STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL

RE: APPLICATION BY T-MOBILE NORTHEAST LLC FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED FOR A TELECOMMUNICATIONS FACILITY AT 387 SHORE ROAD IN THE TOWN OF OLD LYME, CONNECTICUT

DOCKET NO. 392

Date: July 23, 2010

POST-HEARING BRIEF OF APPLICANT T-MOBILE NORTHEAST LLC

Pursuant to § 16-50j-31 of the Regulations of Connecticut State Agencies, T-Mobile Northeast LLC ("T-Mobile") submits this post-hearing brief in support of the above-captioned application. This brief addresses (1) the public need for this telecommunications facility; (2) the lack of environmental impact of the proposed facility; and (3) the facility's consistency with the legislative mandate to avoid the unnecessary proliferation of towers in the State of Connecticut ("State").[1]

I. BACKGROUND

On October 15, 2009, T-Mobile filed with the Connecticut Siting Council ("Council") an application for Certificate of Environmental Compatibility and Public Need for the construction, operation and maintenance of an 80 foot monopole wireless telecommunications facility ("Facility") at 387 Shore Road, Old Lyme, Connecticut ("Property"), pursuant to General Statutes § 16-50aa and § 16-50j-34 of the Regulations of Connecticut State Agencies ("Application"). *(Hearing Exhibit 1, Application, p. 1.)*[2]

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1 T-Mobile submits its Proposed Findings of Fact contemporaneously with this Post-Hearing Brief.

2 For the Council's convenience, all subsequent page references to Hearing Exhibit 1, which is T-Mobile's application, shall be made as "App. at p. __." All subsequent references to exhibits attached to the Application shall be made as "App. Ex. __."

T-Mobile proposes to construct the Facility in the southeastern portion of a 2.11 acre parcel owned by Gregory Benoit, commonly known as 387 Shore Road, Old Lyme, Connecticut, and designated as Map 10, Lot 8 in the Town of Old Lyme's ("Town") Tax Assessor's Records. The Property is zoned for commercial uses and currently serves as a Laundromat. *(App., pp. 1-2, 9, 15; App. Ex. B; Pre-Filed Testimony of Scott M. Chasse ["Chasse,"] p. 2.)*

The Facility would consist of an 800 square foot compound, which would sit within a 2,400 square foot area leased by T-Mobile. An 8 foot high chain link fence would secure the equipment at the Facility. Vehicular access to the Facility would extend from Shore Road along an existing bituminous driveway and parking area and along an existing dirt road. T-Mobile would improve the dirt road with gravel. Utility service would extend underground from a new utility pole placed along the existing overhead utility distribution lines along the south side of Shore Road. *(App., pp. 1-2, 9; App. Ex. B; Chasse, p. 3; March 2, 2010 Transcript ["3.2.10 Tr.,"] p. 22.)*

II. A SIGNIFICANT PUBLIC NEED EXISTS FOR THE FACILITY

General Statutes § 16-50p (a) (3) (A) mandates that the Council "shall not grant a certificate, either as proposed or as modified by the council, unless it shall find and determine . . . [that] a public need for the facility and the basis of the need . . . ." The record amply demonstrates that there is a significant public need for the Facility.

A. The Facility Would Alleviate An Existing Coverage Gap.

There is a coverage gap in T-Mobile's network within the areas surrounding the site of the Facility. The coverage gap requires the installation of a telecommunications facility in the Town. The Facility would alleviate the existing coverage gap, specifically

along Route 156, Connecticut Road, Oak Ridge Drive and Hatchetts Point Road, just south of interstate 95, as well as the surrounding areas and the Amtrak rail line that passes through the area. Accordingly, the Facility would be an integral component of T-Mobile's wireless network in the Town. *(App., pp. 4-5; App. Ex. H, J; Pre-Filed Testimony of Scott Heffernan ["Heffernan,"] pp. 3-5; T-Mobile's Responses to the Council's First Set of Interrogatories ["T-Mobile First Interrog. Resp."]; T-Mobile's Responses to the Town's First Set of Interrogatories; 3.2.10 Tr., pp. 109-10; April 20, 2010 Transcript ["4.20.10 Tr.,"] pp. 118.)*

