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 49 BRAINERD ROAD, NIANTIC (EAST LYME), CONNECTICUT

DOCKET NO. 396

Date: June 16, 2010

POST- HEARING BRIEF OF APPLICANT SBA TOWERS II LLC

Pursuant to § 16-50j-31 of the Regulations of Connecticut State Agencies ("RCSA"), applicant SBA Towers II, LLC ("SBA") submits this post-hearing brief in support of the above-captioned application. This brief is limited to (1) the public need for this telecommunications facility, (2) the lack of environmental impact of the proposed facility, and (3) consistency with the mandate of the Connecticut Legislature to avoid the unnecessary proliferation of towers in the state. SBA also submits its Proposed Findings of Fact in conjunction with this Post-Hearing Brief. As is clear from the record, this brief and SBA' proposed findings of fact, SBA has established a public need for the proposed Facility, has established that this need clearly outweighs the minimal environmental impacts associated with the proposed Facility and that no other alternative site exists in this area of East Lyme. This evidence is undisputed. Therefore, SBA respectfully requests that a certificate issue for the proposed Facility.

I. BACKGROUND

SBA, in accordance with the provisions of Connecticut General Statutes ("CGS") §§ 16-50g through 16-50aa and §§ 16-50j-1 through 16-50j-34 of the RCSA, applied to the

Connecticut Siting Council ("Council") on December 7, 2009 for a Certificate of Environmental Compatibility and Public Need ("Certificate").

SBA proposes to construct a 170-foot steel monopole telecommunications facility in the northern portion of a 51 acre parcel of land owned by Christopher Samuelsen known as 49 Brainerd Road in East Lyme, Assessor's ID 7.4-21of the East Lyme Tax Assessor's Records (the "Property"). The Property is currently developed with a residence and associated outbuildings although large portions of the Property remain undeveloped and wooded. The 100-foot by 100-foot leased area will include a 75-foot by 75-foot fenced compound area at the Property ("Facility"). This Facility will be designed to accommodate the antenna arrays and associated equipment of New Cingular Wireless PCS, LLC ("AT&T"), Cellco Partnership d/b/a Verizon Wireless ("Verizon"), and the equipment of two (2) other telecommunications carrier as well as the Town of East Lyme's emergency services. T-Mobile Northeast, LLC ("T-Mobile") has also filed a co-location application with SBA and has indicated an interest in locating antenna on the proposed Facility and Sprint/Nextel Corporation has also expressed interest in locating antenna on the proposed Facility.

The purpose of this Facility is to provide wireless telecommunications services to the Town of East Lyme, including along Route 156 in East Lyme, in the Giant's Neck and Black Point neighborhoods as well as surrounding areas. Contrary to the assertions of some of the intervenors, the proposed coverage from the Facility goes well beyond covering just the Amtrak corridor. Both AT&T and Verizon expressed need for a facility in this area of East Lyme. In addition, T-Mobile and Sprint/Nextel have expressed interest in locating on the proposed Facility. A Facility at the Site will provide wireless coverage service and

emergency services coverage to this area of East Lyme which currently suffers from inadequate coverage.

II. SBA HAS SATISFIED THE CRITERIA UNDER CSG § 16-50p FOR THE ISSUANCE OF A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED

Pursuant to CGS §16-50p, the Council must find that there is a significant public need for the facility. In addition, the Council must weigh "the nature of the probable environmental impact of the facility." The evidence in this record clearly demonstrates a significant public need for the proposed Facility and that this need is clearly outweighed by the minimal environmental impact anticipated.

A. A SIGNIFICANT PUBLIC NEED EXISTS FOR A TELECOMMUNICATIONS FACILITY IN THIS AREA

CGS §16-50p(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: (1) A public need for the facility and the basis of the need..." CGS §16-50p(a). There can be no dispute that there is a significant public need for this Facility. (SBA Exhibit 1 ("App") at Exhibit F; Verizon Exhibits 1-3; AT&T Exhibits 1-2).

