CONNECTICUT SITING COUNCIL

DOCKET NO. 360

IN THE MATTER OF:

APPLICATION OF CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED FOR THE CONSTRUCTION, MAINTENANCE AND OPERATION OF A WIRELESS TELECOMMUNICATIONS FACILITY ON PROPERTY OF THE FALLS VILLAGE VOLUNTEER FIRE DEPARTMENT, INC., 188 ROUTE 7 SOUTH, FALLS VILLAGE, CONNECTICUT

POST-HEARING BRIEF

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EXECUTIVE SUMMARY

Cellco Partnership d/b/a Verizon Wireless ("Cellco" or "Applicant") has filed an application (the "Application") for a certificate of environmental compatibility and public need ("Certificate"), pursuant to the Public Utility Environmental Standards Act ("PUESA"), Connecticut General Statutes ("Conn. Gen. Stat.") sections 16-50g *et seq.*, to build, maintain and operate a wireless telecommunications facility on property owned by the Falls Village Volunteer Fire Department ("FVVFD") at 188 Route 7 South, in Falls Village, Town of Canaan, Connecticut (the "Falls Village Facility"). The proposed Falls Village Facility will resolve significant gaps in Cellco's coverage in and around the Falls Village area, particularly along the heavily-traveled Routes 7, 112 and 126. Cellco must resolve these coverage problems so that it may continue to provide high-quality, reliable wireless telecommunications coverage within its service area and access to the statewide Enhanced 911 emergency service communications system consistent with its Federal Communications Commission ("FCC") license and the needs of its customers.

Cellco proposes to construct a 150-foot tower disguised as a pine tree ("monopine") on a portion of the FVVFD property. Simulated branches will extend to an overall height of 157 feet. The tower will be constructed adjacent to the future FVVFD station house and related parking facilities planned at the site. An equipment shelter located near the base of the tower would house Cellco's radio equipment and a back-up generator. In addition to Cellco, the Falls Village Facility will be shared by the FVVFD as a platform from which it will provide enhanced emergency service communications to the Town of Canaan. The Falls Village Facility will be designed to accommodate antennas of three additional wireless carriers and the Town of Canaan.

The Falls Village Facility will resolve significant coverage problems that exist in the Falls Village area today with few, if any, adverse effects on the environment. For example, the record in

this docket shows that the Falls Village Facility's radio frequency ("RF") emissions will be a fraction of the established FCC safety standards, thereby resolving the only aspect of RF emissions that the Council can and should consider. The design and characteristics of the Falls Village Facility tower are consistent with the guidelines established by the United States Fish and Wildlife Service to protect against bird strikes; as such, the Falls Village Facility will not pose a threat to migratory birds. The State Historic Preservation Officer determined, subject to conditions that Cellco has agreed to, that the Falls Village Facility "will have no adverse effect on cultural resources eligible or listed on the National Register of Historic Places." The United States Fish and Wildlife Service and the Connecticut Department of Environmental Protection determined that the Falls Village Facility will not impact Federal or State endangered, threatened or special concern species in and around the Falls Village area. The Falls Village Facility will not adversely impact State forests or parks, State or local recreation areas and, according to the National Park Service, subject to certain conditions that Cellco has agreed to, the Falls Village Facility will not have an adverse effect on the Appalachian Trail. The proposed tower's only potential adverse impact is related to its visibility. In the Falls Village area, however, the proposed tower would be visible year round from only approximately 24 acres (less than 0.3% of the 8,042 acre study area, within a two-mile radius of the tower). An additional 22 acres within the same two-mile radius study area may have seasonal views of the tower. To mitigate potential and relatively insignificant visual impacts of the tower, Cellco has proposed the construction of a monopine tower that would blend in more naturally with the surrounding landscape.

Despite the tremendous public benefits and Cellco's efforts to minimize or in many cases eliminate adverse environmental impacts of the Falls Village Facility, Dina Jaeger (the "Intervenor"), who lives in the vicinity of the FVVFD property, has intervened in this proceeding

and seeks to prevent the construction of any telecommunications facility in the Falls Village area. Through her participation, the Intervenor has opposed the proposed Falls Village Facility by injecting irrelevant issues into these proceedings, including, among other things, hypothetical costs of a speculative future lawsuit regarding the Falls Village Facility, an unsupported conflict of interest claim between the Town and the FVVFD, a belief that the Council can displace the FCC's exclusive jurisdiction over RF emissions and a professed concern for humans, migratory birds and wildlife, even though the Falls Village Facility will pose no threat to humans, wildlife or the environment. As such, the Intervenor seeks to have the Council deny the Application based on unknown information and unsupported "claims." The Intervenor's efforts, however, have no basis in law or fact – the record evidence amply demonstrates that the Falls Village Facility is needed, appropriate and will have no significant adverse environmental effects.

Overall, in proposing the Falls Village Facility, Cellco has presented the Council with a telecommunications facility that will satisfy its coverage objectives in the area, present minimal, if any, adverse environmental impacts, support emergency service antennas needed by the FVVFD and the Town, and accommodate future wireless carriers. The record evidence clearly shows that the Council's statutory review criteria have been satisfied. Therefore, the Council should approve Cellco's Falls Village Application.

I. PROCEDURAL BACKGROUND

The Council commenced an evidentiary hearing on the Application on July 1, 2008, which was continued on July 31, 2008. The Council also commenced a public hearing in the evening of July 1, 2008. (July 1, 2008 Afternoon Transcript ("Tr. 1"); July 1, 2008 Evening Transcript ("Tr. 2"); July 31, 2008 Transcript ("Tr. 3").) Prior to the July 1, 2008 hearing, the Council and its staff visited the Falls Village Facility location. At the Council's request, Cellco flew a balloon with a diameter of approximately four feet during the July 1, 2008 site visit at the proposed cell site location between approximately 7:15 a.m. and 5:00 p.m. The balloon was raised to an overall height of 157 feet, representing the top of the monopine "branches" at the top of the proposed tower. (Cellco Exhibit 1 ("Cellco 1") at 14; Tr. 1 at 50:22-24, 51:1-2.)

This Post-Hearing Brief is filed on Cellco's behalf pursuant to Section 16-50j-31 of the Regulations of Connecticut State Agencies ("R.C.S.A.") and the Council's directives. (Tr. 3 at 105:12-24, 206:1-6.) This brief evaluates the Application in light of the review criteria set forth in Conn. Gen. Stat. § 16-50p.

II. FACTUAL BACKGROUND

A. Pre-Application History

Cellco is licensed by the FCC to provide wireless services at both PCS and cellular frequencies throughout Connecticut.[1] Cellco currently provides its customers with limited reliable wireless service in the Falls Village area and experiences significant gaps in coverage at both PCS

[1] On May 30, 2008 Cellco acquired the CT-1 RSA (FCC) license from Alltel Communications. The acquisition of this cellular license enables Cellco to provide wireless services at both PCS and cellular frequencies throughout Litchfield County, including the Falls Village area. (Cellco 7.)

and cellular frequencies along portions of Routes 7, 112, 126 and along local roads in the vicinity. (Cellco 1 at 7; Tab 7; Cellco 7.) What little coverage Cellco does provide in Falls Village today, extends into the area from its existing Sharon North facility, located approximately 2.5 miles to the south, at 477 Route 7 in Sharon and Cellco's existing North Canaan facility, located approximately 5 miles to the north off Lower Road in North Canaan. (Cellco 1 at 7; Tab 7; Cellco 7.) As discussed at the July 1 and 31, 2008 hearings, Cellco's coverage objective for the Falls Village Facility is to fill the gaps between these two existing facilities.

