CONNECTICUT SITING COUNCIL

APPLICATION OF CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS TO THE CONNECTICUT SITTING COUNCIL FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED FOR THE CONSTRUCTION MAINTENANCE AND OPERATION OF A TELE-COMMUNICATIONS FACILITY LOCATED AT ORANGE TAX ASSESSOR MAP 77, BLOCK 3, LOT 1, 831 DERBY MILFORD ROAD, ORANGE, CT	)	DOCKET NO. 448
	)	NOVEMBER 24, 2014

POST-HEARING BRIEF OF INTERVENORS - ALBERT SUBBLOIE, JACQUELINE BARBARA, GLENN MACINNES, AND JILL MACINNES

I. Preliminary Statement

The intervenors, Albert Subbloie, Jacqueline Barbara, Glenn MacInnes and Jill MacInnes (hereinafter the "Intervenors"), respectfully submit this post-hearing brief in opposition to the subject application (Docket 448, hereinafter the "Application) submitted by Cellco Partnership d/b/a Verizon Wireless (hereinafter "Cellco" or the "Applicant") for a certificate of environmental compatibility and public need for the construction and maintenance of a telecommunications Facility located at Orange Tax Assessor Map 77, Block 3, Lot 1, 831 Derby Milford Road, Orange, CT (hereinafter, "Orange North" and/or "Facility"). The Intervenors submit that Cellco has failed to prove a public need for the requested Facility or, that the environmental and other material impacts of siting the Facility where proposed do not outweigh the asserted need for the Facility. Accordingly, the Application should be denied.

II. Proposed Findings of Fact

A. Cellco has failed to establish that there is a substantial need for the proposed Facility.

1. **The Application continually evolved to allow for evolving objectives on behalf of the Applicant. Coverage maps and Cellco's interpretation of coverage maps were routinely modified in an attempt to support specious evolving objectives**.

Cellco repeatedly admitted on record that coverage is not the primary factor prompting the proposed Orange North Facility. If there were a critical coverage claim to support the proposed Facility, it would be demonstrated by evaluating the 700 MHz frequency band. (Pre-filed testimony of David Maxson.[1]) The Applicant has no concrete plans to install the 850 and 1900 MHz bands at Orange North Facility due to the fact that the 850 and 1900 MHz bands are presently used to support the legacy 3G CDMA network. This fact renders the 850 and 1900 MHz CDMA coverage maps submitted by Cellco in support of its Application irrelevant to the proceeding. (*Id.*)

2. **Deployment of 2100 megahertz system will relieve capacity of the 700 megahertz system**

Furthermore, the 2100 MHz coverage map that was submitted by Cellco is pointless for two reasons. First, 2100 MHz is a capacity overlay to the 700 MHz LTE service and is not a coverage resource for the Applicant in this area. Second, both the 700 MHz and 2100 MHz

[1] Mr. Maxson has 26 years of experience designing, building and/or maintaining radio and other electronic communications facilities. He also serves as a wireless Facility siting consultant to numerous municipalities and non-governmental entities. He is experienced in radio propagation modeling, signal test and measurement, radio frequency emissions safety assessment, radio communications Facility design, construction and maintenance, as well as in the processes that regulate wireless facilities. Mr. Maxson is a Senior Member of the Institute of Electrical and Electronics Engineers. He also represents his company, Isotrope, LLC, as a member of the PCIA (the wireless infrastructure association) HetNet Forum. The HetNet Forum is an organization of stakeholders in the heterogeneous networking segment of the wireless industry. Mr. Maxson, has earned by examination the only independent certification available for experts in wireless communications engineering and technology—the IEEE Wireless Professional ("WCP") certification issued by the Communications Society of the International institute of Electrical and Electronics Engineers. This certification demonstrates Mr. Maxson's expertise in seven subject areas of wireless communications engineering technology. Mr. Mason also holds a General (formerly known as First) Class Radiotelephone Operator's License issued by the Federal Communication's Commission and a Certified Radio Broadcast Engineer certification issued by the society of Broadcast Engineers. Mr. Maxson is also a licensed construction supervisor in Massachusetts. (Pre-filed testimony and *curriculum vitae* of David Maxson; *see also*, David Maxson's testimony, as of record appears.)

coverage maps are prepared using CDMA assumptions even though the frequencies are being used exclusively by the Applicant to provide LTE services.

> 9-16-14, p. 357 – **(Mercier) "so I just want understand basically what you're stating is that by deploying the 2100 megahertz system, their 700 will not exhaust as quickly as it's showing; is that correct?)"**
>
> 9-16-14, p. 357 – **(Maxson) "That's correct. Once the 2100 megahertz system is deployed and functioning properly, its purpose is to relieve the capacity needs of that sector, and that's where customers will be diverted when the 700 megahertz component of that sector is busy."**
>
> 9-16-14, p. 457 – **(Mercier) "So you would have no overload on the 2100 megahertz system on Derby Connecticut Beta, Derby North Connecticut Gamma or Shelton 2, there would be no exhaustion of the 2100 system in the short-term that is beyond three years?"**
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> 9-16-14, p. 458 – **(Lattore) "For the next three years, currently we're not projecting any exhaust; that's correct."**
>
> 9-16-14, p. 459 **(Lattore) "as a very general rule when the device is within the footprint of the 2100 megahertz and the channel conditions are sufficient for that device to use it effectively, we do, to the best of our ability, design the network so that the device makes the decision to use the 2100 megahertz software frequency."**

Hence, the Applicant has provided specious evidence to support its coverage claims. (*Id.*)

Given that the fact that Cellco has no plan to install the 850 and 1900 MHz bands at Orange North Facility, it is self-evident that there is no need for new CDMA facilities and, therefore, no coverage gap of any consequence to CDMA voice service. Moreover, for the reasons given, none of the coverage maps submitted by Cellco – the 850 and 1900 MHz coverage maps, the 2100 MHZ coverage maps and the 700 MHz coverage maps – support the Applicant's claims of a gap in LTE coverage. (*Id.; see also*, David Maxson's expert reports and testimony, as of record appear.)