There are no other telecommunications facilities in this area of East Lyme and no utility structures or other suitably tall structures on which to locate a telecommunications facility. Three licensed wireless carriers have expressed their need for a facility in this area of East Lyme. AT&T participated in this proceeding and testified that it currently experiences a .5 mile coverage gap along Route 156 and provided needed . AT&T testified that, at an antenna centerline height of 167', it could fill much of these existing coverage gaps. Verizon participated in this proceeding and testified that it currently experiences a coverage gap of .25 miles (at cellular frequencies) and 2.4 miles (at PCS frequencies) along Route 156. Verizon

testified that, at an antenna centerline height of 147', it could fill much of these existing coverage gaps including providing 2.58 miles of coverage along the Amtrak corridor and coverage along Route 156. In addition, T-Mobile filed an application with SBA to co-locate on the proposed Facility at an antenna height of 157'. Further, Sprint/Nextel expressed its interest in locating at the proposed Facility. Finally, the Town of East Lyme indicated that it may be interested in locating emergency services equipment on the proposed Facility, although cannot do so immediately because of budge issues. This evidence of existing coverage gaps and the ability of the proposed Facility to fills those gaps is undisputed by any testimony or evidence in the record.

B. THE FACILITY WILL HAVE A MINIMAL ENVIRONMENTAL IMPACT

In addition to demonstrating the public need for the Facility, SBA has identified "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..." as required by CGS §16-50p(a).

The record is replete with expert testimony that the Facility will have virtually no adverse environmental impact including: 1) no impact to wetlands or watercourses; 2) no impact to historic resources; 3) no impact to air or water quality; 4) no noise impacts; and 5) minimal visual impact, much of which can be mitigated by re-locating the proposed Facility on the Property. Both SBA and the Property owner have indicated their willingness to re-locate the Facility on the Property to achieve this.

Indeed, the record in this matter convincingly demonstrates that the Facility will have a minimal environmental impact on the surrounding areas, and will not conflict with any environmental policies of the State of Connecticut. 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. Westport v. Connecticut Siting Council, 47 Conn. Sup. 382 (2001), Aff'd, Westport v. Connecticut Siting Council, 260 Conn. 266, 796 A.2d 510 (2002); Nobs v. Connecticut Siting Council, 2000 Conn. Super. LEXIS 1156 (April 28, 2000).

1. There Will Be Minimal Environmental Impact

SBA conducted a complete and comprehensive environmental analysis of the proposed Facility, which can be found in the Application at Exhibits: I (Visual Resource Evaluation), Exhibit J (Wetlands delineation and impact report), Exhibit K (correspondence from State Historic Preservation Office ("SHPO") and Department of Environmental Protection ("DEP")), Exhibit L (consistency with Coastal Management Act) as well as SBA's supplemental Visual Report (SBA Exhibit 8). The State and Federal Agencies contacted as part of this environmental analysis provided substantive responses and conclusions. The environmental analysis concludes that:

i. The closest wetland on the Property is located approximately 50 feet from the proposed Facility. The development of the proposed Facility will have no direct impact on that wetland (SBA App. at Exhibit J; SBA Exhibit 4c);
ii. No endangered, threatened or species of concern were found on the Site and development of the Site would have no adverse impact on any endangered, threatened or species of concern. (SBA App. at Exhibit K);
iii. The Site is not located in a designated wilderness or wildlife preserve area (SBA App at 17-18);

iv. No listed species or designate critical habitats occur on or near the Site. (SBA App. at 17-18, Exhibit J; 4/22/10 Tr. at 120-124);

v. The proposed Facility will have no impact on migratory bird populations, including the black duck, in this area of East Lyme (SBA late-file Exhibit dated May 5, 2010);

vi. According to the State Historic Preservation Office, there will be no adverse impact on cultural resources, including historic areas (SBA App. at Exhibit J);

vii. The Site is not located on lands belonging to any federally recognized Indian tribe in Connecticut (SBA App at 17-18);

viii. The Facility will not be located in a flood zone. (SBA App. at 17-18);

ix. The tower will not be lit (SBA App. at Exhibit O); and

x. The proposed Facility will comply with all applicable noise regulations. (3/23/10 Tr. at 98, 146).

2. There Will Be Minimal Visual Impact

As far as the Facility's potential visibility, the Facility is proposed to be located on the Property in order to minimize impact to residential receptors. The location of the Site on the Property and the existing vegetation will significantly limit the visual impact of the Facility. The proposed Facility will be visible from 2,282 acres within a two-mile radius of the proposed Facility, with 2,219 acres occurring over open water—leaving only 63 acres over land with potential visibility of portions of the proposed Facility. The proposed Facility will be visible from approximately 53 residences year-round and an additional 20 residences will experience limited seasonal views of the Facility. Given the admitted dense residential development in the area, this is not a significant adverse visual impact. See Supplemental Bulk Filing, Plan of Conservation and Development at 112 (indicating that Black Point is "high density").