The Town supports the installation of the Facility to improve wireless services in this area of the Town. The Town recognizes that it needs enhanced wireless coverage for its residents, businesses and emergency services, specifically in the areas that would be addressed by the Facility and the telecommunications facilities proposed in Dockets 391 and 393. *(February 4, 2010 3:00p.m. Transcript ["2.4.10 3:00p.m. Tr.,"] pp. 10-11; February 4, 2010 7:00p.m. Transcript ["2.4.10 7:00p.m. Tr.,"] pp. 12-13; 4.20.10 Tr., pp. 90, 105; June 23, 2010 Transcript ["6.23.10 Tr.,"] pp. 121-22.)*

To provide effective coverage in this area, T-Mobile must mount its antenna array at 77'9" above grade level ("AGL"). This position would allow T-Mobile to minimize the number and height of future telecommunications facilities in this area. Additionally, the antenna height would enable T-Mobile to overcome the existing topography and mature vegetation and provide coverage in these areas of the Town. *(App., pp. 4-5, 9; App. Ex. B, H; Heffernan, pp. 4-5.)*

B. T-Mobile Requires A Three Tower Scenario To Alleviate Existing Coverage Gaps In The Town.

T-Mobile requires a three tower scenario to provide effective wireless service to the areas of the Town covered by the Facility and those telecommunications facilities proposed by T-Mobile in Dockets 391 and 393. Increasing the height of any of the facilities proposed in the Town would not obviate the need for any of the other proposed facilities or allow T-Mobile to reduce the height of any of those facilities.[3] *(Docket 391 Supplemental Pre-Filed Testimony of Scott Heffernan, dated February 24, 2010; 3.2.10 Tr., pp. 246-47; 4.20.10 Tr., p. 67-68.)*

A two tower scenario would not alleviate T-Mobile's existing coverage gap in the Town. Under such a scenario, gaps would exist in T-Mobile's network, which would result in network performance problems. Additionally, a two tower scenario would require taller facilities – much taller than those proposed by T-Mobile in this Docket as well as Dockets 391 and 393. *(3.2.10 Tr., p. 113; 4.20.10 Tr., pp. 68-69, 71-74, 111.)*

The difficulties inherent in a two tower solution to the coverage gaps in the Town are compounded by the coverage needs of Verizon and AT&T. Both wireless providers have established that coverage gaps exist in their respective networks in the area of the Town that would be covered by the telecommunications facility proposed in Docket 391. AT&T could not use the Facility or the telecommunications facility proposed in Docket 393 to alleviate its existing coverage gap. Although Verizon could use the Facility, Verizon could not alleviate its coverage gap with the facility proposed in Docket 393.

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[3] SBA Towers II LLC ("SBA") proposed a telecommunications facility, consisting of a 170 foot monopole structure, on property owned by the Town, located at 14 Cross Lane ("SBA Facility"). The Town, however, rejected the proposed SBA Facility and did not to lease its property to SBA. *(2.4.10 3:00p.m. Tr., pp 10-11; 4.20.10 Tr., p. 84; T-Mobile's Responses to the Council's Second Set of Interrogatories ["T-Mobile Second Interrog. Resp."])*

(Docket 391 Verizon pre-hearing filing, April 26, 2010; Docket 391 AT&T filing, June 28, 2010; 4.20.10 Tr., p. 168-70; 6.23.10 Tr., pp. 20, 31-32.)

C. Although the Issue Of Alternative Technologies Is Controlled By Federal Law, The Record Shows That There Are No Feasible Alternative Deployment Technologies To The Facility.

During the proceedings, the Council requested information regarding Outdoor Distributed Antenna Systems ("DAS"). The Council requested the following information from T-Mobile:

1. Is a DAS a feasible deployment technology in the area that would be served by the Facility?

2. How many locations (DAS nodes) would be necessary to provide coverage in the area that would be served by the Facility?

