

STATE OF CONNECTICUT
SITING COUNCIL

In Re : DOCKET #413
Cellco Partnership d/b/a Verizon Wireless :
Application for a Certificate of :
Environmental Compatibility and :
Public Need for a telecommunications :
facility located at :
723 Leetes Island Road, Branford, Connecticut :
:
: APRIL 27, 2011

**SUPPLEMENTAL MOTION TO COMPEL T-MOBILE TO PROVIDE MORE
COMPLETE RESPONSES TO DISCOVERY REQUESTS**

The Town of Branford hereby supplements its earlier Motion to Compel to require full and fair responses to Interrogatories propounded by the host community to the proposed facility.

BACKGROUND:

On April 6th, the Town submitted its interrogatory requests as a single joint set to be answered by each party to this action as appropriate. On April 13th, the Town received responses from T-Mobile which only partially respond to the Interrogatories. The Town of Branford made a Motion to Compel more complete responses to which T-Mobile continues to resist making responsive answers.

Under Council order, on April 25th, T-Mobile provided exceedingly minimal supplemental responses, remaining careful to avoid providing full responses to the information the Town has requested.

The proposed tower is one of at least 5 tower proposals being made or recently made in the Town of Branford (Pine Orchard, Pleasant Point, Leetes Island Road, Stony Creek and Short Beach Road). Telecommunications towers are ugly. They constitute blots on the visual landscape, something which is recognized in the Council's own

enabling legislation at §16-50g and §16-50p(3)(B) which state:

Sec. 16-50g. Legislative finding and purpose.

The legislature finds that ...telecommunication towers have had a significant impact on the environment and ecology of the state of Connecticut; and that continued operation and development of such power plants, lines and towers, if not properly planned and controlled, could adversely affect the quality of the environment and the ecological, **scenic**, historic and **recreational values of the state**. The purposes of this chapter are: **To provide for the balancing of the need for adequate and reliable public utility services ... with the need to protect the environment and ecology of the state and to minimize damage to scenic, historic, and recreational values;**

Sec 16-50p(3) (b) - The council shall not grant a certificate, either as proposed or as modified by the council, unless it shall find and determine... The nature of the probable environmental impact of the facility alone and cumulatively with other existing facilities, including a specification of every significant adverse effect, including, ... on... the natural environment, ecological balance, ... **scenic**, historic and recreational values

The Town of Branford is attempting to manage or mitigate the combined impact to property values and tourism and has retained experts at no small expense to the taxpayer to assist them in doing so. For that reason, the T-Mobile response that providing clear plastic overlays (Interrogatory 37) is too expensive strikes the Town as a troubling and trifling response. It is telling that T-Mobile does not provide any indication of the magnitude of the alleged financial burden.

While the Town recognizes that each docket stands on its own as a separate administrative proceeding for the purposes of appellate review, it is obvious that the purpose of the creation of a centralized permitting agency of utility infrastructure was to provide for planning of an interconnected statewide network of infrastructure. The

Council's enabling legislation bears out that telecommunications tower siting is not to be made in isolated vacuums.

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Indeed, the 60-day consultation period in which the Council encourages discussion among telecommunications providers and impacted host communities would be rendered a hollow bureaucratic nothingness, if Towns were unable to seek, gain and process information helpful to community-wide planning of multiple facilities in order to minimize their impacts.

Yet, having intervened in Docket 407, the Towns Interrogatories went unanswered as that docket was suspended by T-Mobile due to unavailability of its engineers, and yet T-Mobile proceeded to participate in supporting the proposed facility in the present docket with its full complement of engineers. When the Town made a request for voluntary compliance with Docket 407 Interrogatories in order to continue the discussion of town-wide planning, T-Mobile refused.

The Town, not to be deterred from town-wide planning, intervened in these proceedings to gather additional information which would illuminate the interaction of the proposed facility with others proposed in Branford.

It is upon this background that T-Mobile has chosen to selectively respond to

Interrogatory requests and resist multi-tower planning. The Town has not chosen to treat T-Mobile differently from other carriers. T-Mobile has chosen to hold itself to a privileged status.

The gaming nature of T-Mobile's responses becomes clear when one reviews, for example, its 3 responses to Interrogatory #5.

Initially, T-Mobile pretended not to notice the question:

5. Were drive tests ("scan tests") that would verify the results of the calculated plots conducted? If so, please provide the data sets which were generated by the tests and note whether the data needs to be corrected for variables including, but not limited to, antenna position, gain and line loss.

A5 This interrogatory is directed to the Applicant, Verizon; therefore, a response from T-Mobile is not required.

After the Motion to Compel, T-Mobile then responded with the 10lb sledgehammer objection:

A5 Like Verizon and AT&T, T-Mobile objects to this interrogatory because it seeks proprietary information.

