STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL

RE: APPLICATION BY T-MOBILE NORTHEAST LLC FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED FOR A TELECOMMUNICATIONS FACILITY AT 232 SHORE ROAD IN THE TOWN OF OLD LYME, CONNECTICUT

DOCKET NO. 391

Date: July 23, 2010

POST-HEARING BRIEF OF APPLICANT T-MOBILE NORTHEAST LLC

Pursuant to § 16-50j-31 of the Regulations of Connecticut State Agencies, T-Mobile Northeast LLC ("T-Mobile") submits this post-hearing brief in support of the above-captioned application. This brief addresses (1) the public need for this telecommunications facility; (2) the lack of environmental impact of the proposed facility; and (3) the facility's consistency with the legislative mandate to avoid the unnecessary proliferation of towers in the State of Connecticut ("State").[1]

I. BACKGROUND

On October 15, 2009, T-Mobile filed with the Connecticut Siting Council ("Council") an application for Certificate of Environmental Compatibility and Public Need for the construction, operation and maintenance of a 100 foot monopole wireless telecommunications facility ("Facility") at 232 Shore Road, Old Lyme, Connecticut

[1] T-Mobile submits its Proposed Findings of Fact contemporaneously with this Post-Hearing Brief.

("Property"), pursuant to General Statutes § 16-50aa and § 16-50j-34 of the Regulations of Connecticut State Agencies ("Application"). *(Hearing Exhibit 1, Application, p. 1.)*[2]

T-Mobile proposes to construct the Facility in the northwestern portion of a 5 acre parcel ("Site") owned by South Shore Landing Self Storage, commonly known as 232 Shore Road, Old Lyme, Connecticut, and designated as Map 8, Lot 36-2 in the Town of Old Lyme's ("Town") Tax Assessor's Records. The Property is zoned for light industrial uses and currently serves as a storage facility. *(App., pp. 1-2, 9, 16; App. Ex. B; Pre-Filed Testimony of Scott M. Chasse ["Chasse,"] p. 2.)*

As proposed, the Facility would consist of a 2,400 square foot compound, comprising the entire area leased by T-Mobile. An 8 foot high chain link fence would secure the equipment at the Facility. Vehicular access to the Facility would extend from Buttonball Road along an existing bituminous driveway and gravel parking area. Utility service would extend underground from an existing transformer and telephone demarcation point on the Property. *(App., pp. 1-2, 9; App. Ex. B; Chasse, p. 3; February 4, 2010 3:00p.m. Transcript ["2.4.10 3:00p.m. Tr.,"] pp. 31-32.)*

II. A SIGNIFICANT PUBLIC NEED EXISTS FOR THE FACILITY

General Statutes § 16-50p (a) (3) (A) mandates that the Council "shall not grant a certificate, either as proposed or as modified by the council, unless it shall find and determine . . . [that] a public need for the facility and the basis of the need . . . ." The record amply demonstrates that there is a significant public need for the Facility.

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[2] For the Council's convenience, all subsequent page references to Hearing Exhibit 1, which is T-Mobile's application, shall be made as "App. at p. __." All subsequent references to exhibits attached to the Application shall be made as "App. Ex. __."

A. The Facility Would Alleviate An Existing Coverage Gap.

There is a coverage gap in T-Mobile's network within the areas surrounding the site of the Facility. The coverage gap requires the installation of a telecommunications facility in the Town. The Facility would alleviate the existing coverage gap, specifically along Route 156, Mill Creek Road, Hawks Nest Road and Cross Lane, just south of Interstate 95, as well as the surrounding areas and the Amtrak rail line that passes through the area. Accordingly, the Facility would be an integral component of T-Mobile's wireless network in the Town. *(App., pp. 4-5; App. Ex. H, J; Pre-Filed Testimony of Scott Heffernan ["Heffernan,"] pp. 3-4; T-Mobile's Responses to the Council's First Set of Interrogatories ["T-Mobile First Interrog. Resp."]; T-Mobile's Responses to the Town's First Set of Interrogatories; 2.4.10 3:00p.m. Tr., pp. 34-35, 88-89; April 20, 2010 Transcript ["4.20.10 Tr.,"] pp. 118.)*