3. What would be the estimated cost for a DAS in the area that would be served by the Facility?

4. What would be the process for obtaining the easements necessary for installing a DAS in the area that would be served by the Facility?

5. From whom would easements be necessary to implement a DAS in the area that would be served by the Facility?

T-Mobile objected to this inquiry because it exceeds the scope of the Council's authority over wireless carriers and services under federal law. The federal government has occupied the field of technical standards for wireless transmissions for decades, and any action by a state or local government entity to dictate or encourage the adoption of alternative technologies such as DAS interferes with the federal regulatory scheme and is preempted.

The Second Circuit has recently spoken to this precise issue, and forcefully reaffirmed these principles. In a *per curiam* opinion in *New York SMSA Ltd. P'ship v. Town of Clarkstown*, No. 09-1546-cv, 2010 WL 2598310 (2d. Cir. June 30, 2010), the

Second Circuit affirmed the District Court's determination that federal law preempted a local ordinance which sought to regulate radio frequency interference and impose a preference for certain "alternative" deployment technologies, including specifically DAS. *Id.*, *6. In affirming the lower court decision, the Second Circuit agreed "that federal law occupie[s] the fields of (1) regulation of radio frequency interference and (2) the regulation of the technical and operational aspects of wireless telecommunications service." (Internal quotations omitted.) *Id.*

The Second Circuit explained that "Congress intended the FCC to possess exclusive authority over technical matters related to broadcasting and that Congress's grant of authority to the FCC was intended to be exclusive and to preempt local regulation." (Internal quotations omitted.) *Id.* More specifically, state and local regulations "setting forth a preference for alternate technologies are also preempted because they interfere with the federal government's regulation of technical and operational aspects of wireless telecommunications technology, a field that is occupied by federal law." (Internal quotations omitted.) *Id.*, *7. "While the Telecommunications Act of 1996 preserves the authority of State and local governments over zoning and land use matters . . . this authority does not extend to technical and operational matters, over which the FCC and the federal government have exclusive authority . . . ." (Internal quotations omitted.) *Id.*, *8.

The Second Circuit's forthright decision speaks directly to and vindicates the objections raised by T-Mobile, and leaves no doubt that the Council is without authority to require or impose a preference for a particular wireless technology, including DAS.

Similarly, the Council cannot delay or refuse to grant T-Mobile's application because a DAS has not been evaluated or considered to the Council's satisfaction.

Notwithstanding the legal implications of the Council's inquiry, T-Mobile endeavors to provide as much information as possible in response to the Council's requests in each and every docket. In this instance, T-Mobile provided detailed information regarding a DAS through the supplemental pre-filed testimony of Scott Heffernan, dated April 12, 2010 and May 10, 2010. Representatives of T-Mobile also answered questions posed by the Council during the hearing. T-Mobile provided these responses without any waiver of any federal rights, such as T-Mobile's freedom to determine its system design and technology without unlawful local interference.

With T-Mobile's detailed responses, the record reveals that a DAS would not be a feasible deployment technology for the area that would be served by the Facility. The reasons are multifold.

First, the intended coverage area is too large for a DAS to be a practical alternative, as it includes Route 156, Connecticut Road, Oak Ridge Drive, Hatchetts Point Road, just south of Interstate 95, as well as the surrounding areas and the Amtrak rail line that passes through the area. To serve an area this size would require a prohibitively large number of DAS nodes. Second, the existing, uneven terrain and mature vegetation would prevent the DAS nodes from providing reliable coverage throughout the intended coverage area. Third, the unavailability and relatively low height of existing utility poles in the area would compound the difficulties in deploying a DAS in this area of the Town. Fourth, the unavailability of unused fiber-optic cables to serve as the backbone of a DAS would also compound the difficulties in deploying a

DAS in this area of the Town. Finally, T-Mobile would have to execute access easements, pole attachment agreements with the Town and/or one or more utilities, assuming the existing poles are sufficient for a DAS. *(Supplemental Pre-Filed Testimony of Scott Heffernan, dated April 12, 2010 and May 10, 2010.)*

Accordingly, the record demonstrates that the Facility, as proposed, would alleviate the existing coverage gap in this area of the Town. Notwithstanding T-Mobile's reservation of its federal rights, the evidence submitted also shows that other deployment technologies, such as DAS, are not feasible solutions for the intended coverage objective in the Town.