3. **The Orange North Facility is unnecessary based on Cellco's own stated requirements. The Intervenors' expert patently demonstrated the lack of public need for the requested Facility**.

The proposed Orange North Facility does nothing to address Cellco's system requirements. (*Id.; see also*, David Maxson's expert reports and testimony, as of record appear.) The Applicant initially averred in its application that 8 sectors of 6 cell sites would obtain "significant capacity relief" from the Orange North Facility. Upon further inquiry by the Council, the Applicant provided additional documentation that identified three purportedly "Stressed Sectors" and three 'Unstressed Sectors," and no further support regarding two other sectors. The measure of stress on these six sectors is in the form of capacity utilization trend data solely with respect to the 700 MHz LTE service. No information was provided to verify whether the capacity overlay 2100 MHz service is on line and is being similarly stressed. The 2100 MHz license has twice the bandwidth of the 700 MHz license and should be able to support substantial capacity demand. Subsequently, the Applicant submitted limited data on 2100 MHz capacity utilization. This data shows the 2100 MHz capacity is beginning to be utilized to relieve the 700 MHz service at some sites. (*Id.*)

It is contradictory to assert that significant capacity relief is provided to facilities that show no need for relief. The three Unstressed Sectors were documented by the Applicant as having no tendency to need relief for at least the next three years. Further underscoring the unimportance of any potential trend extending beyond a two-year horizon, the Applicant, in testimony in Docket 446, stated:

> **MR. ASHTON: Having done a little long-range planning in the past, what is your planning horizon? How far out do you go?**
> **THE WITNESS (Ulanday [Cellco's RF Engineer]): Like I said earlier, we do two years.**

[Transcript, April 29, 2014, 3PM, p.34]

The Applicant's use of conventional coverage maps to infer where and by how much the proposed Facility will provide capacity relief is unsound. (Pre-filed testimony of David Maxson; *see also*, David Maxson's expert reports and testimony, as of record appear.) The Applicant took a coverage signal strength map of the proposed Facility and laid it across the coverage footprint on a map of the existing well-penetrating network. This is an incorrect use of coverage mapping technique. It does not show where the new Facility provides dominant service and it does not show which existing sectors will have their service areas reduced by the proposed Orange North Facility. (*Id.*) Furthermore:

> 9-16-14, p. 338 – **(Maxson) "the Applicant says in its new submission that its traffic maps are proprietary, but it does not say whether they even prepared any traffic maps, particularly with respect to the office park in Shelton and the densely populated area in Sunnyside, when they were developing the Orange North search ring**."

The Applicant has failed to submit a complete Application, as required.

The Most Likely Server ("MLS") maps of the existing and existing-plus-proposed conditions prepared by David Maxson show that the six documented sectors said to obtain "significant capacity relief" from Orange North, in fact, receive no relief at all, or at best an insignificant smattering of replacement service. (*Id.*) The result is that the Orange North Facility is planted squarely within the Derby North Beta sector where it fails to achieve the Applicant's stated objectives. Only the Derby North Beta sector obtains any material capacity replacement from the three Orange North sectors. Yet, Derby North Beta has no documented exhaustion trend. Derby North was one of the two sectors that were not even documented for capacity issues. (*Id.*)

Cellco completely overstates the claimed benefits of the proposed Orange North Facility. (*Id.*) The capacity relief claims are grossly excessive and unsubstantiated. (*Id.*) The proposed Orange North Facility will have no material impact on and will not provide "significant capacity relief" to the Milford NE Alpha Sector. (*Id.*) The Orange North Facility will have no material impact on and will not provide "significant capacity relief" to Derby North Gamma. The Orange North Facility will have no impact on and will not provide any capacity relief to the Derby Beta Sector. Finally, the Orange North Facility will have no impact on and will not provide "significant capacity relief" to Orange 2 Gamma, Orange 3 Alpha and Shelton 2 Beta. (*Id.*)

According to the MLS maps, the only existing sector which service area would purportedly be relieved by the proposed Orange North Facility is the Derby North Beta Sector. (*Id.*) However, the Derby North Beta Sector is one of the two sectors withdrawn from consideration by Cellco. Cellco submitted no capacity information for this sector. There is no demonstrated need for relief to be provided to the sole service area, Derby North Beta that the Orange North Facility would service. (*Id.*)

To address stress on the Milford NE Alpha sector, a new Facility well south of the Orange North site, potentially in Milford, Shelton or Western Orange, would be necessary to provide significant capacity relief to Milford NE Alpha. (*Id.*)

Derby North Gamma and Derby Beta sectors are the other two reportedly "stressed sectors" and they are not near Milford NE. Derby North Gamma and Derby Beta have interlocking service areas in Derby and Shelton, which collectively are north of Orange. (*Id.*)

To address Derby North Gamma and Derby Beta exhaustion trends, facilities in Shelton or Derby, north of Orange, would be necessary to relieve these sectors. (*Id.*) Cellco makes nearly identical claims as it does here for the Orange North Facility in a proposed Facility for 111 New

Haven Avenue, Derby, Connecticut, referred to as "Derby South." (*Id.*) Derby South is the solution to the purported problem in the Derby-Shelton area north of Orange. Similarly here, the proposed Orange North is not a good solution. (*Id.*)

Cellco's proposed Orange North Facility does not satisfy the design requirements established by it. The Orange North Facility will not provide significant capacity relief to any of the six sectors at issue. The Orange North Facility is unnecessary based on Cellco's own stated requirements. (*Id.*)

B. Cellco has failed to establish that the proposed Facility is environmentally compatible or that the environmental and other related impacts of siting the proposed Facility at the subject location do not outweigh the need for the Facility.

Cellco's own environmental experts concede that additional critical environmental studies are required in order to assess the proposed Facility's true impact on the environment, ecology and indigenous wildlife.