Cellco Partnership d.b.a. Verizon Wireless ("Verizon") and New Cingular Wireless PCS, LLC ("AT&T") also experience a coverage gap in their respective networks in the area of the proposed Facility. Their networks have an existing coverage gap in the area of the proposed Facility, including along Route 156, as well as the surrounding areas and the Amtrak rail line that passes through the area. (*Verizon's Responses to the Council's First Set of Interrogatories ["Verizon Interrog. Resp."];* AT&T*'s Responses to the Council's First Set of Interrogatories ["AT&T Interrog. Resp."].)*

The Town supports the installation of the Facility to improve wireless services in this area of the Town. The Town recognizes that it needs enhanced wireless coverage for its residents, businesses and emergency services, specifically in the areas that

would be addressed by the Facility and the telecommunications facilities proposed in Dockets 391 and 392. *(2.4.10 3:00p.m. Tr., pp. 10-11; February 4, 2010 7:00p.m. Transcript ["2.4.10 7:00p.m. Tr.,"] pp. 12-13; 4.20.10 Tr., pp. 90, 105; June 23, 2010 Transcript ["6.23.10 Tr.,"] pp. 121-22.)*

To provide effective coverage in this area, T-Mobile seeks to mount its antenna array at 100 feet above grade level ("AGL"). This position would allow T-Mobile to minimize the number and height of future telecommunications facilities in this area. Additionally, the antenna height would enable T-Mobile to overcome the existing topography and mature vegetation and provide coverage in these areas of the Town. *(App., pp. 4-5, 9; App. Ex. B, H; Heffernan, pp. 4-5; 2.4.10 3:00p.m. Tr., p. 33; 4.20.10 Tr., pp. 106, 110.)*

AT&T and Verizon would locate their antenna arrays at 110 and 90 feet AGL, respectively.[3] These positions would enable each wireless carrier to provide coverage to the areas surrounding the proposed Facility. (*Verizon Interrog. Resp.; AT&T Interrog. Resp.)*

The Town has also indicated that it could use the Facility to improve wireless public safety services. The Town would require a height of 160 feet to ensure appropriate wireless coverage for its public safety services. The Town has not allocated the funds necessary to procure its equipment for the Facility; however, T-Mobile would construct the Facility so that the foundation could support a 160 foot monopole structure should the Town obtain the necessary equipment. *(2.4.10 3:00p.m. Tr., p. 11; 4.20.10*

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[3] AT&T has requested that the Council approve the Facility at 110 feet. (*AT&T Interrog. Resp.)*

Tr., pp. 39-40, 74-80, 85-86, 129-31; June 23, 2010 Transcript ["6.23.10 Tr.,"] pp. 105-08, 122.)

B. T-Mobile Requires A Three Tower Scenario To Alleviate Existing Coverage Gaps In The Town.

T-Mobile requires a three tower scenario to provide effective wireless service to the areas of the Town covered by the Facility and those telecommunications facilities proposed by T-Mobile in Dockets 392 and 393. Increasing the height of any of these facilities would not obviate the need for any of the other proposed facilities or allow T-Mobile to reduce the height of any of those facilities.[4] *(Docket 391 Supplemental Pre-Filed Testimony of Scott Heffernan, dated February 24, 2010; 3.2.10 Tr., pp. 246-47; 4.20.10 Tr., p. 67-68.)*

A two tower scenario would not alleviate T-Mobile's existing coverage gap in the Town. Under such a scenario, gaps would exist in T-Mobile's network, which would result in network performance problems. Additionally, a two tower scenario would require taller facilities – much taller than those proposed by T-Mobile in this Docket as well as Dockets 392 and 393. *(3.2.10 Tr., p. 113; 4.20.10 Tr., pp. 68-69, 71-74, 111.)*

The difficulties inherent in a two tower solution to the coverage gaps in the Town are compounded by the coverage needs of Verizon and AT&T. Both wireless providers have established that coverage gaps exist in their respective networks in the area of the Town that would be covered by the Facility. AT&T could not use the telecommunications facilities proposed in Dockets 392 and 393 to alleviate its existing

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[4] SBA Towers II LLC ("SBA") proposed a telecommunications facility, consisting of a 170 foot monopole structure, on property owned by the Town, located at 14 Cross Lane ("SBA Facility"). The Town, however, rejected the proposed SBA Facility and did not to lease its property to SBA. *(2.4.10 3:00p.m. Tr., pp 10-11; 4.20.10 Tr., p. 84; T-Mobile's Responses to the Council's Second Set of Interrogatories ["T-Mobile Second Interrog. Resp."].)*

coverage gap. Although Verizon could use the telecommunications facility proposed in Docket 392, Verizon could not alleviate its coverage gap with the facility proposed in Docket 393. *(Docket 391 Verizon pre-hearing filing, April 26, 2010; Docket 391 AT&T filing, June 28, 2010; 4.20.10 Tr., p. 168-70; 6.23.10 Tr., pp. 20, 31-32.)*

C. Although the Issue Of Alternative Technologies Is Controlled By Federal Law, The Record Shows That There Are No Feasible Alternative Deployment Technologies To The Facility.