In an effort to provide reliable service with the least potential impacts on the environment, Cellco explored the use of existing towers located in the area, including its existing Sharon North and North Canaan facilities. Neither of these existing structures would provide the coverage or capacity relief required in the Falls Village area. (Cellco 1 at 10; Tabs 7, 9.) In addition, no other existing structures of adequate height were identified in the Falls Village area. (Cellco 1, Tab 9.) In the absence of viable existing structures, Cellco identified sites where the construction of a new tower would not be inconsistent with local land uses and where the visual impact of the site would be reduced to the greatest extent possible. Cellco selected the location for the proposed Falls Village Facility in such a manner as to allow it to build and operate a high-quality wireless facility with the least environmental impact. The FVVFD property is the most feasible alternative location investigated. (Cellco 1 at 10; Tab 9.)

B. <u>The Proposed Falls Village Facility</u>

The FVVFD property is an approximately 7.15-acre parcel located in the Town's Residential/Agricultural zone. The FVVFD property is surrounded by agricultural, low density residential, municipal (Highway Department garage), commercial and light industrial land uses. (Cellco 1 at 2, 17; Tab 1.) Cellco proposes to construct a 150-foot tower disguised as a pine tree

("monopine") on the FVVFD property, adjacent to the future FVVFD station house and related parking facilities planned at the site. Cellco has determined that mounting its antennas at the 150-foot level at this location would satisfy its coverage objectives in the Falls Village area. (Cellco 1 at 9-10.)

Cellco would install a total of twelve (12) panel-type antennas (six PCS and six cellular) with their centerline at the 150-foot level on the tower. The top of the monopine "branches" would extend to an overall height of 157 feet above ground level ("AGL"). (Cellco 1, Tab 1, at 6; Cellco 7 at 1.) Equipment associated with Cellco's antennas and a diesel-fueled generator would be located inside a 12' x 30' shelter located near the base of the tower. The tower and equipment shelter would be surrounded by an 8-foot high security fence and gate. (Cellco 1 at 11.) Access to the Falls Village Facility would extend directly from Route 7 over a gravel access driveway. Once the FVVFD site improvements are completed access to the Falls Village Facility will extend through the FVVFD parking area. (Cellco 1 at 11, Tab 1 at 5; Figure C-2.)

C. Municipal Consultation

On October 23, 2007, Cellco commenced the sixty-day municipal consultation process in accordance with Conn. Gen. Stat. § 16-50*l*. At that time, copies of certain technical information summarizing Cellco's plans for the Falls Village Facility were provided to First Selectman Patricia Allyn Mechare. (Cellco 1 at 19; Cellco 3; Tr. 2 at 38-40.) Copies of this technical information were also distributed to the Town's land use agencies and commissions and sent to Curtis G. Rand, First Selectman of the neighboring Town of Salisbury. (Cellco 1 at 19.)

D. Tower Sharing

In an effort to assist with enhancements to its emergency service communications radio system, Cellco has agreed, as a part of its lease with the FVVFD, to permit the installation of

FVVFD antennas at the top of the proposed tower. (Cellco 1 at 10.) Cellco also offered space on the tower to the Town of Canaan, if a need exists. Tower space will be provided to the FVVFD and the Town at no cost. Consistent with its usual practice, Cellco will design the approved Falls Village tower so that it could be shared by other wireless carriers, known and unknown at the time of the Council's decision, in addition to the FVVFD and the Town. (*Id.* at 10-11.)

III. THE CELLCO APPLICATION SATISFIES THE CRITERIA OF CONN. GEN. STAT. § 16-50p FOR ISSUANCE OF A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED

Under Connecticut General Statutes section 16-50p, Cellco must satisfy two key criteria for its Application to be granted and for a Certificate to issue. First, Cellco must demonstrate that there is a "public need for the facility." Conn. Gen. Stat. § 16-50p(a)(1). Second, Cellco must identify "the nature of the probable environmental impact" of the proposed facility through a careful review of the numerous elements specified in Conn. Gen. Stat. § 16-50p(a)(2), and then demonstrate that these impacts "are not sufficient reason to deny the application." Conn. Gen. Stat. § 16-50p(a)(3). The evidence in the record establishes that Cellco has satisfied each criterion and that it is entitled to a Certificate for the Falls Village Facility.

A. A Public Need Exists for a New Telecommunications Facility in Falls Village

The first step in the review of a pending application is consideration of the public need for the proposed facility. As noted in the Application, the FCC has recognized a public need on a national basis for technical improvement, wide area coverage, high quality and a degree of competition in mobile telephone service. (Cellco 1 at 5-6 (*citing* Report and Order, May 4, 1981 (FCC Docket No. 79-318)).) More recently, the Telcom Act emphasized and expanded on these aspects of the FCC's 1981 decision. Among other things, the Telcom Act recognized an important nationwide public need for high quality personal wireless telecommunications services of all

varieties. 47 U.S.C. § 332(a). The Telcom Act also expressly promotes competition and seeks to reduce regulation in all aspects of the telecommunications industry in order to foster lower prices for consumers and to encourage the rapid deployment of new telecommunications technologies. The Council took administrative notice of the Telcom Act in Docket No. 360. (Cellco 1 at 5-6; Council Administrative Notice List, Item 7.) In addition to these findings of nationwide public need, the evidence in the record clearly supports a specific finding that a public need exists for the Falls Village Facility.

1. Record Evidence Concerning The Need for the Facility

Cellco's network currently experiences a significant gap in reliable service in and around the Falls Village area between Cellco's existing Sharon North and North Canaan cell sites, particularly along the heavily-traveled Routes 7, 112 and 126. (Cellco 1 at i, 1-2, 7, Tab 7; Cellco 7.) The record also contains ample written evidence and testimony that Cellco's antennas at the 150-foot level at the proposed Falls Village Facility tower would resolve these existing coverage problems and would allow Cellco to provide high-quality, uninterrupted and reliable wireless telecommunications service consistent with its FCC licenses and to meet the demands of its customers. For example, the record contains evidence and testimony that the need for a particular facility may be demonstrated through the use of technical information and data including: (1) base line drive data; (2) propagation modeling data used to produce coverage plots; (3) lost call data from adjacent cell sites; (4) data on the number of ineffective call attempts from adjacent cell sites; (5) customer complaints; and (6) marketing input. (Cellco 1, Tab 9 at 2; Tr. 3 at 138:18-24, 139:3-4.)

Finally, Cellco is required under the FCC's Enhanced 911 ("E-911") rules to provide Public Safety Answering Points ("PSAPs") with the telephone number of the originator of a wireless 911

call and the location of the cell site or base station transmitting the call (under Phase I of the rules) and under Phase II, to begin provide more precise locational information to PSAPs, specifically, the latitude and longitude of the caller. 40 C.F.R. § 20.18. Without the Falls Village Facility, Cellco's ability to fulfill its obligations to its customers and under the E-911 system is severely inhibited.