After being ordered by the Council to respond, T-Mobile finally responded:

A5 Like Verizon and AT&T, T-Mobile objects to this interrogatory because it seeks proprietary information. Without waiving this objection, T-Mobile provides the following supplemental response: no drive tests were conducted.

Now perhaps, T-Mobile was testing the limits of its proprietary objection, but from where the Town sits, when T-Mobile could have simply replied - "No drive tests were conducted" - it appeared that T-Mobile cared more about being able to say "No" to the Town than it did about responding to questions in a candid fashion. The Town cannot therefore be blamed for seeking to compel complete answers to other questions to which T-Mobile has decided to obfuscate the truth.

It is notable that recently T-Mobile, in its quest to serve Amtrak's desire for unbroken data handling for its Boston-Washington corridor, has proposed the greatest number of

facilities, thereby having the greatest impact on the community. So while T-Mobile is not driving the height of the present facility, it proposes to do the greatest damage to Branford's interests and is attempting to do so in discrete isolated pieces so that the full impact may not be managed.

DISCUSSION:

It is of no import that the Town seeks to compel responses to its Interrogatories from only one participant to these proceedings. In discovery, one may desire or need information from any one of multiple parties, all of them or none. The Town should not be required to burden a party from whom it has no need for additional information. For example, AT&T provided downtilt, azimuth, height and transmitting power for its facilities in Branford (Interrogatory 4, 7, 19, 40). T-Mobile refused to provide downtilt, azimuth or height, on the grounds of trade secret, though without evidence of how the information requested is unique to T-Mobile.

The Town challenges the claim of trade secret as unsustainable in that the laws of physics and the propagation of RF signals from cel towers is information generally known to RF engineers in the industry. T-Mobile has not, because it cannot, make a showing that the azimuth, tilt and height at a particular location is a trade secret unknown in this industry. T-Mobile simply does not want an intervening party to be able to replicate their coverage analysis and thereby test the accuracy of their conclusions.

Furthermore, during testimony at the last hearing AT&T testified that downtilt impacts coverage and is an element which a carrier needs to take into account in designing their system. The interaction, hand off and link budget – the ability for towers to relay and maintain calls – are impacted by the configuration of adjacent sites. It stands to reason then that the Town of Branford should have access to that same information so that it can verify, refute or re-work the coverage depictions presented by the carriers. Otherwise these proceedings unacceptably become more a faith-based process than a

technical one.

The law of Connecticut supports disclosure. In Beta Squared, Inc. v. Thor Designs, 1993 Conn. Super. LEXIS 944 (Conn. Super. Ct. Apr. 19, 1993), the Superior Court, considering an objection to discovery on trade secret grounds held that "[t]he balance between the need for information and the need for protection against the injury caused by disclosure is tilted in favor of disclosure once relevance and necessity have been shown. As the Supreme Court has recognized, 'orders forbidding any disclosure of trade secrets or confidential commercial information are rare.'" Coca-Cola Bottling Co. v. Coca-Cola Co., 107 F.R.D. 288, 292 (D. Del. 1985), quoting Federal Open Market Committee v. Merrill, 443 U.S. 340, 362 n.24, 99 S. Ct. 2800, 61 L. Ed. 2d 587 (1979) In addition, "[a] survey of the relevant case law reveals that discovery is virtually always ordered once the movant has established that the secret information is relevant and necessary." (Citations omitted.)

A. Interrogatory #19 – Assumed downtilt in the coverage maps is not proprietary.

Specifically, T-Mobile declined to respond to Interrogatory #19, which seeks information on the assumption that T-Mobile has made regarding downtilt in its coverage depictions. Since there has been testimony that downtilt affects projected coverage by another carrier (AT&T) such information exists in the general public domain and cannot be claimed as a secret.

B. Participants to Council Proceedings Cannot Utilize Privilege or Trade Secrets As Both a Sword and Shield under the Rule in Curtis Packaging v. KPMG, LLP

T-Mobile improperly attempts to use the claim of trade secret privilege as both a sword and shield. As a sword to prove T-Mobile's need for coverage, T-Mobile presents

to the Council coverage maps depicting graphical representations of calculations performed by computers which have been fed certain parameters which influence projected coverage. As a shield, T-Mobile claims that the parameters are proprietary trade secrets under Conn.Gen.Stat. §35-51(d) and does not present the parameters used, thereby requiring the Council and other parties and intervenors to rely upon the conclusions on faith.

Moreover, since the competing carriers operate their system at different heights, frequencies, power levels and tilts on the same tower, T-Mobile has failed to demonstrate how disclosure of the requested information would create a competitive advantage for the other carriers. In fact, AT&T disclosed its downtilt and azimuth data apparently without fear that T-Mobile would gain competitive advantage.

In Curtis Packaging Corp. v. KPMG, LLP, 2001 Conn.Super. LEXIS 1067, Docket #X06-CV-99-0156558-S, Judicial District of Waterbury, Complex Litigation Docket at Waterbury, (March 23, 2001, McWeeney, J.), citing a series of federal cases, the court held that a protective order was adequate protection to protect an auditor's trade secrets when the opposing party needed access to the information to establish its case.

