

STATE OF CONNECTICUT
SITING COUNCIL

North Atlantic Towers, LLC and
New Cingular Wireless PCS, LLC Application :
for a Certificate of Environmental
Compatibility and Public Need
for a Telecommunications Facility Located :
at 171 Short Beach Road or 82 Short Beach Road
East Haven or Branford, Connecticut.

DOCKET #427

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CONNECTICUT
SITING COUNCIL
NOVEMBER 9, 2012

POST-HEARING PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
OF THE TOWN OF BRANFORD

Preliminary Statement

While the Town of Branford (the "Town") appreciates the need for wireless telecommunications, and has been proactive in attempting to provide wireless services in the Town, it objects to the Branford proposed tower as less appropriate than the available alternative East Haven tower because the East Haven tower, which is lower in height, poses less visual impact to coastal resources and provides better coverage for both of the identified tenants of the tower (Verizon and AT&T) with the possibility of additional facilities being equivalent if either site is chosen. Further, the mere speculative possibility of co-location is not the same as a demonstration and finding of public need for additional height. Thus, the possibility of co-location is an inappropriate basis for a decision on the alternative sites.

The proposed facility has a demonstrated public need for two carriers only, a need which is more ably met by the East Haven tower especially when balanced by the greater visual impact of the Branford tower.

PROPOSED FINDINGS OF FACT

1. Either of the two proposed locations will effectively serve the proposed target area for coverage. (Application, p.6, lines 11-12; Transcript, Wells, p.75, lines 8-15).
2. The proposed facility at East Haven is only 103ft in height, while the proposed Branford facility would be 120 feet in height. (Application, pp.6-7)
3. The proposed East Haven facility at 82 Short Beach Road would provide -82 dBm coverage for a population 10% greater than the population of the proposed facility at 171 Short Beach Road in Branford. (Town of Branford Supplemental Pre-filed Testimony of Branford, Maxson, August 7, 2012, p.2., Exhibit G Coverage maps).
4. The coverage analysis provided by C-Squared Systems for AT&T concurs with the Town's expert that the East Haven tower would serve a 10% greater population with -82dBm coverage. (Application, Tab 1, p.4).
5. The East Haven facility would deliver greater overall coverage and leaves fewer gaps than the Branford facility making the East Haven facility the preferred site for serving the public need. (Maxson Pre-Filed Testimony, p.4; Verizon Responses to Council Interrogatories dated June 18, 2012, Interrogatory 2, p.2; Transcript, 8/15/12 Maxson, p.161 ("demonstrable advantage to the East Haven site"))).
6. Verizon, a confirmed tenant on the proposed facility, testified that "from an RF standpoint...the East Haven site gives us a slight advantage in terms of population covered and area covered.". (Transcript, 8/15/12, Brauer, p.111.)

7. At cellular frequencies East Haven would cover 7.39 square miles (contrast Branford 6.65 square miles) and at PCS frequencies 3.31 square miles (contrast Branford 3.21 square miles); an 11% and 4% increase in coverage area for East Haven. (Maxson Pre-Filed Testimony, p.4; Verizon Responses to Council Interrogatories dated June 18, 2012, Interrogatory 2, p.2)
8. If Branford were chosen as the facility site, AT&T/Atlantic Tower would need another site in East Haven or eastern New Haven to cover existing gaps in East Haven that would be left covered by the Branford facility. (Transcript, 9/11/12, Anthony Wells, p.118, lines 1-12).
9. The Town of Branford has indicated it will not locate its emergency communications on the Branford facility, though East Haven is contemplating going on the East Haven location. (Transcript, 9/11/12, Howse, p.129).
10. The Applicant's viewshed analysis indicates that there will be near shore views of the tower at a number of sensitive receptors including Branford Point, Branford Harbor, Lamphier Cove, Indian Neck Point, Dugg's Cover, Stanley Point, and Horton Point. (Application, Attachment 4c, page 54).
11. By contrast, the East Haven facility will have only distant Long Island Sound views over open water (Application, Attachment 5c; Maxson Pre-filed Testimony, p.3)
12. The Branford location is more visible from Long Island Sound than East Haven due to the increased height of Branford over that of the East Haven facility. (Transcript, 9/11/12, Libertine, p.79)