The Falls Village Facility would be incorporated into a network design plan, intended to provide Cellco customers with reliable wireless service, including access to Connecticut's E-911 system. The Falls Village Facility would provide service to a 2.6 mile portion of Route 7, a 1.1 mile portion of Route 112, a 1.2 mile portion of Route 126 and an overall area of 2.92 square miles at PCS frequencies. (Cellco 1 at 2.) At cellular frequencies, the Falls Village Facility will provide service to a 3.45 mile portion of Route 7, a 1.25 mile portion of Route 112, a 1.3 mile portion of Route 126 and an overall area of 10.6 square miles. (Cellco 7 at 1-2.)

The Town has also recognized a public need for the Falls Village Facility, stating that the facility will "close gaps where wireless service is essential along the Route 7 corridor of our community." (Selectmen Letter.) Moreover, at the public hearing held on July 1, 2008, the President of the Board of Directors of the Falls Village Fire Department expressed a need for the Falls Village Facility, stating that "the project will enhance our communication in the area." (Tr. 2 at 11:12-13.) The evidence in the record before Council demonstrating a public need for the Falls Village Facility remains unrefuted.

2. Under The Second Circuit's Test, The Record Evidence Establishes A Public Need For the Falls Village Facility

The Telcom Act controls the Council's evaluation of whether evidence of a gap in wireless service exists for a finding of public need for a new facility. On that issue, the Telcom Act provides that a state or local government or instrumentality thereof "(I) shall not unreasonably discriminate

among providers of functionally equivalent services; and (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332 (c)(7)(B)(i).

The Second Circuit Court of Appeals has interpreted this text to mean that a state may only deny an application to construct a new facility if (1) the area in which the facility is proposed is already sufficiently serviced by a wireless service provider, and (2) the proposed facility is "substantially more intrusive than existing cell sites by virtue of its structure, placement or cumulative impact." *Sprint Spectrum, L.P. v. Willoth*, 176 F. 3d 630, 643 (2d Cir. 1999). States are prohibited by the Telcom Act from "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.

The Council has implicitly adopted the *Willoth* court's position. Throughout its history, the Council has only denied proposed facilities where the areas in question are already sufficiently served by the provider proposing the facility or where the proposed facility was substantially more intrusive than existing or alternative cell sites. Cellco is unaware of any instance in which the Council has ever denied an application based solely on the existence of coverage by other carriers. The Council's historic method of evaluating need constitutes an adoption of the *Willoth* interpretation of the Telcom Act: public need for a new facility exists where a gap in a provider's coverage exists regardless of whether other providers are currently serving the area unless sharing existing facilities could satisfy a carriers needs. *See* Conn. Gen. Stat. § 16-50aa.

The record in this docket is replete with evidence that the Falls Village Facility will close the existing gap in Cellco's coverage. (Cellco 1 at i, 1-2, 7, Tab 7; Cellco 7, at 2.) As such, Cellco has met its burden of showing public need. Moreover, the record clearly shows that in proposing the Falls Village Facility, Cellco has considered alternative locations, designs and specifications

and that the proposed facility represents the least intrusive facility possible. (Cellco 1 at 10; Tab 9.) The record also establishes that Cellco could not close the significant gap in its coverage through the use of other, existing facilities. (Cellco 1 at 10.) The only other existing towers in the area are those that Cellco currently shares. Therefore, denying Cellco the ability to close the gap in coverage in the Falls Village area would therefore amount to unreasonable discrimination and a prohibition of service in violation of the Telcom Act. 47 U.S.C. § 332(c)(7)(B)(i)(I).

3. The Council Should Reject The Unreasonable Public Need Test Cited to by the Intervenor and Adopted In The Third Circuit

The Court of Appeals for the Third Circuit has adopted a unique and contorted version of the public need test established by the Second Circuit. The Third Circuit has concluded that a gap in coverage justifying a new facility only exists where the area that the new facility will serve is not already served by any other provider. *APT Partnership L.P. v. Penn Township*, 196 F. 3d 469, 480 (3d Cir. 1999). Apparently, the Third Circuit contends that a new facility can be constructed only in the absence of any service by any provider at any level of reliability, a circumstance that in this day likely applies in few parts of the country. *See Independent Wireless One Corp. v. Town of Charlotte*, 242 F. Supp. 2d 409, 419 (D. Vt. 2003).

The Council should reject the Third Circuit's interpretation of the Telcom Act and the intervenor's reliance on that interpretaiton as courts in the First and Second Circuits have. *See, e.g., Independent Wireless One Corp.* 242 F. Supp. 2d at 419; *Omnipoint Communications, Inc. v. Village of Tarrytown Planning Board*, 302 F. Supp. 2d 205 (S.D.N.Y. 2004); *Second Generation Properties, L.P. v. Town of Pelham*, 2002 U.S. Dist. LEXIS 9205 (D. N.H. May 21, 2002), *aff'd*, 313 F.3d 620 (1st Cir. 2002).

The Third Circuit's interpretation completely ignores the anti-discrimination language of the Telcom Act, which prohibits a state from unreasonably discriminating among wireless service providers. 47 U.S.C. § 332(c)(7)(B)(i)(I). Under the Third Circuit's analysis, any wireless coverage by a single provider would justify denying access to a particular geographic area to all other providers. "Although attractively simple, such an interpretation is contrary to the [Telcom Act's] intent to encourage the rapid deployment of new telecommunications technologies." *Willoth*, 176 F.3d at 641 (*quoting Reno v. ACLU*, 521 U.S. 844 (1997)). The Third Circuit's test would also have anti-competitive effects. "If the fact that a provider or providers have coverage in an area is sufficient reason to deny an application by a new provider, even if the provider's proposal is the least intrusive means by which it could fill the gap in its service, the existing companies will have a monopoly on the area and a disincentive to seek out new technological developments, subverting the purpose of the [Telcom Act]." *Independent Wireless One*, 242 F. Supp. 2d at 420.

Applying the Third Circuit's analysis to Falls Village highlights its inherent flaws. In this case, the record clearly and irrefutably establishes that Cellco's customers cannot currently access Cellco's wireless system along major roads in the Falls Village area at either PCS or cellular frequencies. (Cellco 1 at 2, Tab 7; Cellco 7.) As the Council is well aware, these significant gaps in coverage result in risks to safety, customer dissatisfaction and an unreliable statewide communications system. Nonetheless, based on a claim, and only a claim, that other unnamed carriers provide coverage at some unknown level over an unknown area in the Falls Village vicinity, the Intervenor uses the Third Circuit's reasoning to forever bar every other provider from offering service in the Falls Village area. Under the Intervenor's interpretation, Falls Village would always be a one-provider town. Were this view to prevail across Connecticut, the

state would be a patchwork of unconnected sites lacking complete service continuity. That result is expressly contrary to the goals established by the Telcom Act and is absurd.

