granted intervenor status. The “Concerned Residents of Warren and Washington” (“CROWW”) was made a party to this proceeding at the Council meeting held on April 23, 2009. In addition, the Town of Washington Conservation Commission was made a party on April 23, 2009. The Council scheduled the public hearing concerning this docket for May 21, 2009.

II. ARGUMENT

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

1. **Consideration of RF Evidence is Preempted by Federal Law.**

Pursuant to the Supremacy Clause of the United States Constitution, Congress may, within the limits set forth elsewhere in the Constitution, enact legislation that preempts state law. *See* U.S. Const. Art. VI, Cl.2; Pacific Gas & Electric Co. v. State Energy Resources Conservation Comm’n, 461 U.S. 190,203-04 (1983). In 1996, Congress passed the Telecommunications Act of 1996 (the “TCA”), with the purpose to “promote competition and higher quality in American telecommunications services and to reduce the impediments imposed by local governments upon the installation of facilities for wireless communications towers.” City of Rancho Palos Verdes v. Abrams, 544 U.S. 113 (2005).

The TCA expressly provides that “[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 [Federal Communication] Commission’s regulations concerning such emissions.” 47 U.S.C. § 332(c)(7)(B)(iv). Under the TCA, state and local governments cannot regulate wireless facilities “that conform to the FCC Guidelines on the basis of environmental effects of RF radiation.” Cellular Phone Taskforce v Federal Communications Commission, 205 F.3d 82, 96 (2d Cir. 2000); see also “Guidelines for Evaluating the

Environmental Effects of Radiofrequency Radiation,” 11 FCC Rcd 15123 (1996) (“FCC Guidelines”). Therefore, “fear of adverse health effects from electromagnetic radiation is excluded as a factor” and cannot be considered by this Council. 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)). As a result of this “broad preemption authority under the Telecommunications Act,” assuming that the proposed Facility is in compliance with FCC guidelines, this Council simply cannot consider the effects of RF emissions in making its determination as to the environmental compatibility of and public need for the proposed facility. Sprint Spectrum L.P. v. Mills, 283 F. 3d 404 (2d. Cir. 2003); Cellular Taskforce, 205 F.3d at 96; see also 47 U.S.C. § 332(c)(7)(B)(i)-(iv).

Indeed, the Council has recognized the TCA’s preemption over its consideration of health effects, whether thermal or non-thermal and whether human or wildlife impacts. See CSC Docket 360, Conclusions of Law dated March 12, 2009.

In the case of SBA’s Application, the proposed tower will emit radio frequencies at multiple levels of magnitude below the FCC’s maximum permissible exposure limits. As provided by AT&T, Verizon and SBA, the proposed Facility at Site A will be at 29.88% of the FCC maximum exposure limit and the proposed Facility at Site B will be at 6.0% of the FCC maximum exposure limit. This evidence has been verified by SBA’s independent RF engineer. See SBA’s responses to CROWW interrogatories dated May 19, 2009 at Exhibit 1.

Thus, because SBA’s proposed 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. Therefore, any evidence relating to RF emissions would

be irrelevant to the issues before the Council, and such evidence should be precluded from entry in this proceeding.

2. The Council Lacks Jurisdiction Based on Its Prior Decision.

In Docket 360, decided by this Council on March 12, 2009, the Council entered certain conclusions of law relating to the health effects of RF emissions. The Council, inter alia, made the following determinations in that docket: 1) [t]he TCA preempts the Council from considering thermal and non-thermal effects of radio frequency (RF) emissions on human health when those emissions comply with the levels established by the FCC; 2) [t]he TCA preempts the Council from considering effects of radio frequency (RF) emissions on wildlife when those emissions comply with the levels established by the FCC; 3) the TCA, when read together with the Migratory Bird Treaty Act (MBTA) and the Bald and Golden Eagle Protection Act (BGEPA), preempts the Council from considering effects of RF emissions and other harmful effects of telecommunications towers on birds covered by these acts. See Docket 360, Conclusions of Law dated March 12, 2009. The Council is bound by its previous determinations regarding these issues.

B. CROWW and the Washington Conservation Commission Have Raised the Issue of the Health Effects of RF Emissions.

CROWW issued Interrogatories to SBA on April 28, 2009 and on May 13, 2009 and has issued interrogatories related to the health effects of RF emissions See CROWW Interrogatories, First Set, Nos., Second Set No. 1. In addition, the Town of Washington Conservation Commission has raised the issue of RF emissions and health effects in interrogatories dated May 5, 2009. See Washington Conservation Commission Interrogatories, Nos.9, 18, 32-35.

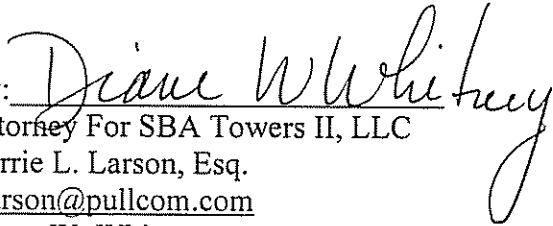
SBA has objected to all of these interrogatories based on the federal preemption under the TCA. All of the requested information is irrelevant to the Council's consideration of this

application because, as discussed, consideration of the health effects of RF emissions is beyond the statutory authority of the Council. Thus, any evidence concerning the health effects of RF emissions should be precluded from entry in this proceeding.

III. CONCLUSION

For all of the foregoing reasons, SBA respectfully requests that the Council find that any and all evidence related to the effects of RF emissions is precluded from this proceeding.

Respectfully Submitted,

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Certification

This is to certify that a copy of the foregoing has been mailed this date to all parties and intervenors of record.

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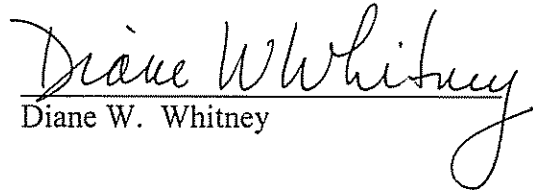
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