1. Cellco disregards potential material adverse impacts on the environment.

The "optimal time" to conduct field surveys for vernal pool amphibians and box turtles, which would have been in April to June time-frame, had already past when Cellco's wildlife biologist, Eric Davison, actually visited the site on July 28, 2014. Mr. Davison's report, therefore, and his conclusions made therein, do not have the benefit of a field survey conducted at the optimal time. Mr. Davison's findings are likely to have been much different had he been able to conduct a field survey in the optimal time-frame of April-June.

Further, Mr. Davison's report establishes that at least two vernal pool amphibians and box turtles are present at the site. Box turtles are a state-listed species of special concern. There is also a large forested wetland that lies north-northwest of the proposed tower site, and this

wetland drains from northeast to southwest across the site. This wetland contains an embedded intermittent watercourse that drains to a pond on the site. (*Id.*) There are vernal pools on the site, which provide breeding habitat for forest dwelling amphibians, principally frogs and salamanders. Mr. Davison's field inspection, however, was conducted at a time (July 28, 2014) when most vernal pools are in the hydrologic drawdown phase, meaning that they are dry. It is reasonable to conclude that Mr. Davison likely may have found evidence of and/or additional vernal pools had he visited the site in the spring. Further, one of the vernal pools identified by Mr. Davison is suitable for wood frog breeding.

Mr. Davison did not have an opinion on what secondary impacts might be associated with the Facility, such as noise would have with respect to protection of terrestrial vernal pool habitats, and that this issue was not reasonably or further explored by Cellco. Mr. Davison's report does not take into account such things as possible blasting of ledge or mechanical chipping of ledge, as well as noise arising from generators operating at the site, or air conditioning systems. The site, however, has a lot of rock and possible rock ledge.

The proposed site is suitable for box turtles. In fact, according to Mr. Davison's report, "**the currently proposed tower site is part of a toposequence that includes wetlands, upland forest and old field habitat that can provide the full range of habitats utilized by box turtle throughout the year.** This is a material concern for the proposed location of the Facility given that the box turtle is a state species of special concern.

Construction of the proposed Facility would also result in "habitat fragmentation." According to Mr. Davison's report, "**The impacts of habitat fragmentation are well documented ... and are considered one of the greatest threats to Connecticut's wildlife.**"

Dean Gustafson testified at the hearing on July 17, 2014 (p. 74) that there "**is considerable connectivity of wildlife**" at the site as it exists now. He also conceded (at p. 79) that the proposed Facility "**is located close to a ridgeline**" with "wetlands" on both sides. He conceded that "**there's the potential for wildlife connectivity over that ridge line.**" (*Id.*, at p. 79) The proposed project's impact on this wildlife connectivity, particularly in light of the fact that, according to Mr. Davison's own report, "**without site specific wildlife usage data, we cannot adequately assess the potential impacts to wildlife resulting from habitat fragmentation,**" is unacceptable. There is a potential material risk to wildlife, if this project is allowed to proceed, which, as substantiated by Mr. Davison's report, cannot be ruled out. This risk includes unknown risks to box turtles, a species of special concern.

Cellco's Avian Resource Evaluation, dated August 4, 2014, does not reasonably rule out potential adverse impacts that the proposed Facility may have on avian life. According to the report, there is a "flyway" only 1,735 feet from the project site. The report states "**siting of tower structures within flyways can be a concern.**" Although the report discounts that concern because of the 103-foot height of the tower and that it will be disguised, that conclusion of "potential impacts" is not based upon any first hand field observations or study. Similarly, according to the report, there is a "water fowl focus area" only 1,122 feet from the proposed Facility.

The report also notes that the "**proposed Facility and access drive will be in proximity to wetland resources: the proposed entrance of the access road is approximately 40 feet east of the wetlands bordering a stream across Derby Milford Road; and, the proposed Facility's compound area is located approximately 100 feet southeast of a forested wetland systems.**" The report concludes that the proposed Facility will not result in "**significant**"

adverse impact to the wild life habitat function (including avian habitat) being supported by these nearby wetland areas "**provided appropriate erosion controls are installed and maintained during construction.**" Thus, according to the express language stated in the report itself, even with "**appropriate erosion controls,**" there will in fact still be an adverse impact to the wild life habitat function (including avian habitat) being supported by these nearby wetland areas.

Further, if **appropriate erosion controls are not maintained during construction**," then, according to the report, there will be "**significant**" adverse impact to the wild life habitat function (including avian habitat) being supported by the nearby wetland areas.

In addition, at page 9 of the report, it is concluded that "**grass land bird species may periodically be present within the general development areas**," meaning that Cellco really doesn't know. In fact, in the report it is recommend that " **a grass land bird nest survey ... be conducted to determine if breeding birds are present and would be disturbed by the proposed development activities**," which hasn't been done. Further, the conclusions are contingent, stating that "**if the avian survey concludes that breeding birds could be disturbed, construction activities would be restricted to avoid the April 15 through July 15 peak nesting period.**" Therefore, further critical study is needed.

Other critical environmental impacts arising from the proposed Facility include potential impairment to the wetlands and vernal pools on the property, both during construction and when the Facility (if allowed) is serviced; the adverse impact of increased sound caused by the proposed generator and air conditioning unit, which will cause undesirable and varying degrees of added mechanical sound to what is and has always been a quiet, residential neighborhood. The added sound is likely to disturb the surrounding residential properties and wildlife.

2. Cellco's actions have been disingenuous in their approach to establishing a public need for the Facility and manifest a disregard for

the material adverse impacts on the surrounding residential neighborhood.

The proposed Facility will have a substantial and material negative and adverse impact on aesthetics in what is otherwise a pristine, residential neighborhood. (Pre-filed testimony and testimony of the Intervenors, as well as photographs and photo simulations submitted by the Applicant.) The tower, which will be at least 100 feet high with the option of adding an additional ten feet, and which will have up to 15 panel-type antennas, will be an absolute eyesore and substantially conflict with the otherwise serene residential and bucolic nature of the surrounding area. (*Id.*) The large tower and antenna Facility will impair views from the surrounding residences. The proposed Facility will significantly drive down the market values of the Intervenors' respective homes and family residences. (*Id.*)

The tower will have a direct impact on the aesthetics of multiple surrounding residential properties. (*Id.*) It will be visible to many property owners year round. The fact that all of Cellco's photographic depictions of the erected tower are with full foliage is misleading and masks the true impact that the tower will have on the neighborhood and residential market values. The proposed Facility and its operation, if allowed, will be out of character for a residential neighborhood and with the natural beauty of the area. It will be highly visible to most homes on Rainbow Trail for at least half the year. (*Id.*)

The subject property consists of historic farm land—a precious and ever diminishing resource in this state--which should not be desecrated with an unsightly, noisy and commercial operation such as the proposed telecommunications Facility. The Application, if granted, will result in the desecration of a significant historic area of Connecticut.