Moreover, there is no evidence in the record that other carriers provide reliable wireless service in the Falls Village area. R.C.S.A. § 16-50j-15 applies to "limited appearances," at the Council's discretion, by which "any person may make a limited appearance which shall entitle said person to file a statement in writing or make an oral statement, under oath or affirmation, at the hearing." Section 16-50j-28(c) provides that "[i]f the council proposes to consider a limited appearance statement as evidence, the council may give all parties and intervenors an opportunity to challenge or rebut the statement and to cross-examine the person who makes the statement." At the Council's public hearing, some members of the public stated that they currently have wireless phone coverage. (*See, e.g.*, Tr. 2 at 13, 14, 17.) However, no specific carrier was identified nor were any details provided as to the coverage area, signal strength or reliability of any such service. None of those members of the public were subject to cross-examination. The Council has not indicated that it proposes to accept any limited appearance statements from the July 1 public hearing as evidence with respect to the Application. Because the information regarding other carriers was undeveloped and untested, the statements should be afforded little, if any, consideration in this matter.

In addition, although a Cellco witness opined at the July 31, 2008 hearing that four companies are licensed to serve "the area," which the witness explained to be Litchfield County in general, there is nothing in the record to show which, if any, carriers actually provide wireless service in the Falls Village area, nor any data, figures, testimony, exhibits or anything else to show coverage area, signal strength, or reliability of any potential carriers. (Tr. 3 at 99-100.) Therefore,

the record is devoid of any evidence to show that other carriers already provide reliable wireless service within the Falls Village Facility's proposed coverage area.[2]

For these reasons, the Council should reject the Intervenor's invitation to adopt the Third Circuit's view and should, instead, continue to employ the Second Circuit's test in *Willoth*. Under that test, Cellco has established that denial of its Application "will result in the denial of cell service to user's of that provider's [Cellco's] service in the given area." *Omnipoint*, 302 F. Supp. 2d at 218. The record evidence shows that the Falls Village Facility will close the gap in Cellco's coverage. Therefore, Cellco has established that a public need for its proposed facility exists.

B. Nature of Probable Environmental Impacts

Under the second step in the review procedure created by PUESA, the Council considers the probable environmental and safety impacts of the proposed facility, including scenic, historic and recreational values, public health and safety, and natural environment and ecological balance. The Council's obligation to consider safety and environmental impacts does not confer on the Council jurisdiction over RF emissions. Further, Cellco's compliance with the USFWS's Tower Guidelines support approval of the Falls Village Facility.

1. Natural Environment and Ecological Balance

The proposed development of the Falls Village Facility has eliminated, to the extent possible, impacts to the natural environment. For example, Cellco intends to construct a 150-foot tower within a small 50' x 75' (3,750 square feet) compound area, adjacent to the future FVVFD firehouse. (Cellco 1, Tab 1 at 4; Figure C-2.) Before the new firehouse is constructed, a 12-foot

[2] The Council asked the parties to address whether evidence in the record indicates that Cellco calls can "roam" on other carriers' networks. (August 14, 2008 Memorandum at 2.) While no such direct evidence exists, the record does contain evidence regarding Cellco's recent acquisition of the Alltel Communications cellular licenses, thereby eliminating Cellco's need for special roaming arrangements in Falls Village and throughout Litchfield County. (Cellco 7; Tr. 1 at 53-54.)

wide gravel access driveway would extend from Route 7, a distance of only approximately 140 feet to the site compound. (Cellco 1 at 2; Tab 1, Figure C-1; C-2.) The Falls Village Facility compound will be surrounded by an 8-foot security fence and gate. (Cellco 1 at 11; Tab 1 at 5; Figure C-2.) Construction of the Falls Village Facility will require a cut of approximately 70 cubic yards of material and a fill of approximately 425 cubic yards of material, for a net of 355 cubic yards of material. (Cellco 6 at 7.) Construction of the Falls Village Facility will require the removal of only seven trees with a diameter at breast height of 6 inches or greater. (Cellco 1, Tab 1, Figure C-1.) These facts and similar factors discussed below demonstrate that the Falls Village Facility will have minimal impact to the natural environment and ecological balance at the FVVFD property and the surrounding area.

2. Public Health and Safety

Cellco has considered several factors in determining that the nature and extent of potential public health and safety impacts resulting from installation of the proposed Falls Village Facility would be minimal or nonexistent.

First, the potential for the proposed tower to fall does not pose an unreasonable risk to health and safety. The proposed tower will be designed and built to meet Electronic Industries Association ("EIA") standards adopted for the State of Connecticut as part of the State Building Code. The tower will be designed with a pre-engineered fault so that the tower radius remains entirely within the FVVFD property. (Cellco 1, Tab 1 at 6; Figure C-1A.) As the Council's numerous prior approvals of tower facilities demonstrate, the theoretical potential of a tower falling does not create a sufficient basis to deny Cellco's proposed facility.

Second, RF emissions from the tower will be a mere fraction of the FCC established safety standard. The worst-case potential public exposure to radio-frequency emissions at the nearest

point of uncontrolled access (the base of each tower) would be only 18.8% or more than five times below the FCC safety standard for Cellco's antennas. (Cellco 7 at 8.) Power density levels drop off rapidly as distance from the tower increases. (Cellco 7 at 2.) Cellco's proposed facility fully complies with the FCC's standard for RF emissions. Pursuant to federal and Connecticut law, any further consideration of RF emissions is preempted by federal law. (*See* Section IV.A., *infra*.)

3. Scenic Values

As noted in the Application, the primary impact of any tower facility is visual. (Cellco 1 at 12-14.) Cellco's site search methodology, described in the Site Search Summary, is designed in large part to minimize the overall visual impact of such facilities. (Cellco 1, Tab 9.) As discussed above, Cellco attempts wherever feasible to avoid the construction of a new tower by identifying any existing towers or other tall non-tower structures in or near its search area. (Cellco 1, Tab 9.) In its site search process, Cellco identified and evaluated Town-owned property south of the FVVFD property and an existing Connecticut Light & Power ("CL&P") transmission line tower near Beebe Hill Road. (Cellco 1, Tab 9; Cellco 6 at 4-6.) However, because the elevation at the Town-owned property drops off to the south and west, the property could not be used without constructing a significantly tower taller than that proposed in the Application. (Cellco 1 at 10, Tab 9 at 2.) Likewise, the CL&P transmission line tower is too short to satisfy Cellco coverage objectives in the area and would need to be expanded to satisfy Cellco's requirements. (Cellco 1 at 10, Tab 9; Cellco 6 at 4-6.) The record does not contain any evidence to suggest that a more feasible location for the Falls Village Facility exists.

If it determines that a new tower must be constructed, Cellco attempts to identify sites where the construction of a tower would not be inconsistent with area land uses and where the visual impact of the site would be reduced to the greatest extent possible. As the Council is aware,

the installation of a tower, used for commercial wireless telecommunications and municipal emergency services, is appropriate on municipal or fire department properties. The FVVFD property is surrounded by agricultural, low density residential, commercial and light industrial land uses, along Route 7 and adjacent roadways. (Cellco 1, Tab 1.)

Visual impact of a tower facility can be further reduced through the proper use of alternative tower structures; so-called "stealth installations." Where appropriate, telecommunications towers camouflaged, as described in this proceeding, as pine trees can help to reduce visual impacts associated with more traditional telecommunications towers. (Cellco 1 at 12-13, Tab 10.) Given the rural setting in the Falls Village area and the significant areas of mature vegetation surrounding the FVVFD property, a stealth tower such as that proposed for the Falls Village Facility is particularly appropriate. (Cellco 1, Tab 10.)