Much has been made of the acreage of visibility of Long Island Sound during this proceeding with parties and intervenors arguing that this acreage of visibility would be a unique experience for boaters viewing the coastline and that this is inconsistent with the Town of East Lyme's Plan of Conservation and Development (the "Plan") as well as the Connecticut Coastal Management Act, Conn. Gen. Stat. § 22a-92 *et seq.* ("CCMA"). To the contrary, SBA has established that the coastline in East Lyme specifically and throughout Connecticut contains structures that are visible from the water, that these structures do not constitute an adverse visual impact and that the proposed Facility is not inconsistent with the Plan or the CCMA.

Several parties and intervenors have argued that the total acreage of visibility over Long Island Sound is inconsistent with the Town of East Lyme's plan of conservation and development. See Town of East Lyme Exhibits 1, 2; Friends of Pattagansett Trust ("FOPT") Exhibit 1. This argument is meritless. First, the Town's plan of conservation and development does not specifically address telecommunications facilities, so it is unclear from that plan whether such facilities are encouraged or discouraged in any particular area of Town. See Supplemental Bulk Filing 2009 Plan of Conservation and Development. Contrary to assertions made by both the Town of East Lyme and the FOPT, a plan of conservation and development is merely an advisory document—even if SBA were filing an application with the Town, rather than the Council, the plan would not be binding on SBA. The Connecticut supreme court has repeatedly recognized that a plan of conservation and development is merely an advisory document... "The purpose of the [plan of conservation and development] is to set forth the most desirable use of land and an overall plan for the town ... Because the overall objectives contained in the town plan must be implemented by the enactment of

specific regulations, the plan itself can operate only as an interpretive tool." AvalonBay Communities, Inc. v. Orange, 256 Conn. 557, 573-576 (2001). In fact, the Town itself acknowledged that it is not unusual for telecommunications facilities to not be included in a plan of conservation and development because a plan is a "general document." See 4/22/10 Tr. at 34. Therefore, the fact that the proposed Facility may be inconsistent with the town's plan of conservation and development—which has not been shown—is not fatal and, as the Town itself admitted, is not even remarkable. Id.

Further, several parties and intervenors have also argued that the visibility over Long Island Sound is inconsistent with the Plan and the CCMA because the proposed Facility is located within the coastal boundary area and the Plan incorporates the standards contained in the CCMA. Again, this argument is meritless. Simply because a location is within the coastal boundary area does not mean that development cannot occur at that location. To the contrary, the Town admitted that it has issued "many" zoning permits and building permits for structures with the coastal boundary area. See 4/22/10 Tr. at 53. As has already been incorporated into this docket, the CCMA (and the Plan through its incorporation of the CCMA) identifies eight potential adverse impacts to coastal resources. See SBA Exhibit 5. The evidence in the record is undisputed that the proposed Facility will have *no* impact on: 1) water quality, 2) existing circulation patterns of coastal waters, 3) natural erosion patterns, 4) natural or existing drainage patterns, 5) coastal flooding, 6) wildlife, finfish or shellfish habitat or 7) tidal wetlands, beaches and dunes, rocky shorefronts, bluffs or escarpments.

Therefore, the only *potential* conflict between the proposed Facility and the CCMA is the 8th potential adverse impact referenced in the CCMA., "degrading visual quality by significantly altering the natural features of vistas or viewpoints." Simply because a structure,

such as the proposed Facility, is located within a coastal boundary does not mean that the structure will "degrade visual quality" or that a project cannot be approved if it will have an impact on one of the eight potential coastal resources identified. In fact, in the DEP, Office of Long Island Sound Programs ("OLISP") "Fact Sheet" discussing these adverse impacts, it states that projects should be designed to avoid these impacts or, *if unavoidable, minimize adverse impacts* to coastal resources and future water-dependent development opportunities and activities. See SBA Exhibit 5. In addition, in the OLISP fact sheet regarding these potential adverse impacts, it provides an example of "degrading visual quality" as "new construction that significantly obstructs coastal views from a scenic overlook or public park." See SBA Exhibit 5. Here, there is no evidence to support that the proposed Facility will obstruct views of the coast from any existing scenic overlook or public park. In addition, as is clear from the evidence in the record, SBA has taken all possible steps to minimize any potential adverse visual impact the proposed Facility may have – including constructing the tower at the minimum height required to provide the needed coverage to this area of East Lyme and providing opportunities for co-location to minimize the need for additional towers.