There are very few buyers who would consider purchasing a home with an active cell tower hundreds of feet away. (*Id.*) The tower, as proposed, will never truly be "concealed" and

does not realistically address a potential buyer's fear of having a cell tower immediately across the street. (*Id.*) Cellco has not provided any evidence that the cell tower Facility and operations will not negatively impact the fair market value of the Intervenors' and neighboring properties.

3. **Concerns regarding the Application are so significant that the entire bi-partisan legislative delegation intervened to express their considerable concern) regarding Orange North.**

9-16-14, p. 432 **(Slossberg) "I would ask this Siting Council to give all the parties a little bit more opportunity to really ensure that we have found, in fact, the best place to site this...we have some real concerns, as I'm sure you know. It's not every day that you have an entire state delegation intervening in one of these applications, but we are, in fact, very concerned. It is a bipartisan delegation that has intervened in this matter."**

C. Conclusions of Fact

There is a substantial imbalanced cost to benefit ratio for the proposed Facility. The primary reason for the proposed Facility stated by the Applicant is capacity relief. Since the date of the original filing of the Application, Cellco has significantly backtracked from its initial position regarding both the need for capacity relief and the capacity relief that the proposed Facility will purportedly accomplish. The testimony of the Intervenors' expert, David Maxson, who, unlike the Applicant's witnesses, is independent of and does not work for Cellco,[2]

[2] Cellco's experts are not independent and are not credible:

9-16-14, p. 501 (Coppola) "Mr. Lattore, Attorney Baldwin had asked the question earlier of Mr. Maxson as to whether he has always appeared on behalf of clients opposed to applications. Have you ever appeared on behalf of clients who were opposed to any telecommunications application?"

9-16-14, p. 501 (Lattore) "I have not."

9-16-14, p. 501-502 (Coppola) "Mr. Laredo, have you ever appeared on behalf of any client that was opposed to any telecommunications application?"

9-16-14, p. 502 (Laredo) "I have not."

9-16-14, p. 502 (Coppola) "Mr. Lattore, in your career, have you always worked for a telecommunications company?"

conclusively establishes that the proposed Facility will not provide significant capacity relief to any of the six sectors at issue. The environmental and aesthetics impacts of the proposed Facility, however, are substantial. The environmental and aesthetics impacts of the proposed Facility, furthermore, are not outweighed by the benefits claimed to arise from the project, even if those benefits are fully credited to the Applicant.

Upon the foregoing facts, the Application must be denied.

III. Law and Legal Argument

A. This Honorable Council must find substantial evidence in the record that the requested Facility is both needed in the location where proposed and, if needed, that is should be sited at that location.

While the Telecommunications Act ("TCA") is often used as a shibboleth by telecommunications carriers to suggest that regulatory bodies must approve whatever application they would like in the name of providing a nationwide network of coverage, as this Honorable Council recently noted on September 22, 2011 in Docket 408 (Hartland):

> **Notwithstanding that the 1996 Telecommunications Act pre-empts the Council from determining the need for telecommunication facilities, the Act does not preempt states from determining whether a particular tower is needed in the location where proposed, and if needed, whether it should be sited at the proposed location. Not every tower that marginally decreases a coverage gap or improves service to a limited number of users must be approved. Against the magnitude of the need for a particular tower, namely the size of the coverage gaps, and the number of calls that are impeded, the Council must balance the adverse environmental impacts created by that tower.**

(Opinion, CT Siting Council, Docket 408.)

9-16-14, p. 502 (Lattore) "Before working for a telecommunications company, I did serve for three years as a software design engineer before coming to Verizon Wireless."

9-16-14, p. 502 (Coppola) "Mr. Laredo, with regard to your experience within this industry, have you always worked with telecommunications companies?"

9-16-14, p. 502 (Laredo) "Yes."

In enacting the Telecommunications Act, 47 U.S.C. § 332, Congress sought to strike a balance between encouraging growth of telecommunication systems and the right of local governments to make land use decisions. 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." *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630, 639 (2d Cir. 1999). "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 facilities,' 47 U.S.C. § 332(c)(7)(A), subject only to the limitations set forth in § 332(c)(7)(B)." *Id.* at 639-40. Indeed, § 332(c)(7), which is entitled "[p]reservation of local zoning authority," expressly states in relevant part: "Except as provided in this paragraph, nothing in this [Act] shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless facilities." 47 U.S.C. § 332(c)(7)(A); *see also*, Sen. Rep. No. 104-230, at 458 (1996) (Section 332 "preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances" specified in that section).

The Council's decision must be based upon substantial evidence in the record. "Substantial evidence' requires evaluation of the entire record, including opposing evidence. *See, American Textile Mfr. Inst., Inc. v. Donovan*, 452 U.S. 490, 523 (1981). The Supreme Court has explained that "[s]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). "Substantial evidence requires evaluation of the entire record ...." (Underscoring added.) *Willoth*, 176 F.3d at 638. Further, "local and state

zoning laws govern the weight to be given the evidence," and the TCA does not affect or encroach upon the substantive standards to be applied under established principles of state and local law." (Internal quotations omitted; citation omitted) *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 494 (2d Cir. 1999).

The Intervenors provided substantial evidence upon which this Honorable Council can rely to deny approval of the proposed Facility, consistent with the TCA. Conversely, Cellco has failed to provide substantial evidence to support its claim of public need for Orange North.

