

STATE OF CONNECTICUT
SITING COUNCIL

CELLCO PARTNERSHIP
d/b/a VERIZON WIRELESS

APPLICATION FOR A CERTIFICATE OF
ENVIRONMENTAL COMPATIBILITY AND
PUBLIC NEED FOR THE CONSTRUCTION,
MAINTENANCE AND OPERATION OF A
TELECOMMUNICATIONS FACILITY
LOCATED AT 188, ROUTE 7 SOUTH,
FALLS VILLAGE (CANAAN), CONNECTICUT

ORIGINAL

DOCKET NO. 360

RECEIVED
SEP 15 2008

CONNECTICUT
SITING COUNCIL

INTERVENOR'S RESPONSE TO CELLCO'S MOTION TO STRIKE

Cellco's Motion to Strike dated September 8, 2008 is based on errors of law and fact and should be denied.

1. Legislative Facts Are Not Adjudicative Facts.
2. The Council's State Statutory Mandate Not Only Prohibits Exclusion of Such Consideration, It Requires It
3. Cellco Improperly Uses Its Motion To Strike To Add Post-Hearing Material

ARGUMENT

1. Legislative Facts Are Not Adjudicative Facts

Cellco's Motion to Strike dated September 8, 2008 is based on a mistake of fact. Intervenor Jaeger's references to FCC interpretations of the agency's own roaming regulations do not constitute "adjudicative facts" that are part of the record of this proceeding. They are presented as the regulatory agency's statements on the specific question posed by letter under date of August 14, 2008 by the Connecticut Siting Council

to the parties after the hearing in this proceeding was closed. The difference between "adjudicative facts" and so-called "legislative facts" is easily explained:

Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the law-making process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body.

(Advisory Committee's Notes to Rule 201 of the Federal Rules of Evidence)

2. The Council's State Statutory Mandate Not Only Prohibits Exclusion of Such Consideration, It Requires It

As Intervenor argued in her Post-Hearing Brief (at pages 6-7), the Siting Council's obligation to consider roaming arrangements is not optional:

Sec. 16-50g. Legislative finding and purpose. * * * The purposes of this chapter are: To provide for the balancing of the need for adequate and reliable public utility services at the lowest reasonable cost to consumers with the need to protect the environment and ecology of the state and to minimize damage to scenic, historic, and recreational values; to provide environmental quality standards and criteria for the location, design, construction and operation of facilities for the furnishing of public utility services at least as stringent as the federal environmental quality standards and criteria, and technically sufficient to assure the welfare and protection of the people of the state; to encourage research to develop new and improved methods of generating, storing and transmitting electricity and fuel and of transmitting and receiving television and telecommunications with minimal damage to the environment and other values described above; to promote energy security; **to promote the sharing of towers for fair consideration wherever technically, legally, environmentally and economically feasible to avoid the unnecessary proliferation of towers in the state** particularly where installation of such towers would adversely impact class I and II watershed lands, and aquifers; to require annual forecasts of the demand for electric power, together with identification and advance planning of the facilities needed to supply that demand and to facilitate local, regional, state-wide and interstate planning to implement the foregoing purposes.

C.G.S. Chapter 277a Public Utility Environmental Standards Act, §16-50g. (Bold added here to the underlining emphasis made in Intervenor's Post-Hearing brief.)

The legislative history of the Telecommunications Act of 1996 to which the Siting Council directed the Applicant and Intervenor in its letter of August 14, 2008 also expressly states:

The conferees also intend that the phrase "unreasonably discriminate among providers of functionally equivalent services" will provide localities with the flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable zoning requirements even if those facilities provide functionally equivalent services. For example, the conferees do not intend that if a State or local government grants a permit in a commercial district, it must also grant a permit for a competitor's 50-foot tower in a residential district.

(H.R. Report 104-204 at page 208)
(Emphasis added.)

Additionally, Connecticut General Statutes Section 16-50p(b)(1) requires the Siting Council to consider:

Sec. 16-50p. Certification proceeding decisions: Timing, opinion, factors considered. Telecommunications and community antenna television facilities: Additional factors considered, conditions. Modification of location.

Amendment proceeding decisions. Service and notice. "Public need" defined.

(a)(1) In a certification proceeding, the council shall render a decision upon the record either granting or denying the application as filed, or granting it upon such terms, conditions, limitations or modifications of the construction or operation of the facility as the council may deem appropriate.