During the proceedings, the Council requested information regarding Outdoor Distributed Antenna Systems ("DAS"). The Council requested the following information from T-Mobile:

1. Is a DAS a feasible deployment technology in the area that would be served by the Facility?

2. How many locations (DAS nodes) would be necessary to provide coverage in the area that would be served by the Facility?

3. What would be the estimated cost for a DAS in the area that would be served by the Facility?

4. What would be the process for obtaining the easements necessary for installing a DAS in the area that would be served by the Facility?

5. From whom would easements be necessary to implement a DAS in the area that would be served by the Facility?

T-Mobile objected to this inquiry because it exceeds the scope of the Council's authority over wireless carriers and services under federal law. The federal government has occupied the field of technical standards for wireless transmissions for decades, and any action by a state or local government entity to dictate or encourage the adoption of alternative technologies such as DAS interferes with the federal regulatory scheme and is preempted.

The Second Circuit has recently spoken to this precise issue, and forcefully reaffirmed these principles. In a *per curiam* opinion in *New York SMSA Ltd. P'ship v. Town of Clarkstown*, No. 09-1546-cv, 2010 WL 2598310 (2d. Cir. June 30, 2010), the Second Circuit affirmed the District Court's determination that federal law preempted a local ordinance which sought to regulate radio frequency interference and impose a preference for certain "alternative" deployment technologies, including specifically DAS. *Id.*, *6. In affirming the lower court decision, the Second Circuit agreed "that federal law occupie[s] the fields of (1) regulation of radio frequency interference and (2) the regulation of the technical and operational aspects of wireless telecommunications service." (Internal quotations omitted.) *Id.*

The Second Circuit explained that "Congress intended the FCC to possess exclusive authority over technical matters related to broadcasting and that Congress's grant of authority to the FCC was intended to be exclusive and to preempt local regulation." (Internal quotations omitted.) *Id.* More specifically, state and local regulations "setting forth a preference for alternate technologies are also preempted because they interfere with the federal government's regulation of technical and operational aspects of wireless telecommunications technology, a field that is occupied by federal law." (Internal quotations omitted.) *Id.*, *7. "While the Telecommunications Act of 1996 preserves the authority of State and local governments over zoning and land use matters . . . this authority does not extend to technical and operational matters, over which the FCC and the federal government have exclusive authority . . . ." (Internal quotations omitted.) *Id.*, *8.

The Second Circuit's forthright decision speaks directly to and vindicates the objections raised by T-Mobile, and leaves no doubt that the Council is without authority to require or impose a preference for a particular wireless technology, including DAS. Similarly, the Council cannot delay or refuse to grant T-Mobile's application because a DAS has not been evaluated or considered to the Council's satisfaction.

Notwithstanding the legal implications of the Council's inquiry, T-Mobile endeavors to provide as much information as possible in response to the Council's requests in each and every docket. In this instance, T-Mobile provided detailed information regarding a DAS through the supplemental pre-filed testimony of Scott Heffernan, dated May 10, 2010. Representatives of T-Mobile also answered questions posed by the Council during the hearing. T-Mobile provided these responses without any waiver of any federal rights, such as T-Mobile's freedom to determine its system design and technology without unlawful local interference.

With T-Mobile's detailed responses, the record reveals that a DAS would not be a feasible deployment technology for the area that would be served by the Facility. The reasons are multifold.