Cellco submitted a Visual Resource Evaluation Report prepared by VHB, Inc. ("VHB Report") as a part of the Application. (Cellco 1, Tab 10.) Prior to preparing the report, VHB conducted a balloon float at the FVVFD property. After conducting this balloon float and field reconnaissance, VHB determined that the proposed towers would be partially visible year-round, above the tree canopy, from an overall area of approximately 24 acres and seasonally visible from an additional 22 acres. (Cellco 1, Tab 10 at 5.) Portions of only five residential properties could have at least partial year-round views of the Falls Village Facility; however, such views will be mitigated by the facility's monopine design. (*Id.*) Accordingly, the record demonstrates that the proposed facility will have no significant or unreasonable impact on scenic values. As discussed below, Cellco has also agreed to take steps to mitigate any potential impact to the nearby Appalachian Trail. (Cellco 4; Tr. 3 at 165:6-24, 166:1-2.)

4. Historical Values

As it does with all of its tower applications, prior to filing an application with the Council, Cellco requested that the State Historic Preservation Office ("SHPO") of the Connecticut Historical Commission (the "Commission") review the proposed cell site. The SHPO determined that the Falls Village Facility would have no adverse effect on Connecticut's cultural resources eligible or listed on the National Register of Historic Places, provided Cellco comply with certain conditions: (1) Cellco must continue to coordinate with the National Park Service ("NPS") regarding views of the tower from portions of the Appalachian Trail; and (2) the antenna and equipment must be removed if not in use for six consecutive months. (Cellco 1, Tab 11). Cellco has also consulted with the NPS, which has determined that the Falls Village Facility will not have an adverse impact on the Appalachian Trail, provided Cellco employs the following mitigation measures: (1) purchase, deliver and plant approximately 25 white pine trees, of a minimum of five feet in height, along the Appalachian Trail near Warren Turnpike; and (2) agree to construct a monopine, as proposed. (Cellco 4.) Cellco has committed to comply with all of these requests and will continue to work with the NPS. (Tr. 3 at 165:6-24, 166:1-2.) All of this evidence remains unrefuted.

5. Recreational Values

There are no recreational activities or facilities that would be adversely impacted by the proposed Falls Village Facility. (Cellco 1 at 16.) As discussed above, any potential impacts to the Appalachian Trail will be mitigated as requested by the NPS. There is no contrary evidence in the record to support a claim that the Falls Village Facility location would adversely impact recreation resources in the area.

6. Forests and Parks

As discussed above, Cellco has consulted with and is committed to fulfilling the requests of the NPS in order to avoid any adverse impacts on the Appalachian Trail. There is no evidence in the record that suggests that the Falls Village Facility would have any adverse effects on state forests or parks in the Falls Village area. (Cellco 1, Tabs 1 and 10.) This evidence remains unrefuted.

7. Air and Water Quality

a. Air Quality

The equipment associated with the proposed Falls Village Facility would generate no air emissions under normal operating conditions. (Cellco 1, Tab 1 at 7.) During power outage events and periodically for maintenance purposes, Cellco would utilize an on-site backup generator to provide emergency power to the Falls Village Facility. The use of the generator during these limited periods would result in minor levels of emissions. Pursuant to R.C.S.A. § 22a-174-3, Cellco will obtain an appropriate permit from the Connecticut Department of Environmental Protection ("DEP") Bureau of Air Management prior to installation of the proposed generator. (Cellco 1, Tab 1 at 7.)

b. Water Quality

The proposed Falls Village Facility will not utilize water, nor will it discharge substances into any groundwater, or public or private sewage system. There are no lakes, ponds, rivers, streams, wetlands or other regulated water bodies in the area that will be impacted by the Falls Village Facility. No wetlands were identified within 200 feet of the facility. Seasonal intermittent watercourses were identified approximately 240 feet south of the facility compound and

approximately 260 feet north of the compound. The Falls Village Facility will not adversely affect either watercourse. (Cellco 1 at 18; Tab 12.)

8. Fish and Wildlife

As a part of its National Environmental Policy Act ("NEPA") Checklist, Cellco received comments on the Falls Village Facility from the U.S. Department of Interior, Fish and Wildlife Service ("USFWS") and the Environmental and Geographic Information Center of the DEP. Both the USFWS and the DEP have confirmed that no known populations of Federal or State Endangered, Threatened or Special Concern Species occur at the FVVFD property. (Cellco 1 at 20, Tab 11.) This evidence remains unrefuted.

C. The Cellco Application Should Be Approved Because The Benefits Of The Proposed Facility Outweigh Any Potential Impacts

Following a determination of the probable environmental impacts of the proposed Falls Village Facility, and an examination of impacts of alternative sites, Section 16-50p requires that the Applicant demonstrate why these impacts "are not sufficient reason to deny the application." Conn. Gen. Stat. § 16-50p(a)(3). The record establishes that the impacts associated with the proposal would be limited and outweighed by the benefits to the public from the proposed Falls Village Facility and, therefore, requires that the Council approve the Application.

As discussed above, the only potential adverse impact from the proposed towers involves "scenic values." As the record overwhelmingly demonstrates, the proposed Falls Village Facility would have minimal impacts on scenic values in the area. These limited impacts may be, and in this case are, outweighed by the public benefit derived from the establishment of the Falls Village Facility. Unlike many other types of development, telecommunications facilities do not cause indirect environmental impacts, such as increased traffic and related pollution.

The limited aesthetic and environmental impacts of the proposed facility can be further mitigated by the sharing of the Falls Village Facility by wireless carriers and municipal emergency service providers. The proposed Falls Village Facility will be capable of supporting these additional uses.

In sum, the potential environmental impacts of the proposed Falls Village Facility would be minimal when balanced against the significant benefits the facility would provide to the general public. These impacts, therefore, do not provide a sufficient basis to deny the Application. The proposed Falls Village Facility, therefore, satisfies the criteria for a Certificate pursuant to Connecticut General Statutes § 16-50p, and the Applicant's request for a Certificate should be granted.

IV. THE COUNCIL SHOULD EXCLUDE IRRELEVANT EVIDENCE

The Uniform Administrative Procedure Act provides that any "oral or documentary evidence may be received, but the agency shall, as a matter of policy, provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence . . . ." Conn. Gen. Stat. § 4-178. In accordance with Section 4-178, the Council should exclude any and all evidence relating to (1) the putative effects of RF emissions associated with telecommunications facilities; (2) "bird strikes" in connection with the Migratory Bird Treaty Act, 16 U.S.C. § 703 *et seq.* ("MBTA") or the Bald and Golden Eagle Protection Act, 16 U.S.C. § 668 *et seq.* ("BGEPA") offered in connection with RF effects; (3) speculative future lawsuits related to the proposed facility; and (4) Cellco's lease with the FVVFD. All of this evidence is irrelevant to the Council's consideration of the Falls Village Facility.

A. Federal Law Preempts Consideration of RF Evidence

The Council has asked the parties to address "whether there is field preemption of the

radio frequency area, namely whether, even if 47 U.S.C. § 332(c)(7)(B)(iv) or any other statutory provision does not specifically preempt Council consideration of the effects of RF emissions that are within FCC established limits, Congress preempted the field of RF emissions." (August 14, 2008 Memorandum at 1.) Cellco respectfully submits that the Council need not reach the issue of "field preemption" in light of the clear and unmistakable existence of "express preemption" on the issue of RF emissions.