(b) (1) Prior to granting an applicant's certificate for a facility described in subdivision (5) or (6) of section 16-50i, the council shall examine, in addition to its consideration of subdivisions (1) to (5), inclusive, of subsection (a) of this section: (A) The feasibility of requiring an applicant to share an existing facility, as defined in subsection (b) of section 16-50aa, within a technically derived search area of the site of the proposed facility, provided such shared use is technically, legally, environmentally and economically feasible and meets public safety concerns, (B) whether such facility, if constructed, may be shared with any public or private entity which provides telecommunications or community antenna television service to the public, provided such shared use is technically, legally, environmentally and economically feasible at fair market rates, meets public safety concerns, and the parties' interests have been considered and (C) whether the proposed facility would be located in an area of the state which the council, in consultation with the Department of Environmental Protection and any

affected municipalities, finds to be a relatively undisturbed area that possesses scenic quality of local, regional or state-wide significance. The council may deny an application for a certificate if it determines that (i) shared use under the provisions of subparagraph (A) of this subdivision is feasible, (ii) the applicant would not cooperate relative to the future shared use of the proposed facility, or (iii) the proposed facility would substantially affect the scenic quality of its location and no public safety concerns require that the proposed facility be constructed in such a location.

Connecticut General Statutes Sec. 16-50p.
(Emphasis added.)

Under the same section under 16-50p(b)(1)(B)(2), the Siting Council is not only required to consider sharing (roaming) use of existing facilities (as provided for in C.G.S. §16-50p(b)(1)), but the Council may impose conditions to promote such "shared use" precisely for the purpose of avoiding "the unnecessary proliferation of such facilities."

(2) When issuing a certificate for a facility described in subdivision (5) or (6) of subsection (a) of section 16-50i, the council may impose such reasonable conditions as it deems necessary to promote immediate and future shared use of such facilities and avoid the unnecessary proliferation of such facilities in the state. * * *

Connecticut General Statutes
Sec. 16-50p(b)(1)(B)(2)
(Emphasis added.)

3. Cellco Improperly Uses Its Motion To Strike To Add Post-Hearing Material

Cellco has ingeniously worked an improper strategy to do the very thing it challenges in its Motion to Strike, by improperly introducing new material it hopes to get into this record that it failed to introduce in its Application and at the hearing.

Cellco states in its Application that:

Cellco will design its Falls Village Facility tower and compound area so it could be shared by a minimum of four wireless carriers, together with the FVFD and the Town. This type of tower sharing arrangement would reduce, if not eliminate, the need for these other carriers or municipal entities to develop a separate tower in this same area in the future.

(Cellco Application, p. 10)

Such an assertion is disingenuous in light of the Council's statutory mandate to consider "sharing" of facilities to avoid "the unnecessary proliferation of such facilities." (C.G.S. Sec. 16-50p(b)(1)(B)(2), supra.) In an effort to mislead the Council, rather than fully addressing the very subject to which consideration of "roaming" relates, the Applicant's rhetorical distraction technique is to suggest that only the proposed tower is the one that can be shared.

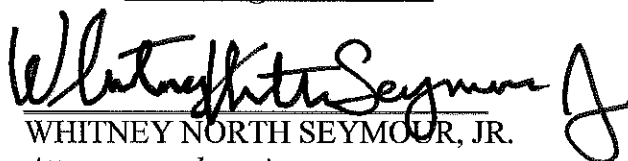
In addition, Cellco attaches two voluminous FCC documents as Exhibits A and B, adding exactly the same type of material---in expanded form---that it seeks to have stricken from Intervenor's brief.

The Applicant's Motion to Strike is frivolous, is based on errors of law and fact, and, in light of the Siting Council's jurisdiction and statutory powers, is misguided. For the foregoing reasons, the Cellco motion should be denied.

Respectfully submitted,



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Falls Village, CT
September 12, 2008

Attorneys for Intervenor Dina Jaeger

CERTIFICATION

I certify that on September 12, 2008, an original and twenty copies of the foregoing Intervenor's Response to Cellco's Motion to Strike was mailed to the Connecticut Siting Council offices at 10 Franklin Square in New Britain, Connecticut, and that a copy was mailed prepaid first class mail to the following:

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September 12, 2008