D. The Record Supports A Valid Public Need For The Facility.

In summary, the record establishes that the Facility would alleviate discrepancies in coverage for T-Mobile's network. The three tower scenario proposed by T-Mobile would also alleviate existing coverage gaps for Verizon and AT&T. Other deployment technologies would not remedy these coverage gaps. The Facility, therefore, would meet a significant public need for improved wireless telecommunications in the Town.

III. THE FACILITY WOULD HAVE A MINIMAL ENVIRONMENTAL IMPACT

In addition to demonstrating a public need for the Facility, T-Mobile must identify "the nature of the probable environmental impact . . . including a specification of every significant adverse effect . . . whether alone or cumulatively with other effects, on, and conflict with the policies of the state concerning, the natural environment, ecological balance, public health and safety, scenic, historic and recreational values, forests and parks, air and water purity and fish, aquaculture and wildlife . . . ." General Statutes §

16-50p (a) (3) (B). The record is replete with evidence demonstrating that the Facility would have a minimal environmental impact, if any, on the surrounding areas, and would not conflict with any environmental policies of the State.

A. The Facility Would Not Have A Significant Impact On The Environment.

T-Mobile conducted a comprehensive environmental analysis of the Facility, which is attached to the Application as Exhibit K (Wetlands Report), Exhibit N (Visual Resource Evaluation Report), Exhibit O (Coastal Consistency Analysis) and Exhibit Q (NEPA Compliance Documentation). State and Federal authorities provided substantive responses (Exhibit O). The environmental analysis concluded that the Facility would not impact adversely the natural resources of the State.

The Property is not designated as a wilderness area and it is not located in any areas identified as a wildlife preserve or in a U.S. Fish and Wildlife Service National Wildlife Refuge. Nor would the Facility affect threatened or endangered species or designated critical habitats. Additionally, the proposed Facility would not impact any National Parks, National Forests, National Parkways or Scenic Rivers, State Forest, State Designated Scenic Rivers or State Game lands. *(App., p. 13; App. Ex. Q; Pre-Filed Testimony of Michael Chun ["Chun,"] p. 3.)*

The proposed Facility would not impact any recognized districts, sites, buildings, structures or objects of significance in American history, architecture, archeology, engineering or culture as listed on the National Register of Historic Places. On June 17, 2009, the State Historic Preservation Officer ("SHPO") determined that the Facility

would not have an adverse impact on any such resources.[4] *(App., p. 14; App. Ex. O, Q; Chun, p. 4; Supplemental Pre-Filed Testimony of Michael Chun.)*

The proposed Facility would not affect any Native American religious sites. T-Mobile consulted with three Native American tribes – the Mashantucket Pequot Tribe, the Mohegan Indian Tribe and the Narragansett Indian Tribe – because they might have had interests impacted by the construction, operation and maintenance of the Facility. None of the Tribes responded that they have any interests that would be impacted by the Facility. *(App., pp. 13-14; App. Ex. Q; Chun, p. 4.)*

T-Mobile also conducted a wetland analysis. The construction, maintenance and operation of the Facility would not have an adverse impact on any wetland system. There is a wetland located on the Property approximately 250 feet west of the Site. This wetland system consists of forested wetlands and a small pond which drains into a larger pond associated with an impoundment of the Three Mile River, which is located on the Property approximately 500 feet west of the Site. These wetland systems are too far from the Site to be impacted directly or indirectly by the Facility.[5] *(App., p. 16; App. Ex. B, K; Pre-Filed Testimony of Dean E. Gustafson ["Gustafson,"], pp. 2-4; Chasse, p. 4.)*

T-Mobile performed a coastal consistency analysis to confirm that the Facility would comply with the Connecticut Coastal Management Act, General Statutes § 22a-90 *et seq.* The Facility would not impact any coastal resources. There are no coastal

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[4] The Property is zoned C-30. This is a commercial designation; such properties may be used for, *inter alia*, telecommunications facilities, laundry establishments, storage facilities, business offices and retail. *See* Old Lyme Zoning Regs., § 5.10.