First, the intended coverage area is too large for a DAS to be a practical alternative, as it includes Route 156, Mill Creek Road, Hawks Nest Road and Cross Lane, as well as the surrounding areas and the Amtrak rail line that passes through the area. To serve an area this size would require a prohibitively large number of DAS nodes. Second, the existing, uneven terrain and mature vegetation would prevent the DAS nodes from providing reliable coverage throughout the intended coverage area. Third, the unavailability and relatively low height of existing utility poles in the area

would compound the difficulties in deploying a DAS in this area of the Town. Fourth, the unavailability of unused fiber-optic cables to serve as the backbone of a DAS would also compound the difficulties in deploying a DAS in this area of the Town. Finally, T-Mobile would have to execute access easements, pole attachment agreements with the Town and/or one or more utilities, assuming the existing poles are sufficient for a DAS. *(Supplemental Pre-Filed Testimony of Scott Heffernan, dated May 10, 2010.)*

Accordingly, the record demonstrates that the Facility, as proposed, would alleviate the existing coverage gap in this area of the Town. Notwithstanding T-Mobile's reservation of its federal rights, the evidence submitted also shows that other deployment technologies, such as DAS, are not feasible solutions for the intended coverage objective in the Town.

D. The Record Supports A Valid Public Need For The Facility.

In summary, the record establishes that the Facility would alleviate coverage discrepancies for T-Mobile's network. The three tower scenario proposed by T-Mobile would also alleviate existing coverage gaps for Verizon and AT&T. Other deployment technologies would not remedy these coverage gaps. The Facility, therefore, would meet a significant public need for improved wireless telecommunications in the Town.

III. THE FACILITY WOULD HAVE A MINIMAL ENVIRONMENTAL IMPACT

In addition to demonstrating a public need for the Facility, T-Mobile must identify "the nature of the probable environmental impact . . . including a specification of every significant adverse effect . . . whether alone or cumulatively with other effects, on, and conflict with the policies of the state concerning, the natural environment, ecological

balance, public health and safety, scenic, historic and recreational values, forests and parks, air and water purity and fish, aquaculture and wildlife . . . ." General Statutes § 16-50p (a) (3) (B). The record is replete with evidence demonstrating that the Facility would have a minimal environmental impact, if any, on the surrounding areas, and would not conflict with any environmental policies of the State.

A. The Facility Would Not Have A Significant Impact On The Environment.

T-Mobile conducted a comprehensive environmental analysis of the Facility, which is attached to the Application as Exhibit K (Wetlands Report), Exhibit N (Visual Resource Evaluation Report), Exhibit O (Coastal Consistency Analysis) and Exhibit Q (NEPA Compliance Documentation). State and Federal authorities provided substantive responses (Exhibit O). The environmental analysis concluded that the Facility would not impact adversely the natural resources of the State.

The Property is not designated as a wilderness area and it is not located in any areas identified as a wildlife preserve or in a U.S. Fish and Wildlife Service National Wildlife Refuge. Nor would the Facility affect threatened or endangered species or designated critical habitats. Additionally, the proposed Facility would not impact any National Parks, National Forests, National Parkways or Scenic Rivers, State Forest, State Designated Scenic Rivers or State Game lands. *(App., p. 13; App. Ex. Q; Pre-Filed Testimony of Michael Chun ["Chun,"] p. 3.)*

The proposed Facility would not impact any recognized districts, sites, buildings, structures or objects of significance in American history, architecture, archeology, engineering or culture as listed on the National Register of Historic Places. On December 23, 2009, the State Historic Preservation Officer ("SHPO") determined that

the Facility would not have an adverse impact on any such resources. *(App., p. 14; App. Ex. O, Q; Chun, p. 4.)*

The proposed Facility would not affect any Native American religious sites. T-Mobile consulted with three Native American tribes – the Mashantucket Pequot Tribe, the Mohegan Indian Tribe and the Narragansett Indian Tribe – because they might have had interests impacted by the construction, operation and maintenance of the Facility. None of the Tribes responded that they have any interests that would be impacted by the Facility. *(App., p. 14; App. Ex. Q; Chun, p. 4; 2.4.10 3:00p.m. Tr., pp. 72-73.)*

T-Mobile also conducted a wetland analysis. The construction, maintenance and operation of the Facility would not have an adverse impact on any wetland. There are two wetland systems located nearby the proposed Facility. One wetland is a forested wetland system associated with a wetland system on an adjacent parcel to the east. The second wetland is a larger, more complex system located to the west. Most of the second wetland system is located on an adjacent parcel to the west. *(App., pp. 9, 16-17; App. Ex. B, K; Pre-filed Testimony of Dean E. Gustafson ["Gustafson,"] pp. 3-4; 2.4.10 3:00p.m. Tr., pp. 53-60; 4.20.10 Tr. pp. 49-50.)*