Federal preemption takes three forms: (1) express preemption; (2) conflict preemption; and (3) field preemption. *See Sullivan v. American Airlines, Inc.*, 424 F.3d 267, 273 (2d Cir. 2005) (*citing Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992)). "As is always the case in preemption analysis, Congressional intent is the 'ultimate touchstone.'" *Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311, 320 (2d Cir. 2000) (*quoting Cipollone*, 505 U.S. at 516). Express preemption exists where Congress' intent to exclude state and local regulation of an issue is "'explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" *Cipollone*, 505 U.S. at 516 (*quoting Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). A finding of preemption is "easy" "when Congress has made its intent known through explicit statutory language . . . ." *English v. General Electric Co.*, 496 U.S. 72, 79 (1990). Conflict preemption exists where, in "the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law." *Cipollone*, 505 U.S. at 516 (*citing Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 204 (1983). Finally, field preemption exists where "federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Cipollone*, 505 U.S. at 516 (*quoting Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 153, (1982) (internal quotation marks and citation

omitted). Field preemption exists "in the absence of explicit statutory language" where an inference must be made that Congress intended the federal government to exclusively occupy a field of regulation. *See English*, 496 U.S. at 79. Where express preemption is present, the Council need not look for an inference of field preemption.

Federal law and case law interpreting it establish that the Council is expressly preempted from considering any evidence relating to effects of RF emissions associated with telecommunications facilities ("RF Evidence"). Under the federal Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (the "Telcom Act") "[n]o State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions." 47 U.S.C. § 332(c)(7)(B)(iv). Congress has thus expressly preempted state and local government regulation of wireless service facilities on the basis of any effects of RF emissions.

This preemption is wholly aligned with the overall purpose of the Telcom Act. "Congress enacted the [Telcom Act] . . . to promote competition and higher quality in American telecommunications services and to 'encourage the rapid deployment of new telecommunications technologies' . . . . One of the means by which it sought to accomplish these goals was *reduction of the impediments* imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers." *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005) (emphasis added). The clear language of the Telcom Act is intended to reduce local impediments to the installation of facilities by reserving to the FCC considerations of RF emissions.

Numerous courts that have considered the preemptive nature of the Telcom Act with

respect to RF emissions have reached the same conclusion: state and local governments may not veto proposed facilities based on the effects of RF emissions as long as the proposed facility meets the FCC's standards for RF emissions. As the Second Circuit has explained in *Cellular Phone Taskforce v. Federal Communications Commission*, 25 F.3d 82, 96 (2d Cir. 2000), state and local governments cannot regulate wireless facilities "that conform to the FCC Guidelines on the basis of environmental effects of RF radiation." *Id.* at 96; *see also Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 412, 417 (2d Cir. 2002). Because Congress reserved such "broad preemption authority under the Telecommunications Act," the Council cannot exercise its regulatory power on the basis of the effects of RF emissions. *See id.; see also* 47 U.S.C. § 332(c)(7)(B)(i)–(iv).

The Council is well aware of its limitations under the Telcom Act. At the commencement of the Council's hearing on this Application Chairman Caruso stated:

> I also wish to note the specific ways that the Federal Telecommunications Act of 1996 restricts this Council's actions. This Act states, and I quote, 'No state or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions,' end quote. The Commission referred to in that passage is the Federal Telecommunications Commission, also called the FCC, and that passage is found at 47 U.S.C. Section 332(c)(7)(iv). This Council is, of course, an instrumentality of Connecticut State government for purposes of this Act.

(Tr. 1 at 5:6-19.)

The Telcom Act's prohibition on consideration of RF emissions does not eliminate the Council's authority and duty to review other aspects of the proposed facility. But the Telcom Act itself and the numerous cases interpreting it establish, unmistakably, that "fear of adverse health

effects from electromagnetic radiation is excluded as a factor." *Prime Co Personal Communications, L.P. v. City of Mequon*, 352 F.3d 1147, 1149 (7th Cir. 2003) (*citing* 47 U.S.C. § 332(c)(7)(B)(iv); (*see also* Tr. 1 at 6:6-15.) Because the Falls Village Facility will operate well within the FCC standard, federal law preempts the Council from considering any RF Evidence.

B. Connecticut Law Limits the Council's Authority

The Connecticut Supreme Court has recently recognized that the Council is preempted from considering RF Evidence. Under PUESA, the Connecticut General Assembly granted the Council broad powers with respect to the siting of certain defined "facilities" in the state. Conn. Gen. Stat. § 16-50i(a)(6) (authorizing the Council's regulation of telecommunication towers and associated equipment used in a cellular system as defined in the Code of Federal Regulations Title 47, Part 22). As a creature of statute, the Council's jurisdiction is necessarily limited by PUESA.

Earlier this year, the Connecticut Supreme Court noted that the Council lacks the authority to consider the effects of RF emissions. *Bornemann v. Conn. Siting Council*, 287 Conn. 177, 183 (2008). Specifically, the Supreme Court ruled that "the biological effects of high frequency radio wave emissions on wildlife" are "beyond the statutory authority" of the Council. *Id.* It is clear from the Supreme Court's decision in *Bornemann* that it considered and ruled on the issue of preemption. The Court held:

> The plaintiffs further claim that their appeal is not moot because their petition raised other claims for relief that have not been resolved, namely, their request that Nextel should be required to fund independent research on the biological effects of high frequency radio wave emissions on wildlife, and that Nextel should pay the plaintiffs' costs and attorney's fees. These claims, however, were ancillary to the plaintiffs' primary request for relief and, moreover, were beyond the statutory authority of the council.

287 Conn. at 183 (emphasis added).

The term "moreover" is defined as "in addition thereto, also, furthermore, likewise, beyond this, besides this." Black's Law Dictionary, 6th Ed. (1990). The subject of both clauses of the court's final sentence is "these claims" – the plaintiff's claims that the Council should direct the applicant to fund studies on the effects of RF emissions. The verb "were" in the second clause of the final sentence refers back to the subject at the start of the sentence, "these claims." The use of the word "moreover" between the first and second clauses in the sentence demonstrates that our Supreme Court was asserting two concepts in the same sentence with respect to the same subject: first, the RF emission claims were ancillary and, second, that they were "beyond the statutory authority of the council." The Council cannot overlook the Supreme Court's statement on this precise issue. This state's highest court has explicitly concluded that Connecticut law limits the Council's jurisdiction and does not grant the authority to consider RF emissions. For these reasons, the Council should exclude the proffered evidence of RF emissions as irrelevant and should not consider such evidence in its deliberations on the Falls Village Facility.