B. Burden of Proof

The burden or proof rests solely on Cellco, as the applicant. The applicant to an administrative agency bears the burden of proof. *Samperi v. Inland Wetlands Agency*, 226 Conn. 579, 593 (1993). It is an elementary rule that whenever the existence of any fact is necessary in order that a party may make out his case or establish his defense, the burden is on such party to show the existence of such fact." (Internal quotation marks omitted) *Zhang v. Omnipoint Communications Enterprises, Inc.*, 272 Conn. 627, 645 (2005), quoting *Nikitiuk v. Pishtey*, 153 Conn. 545, 552 (1966); *see also, Komondy v. Zoning Board of Appeals*, 127 Conn. App. 669, 678 (2011) ("the burden rests with the applicant to demonstrate its entitlement to the requested relief."); C. Tait, Connecticut Evidence (3d Ed.2001) § 3.3.1, p. 136 ("whoever asks the court to give judgment as to any legal right or liability has the burden of proving the existence of the facts essential to his or her claim or defense").

Accordingly, Cellco carries the burden of proof to show that it is entitled to a certificate of environmental compatibility and public need for the proposed cellular communications tower under the Public Utility Environmental Standards Act, Connecticut General Statutes §§ 16-50g, *et. seq*. The statutes governing siting council consideration of applications for a certificate of

public need are silent as to the standard of proof that the applicant must meet in order for the application to be granted. "In the absence of state legislation prescribing an applicable standard of proof ... the preponderance of the evidence standard is the appropriate standard of proof in administrative proceedings .... " *Goldstar Medical Services, Inc. v. Dept. of Social Services*, 288 Conn. 790, 821 (2008).

C. Due Process and Fundamental Justice

In addition, the requirements of fundamental fairness and due process apply to siting council procedures. *Concerned Citizens of Sterling v. Connecticut Siting Council*, 215 Conn. 474 (1990); *Rosa v. Connecticut Siting Council*, Superior Court, Judicial District of New Britain, Docket No. HHB-CV-05-4007974-S (March 1,2007), 2007 WL 829582; *Torrington v. Connecticut Siting Council*, Superior Court, Judicial District of Hartford, Docket No. CV90-0371550-S (September 12, 1991), 1991 WL 188815.

"In all its proceedings, a regulatory agency must act strictly within its statutory authority, within constitutional limitations, and in a lawful manner." (Internal quotations omitted; citation omitted.) *Huck v. Inland Wetlands & Watercourses Agency*, 203 Conn. 525, 536 (1987). "Hearing before administrative agencies," such as this Council, "although informal and conducted without regard to the strict rules of evidence, must be conducted so as not to violate the fundamental rules of natural justice. ... . Due process of law requires not only that there be due notice of the hearing but that at the hearing the parties involved have a right to produce relevant evidence, and an opportunity to know the facts on which the agency is asked to act, to cross-examine witnesses and to offer rebuttal evidence." (Internal quotations omitted; citations omitted.) *Id.* A fundamental principle of due process is that each party has the right to receive notice of a hearing, and the opportunity to be heard at a meaningful time and in a meaningful

manner. *Harkless v. Rowe*, 232 Conn. 599, 627 (1995). "An integral premise of due process is that a matter cannot be properly adjudicated 'unless the parties have been given a reasonable opportunity to be heard on the issues involved ....'" *Bryan v. Sheraton-Hartford Hotel*, 62 Conn.App. 733, 741 (2001), quoting *Bloom v. Zoning Board of Appeals*, 233 Conn. 198, 205 (1995).

In *Grimes v. Conservation Commission*, 243 Conn. 266, 273-4 (1997), the Supreme Court defined the parameters of "fundamental fairness" in administrative proceedings:

> **Although no constitutional due process right exists in this case, we have recognized a common law right to fundamental fairness in administrative hearings. "The only requirement [in administrative proceedings] is that the conduct of the hearing shall not violate the fundamentals of natural justice." *Miklus v. Zoning Board of Appeals*, 154 Conn. 399,406, 225 A.2d 637 (1967). Fundamentals of natural justice require that 'there must be due notice of the hearing, and at the hearing no one may be deprived of the right to produce relevant evidence or to cross-examine witnesses produced by his adversary .... ' *Parsons v. Board of Zoning Appeals*, 140 Conn. 290, 293, 99 A.2d 149 (1953), overruled on other grounds, *Ward v. Zoning Board of Appeals*, 153 Conn. 141, 146- 47,215 A.2d 104 (1965). Put differently, "[d]ue process of law requires that the parties involved have an opportunity to know the facts on which the commission is asked to act ... and to offer rebuttal evidence." *Pizzola v. Planning & Zoning Commission*, 167 Conn. 202, 207, 355 A.2d 21 (1974); see also *New England Rehabilitation Hospital of Hartford, Inc. v. Commission on Hospitals & Health Care*, 226 Conn. 105, 149-50,627 A.2d 1257 (1993) (administrative agency "cannot properly base its decision ... upon [independent] reports without introducing them in evidence so as to afford interested parties an opportunity to meet them"); *Huck v. Inland Wetlands & Watercourses Agency*, 203 Conn. 525, 536, 525 A.2d 940 (1987) (administrative due process requires due notice and right to produce relevant evidence); *Connecticut Fund for the Environment, Inc. v. Stamford*, 192 Conn. 247, 249, 470 A.2d 1214 (1984) (same). The purpose of administrative notice requirements is to allow parties to "prepare intelligently for the hearing." *Jarvis Acres, Inc. v. Zoning Commission*, supra, 163 Conn. [41] at 47, 301 A.2d 244. (Footnotes omitted.)** *Id.*

This Honorable Council is bound by all of the foregoing constitutional, statutory—both federal and state—and common law considerations in its consideration of the Application.

D. The Applicant has Failed to Satisfy its Burden of Proof under C.G.S. Section 16-50p for the issuance of a Certificate of Environmental Compatibility and Public Need.