Although there are two wetland systems located on or near the Property, the proposed Facility would be located immediately adjacent to existing developed and disturbed areas associated with the storage facility on the Property and the Amtrak rail line adjacent to the Property. To avoid temporary impacts to these wetland systems, T-Mobile would install a silt fence during construction. T-Mobile would also stabilize the Facility with loam and a New England Conservation / Wildlife seed mix to avoid any permanent impacts. In addition, a buffer planting of native shrubs would be located

along the north, west and south sides of the proposed Facility to enhance the wetland buffer. This native wetland buffer would not require maintenance. The construction, maintenance and operation of the Facility would not have an adverse impact on these wetland systems.[5] *(App., pp. 9, 16-17; App. Ex. B, K; Gustafson, pp. 3-4; 2.4.10 3:00p.m. Tr., pp. 53-60; 4.20.10 Tr. pp. 49-50.)*

T-Mobile performed a coastal consistency analysis to confirm that the Facility would comply with the Connecticut Coastal Management Act, General Statutes § 22a-90 *et seq.* The Facility would not impact any coastal resources. There are no coastal resources located on or near the Property. The nearest coastal resource consists of tidal wetlands associated with Mile Creek located 800 feet west of the Site. *(App., p. 14; App. Ex. O; Gustafson, p. 5.)*

Lastly, T-Mobile conducted an aeronautical study in accordance with the regulations promulgated by the Federal Aviation Administration. Based upon that study, the proposed Facility would not require marking or lighting. *(App., p. 18; App. Ex. S, Revised Ex. S.)*

The record demonstrates that the Facility is categorically excluded from any requirement for further environmental review by the Federal Communications Commission in accordance with the National Environmental Policy Act of 1969. See 47 C.F.R. §§ 1.1306(b) and 1.1307(a). The comprehensive environmental analysis supports a finding that the Facility would not adversely impact the surrounding area.

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[5] The Facility would have no impact on water flow, water quality, or air quality and would comply with relevant noise regulations. Additionally, the Facility would not be located in a floodplain. *(App., p. 13; App. Ex. P; Gustafson, pp. 3-5; Chun, p. 4.)*

B. The Facility Would Not Have A Significant Visual Impact On The Surrounding Area.

Existing topography and mature vegetation would reduce some of the potential visual impacts of the proposed Facility on the surrounding areas. The average height of the tree canopy within a two mile radius of the Facility ("Study Area") is approximately 60 feet. The tree canopy covers nearly 3,804 acres of the 8,042 acre study area – with 2,605 acres of the Study Area consisting of surface water, mainly portions of the Long Island Sound. (*App., p. 11; App. Ex. N; Pre-Filed Testimony of Michael P. Libertine ["Libertine,"] p. 6.)*

The Facility would be set back approximately 900 feet from Shore Road, with screening provided by mature trees, limiting most of the nearby views to the upper 10 or 20 feet of the Facility. Residential development is limited to Otter Rock Road to the west and areas to the southeast, all at distances at or greater than 0.25 miles from the proposed Site. (*App., p. 11; App. Ex. B, N; Libertine, p. 6.)*

At the Site and with a proposed height of 100 feet AGL, the areas from which the Facility would be at least partially visible year round comprise approximately 1,817 acres. Approximately 97 percent of this area (1,773 acres) consists of open water on the Long Island Sound, over 0.50 miles away, where any views of the Facility would be limited to the top of Facility among surrounding vegetation. Aside from these more distant, open water views, some areas near the Facility would have year round partial views, including portions of Shore Road, Otter Rock Road, Hawks Nest Road and Washington Avenue. These views would be limited primarily to areas within 0.25 miles of the Facility. Areas of seasonal visibility would comprise approximately 55 additional

acres. These views would be within the immediate vicinity of the proposed Facility. (*App., pp. 11-12; App. Ex. N; Libertine, pp. 5-6.*)

The open water views on the Long Island Sound would have a minimal visual impact on the shoreline and the Facility would not impact any coastal resources. These views would be distant and limited to the very upper portion of the Facility, which would be difficult to discern above the tree canopy. The vegetative backdrop and the rising topography would limit the views of the Facility from the Long Island Sound. The existing development along the immediate shoreline would provide more prominent views than the proposed Facility.[6] *(App. Ex. M; Libertine, p. 5; 2.4.10 3:00p.m. Tr., pp. 64-68; 3.2.10 Tr., pp. 51, 72; 4.20.10 Tr., pp. 56-57.)*

The Facility would not have an adverse visual effect on historic, architectural, or archeological resources listed on or eligible for the National Register of Historic Places. This determination is consistent with SHPO's conclusion. *(App. Ex. M; Libertine, p. 6.)*

At the request of the Council, T-Mobile considered the visual impact of the proposed Facility at various heights. Aside from the proposed height of 100 feet, discussed above, T-Mobile also assessed the potential views of the Facility at 110 and 180 feet.