C. Finding Public Need Under the PUESA Does Not Equate to a Cost-Benefit Analysis

The Intervenor has suggested that the Council should consider the unknown costs of a speculative future lawsuit against the proposed tower as part of its consideration of the public need for the proposed facility. (Intervenor Interrogatory Nos. 5, 7-9; Tr. 3 at 48: 23-24; 49:1-13.) Evidence related to such a theoretical topic is irrelevant to the Council's decision on the Application. The determination of public need cannot be confused with a cost-benefit analysis based on speculative assumptions. The PUESA does not permit the Council to examine "financial

responsibility" for costs associated with an application for a proposed facility, let alone financial responsibility for a hypothetical future lawsuit. This question is unrelated to the determination of public need in the context of the Telcom Act or PUESA, especially since the Intervenor's hypothetical is based on a lawsuit that may never arise – it is pure speculation. Any such evidence is irrelevant and should be excluded from the record.[3]

D. Evidence Related to Cellco's Lease is Irrelevant

The subject of Cellco's lease with the FVVFD, including some baseless suggestion of a conflict of interest between the FVVFD and the Town, has also been the topic of extensive examination by the Intervenor. (*See* Intervenor Interrogatory Nos. 2-3, 6, 9; Tr. 2 at 38:22-25; Tr. 2 at 41-45; Tr. 2 at 45:16-23; Tr. 2 at 46: 3-9.) That subject, however, is also irrelevant to the Council's decision on the Application.

The PUESA expressly forbids the Council from considering underlying property interests with respect to an application. Section 16-50p(g) provides "[i]n making its decision as to whether or not to issue a certificate, the council shall in no way be limited by the fact that the applicant may already have acquired land or an interest therein for the purpose of constructing the facility which is the subject of its application." As such, section 16-50p(g) "specifically forbids the council from allowing a property interest to influence its decision . . . ." *Corcoran v. Conn. Siting Council*, 50 Conn. Supp. 443, 452 (Conn. Super. Ct. 2006), *aff'd*, 284 Conn. 455, 456-57 (2007). Therefore, this topic is irrelevant to the Council's evaluation of public need. Any evidence related to some alleged conflict of interest between the Town and the FVVFD related to the lease is equally irrelevant and should also be excluded.

[3] The Council should also note that this is especially so since the Intervenor has raised the issue of a potential lawsuit against the Town, yet the Town is not a party to the lease between Cellco and the FVVFD. (Cellco 1, Tab 14.)

V. THE TELCOM ACT DOES NOT CONFLICT WITH FEDERAL LAW PROTECTING MIGRATORY BIRDS

The Intervenor cannot base her opposition to the Falls Village Facility on federal laws or treaties related to migratory birds such as the Migratory Bird Treaty Act, 16 U.S.C. § 703 *et seq.* ("MBTA") or the Bald and Golden Eagle Protection Act, 16 U.S.C. § 668 *et seq.* ("BGEPA") under the guise of preventing "bird strikes" because the Falls Village Facility does not pose any danger of bird strikes. As such, the Council need not entertain such issues.

A. Neither the Migratory Bird Treaty Act Nor the Bald and Golden Eagle Protection Act Apply

The Council has asked the parties to address whether other federal statutes or treaties (including migratory bird laws) affect the applicability of 47 U.S.C. § 332(c)(7)(B)(iv) to the Application and whether possible effects on wildlife other than effects from RF emissions, such as bird strikes, apply. (August 14, 2008 Memorandum at 1-2.) The evidence in the record shows that the Falls Village Facility has been designed so that there is no danger of bird strikes – therefore, there is no conflict between the Telcom Act and other federal migratory bird protection laws or treaties.

Under the MBTA, it is unlawful to, with respect to migratory birds protected under treaty:

> pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or eggs of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof . . . .

16 U.S.C. § 703(a). Similarly, under the BGEPA, it is unlawful to "knowingly, or with wanton disregard for the consequences of his act take, possess, sell, purchase, barter, offer to sell, purchase

or barter, transport, export or import, at any time or in any manner any bald eagle commonly known as the American eagle or any golden eagle, alive or dead, or any part, nest, or egg thereof . . . ." 16 U.S.C. § 668(a). Indeed, the "MTBA's plain language prohibits conduct directed at migratory birds - - 'pursue, hunt, take, capture, kill, possess,' and so forth." *Newton County Wildlife Ass'n. v. United States Forest Service*, 113 F.3d 110, 115 (8th Cir. 1997). The MBTA's "ambiguous terms 'take' and 'kill' . . . mean 'physical conduct of the sort engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute's enactment in 1918.'" *Id.* (*quoting Seattle Audubon Society v. Evans*, 952 F.2d 297, 302 (9th Cir. 1991). The USFWS has adopted regulations consistent with the interpretation of the MBTA as directed toward conduct by hunters and poachers. The USFWS defines "take" to mean "pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect." 50 C.F.R. § 10.12.

The record shows that such laws do not apply here. Neither Cellco nor the Council have taken any action directed at migratory birds and as such, no violation of the MBTA or BGEPA has occurred. *See Citizens Against Toxic Sprays, Inc. v. Bergland*, 428 F. Supp. 908, 938-39 (D. Or. 1977) (finding that the MBTA does not provide private right of action and even assuming such a remedy exists, relief is not available where it has not been established that any violation of the MBTA has occurred). There is absolutely nothing in the record to suggest that any current, past or future action related to the construction, operation and maintenance of the Falls Village Facility falls within the scope of either the MBTA or BGEPA.

Because neither the MBTA nor the BGEPA applies, any evidence the Intervenor seeks to offer related to those laws relative to bird strikes is immaterial. The Intervenor has offered a list of birds sighted "within 2 miles" of the proposed facility, (Exhibit IJ16), a study dated August 13,

2007, (Exhibit IJ51), a copy of *American Bird Conservancy, Inc. v. FCC*, (Exhibit IJ52), a copy of an FCC press release (Exhibit IJ53) and an FCC public notice dated May 1, 2008, (Exhibit IJ54), all of which are relate to the danger of bird strikes. However, those issues do not apply to the Falls Village Facility because the evidence in the record shows that the proposed Falls Village Facility has been designed to eliminate any dangers associated with bird strikes.

The USFWS has addressed the issue of bird strikes as they relate to telecommunications towers. In the "Service Interim Guidelines For Recommendations On Communications Tower Siting, Construction, Operation, and Decommissioning," ("Tower Guidelines") the USFWS has stated that "[i]f collocation is not feasible and a new tower or towers are to be constructed, communications service providers should be strongly encouraged to construct towers no more than 199 feet above ground level (AGL), using construction techniques which do not require guy wires (e.g., use a lattice structure, monopole, etc.). Such towers should be unlighted if Federal Aviation Administration regulations permit." These factors are also addressed in the Intervenor's exhibits, which indicate that bird strikes are problematic for towers that are more than 199 feet tall, are supported by guy wires and are lighted. (*See* Exhibit IJ51; Exhibit IJ52.)

The evidence in the record shows that the proposed Falls Village Facility will be well below 199 feet, unlighted and free-standing. (Cellco 1; Tr. 3 at 158:9-15; 159:12-13.) Therefore, bird strikes are not a concern for the Falls Village Facility as explained by the

Intervenor's own exhibits.[4] As such, the Intervenor's evidence and exhibits relating to bird strikes, including exhibits IJ49-IJ54 and IJ67, are immaterial because the Falls Village Facility does not pose any such danger.