Pursuant to this Council's own enabling legislation, the Council must find that the Applicant has proven that there is "a public need for the Facility and the basis of the need." *Conn. Gen Stat.* § 16-50p(a)(3)(A). In addition, the Council must weigh the "nature of the probable environmental impact of the Facility" and find whether the Facility, alone or cumulatively with other existing facilities, effects or has an "impact on, 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." *Id.*, at (a)(3)(B).

1. Cellco has failed to establish that there is a substantial need for the proposed Facility. The Orange North Facility is unnecessary based on Cellco's own stated requirements. The Intervenors' expert patently demonstrated the lack of public need for the requested Facility.

As demonstrated, the proposed Orange North Facility does nothing to address Cellco's system requirements. (Pre-filed Testimony of David Maxson; *See also*, David Maxson's expert reports and testimony, as of record appear.) Cellco's proposed Facility does not satisfy the design requirements established by it. The Orange North Facility will not provide significant capacity relief to any of the six sectors at issue. The Orange North Facility is unnecessary based on Cellco's own stated requirements. (*Id.*)

2. Cellco has failed to establish that the proposed Facility is environmentally compatible or that the environmental and other related impacts of siting the proposed Facility at the subject location do not outweigh the need for the Facility

Even if Cellco were to show a true public need for its proposed Facility (and it has not), its presentation does not overcome the clear adverse impact the proposed Facility has on: the surrounding wetlands; indigenous wild life, including, without limitation, avian wildlife, avian

flight paths, and box turtles and other amphibious wildlife; wildlife and the surrounding residential neighborhood and farm land from increased sound caused by the Facility, including, without limitation, its diesel-fueled back-up generator and air-conditioning unit; the aesthetics of an otherwise pristine residential neighborhood and farm land; private property rights; what is a significant historic area of Connecticut; and the property values of the Intervenors and their neighbors.

A zoning commission acts reasonably if it has a legitimate basis for denying a permit to provide services. *Smart SMR of New York, Inc. v. Zoning Commission of the Town of Stratford*, 995 F. Supp. 52, 59 (D. Conn. 1998). A zoning authority may, under the TCA, consider factors such a visuals and aesthetics. *Id.* Connecticut also recognizes aesthetics as a valid ground for local zoning decisions. *SBA Communications, Inc. v. Zoning Commission of the Town of Franklin*, 164 F.Supp.2d 280, 291 (D. Conn. 2001). The Second Circuit has held that in reviewing an application for the construction of telecommunication facilities, "the Board has discretion to rely on aesthetic objections raised by neighbors who know the local terrain and the sight-lines of their own homes." *Omnipoint Comm., Inc. v. City of White Plains*, 430 F. 3d 529, 533-535 (2d Cir 2005).

It is certainly within the province of the Council's authority to deny the Application because of its adverse environmental, ecological and scenic impacts. *Conn. Gen Stat.* § 16-50p(a)(3)(B). Indeed, Section 16-50g of the enabling act, wherein the legislative 'finding and purpose" is expressly set forth, provides, in relevant part:

> **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.** ***Id.***

The environmental and aesthetics impacts of the proposed Facility are clearly substantial.

As Cellco's own expert concluded, "**grass land bird species may periodically be present within the general development areas.** Cellco really doesn't know and hasn't conducted the necessary studies to find out. In fact, Cellco's expert himself recommends that " **a grass land bird nest survey ... be conducted to determine if breeding birds are present and would be disturbed by the proposed development activities.**" Other substantial environmental impacts, although identified, have not been addressed, such as the fact that according to Mr. Davison's own report, "**without site specific wildlife usage data, we cannot adequately assess the potential impacts to wildlife resulting from habitat fragmentation"** to be caused by the project. There is an undeniable potential material risk to wildlife if this project is allowed to proceed, which, as substantiated by the Applicant's own report, cannot be ruled out. This risk includes unknown risks to box turtles, a species of special concern.

The tower will have a direct impact on the aesthetics of multiple surrounding residential properties. It will be an absolute eyesore. The fact that all of Cellco's photographic depictions of the erected tower are with full foliage is misleading, and masks the true impact that the tower will have on the neighborhood and residential market values. The Intervenors and a significant number of additional surrounding property owners will have year round views of the proposed 100 foot tall tower. The proposed Facility and its operation, if allowed, will be out of character for a residential neighborhood and with the natural beauty of the area. It will be highly visible to most homes on Rainbow Trail for at least half the year.

The subject property consists of historic farm land—a precious and ever diminishing resource in this state--which should not be desecrated with an unsightly, noisy and commercial operation such as the proposed telecommunications Facility. The Application, if granted, will result in the desecration of a significant historic area of Connecticut. The entire bi-partisan legislative delegation intervened because of the environmental and citizen concerns that Cellco has failed to address.

The environmental and aesthetics impacts of the proposed Facility, furthermore, are not outweighed by the benefits claimed to arise from the project, even if those benefits are fully credited to the Applicant. Accordingly, for these reasons alone, the Application should be rejected pursuant to § 16-50p of the General Statutes.

Cellco's Application, in addition to failing to demonstrate a public need for the Orange North Facility, is also incomplete and, for this reason alone, should be denied.

E. <u>Cellco purposely withheld data/information from its Application so that the Intervenors would not have data/information which Cellco claims is absolutely necessary in order judge the Application</u>.

According to the Applicant, neither the Intervenors nor their expert witness, David Maxson, can accurately evaluate Cellco's application since they do not possess the "confidential" data and records that Cellco has intentionally withheld from them and this Honorable Council. Cellco's expert witnesses have asserted that the Intervenors are not able to have an accurate opinion regarding the Cellco's application because they do not possess all of the data and records that Cellco has intentionally decided not to submit into the record of this proceeding. Cellco's expert witness, Juan Latorre, testified that "**Mr. Maxson [the Intervenors' expert] does not have all the data that is available to [Cellco] that could allow him to make**

a[n] accurate and truthful depiction on what potential coverage and capacity benefits of this site could be." Hearing Transcript, September 16, 2014, at p. 503.[3]

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[3] 9-16-14, p. 414 – (Baldwin) "To prepare your testimony and your report, did you perform any drive tests in the Orange and Derby area?"

9-16-14, p. 414 – (Maxson) "I did not."