The views of the proposed Facility would not change significantly if the height of the Facility is increased from 100 feet AGL to 110 feet AGL at the Site. At either height, the views would be limited to the upper part of the Facility and would be primarily within close proximity to the Property (0.25 miles) or distant views from portions of the Long Island Sound. The Facility at 100 feet AGL would be visible from approximately 1,817

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[6] The Facility, along with the facilities proposed in Dockets 392 and 393, would not have a detrimental, cumulative impact on the shoreline. *(3.2.10 Tr., pp. 59, 216.)*

acres of the 8,042 acre Study Area. The Facility at 110 feet AGL would be visible from approximately 1,876 acres of the Study Area. At both heights, approximately 97 percent of the views (acreage) would be distant views on the Long Island Sound. *(Supplemental Pre-Filed Testimony of Michael P. Libertine ["Suppl. Libertine,"] pp. 2-3; AT&T filing, February 23, 2010.)*

The views of the Facility at a height of 180 feet AGL, located at the Site, would be more pronounced. The Facility would be visible year round from approximately 2,128 acres of the 8,042 acre Study Area; however, 95 percent (2,017 acres) of these views would consist of distant, open water views on the Long Island Sound. Areas where a shorter Facility might be visible would be subjected to views of a larger portion of the Facility above the tree canopy. Some developed areas to the south and southeast would experience an increase in visibility. *(Suppl. Libertine, p. 3.)*

C. Alternative Locations For the Facility On the Property.

At the request of the Council, T-Mobile considered two alternative locations for the Facility on the Property, with a purpose of increasing the buffer between the existing wetlands and the Facility compound. The first alternative would be slightly to the north of the Site in the northwest corner of the Property ("NW Location"). The second alternative would be located in the northeast corner of the Property ("NE Location"). *(T-Mobile filing, April 12, 2010; 4.20.10 Tr., p. 52.)*

The NW Location would increase the buffer between the Facility and the nearest wetland system from 20 feet to 38 feet. Neither the Site nor the NW Location would adversely impact any wetland systems. The NE Location would also not adversely

impact any wetland systems. *(4.20.10 Tr., pp. 49-50; Gustafson Memorandum, dated April 2, 2010.)*

The visibility of the proposed Facility at 100 and 110 feet AGL and situated in the NW Location would be substantially similar to the views of the Facility at the same heights and situated at the Site. *(Suppl. Libertine., pp. 2-3; 4.20.10 Tr., pp. 34, 37, 46.)* See Part III.B., *supra*.

The views of the Facility from the NE Location would differ somewhat from the views of the Facility at the Site and the NW Location. At 100 feet AGL, the Facility would be visible from approximately 1,899 acres within the 8,042 acre Study Area. The additional acreage of visibility would include a slight expansion of views to the east and southeast of the Property. These views would be within close proximity (0.25 miles) of the Facility and would be limited to the upper portions of the Facility. *(Suppl. Libertine, pp. 3-4; 4.20.10 Tr., pp. 35-36, 47.)*

At 110 feet AGL and situated in the NE Location, the Facility would be visible from approximately 1,953 acres of the 8,042 acre Study Area. These views would not differ significantly from the views of the Facility at 100 feet AGL. Most of the views would be distant, open water views on the Long Island Sound. Approximately 97 percent of this area (1,892 acres) would consist of open water views on the Long Island Sound. There would be additional views of the upper portions of the Facility from select areas to the northeast, east and southeast. *(Suppl. Libertine, p. 4; 4.20.10 Tr., pp. 35-36, 47.)*

The views of the Facility at 180 feet AGL from the NE Location would be more pronounced. The Facility would be visible year round from approximately 2,270 acres,

although 94 percent of these views (2,138 acres) would consist of distant, open water views on the Long Island Sound. A Facility at this height would substantially expand areas of year-round visibility, particularly in those neighborhoods to the south and southeast. *(Suppl. Libertine, p. 4; 4.20.10 Tr., pp. 35-36, 47.)*