Certainly, as admitted by the various parties and intervenors, a significant number of existing residences, businesses, transportation and utility infrastructure, and other structures located within the coastal boundary are visible from some point within the coastal boundary—including the Amtrak corridor and associated infrastructure, Millstone/Dominion Power Plant with its associated smokestacks and existing towers in this area of East Lyme. See SBA Exhibit 5, 8. The proposed Facility will certainly not be a unique feature in this area, in views from land or from the water. Therefore, the proposed will not degrade visual quality in the area and is consistent with the CCMA.

3. No Alternative Sites Exist

Prior to filing its application and throughout the hearing process, SBA thoroughly established that no alternative sites exist to the proposed Facility. The parties and intervenors to this proceeding identified several proposed alternate sites including:

1) Pondcliff Condominiums – both AT&T and Verizon established that this site would not fill its coverage objectives (See Verizon Exhibit 2, 3/23/10 Tr. at 96; AT&T Exhibit 3, 3/23/10 Tr. at 177).

2) DEP Parcel (Giant's Neck Road (assessors parcel 10.3, 14-1) – SBA established that DEP will not lease this parcel for the development of a telecommunications facility. (SBA Exhibit 7, 3/23/10 Tr. at 177). The Town of East Lyme admitted that, despite its intent, it has been unable to obtain ownership of the DEP Parcel. (4/22/10 Tr. at 50-52). Therefore, the DEP Parcel is not an available alternative.

3) T-Mobile Parcel (Indian Woods Road parcel). AT&T testified that the T-Mobile Parcel would not fill its coverage needs. See AT&T late-file exhibit dated 5/14/10; see also 3/23/10 Tr. at 144. Therefore, notwithstanding the other potential environmental and access issues associated with the T-Mobile Parcel that have been raised, the T-Mobile Parcel is not a viable alternative to the proposed Facility.

4) Alternate Locations at 49 Brainerd Road (subject property). The parties and intervenors to this proceeding identified 3 alternative locations, other than the proposed Site, on the property at 49 Brainerd Road, depicted on SBA's micro-aerial map submitted on May 6, 2010:

a. Option 1 (also known as Russell Brown's Option 1)

b. SBA Hybrid Option

c. Option 2 (also known as Russell Brown's Option 2)

AT&T and Verizon both indicated that any of these three alternates would fulfill their respective coverage needs at the same height as those proposed at the original location. See 3/23/10 Tr. at 91, 139. SBA presented evidence that while the visual impact of any of these three locations would be comparable to the proposed Facility, option 1 would have a greater wetland impact than any of the other options and would also impact an existing well on the Property. See 3/23/10 Tr. at 33-34; 4/22/10 Tr. at 97. SBA presented further evidence that the re-location of the proposed Facility from the original location to any of these three alternate locations would reduce the visibility of the proposed Facility from the immediate neighbors. See 3/23/10 Tr. at 30-33. SBA would argue that re-locating the proposed Facility to the Russell Brown's Option 2 would accomplish the goals of minimizing the immediate views to the immediate neighbors and the trail head at the Raven's Wood property.

IV. A CERTIFICATE SHOULD BE ISSUED TO SBA FOR THE PROPOSED FACILITY TO AVOID THE UNNECESSARY PROLIFERATION OF TOWERS

The Connecticut legislature has declared that the sharing of towers to avoid the unnecessary proliferation of towers is in the public interest. CGS §16-50aa. In addition, §16-50p(b) directs that, when issuing a certificate for a telecommunications tower, the Council "may impose such reasonable conditions as it deems necessary to promote immediate and future shared use of such facilities and avoid the unnecessary proliferation of such facilities in the state." "The sharing of facilities is encouraged, if not required by General Statutes §16-

50p(b)(1)(A)." Nobs v. Connecticut Siting Council, 2000 Conn. Super. LEXIS 1156 (April 28, 2000).

Certification of the proposed Facility will help to avoid the unnecessary proliferation of telecommunication facilities in this portion of the state. There are no other existing facilities or structures in this area from which the carriers could co-locate to provide such coverage. AT&T and Verizon have expressed their need for a Facility in this area of East Lyme. Because all major telecommunications carriers could utilize the Facility as well as local emergency services, if requested, approval by the Council will uphold the state mandate to avoid the unnecessary proliferation of towers.

V. CONCLUSION

It is clear from the evidence presented in the docket that approval of the Facility in this area of East Lyme is necessary to provide adequate wireless coverage. SBA has demonstrated that utilization of the Property provides the best location for a Facility in this area of East Lyme and that no alternative sites exist in this area. This Facility is the optimal solution for the lack of coverage in this area, with the least amount of environmental impact. As such, SBA respectfully urges the Council to issue a Certificate for the proposed Facility.

Respectfully Submitted,

By: _____

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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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