[5] The Facility would have no impact on water flow, water quality, or air quality and would comply with relevant noise regulations. Additionally, the Facility would not be located in a floodplain. *(App., p. 13; App. Ex. Q; Gustafson, pp. 3-5; Chun, p. 4.)*

resources located on or near the Property. The nearest coastal resource consists of tidal wetlands associated with the Threemile River located 500 feet southwest of the Facility across the Amtrak right-of-way. *(App., p. 14; App. Ex. O; Gustafson, p. 4.)*

Lastly, T-Mobile conducted an aeronautical study in accordance with the regulations promulgated by the Federal Aviation Administration. Based upon that study, the proposed Facility would not require marking or lighting. *(App., p. 17; App. Ex. S, Revised Ex. S.)*

The record demonstrates that the Facility is categorically excluded from any requirement for further environmental review by the Federal Communications Commission in accordance with the National Environmental Policy Act of 1969. See 47 C.F.R. §§ 1.1306(b) and 1.1307(a). The comprehensive environmental analysis supports a finding that the Facility would not adversely impact the surrounding area.

B. The Facility Would Not Have A Significant Visual Impact On The Surrounding Area.

Existing topography and mature vegetation would reduce some of the potential visual impacts of the proposed Facility on the surrounding areas. The average height of the tree canopy within a two mile radius of the Facility ("Study Area") is approximately 60 feet. The tree canopy covers nearly 2,964 acres of the 8,042 acre study area – with 3,579 acres of the Study Area consisting of surface water, mainly portions of the Long Island Sound. (*App., pp. 10-12; App. Ex. N; Pre-Filed Testimony of Michael P. Libertine ["Libertine,"] p. 6.)*

The areas from which the Facility would be at least partially visible year round comprise approximately 679 acres. Approximately 97 percent of this area consists of open water on the Long Island Sound to the south. Aside from these more distant,

open water views, some areas near the Facility would have year round partial views, including select portions of Route 156 and the Amtrak right-of-way. Areas of seasonal visibility would include approximately 31 additional acres, limited to locations within 0.25 miles of the proposed Facility. (*App., pp. 10-12; App. Ex. N; Libertine, p. 5.*)

The open water views on the Long Island Sound would have a minimal visual impact on the shoreline and the Facility would not impact any coastal resources. These views would be distant and limited to the very upper portion of the Facility, which would be difficult to discern above the tree canopy. The vegetative backdrop coupled with the rising topography as one moves inland from the shoreline would limit the views of the Facility from the Long Island Sound. The existing development along the immediate shoreline would provide more prominent views than the proposed Facility.[6] *(App. Ex. N; Libertine, p. 5; 2.4.10 3:00p.m. Tr., pp. 64-68; 3.2.10 Tr., pp. 51, 72; 4.20.10 Tr., pp. 56-57.)*

The Facility would not have an adverse visual effect on historic, architectural, or archeological resources listed on or eligible for the National Register of Historic Places. This determination is consistent with SHPO's conclusion. *(App. Ex. N; Libertine, p. 6.)*

C. Alternative Layout Of The Facility.

At the request of the Council, T-Mobile considered an alternative layout for the Facility compound on the Property. The Council asked T-Mobile to do so to allow for a vegetative barrier between the Facility compound and the Amtrak right-of-way. Under the initial layout for the Facility compound, T-Mobile would not have sufficient space to

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[6] The Facility, along with the other telecommunications facilities proposed in Dockets 391 and 393, would not have a detrimental, cumulative impact on the shoreline. The relatively low height of the facilities and the existing mature vegetation would limit the views of the Facility from the shoreline. *(3.2.10 Tr., pp. 59, 216.)*

replace the removed trees with evergreen plantings. The removal of the three trees, however, would not alter the visual impact of the proposed Facility on the surrounding area. *(App. Ex. N; 3.2.10 Tr., p. 47.)*