Although the visibility of the proposed Facility at 100 and 110 feet AGL, from any of the locations on the Property, would not have an adverse visual impact on the surrounding areas, the Site and the NW Location would have less of a visual impact than the NE Location. Additionally, the NE Location would be more difficult from an engineering perspective. (*T-Mobile filing, April 12, 2010; 4.20.10 Tr., pp. 51-52.)*

D. The Migratory Bird Treaty Act Does Not Apply To T-Mobile's Application For A Telecommunications Facility.

The Migratory Bird Treaty Act ("MBTA") 16 U.S.C. § 703 *et seq.*, does not apply generally to wireless telecommunications facilities. To construe the MBTA otherwise would run contrary to common sense and render unworkable the federal mandate for universal wireless service under the Telecommunications Act of 1996.

Congress enacted the MBTA in 1918. It implements four bilateral migratory bird treaties signed between the United States and Canada (via Great Britain), Mexico, Japan and the former Soviet Union. *The Fund for Animals v. Norton*, 365 F. Supp.2d 394, 407 (S.D.N.Y. 2005), *aff'd*, 538 F.3d 124 (2008). The MBTA is a criminal statute enforced by the Secretary of Interior, which imposes strict liability on those who violate its provisions. *Id.*, 408; *see also Newton County Wildlife Ass'n v. United States Forest Serv.*, 113 F.3d 110, 114-15 (8th Cir. 1997), *cert. denied*, 522 U.S. 1108, 118 S. Ct. 1035, 140 L. Ed. 2d 102 (1998). The MTBA does not create a private cause of action. *The Fund for Animals v. Norton*, *supra*, 365 F. Supp.2d at 408.

The MBTA provides in relevant part:

> [I]t shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill . . . any migratory bird, nest, or egg of any such bird . . . included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916 (39 Stat. 1702), the United States and the United Mexican States . . . Japan . . . and the Union of Soviet Socialists Republics

16 U.S.C. § 703.[7]

Research has not revealed any decisional law addressing the MBTA in the context of wireless telecommunications facilities. However, some Circuits have limited the MBTA's purview when moving beyond the conduct of hunters and poachers.

One such limitation is "habitat modification or destruction." *Seattle Audubon Society v. Evans*, 952 F.2d 297, 302 (9th Cir. 1991)(holding that MBTA does not apply to sale of logging rights). "Strict liability may be appropriate when dealing with hunters and poachers [however] it would stretch this 1918 statute far beyond the bounds of reason to construe it as an absolute criminal probation on conduct, such as timber harvesting, that *indirectly* results in the death of migratory birds. . . . [T]he ambiguous terms "take" and "kill" in 16 U.S.C. § 703 mean physical conduct of the sort engaged by in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute's enactment in 1918." (Internal quotation marks omitted.) *Newton County*

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[7] The MBTA neither defines nor references "flyways." Research has not revealed any decisional law applying the MBTA in instances involving "flyways." The "flyways" are geographic routes used by migratory birds. The United States Fish and Wildlife Service ("USFW") determines hunting seasons in the United States. *See* 50 C.F.R. §§ 20.105 and 20.152. Its regulations are administered regionally by the Atlantic, Mississippi, Central and Pacific Flyways Councils. *Id.* The Flyways Councils are independent organizations that consult with the USFWS regarding the welfare of migratory birds and the public's interests in hunting and harvesting. *Id.*

Wildlife Ass'n v. United States Forest Serv., *supra*, 113 F.3d 115 (holding that MBTA does not apply to timber sales).

The Second Circuit also recognizes a reasonably limited interpretation of the MBTA. The Court has explained that an interpretation of the MBTA "that would bring every killing within the statute, such as deaths caused by automobiles, airplanes, plate glass modern office buildings or picture windows in residential dwellings into which birds fly, would offend reason and common sense." *United States v. FMC Corp.*, 572 F.2d 902, 905 (2d Cir. 1978) (holding that MBTA applied to company that discharged toxic chemicals into pond killing birds protected by statute).