The Town is willing to abide by a protective order which allows access to the requested information and still protects the information from disclosure outside the Siting Council proceedings.

C. T-Mobile Resists Making a Specific Answer to a Portion of Interrogatory #23 Regarding the Deployment of Impact Mitigation Measures

The Town is attempting to ascertain T-Mobile's use of a series of stealth measures which can mitigate scenic impairment. While T-Mobile has finally provided a partial response, it has omitted any response regarding the use of combined multi-band antenna arrays. The response to this question is meant to determine if in fact T-Mobile

has utilize this technology as a feasible alternative, a matter which is completely relevant to the determination of whether alternatives of least impact have been proposed.

D. The Town Stands on Its Request for the Dropped Call Information in Interrogatory #31

Despite T-Mobile's protest that market trading areas are very large, what T-Mobile does not provide is whether T-Mobile has such data compiled in electronic form presently and can provide the same. It appears that the nature of the objection is not one of inability but unwillingness to disclose the information.

E. T-Mobile Has Not Properly Objected to the Generation of Coverage Maps

As to Interrogatory #33 and #37, T-Mobile did not object but instead unilaterally refused to respond to the Interrogatory request to provide more useful coverage plots. In response to Interrogatory #33, AT&T provided coverage maps depicting coverage bins at levels of -3dBm apart from -74dBm to -89dBm. T-Mobile possesses the capability of providing similar coverage plots with shorter bins as it has done in past Council proceedings.

The request is neither frivolous nor mere make-work. The coverage maps submitted suggest that coverage stops and disappears at certain points in the target area below -82dBm, despite testimony in this proceeding that these maps have a standard deviation of -8dBm. Generation of new maps at alternate lower heights with the smaller signal strength bins would demonstrate a far more accurate depiction of coverage. This would materially assist the Council and the Town in determining whether the height requested is necessary or simply desired.

Again, T-Mobile does not argue that the information is somehow privileged or irrelevant, nor does it argue that the information cannot be produced. It simply *declines* to produce the information. It is important to keep in mind that previously carriers have argued that they are not required to provide access to their computer modeling software to allow duplication of their results. This refusal to provide highly relevant information is obstructive to an open and fair process that seeks to discern the truth.

Regarding Interrogatory 37 requesting clear plastic overlays, a useful tool previously requested and utilized by both the Council and intervenors, again T-Mobile's objection is improper. T-Mobile claims that the request is unduly expensive, but fails to provide any information as to the magnitude of the expense. Given the potential impact to real property values, tax base, tourism and the cost of the Town having to participate in these proceedings, it is likely that the cost of this request pales in comparison.

T-Mobile is making a request of the privilege of siting its facilities in Branford. It should be required to provide reasonable proofs for that request where a host community has determined that there is a serious enough concern to commit its own resources to participate in the proceedings. The vast majority of proceedings go without intervention or additional scrutiny, but in the more sensitive locations additional scrutiny is warranted and should be tolerated if not encouraged.

F. Interrogatory #39 Requests Information Regarding the Technical Specifications of Sites Handing Off in and into Branford So That the Town may Attempt to Reproduce and Test the Coverage Assumptions

The Town's arguments previously submitted regarding this Interrogatory remain valid. While T-Mobile has provided supplemental responses, T-Mobile has declined to disclose height, azimuth and tilt which was disclosed by AT&T. The utility of such information has been argued above and in the previous motion to compel.

G. The Claim of privilege as to the Clutter and Terrain Data Used in Coverage

Modeling is Not a Trade Secret

First, T-Mobile misrepresents that AT&T objected to the provision of the clutter and terrain database. As noted by AT&T in its response, the clutter and terrain data were derived from databases provided by the US Geological Survey, a decidedly public source. Terrain and clutter databases are often derived from such sources, and the Town would like to be able to assess which databases have been utilized to determine if there are more accurate or updated databases which would provide more accurate coverage depictions.

H. T-Mobile's Request For In Camera Proceedings Is Unnecessary

T-Mobile attempts to escalate these proceedings beyond reason by requesting that these proceedings be held in camera. T-Mobile's co-located facilities are accessible and viewable by the other carrier competitors on the towers. The information regarding the orientation, height and tilt are easily obtained by employees of the other tower tenants. Thus, the information is not secret. In addition, T-Mobile's claim of privilege to information that it utilizes in generating submissions to the Council for approval should not be used as a sword to obtain a permit and a shield from reasonable inquiry. The information should be available for intervening parties to analyze in their planning efforts.

Wherefore, the Town requests more fair responses to its Interrogatories.

Respectfully Submitted,

The Town of Branford,

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CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing was deposited in the United States mail, first-class, postage pre-paid this 27th day of April, 2011 and addressed to:

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