STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL

IN RE: T-MOBILE NORTHEAST, LLC	:	DOCKET #393
APPLICATION FOR CERTIFICATE FOR	:	
TELECOMMUNICATIONS FACILITY AT	:	
BUTTONBALL ROAD, OLD LYME	:	JULY 22, 2010

POST-HEARING BRIEF OF THE BLACK HALL CLUB

The Black Hall Club ("Black Hall") appreciates the need for wireless telecommunications, and even attempted to host a190 foot facility (significantly taller than the proposed 100 ft tower) in the past until they learned the facility would have too great a visual impact to its neighbors.

In good faith, and out of respect for the Council's intent to provide adequate coverage for the gap in service in Old Lyme by the least intrusive means, Black Hall negotiated a stipulation which meets the need identified in the record for wireless coverage. (Joint Stipulation, Exhibit B-16).

Black Hall objects to any greater height or configuration (T-arms of other projecting transmission equipment) on the grounds that the record demonstrates a need at most for the stipulated configuration and no more. For the Council to approve a taller height or more visually intrusive configuration in order to accommodate the speculative and unproven needs of as yet unidentified carriers (as was suggested by at least one Council member) would constitute clear error, especially where the Applicant and intervening carriers in Docket 391[1] which was heard in conjunction with this and

[1] As the Council is aware, AT&T and Verizon intervened in Docket 391, but not specifically in Docket 393 or 392 which are also located in Old Lyme. Had AT&T or Verizon felt that their customers would be served by the Buttonball Road site, they certainly were capable of expressing that interest. In fact, during the proceedings of Docket 391, AT&T analyzed the Buttonball Road site in its analysis of the sites in Dockets 392 and 393 dated June

Applicant's third application in Old Lyme specifically testified that the Buttonball Road site was not a solution to their coverage needs.

There is nothing in the record to suggest that any other carrier would be served by the Buttonball Road site or to suggest that the public need would be served by additional height or a T-arm or platform configuration to reserve additional space.

This point bears clarification and emphasis. As the record only contains an indication that the gap in service exists in T-Mobile's coverage and specifically does not contain any indication of any gap in service for any other carrier near the Buttonball Road site, it would be an arbitrary and capricious determination to approve a configuration other than the stipulated configuration. Further, any reservation of space on the Buttonball Road tower for future carriers would not be based upon evidence in the record and would be reversible error under the rule in Finley v. Orange Inland Wetland Commission, 289 Conn. 12, 38-41 (2008).

Thus, Black Hall urges the Council to approve the stipulated configuration as negotiated by the parties to these proceedings.

ARGUMENT

A. The Parties' Stipulation Must Be Approved Under the TCA.

The Telecommunications Act of 1996 mandates that only "significant gaps" be filled. Sprint Spectrum L.P. v. Willoth, 176 F.3d 630 (2d Cir. 1999). In that case, Sprint filed an application to build three cell sites with a 150-foot tower at each location in

28, 2010 and found it was specifically not acceptable for the provision of coverage and was "too close" to its existing tower at Mile Creek Road. Significantly, AT&T and Verizon, as the only other carriers that bothered to intervene in the Old Lyme applications, indicated that they did not have a gap in service in the Buttonball Road area.

Ontario, New York. The zoning commission denied the application and Sprint appealed. The Second Circuit affirmed the District Court's summary judgment ruling in favor of the commission. One of the issues raised by Sprint was that the commission's denial of its application "prohibits or has the effect of prohibiting the provision of personal wireless services" in violation of §332(c)(7)(B)(i)(II) of the Act. In that case, as in this one, the applicant argued that it has the right under the Act "to construct any and all towers that, in its business judgment, it deems necessary to compete effectively with other telecommunications providers." Id. at 639. In rejecting this claim, the Second Circuit reasoned that since Sprint would never propose to build a tower it thought was unnecessary to compete, "such a rule would effectively nullify a government's right to deny construction of wireless telecommunications facilities, a right explicitly contemplated in 47 U.S.C. § 332(c)(7)(B)(iii)." Id. Instead, the Second Circuit held that "the Act's ban on prohibiting personal wireless services precludes 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. Sprint v. Willoth, *supra,* has been followed by many Courts, including the Third Circuit. In adopting the rule emanating from Willoth, the Third Circuit requires proof that: (1) "the facility will fill an existing significant gap in the ability of remote users to access the national network" and (2) "the manner in which it proposes to fill the significant gap in service is the least intrusive on the values that the denial sought to serve." APT Pittsburgh Limited Partnership v. Penn Township, 196 F.3d 469, 480 (3d. Cir. 1999).

The Town of Old Lyme also testified that it did not need the Botton Ball Road site for its emergency communications purposes and that they were pursuing the location in Docket 392 for this purpose.

The burden of not only demonstrating the existence of a significant gap but also of proving that the manner in which that gap will be filled is the least intrusive means possible rests squarely with the Applicant – a standard which also binds this Council. While Black Hall does not dispute that there is a gap in coverage in certain parts of Old Lyme for one carrier, the record established by the Applicant supports that only a 100-foot brown stick monopole with flush mounted antennae is necessary to fill that gap and that it is the least intrusive means of filling that gap, even when utilizing the carriers' "optimal standard" of 99% reliability which is significantly greater than the adequate reliability standard under the Telecommunications Act. Indeed, approving a facility based on the heightened standard presented by the carrier constitutes clear error.

CONCLUSION

Based upon the foregoing, the Black Hall respectfully requests that the Council approve a Certificate with the specific conditions set forth in the Stipulation.

Respectfully Submitted,

Black Hall Golf Club

By_____

Keith R. Ainsworth, Esq.
Evans Feldman & Ainsworth, L.L.C. #101240
261 Bradley Street
P.O. Box 1694
New Haven, CT 06507-1694
(203)772-4900
(203)782-1356 fax
krainsworth@snet.net

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing was deposited in the United States mail, first-class, postage pre-paid this 22nd day of July, 2010 and addressed to all parties and intervenors on the attached service list and as noted below.

Mr. S. Derek Phelps, Executive Director, Connecticut Siting Council, 10 Franklin Square, New Britain, CT 06051 (1 orig, 15 copies, plus 1 electronic).

T-Mobile Northeast, LLC c/o Julie Kohler, Esq., Cohen & Wolf, LLP, 1115 Broad Street, Bridgeport, CT 06604 (203) 368-0211/(203) 394-9901 fax jkohler@cohenandwolf.com

Town of Old Lyme c/o The Hon. Tim Griswold, 52 Lyme Street, Old Lyme, CT 06371

Keith R. Ainsworth, Esq.