9-16-14, p. 414 – (Baldwin) "Did you have access to any of Verizon's current or future frequency deployment plans in the area?"

9-16-14, p. 414 – (Maxson) "Only what the Applicant has put on the record, which is quite thin."

9-16-14, p. 414 – (Baldwin) "Did you have any access to any information regarding the availability of resources and the loading on adjacent cell sites in the area other than what's been provided?"

9-16-14, p. 414 – (Maxson) "I have not."

9-16-14, p. 414 – (Baldwin) "Did you have any access to Verizon's customer data or customer feedback information?"

9-16-14, p. 415 – (Maxson) "I have not."

9-16-14, p. 415 – (Baldwin) "Do you know how Verizon plans to deploy that 1900 megahertz frequency in the New Haven County market?

9-16-14, p. 415 – (Maxson) "I am not clairvoyant."

9-16-14, p. 502 – (Coppola) "Mr. Lattore, Attorney Baldwin had asked Mr. Maxson if he had access to certain records and information from Verizon before we had the break. Do you believe that Mr. Maxson needed some of those records and information in order to complete his analysis?"

9-16-14, p. 503 – (Lattore) "Mr. Maxson does not have all the data that is available to Verizon Wireless that could allow him to make a accurate and truthful depiction on what the potential coverage and capacity benefits of this site could be."

9-16-14, p. 503 – (Coppola) "So what information and records is he missing?"

9-16-14, p. 504 – (Lattore) "He 's not missing any information in records. The information Mr. Maxson doesn't have available to him is the Verizon wireless proprietary data such as our operation, our link budget."

9-16-14, p. 504 (Coppola) "Excuse me. If you'd just go slow."

9-16-14, p. 504 (Lattore) "Sure. Our link budget, our drive data analysis, our traffic map analysis that Verizon uses to make strong determinations on what proposed facilities will do for both coverage and capacity enhancements to the network."

9-16-14, p. 504 (Coppola) "But is there anything else that I'm missing? So those three documents. Is there anything else that he should have."

9-16-14, p. 505 (Lattore) "Those three documents are data that would provide or allow an engineer to better assess the demand and capacity and coverage of a particular area."

9-16-14, p. 506 (Coppola) "My question is: Does the Siting Council need the three documents that you just testified that Mr. Maxson needed in order to assess this application; those are the link budget, the drive data analysis, and the traffic map analysis? My question is: if Mr. Maxson needed that information and records in order to properly assess this application, then would the Siting Council also need that information in order to do the same exercise?"

9-16-14, p. 506 (Lattore) "No, we don't feel so. We feel the data that we provided all parties creates a compelling argument for why Verizon Wireless needs a capacity and coverage argument for this Facility. I merely just wanted to provide to you as to why Mr. Maxson's report lacks all of the data necessary to create a compelling arugment."

9-16-14, p. 507 (Coppola) "Did you testify that Mr. Maxson needed to review the link budget, the drive data analysis, and the traffic map analysis in order to accurately review this application?"

9-16-14, p. 507 (Lattore) "If he had that data available to him, he could make a more accurate depiction of the potential location."

9-16-14, p. 507 (Coppola) "But did you just testify before that he actually needed that information in order to accurately analyze this application?"

9-16-14, p. 507 (Lattore) "Yes, but that data I just described is not available to him."

9-16-14, p. 508 (Coppola) "Could Mr. Maxson accurately review this application without those three documents and that information which you have testified before he should have reviewed?

9-16-14, p. 508 (Lattore) "No, he doesn't have the capability to do that."

9-16-14, p. 508 (Coppola) "If he doesn't have the capability to accurately review this application without that information, then doesn't the Connecticut Siting Council members also need that same information in order to accurately review the application?"

9-16-14, p. 509 (Lattore) "No."

9-16-14, p. 533 (Coppola) "So Mr. Lattore, you testified that Mr. Maxson would need to review the link budget as part of his analysis in order to accurately review this application. Correct?"

9-16-14, p. 533 (Lattore) "Yes"

9-16-14, p. 543 (Coppola) "Mr. Maxson is still missing some information which will allow him to conclude accurately whether this application is needed?"

9-16-14, p. 543 (Lattore) "Yes."

9-16-14, p. 544-545 (Ashton) "You (were) asked again whether or not Verizon has provided adequate information for Mr. Maxson to form a conclusion, and the answer is no. That's a black or a white picture, and I'm wondering if there's not a gray. Is the volume and type of information that you have provided adequate to have Mr. Maxson form a reasonable picture of the network and how this proposed Facility works, maybe not to the last 15 places to the right of the decimal, but does it give a pretty clear indication as to whether or not this Facility is needed, in your opinion?"

If Cellco did not submit the secret data and information in the record that would allow Mr. Maxson to accurately determine the potential coverage and capacity benefits of the proposed site, then it would only follow logically that the Council would also not be in a position to accurately determine the potential coverage and capacity benefits of the proposed site because the Council would be relying on the same limited data and information in the record. Cellco's refusal to provide the Intervenors and the Council with the secret data and information that its own expert claims is necessary to accurately review the application, violates the Intervenors' constitutional and due process rights to a fair hearing, as well as the requirements of the Uniform Administrative Practices Act, Conn. Gen. Stat. §§ 4-166, *et. seq.*

If Cellco is of the position that the limited data it unilaterally chose to disclose to this Honorable Council is sufficient to judge its Application, then it cannot logically argue that the Intervenors and their expert cannot "accurately" attack that very Application using the exact same data. Cellco cannot logically or justly argue that Mr. Maxson's opinions are invalid because he and his clients do not have access to the secret data withheld by Cellco. No weight can justly be given to Cellco's challenge to Mr. Maxson's expert opinions, therefore, unless the secret data was made available to the Intervenors for critical review and analysis—and it was not. Hence, Mr. Maxson's expert opinions must stand as uncontested on any grounds other than their own merits.

Cellco cannot justly have it both ways: one cannot adversely judge its Application without the withheld data, but the Application is in and of itself wholly sufficient to be granted.

