STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL

IN RE:	:	
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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	:	DOCKET NO. 360
	:	DECEMBER 8, 2008

SUPPLEMENTAL BRIEF OF
CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS

Cellco Partnership d/b/a Verizon Wireless ("Cellco") respectfully submits this Supplemental Brief pursuant to the Connecticut Siting Council's ("Council") November 21, 2008 request in the above-captioned docket.

I. BACKGROUND

In this docket, Cellco has applied for a Certificate of Environmental Compatibility and Public Need ("Certificate") for the construction, maintenance and operation of a wireless telecommunications facility located at 188 Route 7 South, Falls Village (Canaan), Connecticut (the "Falls Village Facility"). On September 2, 2008, Cellco submitted its Post-Hearing Brief ("Cellco Brief"), pursuant to the Council's August 14, 2008 directive. In that Brief, Cellco discussed the inapplicability of the Migratory Bird Treaty Act, 16 U.S.C. § 703, to the Telecommunications Act ("Telcom Act"), 47 U.S.C. § 332(c)(7)(B)(iv), and to the proposed Falls Village Facility. Cellco also demonstrated that the Record evidence established that the Falls Village Facility would have no adverse effects on wildlife. (*See* Cellco Brief at 28-31.) Therefore, the proposed Falls

Village Facility does not threaten a violation of the MBTA and there is no conflict between the Telcom Act and other federal migratory bird protection laws or treaties, including the MBTA.

By letter dated November 21, 2008, the Council asked the parties and intervenors for additional comment on the MBTA as it relates to the Falls Village Facility, specifically with respect to *United States v. FMC Corporation*, 572 F.2d 902 (2d Cir. 1978). Cellco respectfully submits this Supplemental Brief pursuant to that request.

II. ARGUMENT

Cellco did not discuss *FMC* in its Post-Hearing Brief because *FMC* is inapposite. Simply put, the facts of *FMC* bear no resemblance to any of the facts surrounding the Falls Village Facility.

Under the MBTA, it is unlawful to do any of the following with respect to migratory birds protected by 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).

In *FMC*, a pesticide manufacturer was tried and convicted of violating the MBTA. The manufacturer had unwittingly pumped poisonous materials into a ten-acre holding pond. 572 F.2d at 904, 908. The pond attracted waterfowl during migration and the poison in the pond killed some of those migrating birds. At trial, the court instructed the jury that no awareness of wrongdoing or specific intent to violate the law was required to establish a violation of the MBTA. *Id.* at 904. The issue on appeal was whether the MBTA requires that a violation be intentional – put another way, whether a violator of the MBTA must have a *mens rea*. *Id.*

The Second Circuit Court of Appeals in *FMC* declined to resolve that question broadly, deciding the case on its narrow facts. The court decided that FMC Corporation could be held to have violated the MBTA on the theory of strict liability. *Id.* at 907-08. In the court's view, FMC engaged in an "extrahazardous" activity, namely, manufacturing a pesticide known to be highly toxic. Citing strict liability cases and the Restatement (Second) of Torts, the court ruled that because FMC's enterprise of manufacturing a toxic pesticide involved an unusual hazard, FMC had to "pay its way." *Id.* at 907.

The court's discussion, however, undermined the proposition that no *mens rea* would ever be required for a violation of the MBTA. In the court's words, "[i]mposing strict liability on FMC in this case does not dictate that every death of a bird will result in imposing strict criminal liability on some party." *Id.* at 908. The court distinguished the *FMC* case, in which the defendant had engaged in an "extrahazardous" activity, from other activities that would not result in a violation of the MBTA. *Id.* at 905. Such activities included driving a car, flying an airplane or constructing a home or building with glass windows. *Id.* In the court's view, birds killed by these activities would not result in a violation of the MBTA. To interpret the MBTA otherwise "would offend reason and common sense." *Id.*

The *FMC* decision provides no basis on which to conclude that the Falls Village Facility threatens to violate the MBTA. The construction, maintenance and operation of a telecommunications facility does not constitute an ultrahazardous activity to which strict liability applies. Simply put, telecommunications towers are not in any way similar to the manufacture of toxic pesticides or the use of explosives, activities to which strict liability standards apply.

To the contrary, the proposed monopine tower at issue in this Docket is logically and factually indistinct from a home or building for purposes of an MBTA analysis. Birds are no doubt killed daily when they fly into homes and office buildings around the country. As the Second

Circuit opined, however, interpreting that those bird deaths violate the MBTA "would offend reason and common sense." *Id.* at 905. Like houses and office buildings, the proposed monopine tower would be stationary and would not be inherently inviting and lethal, such as a ten-acre pond filled with toxic chemicals. Therefore, the facts underlying the *FMC* decision and the legal theory on which it was decided have no application to Cellco's proposed telecommunications facility. To interpret any deaths that resulted from birds flying into the proposed monopine tower as a violation of the MBTA would, as the Second Circuit has held, "offend reason and common sense."

Equally important, the *FMC* case demonstrates another basis on which the facts in the current Docket are dissimilar to those that resulted in FMC's violation of the MBTA. There, the court found that FMC had performed an affirmative act: it manufactured a highly toxic pesticide and failed to prevent it from coming into contact with birds and other living organisms. *Id.* at 907. FMC was aware of the risk of harm that could be produced from the chemicals it manufactured. 572 F.2d at 908. The court considered FMC's affirmative act analogous to cases in which hunters were convicted for violating the MBTA by intentionally killing birds. The court's assertion that birds killed when they fly into houses or office buildings would not violate the MBTA demonstrates that constructing a house or office building would not constitute an affirmative act analogous to the hunting cases. Logically, Cellco's construction and operation of a monopine tower would likewise not give rise to a violation of the MBTA.

The *FMC* decision, issued in 1978, must also be evaluated in light of the more recent decisions and regulations issued under the MBTA. Other circuit courts have, more recently, emphasized that the plain language of the MBTA "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 United States Fish and Wildlife Service ("USFWS") regulations are consistent with the interpretation of the MBTA that it is directed toward conduct by hunters and poachers. Specifically, the USFWS defines "take" in its regulations 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. Cellco's proposed construction and operation of a telecommunications facility in Falls Village does not constitute "physical conduct of the sort engaged in by hunters and poachers." Indeed, Cellco's construction of a monopine tower cannot credibly be characterized as conduct directed at migratory birds. Therefore, there is no threatened violation of the MBTA and, as a result, there is no conflict between the MBTA and the Telcom Act.

III. CONCLUSION

For the foregoing reasons, Cellco respectfully submits that the record evidence shows that the Falls Village Facility does not threaten to violate the MBTA and *United States v. FMC Corporation* is inapposite. Because the proposed telecommunications facility poses no threat of violating the MBTA, there is no conflict between the MBTA and the Telcom Act.

Respectfully submitted,

CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of December 2008, a copy of the foregoing was mailed, postage prepaid to:

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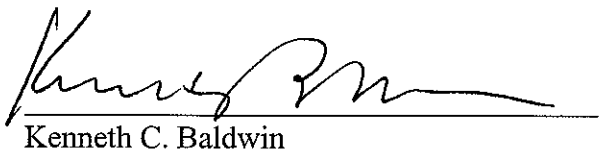

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