The alternative layout shifts the Facility compound to the north approximately 7 feet on the Property. The alternative layout would provide sufficient space between the Facility compound and the Amtrak rail line to include evergreen plantings, which would replace the three trees removed near the southern boundary of the Property. The trees to be removed are in poor condition. T-Mobile cannot shift the Facility compound any further away from the Amtrak rail line – as proposed in the alternative layout – without having to remove other mature trees and large rock outcroppings. *(Alternative Layout, filed April 12, 2010; 3.2.10 Tr., pp. 44-45; 6.23.10 Tr., p. 60.)*

D. The Migratory Bird Treaty Act Does Not Apply To T-Mobile's Application For A Telecommunications Facility.

The Migratory Bird Treaty Act ("MBTA") 16 U.S.C. § 703 *et seq.*, does not apply generally to wireless telecommunications facilities. To construe the MBTA otherwise would run contrary to common sense and render unworkable the federal mandate for universal wireless service under the Telecommunications Act of 1996.

Congress enacted the MBTA in 1918. It implements four bilateral migratory bird treaties signed between the United States and Canada (via Great Britain), Mexico, Japan and the former Soviet Union. *The Fund for Animals v. Norton*, 365 F. Supp.2d 394, 407 (S.D.N.Y. 2005), *aff'd*, 538 F.3d 124 (2008). The MBTA is a criminal statute enforced by the Secretary of Interior, which imposes strict liability on those who violate its provisions. *Id.*, 408; *see also Newton County Wildlife Ass'n v. United States Forest Serv.*, 113 F.3d 110, 114-15 (8th Cir. 1997), *cert. denied*, 522 U.S. 1108, 118 S. Ct.

1035, 140 L. Ed. 2d 102 (1998). The MTBA does not create a private cause of action. *The Fund for Animals v. Norton*, *supra*, 365 F. Supp.2d at 408.

The MBTA provides in relevant part:

> [I]t 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 . . . any migratory bird, nest, or egg of any such bird . . . 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 . . . Japan . . . and the Union of Soviet Socialists Republics

16 U.S.C. § 703.[7]

Research has not revealed any decisional law addressing the MBTA in the context of wireless telecommunications facilities. However, some Circuits have limited the MBTA's purview when moving beyond the conduct of hunters and poachers.

One such limitation is "habitat modification or destruction." *Seattle Audubon Society v. Evans*, 952 F.2d 297, 302 (9th Cir. 1991)(holding that MBTA does not apply to sale of logging rights). "Strict liability may be appropriate when dealing with hunters and poachers [however] it would stretch this 1918 statute far beyond the bounds of reason to construe it as an absolute criminal probation on conduct, such as timber harvesting, that *indirectly* results in the death of migratory birds. . . . [T]he ambiguous terms "take" and "kill" in 16 U.S.C. § 703 mean physical conduct of the sort engaged by in by hunters and poachers, conduct which was undoubtedly a concern at the time of

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[7] The MBTA neither defines nor references "flyways." Research has not revealed any decisional law applying the MBTA in instances involving "flyways." The "flyways" are geographic routes used by migratory birds. The United States Fish and Wildlife Service ("USFW") determines hunting seasons in the United States. *See* 50 C.F.R. §§ 20.105 and 20.152. Its regulations are administered regionally by the Atlantic, Mississippi, Central and Pacific Flyways Councils. *Id.* The Flyways Councils are independent organizations that consult with the USFWS regarding the welfare of migratory birds and the public's interests in hunting and harvesting. *Id.*

the statute's enactment in 1918." (Internal quotation marks omitted.) *Newton County Wildlife Ass'n v. United States Forest Serv.*, *supra*, 113 F.3d 115 (holding that MBTA does not apply to timber sales).

The Second Circuit also recognizes a reasonably limited interpretation of the MBTA. The Court has explained that an interpretation of the MBTA "that would bring every killing within the statute, such as deaths caused by automobiles, airplanes, plate glass modern office buildings or picture windows in residential dwellings into which birds fly, would offend reason and common sense." *United States v. FMC Corp.*, 572 F.2d 902, 905 (2d Cir. 1978) (holding that MBTA applied to company that discharged toxic chemicals into pond killing birds protected by statute).