13. Branford poses a greater visual impact at ground level than East Haven,.
(Transcript, 9/11/12, Libertine, p.92).
14. A flat topped monopine configuration which has been done at other locations
would help reduce the impacts of close visibility at the East Haven location.
(Transcript, 10/2/12, Libertine, pp.30 -31)
15. The Branford location poses a greater impact on residential homes as noted by
the statistics in the Application itself. Only 35 homes will have year round views
of the East Haven tower, while 54 homes would have such views of the Branford
tower– a 54% increase in residential impacts. (Application, VHB Attachment 4c,
pp.5, 6 and Attachment 5c, pp.5,6).
16. There are three times as many residential homes within 1000 feet of the
Branford site than the East Haven site (115 at East Haven, 335 at Branford).
(Transcript, 8/15/12, Stevens, p.57)
17. Moreover, if the East Haven facility were moved further back behind the
firehouse, the number of homes with views of the tower would be reduced by the
shielding of the tower by tucking the tower behind the firehouse structure.
(Transcript, 8/15/12, Libertine, pp.25-26).
18. The lower height of the East Haven tower makes the quality of the year-round
impacts less imposing. In addition, there are an additional 17% more homes
impacted by the Branford facility overall than the East Haven facility (83 versus
71 homes). (Pre-filed Testimony of Maxson, p.3; Application, VHB Attachments
4c, p.6 and 5c, p.6)

19. The Branford facility would be visible in 2,025 acres while the East Haven facility would be visible from only 1,446 acres; a 29% smaller visual impact. (Application, VHB Attachment 4c, p.5 and 5c, p.5)
20. Despite claims of site instability and erosion and sedimentation concerns raised by individual intervenors from East Haven, there would be no problems controlling erosion at the East Haven site or constructing a sufficient foundation to support the tower. (Transcript, 08/15/12, Kiburz, AT&T, pp.20, lines 18-24; Stevens, pp.68-73).
21. The East Haven facility poses no impacts to wetlands resources. (Transcript, 10/2/12, Kiburz, p.41)
22. Intervenor, Nikki Whitehead, despite the submission of voluminous information non natural resources extant and proximate to both proposed tower locations, had no data or evidence indicating that either avian communities or habitat values would be impacted. (Transcript, 9/11/12, Whitehead, pp.44-47).
23. Even so, Ms. Whitehead admitted to not having credentials or qualifications to testify to the impacts to avian species by lighted towers and that she was not a biologist, engineer or ecologist. (Transcript, 9/11/12, Whitehead, pp.48-50)
24. The views from recreational areas at East Haven are obscured and would not have any effect on recreation. (Transcript, 10/2/12, Libertine, pp.28-29).
25. By contrast, several people at the initial public hearing indicated they could see the balloon flight for the Branford location from several recreational beach areas in Branford. (Transcript, July 10, 2012) and AT&T's Mr. Libertine testimony

PROPOSED FINDINGS OF LAW

A. The Applicants have not demonstrated the public need for the Branford tower since the East Haven tower constitutes the least intrusive means to cover the identified significant gaps in coverage.

The Telecommunications Act of 1996 mandates that only “significant gaps” be filled. Sprint Spectrum L.P. v. Willoth, 176 F.3d 630 (2d Cir. 1999). In that case, Sprint filed an application to build three cell sites with a 150-foot tower at each location in Ontario, New York. The zoning commission denied the application and Sprint appealed. The Second Circuit affirmed the District Court’s summary judgment ruling in favor of the commission. One of the issues raised by Sprint was that the commission’s denial of its application “prohibits or has the effect of prohibiting the provision of personal wireless services” in violation of §332(c)(7)(B)(i)(II) of the Act. In that case, as in this one, the applicant argued that it has the right under the Act “to construct any and all towers that, in its business judgment, it deems necessary to compete effectively with other telecommunications providers.” Id. at 639. In rejecting this claim, the Second Circuit reasoned that since Sprint would never propose to build a tower it thought was unnecessary to compete, “such a rule would effectively nullify a government’s right to deny construction of wireless telecommunications facilities, a right explicitly contemplated in 47 U.S.C. § 332(c)(7)(B)(iii).” Id. Instead, the Second Circuit held that “the Act’s ban on prohibiting personal wireless services precludes denying an

application for a facility that is the least intrusive means for closing a significant gap in a remote user's ability to reach a cell site that provides access to land-lines." Id. at 643. Sprint v. Willoth, *supra*, has been followed by many Courts, including the Third Circuit. In adopting the rule emanating from Willoth, the Third Circuit requires proof that: (1) "the facility will fill an existing significant gap in the ability of remote users to access the national network" and (2) "the manner in which it proposes to fill the significant gap in service is the least intrusive on the values that the denial sought to serve." APT Pittsburgh Limited Partnership v. Penn Township, 196 F.3d 469, 480 (3d. Cir. 1999).

The burden of not only demonstrating the existence of a significant gap but also of proving that the manner in which that gap will be filled is the least intrusive means possible rests squarely with the Applicant. While the Town does not dispute that there is a gap in coverage in western Branford/eastern East Haven, neither the applicants nor the intervening carrier have demonstrated that the Branford tower is necessary to fill that gap and that it is the least intrusive means of filling that gap. To the contrary, the Applicants and Verizon have both established that the East Haven tower is visually less-intrusive and will adequately cover the significant gaps they have identified.