The construction of the MBTA adopted by the Second, Eighth and Ninth Circuits is reasonably limited, particularly in light of the Telecommunications Act of 1996. In amending the Communications Act of 1934 with the Telecommunications Act of 1996, the United States Congress recognized the important public need for high quality telecommunications services throughout the United States. The purpose of the Telecommunications Act of 1996 was to "provide for a competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies to all Americans." H.R. Conf. Rep. No. 104-458, 206, 104th Cong., Sess. 1 (1996). The MBTA, therefore, cannot be construed to apply to telecommunications facilities in light of Congress' pronouncement that all Americans should have wireless services.

Moreover, the United States Fish and Wildlife Service ("USFW") has adopted interim guidelines for telecommunications facilities ("Guidelines") to minimize the impact of such facilities on migratory birds. These guidelines are not mandatory – they are

suggested measures while the USFW studies the impact of telecommunications facilities on migratory birds. The Facility would comport with the Guidelines: it would be well under 200 feet, without guy wires and unlit. *(App. Ex. B, P; Pre-Filed Testimony of Ashley Bonavenia ["Bonavenia,"] p. 3; 2.4.10 3:00p.m. Tr., p. 62.)*

Construing the MBTA to apply generally to wireless telecommunications facilities would render the federal mandate for universal wireless service unworkable. Accordingly, a reasonable interpretation of the MBTA, as adopted by several Circuits, would limit the purview of the statute from applying to such facilities.

E. Approval of T-Mobile's Application Would Comport With Existing Decisional Law.

Ultimately, the design and location of the Facility would minimize the Facility's environmental impact while addressing the coverage discrepancies in the area. The existing case law supports the approval of T-Mobile's Application as several Connecticut court decisions have affirmed the issuance of certificates for similar facilities and projects that involved comparable or greater environmental impacts than that proposed in the present application. *See generally Westport v. Connecticut Siting Council*, 47 Conn. Sup. 382, 797 A.2d 655 (2001), *Aff'd*, *Westport v. Connecticut Siting Council*, 260 Conn. 266, 796 A.2d 510 (2002); *Nobs v. Connecticut Siting Council*, No. CV 980492714S, 2000 WL 675643 (Conn. Super. Ct. April 28, 2000).

IV. A CERTIFICATE SHOULD ISSUE FOR THE PROPOSED FACILITY TO AVOID THE UNNECESSARY PROLIFERATION OF TOWERS

The Connecticut legislature has determined that the sharing of towers to avoid the unnecessary proliferation of towers is in the public interest. General Statutes § 16-

50aa. General Statutes §16-50p (b) (1) (A) requires the Council to consider the feasibility of tower sharing to avoid the unnecessary proliferation of telecommunications facilities. "The sharing of facilities is encouraged, if not required by General Statutes §16-50p (b) (1) (A)." *Nobs*, 2000 WL 675643, at *2 n.1.

Certification of the proposed Facility would be in the public interest. There are no other existing facilities or structures in this area upon which T-Mobile could co-locate. The Facility would provide co-location opportunities for municipal public safety communications systems and three other wireless providers, which would limit the proliferation of telecommunications facilities.

Verizon and AT&T have intervened in the proceedings and expressed an interest to locate their respective equipment on the Facility. Additionally, the Town has indicated an interest to locate its public safety communication system on the Facility. Accordingly, this Facility, in conjunction with the facilities proposed in Dockets 392 and 393, would satisfy the coverage needs of at least three wireless carriers in this area of the Town. Therefore approval by the Council would be consistent with the legislative mandate to avoid the unnecessary proliferation of towers. *(Docket 391 Verizon pre-hearing filing, April 26, 2010; Docket 391 AT&T filing, June 28, 2010; 4.20.10 Tr., p. 168-70; 6.23.10 Tr., pp. 20, 31-32.)*

VI. CONCLUSION

The record amply supports the approval of a certificate for the Facility. The Facility is necessary to provide adequate wireless coverage in this area of the Town. T-Mobile has demonstrated that the Property is the best location for a facility which would

address the coverage issues in this area with the least amount of environmental impact. T-Mobile requests that the Council issue a certificate for the Facility, reflecting in its Decision and Order, consistent with General Statutes § 16-50x, that such approval satisfies and is in lieu of all local and state approvals and certifications.

THE APPLICANT,
T-MOBILE NORTHEAST LLC

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on this day a copy of the foregoing was delivered by Electronic Mail and regular mail, postage prepaid, to all parties and intervenors of record, as follows:

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