The construction of the MBTA adopted by the Second, Eighth and Ninth Circuits is reasonably limited, particularly in light of the Telecommunications Act of 1996. In amending the Communications Act of 1934 with the Telecommunications Act of 1996, the United States Congress recognized the important public need for high quality telecommunications services throughout the United States. The purpose of the Telecommunications Act of 1996 was to "provide for a competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies to all Americans." H.R. Conf. Rep. No. 104-458, 206, 104th Cong., Sess. 1 (1996). The MBTA, therefore, cannot be construed to apply to telecommunications facilities in light of Congress' pronouncement that all Americans should have wireless services.

Moreover, the United States Fish and Wildlife Service ("USFW") has adopted interim guidelines for telecommunications facilities ("Guidelines") to minimize the impact

of such facilities on migratory birds. These guidelines are not mandatory – they are suggested measures while the USFW studies the impact of telecommunications facilities on migratory birds. The Facility would comport with the Guidelines: it would be well under 200 feet, without guy wires and unlit. *(App. Ex. B, P; Pre-Filed Testimony of Ashley Bonavenia ["Bonavenia,"] p. 3; 2.4.10 3:00p.m. Tr., p. 62.)*

Construing the MBTA to apply generally to wireless telecommunications facilities would render the federal mandate for universal wireless service unworkable. Accordingly, a reasonable interpretation of the MBTA, as adopted by several Circuits, would limit the purview of the statute from applying to such facilities.

E. Approval of T-Mobile's Application Would Comport With Existing Decisional Law.

Ultimately, the design and location of the Facility would minimize the Facility's environmental impact while addressing the coverage discrepancies in the area. The existing case law supports the approval of T-Mobile's application for a certificate as several Court decisions have affirmed the issuance of certificates for similar facilities and projects that involved comparable or greater environmental impacts than that proposed in the present application. *See generally Westport v. Connecticut Siting Council*, 47 Conn. Sup. 382, 797 A.2d 655 (2001), *Aff'd*, *Westport v. Connecticut Siting Council*, 260 Conn. 266, 796 A.2d 510 (2002); *Nobs v. Connecticut Siting Council*, No. CV 980492714S, 2000 WL 675643 (Conn. Super. Ct. April 28, 2000).

IV. A CERTIFICATE SHOULD ISSUE FOR THE PROPOSED FACILITY TO AVOID THE UNNECESSARY PROLIFERATION OF TOWERS

The Connecticut legislature has determined that the sharing of towers to avoid the unnecessary proliferation of towers is in the public interest. General Statutes § 16-50aa. General Statutes §16-50p (b) (1) (A) requires the Council to consider the feasibility of tower sharing to avoid the unnecessary proliferation of telecommunications facilities. "The sharing of facilities is encouraged, if not required by General Statutes §16-50p (b) (1) (A)." *Nobs*, 2000 WL 675643, at *2 n.1.

Certification of the proposed Facility would be in the public interest. There are no other existing facilities or structures in this area upon which T-Mobile could co-locate. Verizon and AT&T would also provide coverage to this area from their existing facilities and/or their relative positions on the telecommunications facility proposed by T-Mobile in Docket 391. Accordingly, this Facility, in conjunction with the facilities proposed in Dockets 391 and 393, would satisfy the coverage needs of three wireless carriers in this area of the Town. Therefore approval by the Council would be consistent with the legislative mandate to avoid the unnecessary proliferation of towers. *(Docket 391 Verizon pre-hearing filing, April 26, 2010; Docket 391 AT&T filing, June 28, 2010; 4.20.10 Tr., p. 168-70; 6.23.10 Tr., pp. 20, 31-32.)*

V. THE INTERVENOR MARY STALEY HAS OFFERED NO EVIDENCE TO REBUT T-MOBILE'S VOLUMINOUS EVIDENCE IN SUPPORT OF THE APPLICATION.