Moreover, the development of testimony that additional carriers could be placed on the Branford tower, is speculative in that there is no evidence in the administrative record of whether other carriers could locate at the available heights. BY contrast, the only evidence in the record is that the other carriers licensed to do business in Connecticut were given notice of this application and they expressed no interest in co-location at the Branford site.

Thus, approving a facility based on speculation that co-location might possibly occur constitutes clear appealable error.

B. The proposed tower is opposed by the Town of Branford while the Town of East Haven is contemplating using the East Haven site for emergency services.

In enacting the Telecommunications Act of 1996, Congress sought to “strike a balance between encouraging the growth of telecommunications systems and the right of local governments to make land use decisions.” SBA Communications, Inc. v.

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[T]he TCA and the courts interpreting this statute acknowledge the legitimate local interest in such determinations. As the Second Circuit recently noted in Sprint Spectrum, L.P. v. Willoth, 176 F.3d 630 (2d Cir. 1999), the goals of increasing competition and rapid deployment of new technology do not trump all other important considerations, including the preservation of the autonomy of states and municipalities. Rather in the context of constructing a national wireless telecommunications infrastructure, Congress chose to preserve all local zoning authority over decisions regarding the placement, construction, and modification of personal wireless service facilities, 47 U.S.C. §332(c)(7)(A), subject only to the limitations set forth in § 332 (c)(7)(B). Willoth, 176 F.3d at 639-40. The legislative history of the TCA illustrates the importance of preserving local land use authority. As stated in the Senate Report, § 332 “preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances specified in that section.” See Sen. Rep. No. 104-230, at 458 (1996).

Id. (Emphasis supplied).

The Town of Branford has formally intervened in these proceedings to oppose the Branford site and has at considerable expense presented expert testimony and studies to demonstrate the relative impacts to the surrounding scenic vistas posed by the two alternative locations. Using evidence and testimony of the Applicants and the

intervening carrier in addition to its own testimony, Branford has demonstrated that the most appropriate site is at 82 Short Beach Road. Branford has no interest or need to utilize the Branford facility for its emergency services communications. (Transcript, 8/15/12, DaRos, p. 174, lines 12-15).

The Town of East Haven, having been fully informed of these proceedings has chosen not even to attend the public hearing held in East Haven or to make any comment whatsoever. The only evidence in the record is that the Town is at best indifferent to the 82 Short Beach Road facility and is contemplating utilizing it for their emergency services communications. (Transcript, 8/15/12, Pierson, pp. 148-149; Transcript, 9/11/12, Howse, p.129).

If the Council is to give any weight to the input by local communities, it should not ignore the record that has been built, or not, by each Town as to do so could be seen as arbitrary.

C. The proposed Branford tower will have a major, negative impact on the mature, residential neighborhood and the protected open space and scenic vistas in the immediate area, thus the Branford location is not the least intrusive means of providing service to the identified significant gaps in coverage.

Without undue repetition of the proposed findings of facts recited above, the East Haven tower is less intrusive because:

- a. It is shorter in height.
- b. It can be seen from fewer homes.
- c. It presents a smaller visual impact to recreational beach views.
- d. It presents smaller visual impacts to recreational trails and protected open space.

- e. It presents smaller visual impacts to Long Island Sound views.
- f. Its lower near-view impacts can be screened in part by hiding it behind the existing firehouse and by utilizing a flat-topped monopine.

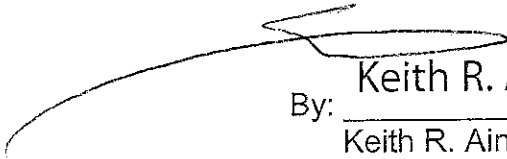
Further the East Haven facility is the better means for covering the gap because:

- a. Verizon predicts a greater coverage footprint to more people.
- b. AT&T predicts a larger cellular coverage footprint and otherwise nearly indistinguishable coverage at either site.
- c. The likelihood of the need for an additional facility if the Branford site is permitted still exists. (Transcript, 9/11/12, Wells, p.118, lines 1-12).

CONCLUSION

Based upon the foregoing, the Town respectfully requests that the Council issue a Certificate for the construction of the facility at 82 Short Beach Road as the least intrusive means of providing service to the public.

TOWN OF BRANFORD

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CERTIFICATION

This is to certify that, on the date hereof, a copy of the foregoing was sent, electronically, and via first class United States mail, postage prepaid, to the following counsel and pro se parties of record:

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