The Intervenor claims in her July 28, 2008 Response to Applicant's Motion to Preclude ("Intervenor Response") that the Telcom Act does not block consideration of harm to migratory birds or bald eagles in the face of the MBTA and BGEPA based on the Supremacy Clause of the United States Constitution. (Intervenor Response at 5.) While the Intervenor's exegesis on the relative weights of the Constitution, international treaties and federal law may be interesting to some, it has no bearing on the issues before the Council because no violation of the MBTA and BGEPA is even theoretically possible, let alone threatened. Therefore, there is no danger of "multiple violations of Intervenor's procedural and substantive rights and protections" by excluding her evidence relating to migratory birds and bald eagles. (*See* Intervenor Response at 6.)

B. Cellco Was Denied the Opportunity to Cross Examine the Intervenor

The Intervenor has introduced exhibits and documents that she did not author and about which she possesses essentially no knowledge. The Council should not afford any weight to evidence about which Cellco was deprived of the opportunity to cross-examination any proffering witness.

[4] The Intervenor's reliance on *American Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027 (D.C. Cir. 2008) (Exhibit IJ53) is also misplaced. In *American Bird Conservancy*, the Court of Appeals for the District of Columbia Circuit simply directed the FCC, in conjunction with the USFWS, to conduct further studies on the issue of bird strikes relative to telecommunications towers based on the FCC's obligations under the National Environmental Policy Act, 42 U.S.C. § 4321 et seq. *See id.* at 1034-35. However, neither the USFWS nor the FCC have promulgated any new standards, guidelines or regulations related to bird strikes. Therefore, because the Falls Village Facility complies with the USFWS' Tower Guidelines, which currently control, *American Bird Conservancy* does not provide any useful authority.

The PUESA provides parties with "the right to present such oral or documentary evidence and to conduct such cross-examination as may be required for a full and true disclosure of the facts." Conn. Gen. Stat. § 16-50o(a). R.C.S.A. § 16-50j-28 also governs the rules of evidence for matters before the Council. Moreover, R.C.S.A. § 16-50j-28(c) provides that "[c]ross examination may be conducted by any party or intervenor if it is required by the council for full and true disclosure of the facts . . . ."

The record shows that the Intervenor has sought to introduce the above documents that appear to be copies of studies, statements by others and other items, none of which were subject to cross examination because the Intervenor either did not author them or was not familiar with their contents. For example, when questioned at hearing about the contents of Intervenor Exhibit IJ51, which concerns bird strikes, the Intervenor was unable to provide any meaningful testimony regarding that document. (Tr. 3 at 178-81.) Given the lack of any meaningful opportunity to cross-examine the proponent of this evidence, and given the hearsay nature of the evidence, the full and true disclosure of the facts has not occurred in this case. Therefore, the evidence should not be afforded any weight in the Council's decision on the Application.

VI. CELLCO SATISFIED MUNICIPAL CONSULTATION REQUIREMENTS

Cellco engaged in municipal consultation as required by PUESA. Under Conn. Gen. Stat. § 16-50*l*, "at least sixty days prior to the filing of an application with the council," Cellco was required to "consult with the municipality in which the facility will be located . . . . Such consultation with the municipality shall include, but not be limited to good faith efforts to meet with the chief elected official of the municipality." Conn. Gen. Stat. § 16-50*l*(e) (emphasis added).

On October 23, 2007, Cellco commenced the sixty-day municipal consultation process in accordance with Conn. Gen. Stat. § 16-50*l*. At that time, copies of Cellco's technical information

summarizing Cellco's plans for the Falls Village Facility were provided to First Selectman Patricia Allyn Mechare. Copies of this technical information were also distributed to the Town's land use agencies and commissions and sent to Curtis G. Rand, First Selectman of the neighboring Town of Salisbury. (Cellco 1 at 19.)

The requirement to "make good faith efforts" indicates that meeting with the chief elected official is not mandatory; otherwise, the General Assembly could have easily drafted the statute to make it a requirement. Moreover, to make an "effort" indicates that actually engaging in such a meeting is a ceiling, and not a floor, for the applicant's obligations under the statute. In addition, the statute required Cellco to "provide the chief elected official with any technical reports concerning the public need, the site selection process and the environmental effects of the proposed facility" at the time of any such consultation, which it did. Conn. Gen. Stat. § 16-50*l*(e).

The Intervenor has suggested that the Town's failure to hold public meetings on the Application renders it deficient in some way. (Intervenor Interrogatory Nos. 1, 4; Tr. 2 at 45:20-21.) This claim has no basis in law. Only the municipality can decide whether to conduct public meetings on the proposed facility. "The municipality may conduct public hearings and meetings as it deems necessary for it to advise the applicant of its recommendations concerning the proposed facility." Conn. Gen. Stat. § 16-50*l*(e) (emphasis added). The choice – and it is clearly a choice under the statute – to hold public meetings belongs to the Town not to Cellco. Therefore, regardless of whether the Town chose to hold public meetings has no bearing on whether Cellco met its statutory obligations, which the evidence shows Cellco did.

Regardless, the evidence in the record shows that the Application was discussed at public Town meetings. The proposed Falls Village Facility was the subject of discussion at several regular meetings of the Town of Canaan Board of Selectmen. (*See, e.g.*, Exhibit IJ61, Minutes of

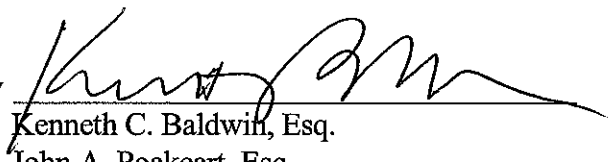
the April 23, 2008 Board of Selectmen Special Meeting.) In correspondence dated April 28, 2008, the Town Board of Selectmen stated that it "strongly supports" Cellco's Application, finding that Cellco's "plans for design construction will have a minimum impact on the surrounding areas." (Letter from First Selectman Patricia Allyn Mechare to Connecticut Siting Council dated April 28, 2008 ("Selectmen Letter").) Notably, the Board also stated that the facility "begins to close gaps where wireless service is essential along the Route 7 corridor of our community." (*Id.*) Finally, the Board reported that "the Town of Canaan Planning and Zoning Commission have [sic] reviewed [the] application and are in agreement with the Board of Selectmen in its support." (*Id.*)

Whether the Town held public meetings in no way implicates Cellco's obligations to engage in municipal consultation. Therefore, Cellco's Application is not deficient because Cellco fulfilled its municipal consultation requirements under Conn. Gen. Stat. § 16-50*l*. This evidence remains unrefuted.

VII. CONCLUSION

Based on the unrefuted evidence contained in the record and the arguments presented above, Cellco has satisfied the criteria in Connecticut General Statutes Section 16-50p. Accordingly, the issuance of a Certificate to Cellco for the Falls Village Facility is appropriate and fully consistent with the Act.

Respectfully submitted,
CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS

By 

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CERTIFICATION

This is to certify that on this 2nd day of September 2008, a copy of the foregoing was mailed, postage prepaid, to the following:

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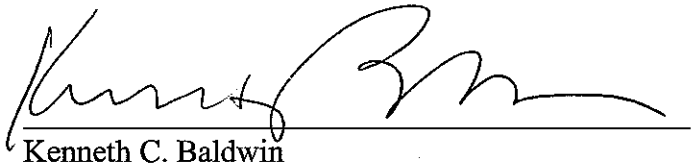

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