9-16-14, p. 545 (Lattore) "My opinion is that we've provided significant data that would allow someone to make a reasonable assessment of what the potential off-load capacity relief of this proposed site and its overall function would be. However, in reviewing Mr. Maxson's report, I don't feel that he was able to reach conclusions based on the data today that are accurate and accurately depict the proposed location's enhancement of our network."

Cellco's position is untenable and smacks of "1984" or falling down a rabbit hole. Although the Intervenors' expert believes that the Application is so fundamentally flawed on its face as to provide him with sufficient evidence as is to conclusively reject Cellco's claim of public need, were this Council to find in favor of the Application, then the Council will be relying upon Cellco's argument that the Intervenors and their expert did not have sufficient information to challenge the Application. This would be unjust and in violation of due process.

The Intervenors respectfully submit that if the Intervenors and Mr. Maxson cannot "accurately analyze" Cellco's pending application without Cellco's secret data, as expressly testified to by Mr. Latorre, then this Council cannot as well. For this reason alone the Application should be denied. [4]

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[4] Furthermore, Cellco would not be harmed if this Council required disclosure of the withheld data/information because the Intervenors and their experts agreed on the record to execute a confidentiality agreement: 9-16-14, p. 424 – (Coppola) "Mr. Maxson, Attorney Bladwin asked you about certain documents and information that Verizon has not provided to you but which the Intervenors have requested as part of this docket?"

9-16-14, p. 424 – (Maxson) "Yes"

9-16-14, p. 424 – (Coppola) "And would it be helpful for you to have that information and records?"

9-16-14, p. 424 – (Maxson) "Yes, it would."

9-16-14, p. 424-425 (Coppola) "And if Verizon was willing to provide that information and documentation to you, would you agree to execute a confidentiality agreement whereby you would agree to keep the information and documentation that you receive confidential and only to use that information for purposes of evaluation this application as part of Docket 448?"

9-16-14, p. 425 (Maxson) "If that is something that my clients would accept, I would be happy to comply with that, yes."

9-16-14, p. 425 (Coppola) "If I may then, Mr. Chairman, ask each of the clients would you agree to execute a confidentiality agreement if Verizon was to provide this other information and documentation where the documents and information would be sealed as part of the record of this Docket 448 and only used for purposes of this docket?"

9-16-14, p. 425 (G. MacInnes) "Yes"

9-16-14, p.425 (J. MacInnes) "Yes"

9-16-14, p. 425 (Subbloie) "Yes"

F. If the Application is granted, then, as a condition to approval, the Council should require Cellco to move the tower closer to the existing barn and construct it within a silo structure.

The Application should not be granted for any one or all of the reasons briefed above. If the Council, nonetheless, were to find a public need for the Facility and/or grant the Application, then it should condition the same on further environmental studies in order to address the substantial concerns expressed by the Intervenors, including having the tower housed within a silo structure.

> 9-16-14, p. 480 **(Libertine) "certainly silos could be accomplished. They have been done. There's some of varying heights. In this case if were to consider a silo, I don't think we'd be considering it in the location that we've chosen. I think, as the Intervenors had suggested, if a silo was placed next to the existing barn, could that blend in? Certainly. We would be talking about a structure that's probably going to be in the 115 tall range to accommodate a dome at the top where we only need a 100-foot level, but it certainly could be done."**

As a further condition, the Council should also require Cellco to perform the additional environmental studies recommended by Cellco's own environmental, wildlife and aviation experts, retaining the right to rescind and negate any such conditional approval if the necessary future studies raise additional environmental objections. In addition, any construction must be subject to "appropriate erosion controls," as cited in Cellco's own expert reports.

IV. Conclusion

There is a substantial imbalanced cost to benefit ratio for the proposed Facility. The primary reason for the proposed Facility stated by the Applicant is capacity relief. Since the date of the original filing of the Application, Cellco has significantly backtracked from its initial position regarding both the need for capacity relief and the capacity relief that the proposed

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9-16-14, p. 425 (Barbara) "Yes"

Facility will purportedly accomplish. The testimony of the Intervenors' expert, David Maxson, who, unlike the Applicant's witnesses, is independent of and does not work for Cellco, conclusively establishes that the proposed Facility will not provide significant capacity relief to any of the six sectors at issue. The environmental, ecological, scenic and aesthetics impacts of the proposed Facility, however, are substantial. The environmental, ecological, scenic and aesthetics impacts of the proposed Facility are not outweighed by the benefits claimed to arise from the proposed Facility, even if those benefits are fully credited to the Applicant.

For all of the foregoing reasons, the Application should be denied.

Respectfully submitted,

THE INTERVENORS

BY: _____

Mark Kovack, Esq.
Mario F. Coppola, Esq.
Berchem, Moses, and Devlin, P.C.
1221 Post Road East, Suite 301
Westport, CT 06880
Tel: 203-227-9545; Fax: 203-226-1641
Email: mcoppola@bmdlaw.com
THEIR ATTORNEYS

CERTIFICATE OF SERVICE

This is to certify that on the above date a true copy of the foregoing has been sent by U.S. Mail, first-class, postage pre-paid, to the following parties of record:

Melanie Bachman, Esq., Executive Director, Connecticut Siting Council, 10 Franklin Sq., New Britain, CT 06051 (1 original, 15 copies, plus 1 electronic)

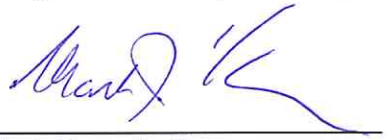
Cellco Partnership d/b/a Verizon Wireless, Kenneth Baldwin, Esq.; Robinson & Cole, 280 Trumbull Street, Hartford, CT 06103

State Senator Gayle Slossberg, Legislative Office Building Room 2000, Hartford, CT 06106

State Representative Paul Davis, Legislative Office Building, Room 4045, Hartford, CT 06106

State Representative Themis Klarides, Legislative Office Building, Room 4200, Hartford, CT 06106

State Representative James Maroney, Legislative Office Building, Room 5006, Hartford, CT 06106



Mark Kovack, Esq.