The Council granted party status in these proceedings to Mary Staley ("Staley"), of Ogden Road, Bethesda, Maryland. Staley owns an undeveloped parcel at 3 North

Road, which is situated near the Property on the opposite side of the Amtrak right-of-way. *(Appl. Ex. B; Staley Application for Intervention.)*

Although Staley has taken issue with several aspects of T-Mobile's Application, she has not offered any credible evidence to support her position. Additionally, Staley has not disclosed any experts to rebut the qualified and credible testimony of T-Mobile's panel of experts, the latter of which established that a public need exists for the Facility and that the Facility would not impact significantly the environment.

Staley's primary concern is the visual impact of the proposed Facility. *(4.20.10 Tr., p. 152.)* T-Mobile, however, has proposed a relatively low tower at 80 feet AGL to minimize any visual impact. The Facility would be partially visible to only 679 acres of the 8,042 acre Study Area. As discussed in Part III, *supra*, the Facility would be visible to a very small percentage of the Study Area. Most of the views would be distant, open water views on the Long Island Sound. The remaining views would be limited to the immediate area of the Facility, either through the existing mature vegetation or slightly above the tree canopy. While it is not feasible to eliminate all of the views of the Facility, T-Mobile has minimized the potential visual impact to a great extent. (*App., pp. 10-12; App. Ex. N; Libertine, p. 5.)*

Staley also argues that the Facility would disrupt the pastoral nature of the area. *(4.20.10 Tr., p. 152.)* There is, however, some development in the immediate area of the Property. The Amtrak right-of-way, with its catenaries, abuts the Property. The Property hosts a Laundromat, which includes an existing propane tank and boat storage area. Staley can view these structures from her parcel and has been able to do so since she first purchased the parcel in or around 2000. Accordingly, the area is not truly

pastoral and the Facility would not significantly disrupt the character of the immediate area. *(App. Ex. B; photographs filed April 12, 2010; 4.20.10 Tr., pp. 142, 158; 6.23.10 Tr., p. 85.)*

Staley further contends that T-Mobile has failed to demonstrate a public need for the Facility and the absence of an adverse impact on the environment. The record belies this contention. T-Mobile has submitted voluminous documentary evidence and testimony establishing the need for the Facility. It is undisputed that T-Mobile (and other wireless carriers) experiences a coverage gap in this area of the Town. The Town has also acknowledged the need for improved wireless service in the areas surrounding the site of the proposed Facility. Finally, the comprehensive environmental analysis, including an analysis under National Environmental Policy Act of 1969, wetland inspection and coastal consistency analysis, demonstrates unequivocally that the Facility would have a minimal, if any, impact on the environment. *See* Parts II - IV, *supra*.

Ultimately, Staley has offered no expert testimony to rebut any component of T-Mobile's Application. Specifically, she has offered no credible evidence to establish her claims that (1) there is no need for the Facility; (2) the Facility would adversely impact the environment; (3) T-Mobile's visibility analysis is inaccurate; and (4) property values would decrease because of the Facility. Further, Staley has not demonstrated that she is qualified to opine as to any of these issues.

VI. CONCLUSION

The record amply supports the approval of a certificate for the Facility. The Facility is necessary to provide adequate wireless coverage in this area of the Town. T-Mobile has demonstrated that the Property is the best location for a facility which would address the coverage issues in this area with the least amount of environmental impact. T-Mobile requests that the Council issue a certificate for the Facility, reflecting in its Decision and Order, consistent with General Statutes § 16-50x, that such approval satisfies and is in lieu of all local and state approvals and certifications.

THE APPLICANT,
T-MOBILE NORTHEAST LLC

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on this day a copy of the foregoing was delivered by Electronic Mail and regular mail, postage prepaid, to all parties and intervenors of record, as follows:

The Honorable Timothy C. Griswold
First Selectman
Town of Old Lyme
Town Office Building
52 Lyme Street
Old Lyme, CT 06371
(Via Email: selectmansoffice@oldlyme-ct.gov***)***

Mary Staley
5805 Ogden Road
Bethesda, MD 20816
(Via Email: mstaley@kelleydrye.com***)***

Jesse A. Langer