

**STATE OF CONNECTICUT
SITING COUNCIL**

DOCKET NO. 488 - Homeland Towers, LLC and New Cingular Wireless PCS, LLC d/b/a AT&T application for a Certificate of Environmental Compatibility and Public Need for the construction, maintenance, and operation of a telecommunications facility located at one of two sites: Kent Tax Assessor ID #M10, Block 22, Lot 38 Bald Hill Road or 93 Richards Road, Kent, Connecticut.

AUGUST 3, 2020

MOTION TO STRIKE TESTIMONY

Planned Development Alliance of Northwest Connecticut ("PDA") hereby moves to strike the testimony of Applicant's counsel, Attorney Lucia Chiocchio, submitted during the July 24, 2020 evidentiary proceeding in this Docket.

The grounds for this motion are that the testimony rendered by counsel (Transcript pp.83-85) was improper substantive testimony by a legal advocate; that Attorney Chiocchio was not identified as a witness in these proceedings and did not submit pre-filed testimony and is not subject to cross examination.

BACKGROUND

At the evidentiary session on July 24th, Councilor Morrisette was asking cross examination of Applicant's radio frequency engineering witness, Mr. Martin Lavin of C Squared Systems, on the topic of small cells when the following exchange occurred:

MR. MORISSETTE: Thank you. Okay.

23 **Mr. Lavin,** I'm moving on to Siting Council

24 **Interrogatory Set Two, Question 46. This has to**

25 **do with small cell --**

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1 **THE WITNESS (Lavin):** Yes.

2 **MR. MORISSETTE:** -- distributed antenna

3 **systems. I'm not familiar with PURA Docket**

4 **18-06-13, but my impression is is that was more of**

5 **a siting docket where PURA could sign off on the**

6 **locations of the small cells within those areas**

7 **and not justifying small cells versus, you know,**

8 rural versus urban settings?
9 THE WITNESS (Lavin): Yes.
10 MS. CHIOCCHIO: Mr. Morissette, this is
11 Attorney Chiocchio.
12 MR. MORISSETTE: Yes.
13 MS. CHIOCCHIO: I'm going to answer
14 that question since I've been involved in AT&T's
15 project or small cell project. So yes, those are,
16 the reference to that docket is AT&T's small cell
17 build plan for the State of Connecticut, and those
18 small cells are in densely-populated areas where
19 capacity relief is needed. Does that answer your
20 question?
21 MR. MORISSETTE: Sort of. Let me go a
22 little bit further. Does it provide guidance as
23 to where these small cells should be incorporated,
24 or is it specific to those areas in which were
25 part of the docket?
85
1 MS. CHIOCCHIO: It provides information
2 about those specific locations where small cells
3 were deployed.
4 MR. MORISSETTE: Okay. So it's
5 specific to those locations?
6 MS. CHIOCCHIO: Correct.
7 MR. MORISSETTE: Okay, great. That's
8 helpful.

This testimony was improper for several reasons. First, the Council was cross-examining Mr. Lavin, so counsel's response usurped the witness' role and constitutes improper coaching of a witness. Second, counsel's response was wholly unsolicited and the interjection related to contested matters in these proceedings, thus the testimony was improper under the Code of Professional Responsibility §3.7.¹ The remedy for such interjection is the striking of the testimony, the opportunity to cross examine the witness or the withdrawal of counsel, otherwise the intervenor would be prejudiced by the inability to challenge the proffered testimony.²

¹ Rule 3.7. Lawyer as Witness **(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless: (1) The testimony relates to an uncontested issue;** (2) The testimony relates to the nature and value of legal services rendered in the case; or (3) Disqualification of the lawyer would work substantial hardship on the client. (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9. (emphasis added).

² The Commentary to Rule 3.7 notes that "*The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on*

The testimony is not trivial or perfunctory. The attempt by the Applicants to discredit small cell technology is at the heart of their single-minded pursuit of a tower on a highly visible ridgeline in Kent. The testimony creating the false narrative that small cell technology cannot carry First Net technology, cannot provide rural coverage or cannot provide penetrating coverage at 700Mhz is Applicant's only serious challenge to the intervening parties' attempt to protect the scenic values of Kent. Connecticut's Supreme Court set forth that fundamental fairness applies to Siting Council proceedings³ measured by the harmless error standard.⁴ Unlike the immaterial ancillary matters considered in *FairWindCT*, the testimony rendered by counsel goes to the heart of Applicants tactic.

It could fairly be said that counsel's testimony violated fundamental fairness in that it ran afoul of a very old principle: when a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, she should leave trial of that case to other counsel⁵. Even if this were an "informal" proceeding of an agency rather than a trial, the principle is so foundational, that it must certainly be part of fundamental fairness. It is difficult to imagine a lawyer freely morphing between advocate and unsworn witness in a proceeding because it severely frustrates the basic right of cross-examination and the traditional division of advocacy from witness testimony of fact. The result is that one side must give way to the other – either the testimony is struck or the lawyer becomes a witness and loses the advocate's role.

evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof."

³ *Grimes v. Conservation Commission*, 243 Conn. 266, 273, 703 A.2d 101 (1997) ("we have recognized a common-law right to fundamental fairness in administrative hearings").

⁴ *FairWindCT v. Connecticut Siting Council*, 313 Conn. 669, 680, 99 A.3d 1038 (2014).

⁵ See e.g., *Nanos v. Herrington*, 97 Conn. 529 (1922).

Respectfully Submitted,

Planned Development Alliance of Northwest Connecticut, Inc.,

By _____

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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 3rd day of August 2020 and addressed to:

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