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 61-1 BUTTONBALL ROAD IN THE TOWN OF OLD LYME, CONNECTICUT	DOCKET NO. 393 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 61-1 Buttonball Road, Old Lyme, Connecticut

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[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 southeastern portion of a 2.53 acre parcel owned by Ron Swaney, LLC, commonly known as 61-1 Buttonball Road, Old Lyme, Connecticut, and designated as Map 8, Block 11, Lot 1 in the Town of Old Lyme's ("Town") Tax Assessor's Records. The Property is zoned for light industrial uses and currently serves various commercial functions. *(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 2,500 square foot compound, which would sit within a 5,625 square foot 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 parking area. Utility service would extend underground from an existing transformer and telephone demarcation point on the Property. *(App., pp. 1-2, 9, 13; App. Ex. B; Chasse, p. 3; March 2, 2010 Transcript ["3.2.10 Tr.,"] p. 123.)*

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 Buttonball Road and Route 156, 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. 3-5; 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; 3.2.10 Tr., pp. 137-40, 146, 154-55; April 20, 2010 Transcript ["4.20.10 Tr.,"] pp. 118.)*

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. *(February 4, 2010 3:00p.m. Transcript ["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 97'9" 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.)*

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 391 and 392. 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.[3] *(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 391 and 392. *(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 telecommunications facility proposed in Docket 391. AT&T could not use the Facility or the telecommunications facility proposed in Docket

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[3] 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."])*

392 to alleviate its existing coverage gap. Although Verizon could use the telecommunications facility proposed in Docket 392, Verizon could not alleviate its coverage gap with the Facility. *(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.*, at *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 Buttonball Road and Route 156, 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 M (Visual Resource Evaluation Report), Exhibit N (Coastal Consistency Analysis) and Exhibit P (NEPA Compliance Documentation). State and Federal authorities provided substantive responses (Exhibit N). 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. P; 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 August 28, 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. N, P; 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., pp. 14-15; App. Ex. P; Chun, p. 4.)*

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 is a wetland located on the Property approximately 275 feet west of the Site. There is another wetland system, a man-made irrigation pond, located approximately 175 feet east on an adjacent parcel. These wetland systems are too far from the Site to be impacted directly or indirectly by the Facility.[4] *(App., pp. 16-17; App. Ex. B, K; Pre-Filed Testimony of Dean E. Gustafson ["Gustafson,"], pp. 2-3; Chasse, p. 4.)*

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 the Black Hall River located 1,500 feet west of the Site. *(App., p. 14; App. Ex. N; Gustafson, p. 4.)*

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[4] 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.)*

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. R, Revised Ex. R.)*

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.

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 5,041 acres of the 8,042 acre study area – with 1,767 acres of the Study Area consisting of surface water, mainly portions of the Long Island Sound. (*App., pp. 10-11; App. Ex. M; Pre-Filed Testimony of Michael P. Libertine ["Libertine,"] p. 6.)*

The Facility would be set back approximately 1,000 feet from Buttonball Road, with screening provided by mature trees, limiting most of the nearby views to the upper portions of the proposed Facility. The few residential properties within 0.25 miles of the Property are located to the west and southwest along Buttonball Road. (*App., p. 11; App. Ex. B, M; Libertine, p. 6.)*

The areas from which the Facility would be at least partially visible year round comprise approximately 289 acres, which is 3.6 percent of the entire Study Area. Approximately 91 percent of this area consists of the Great Island Tidal Marsh, located 1.25 miles to 2 miles southeast of the Facility and/or open water on the Long Island Sound to the south. These 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 Buttonball Road near the Facility, select portions of South Neck Road 1.25 miles to the southwest, and some open areas of the Black Hall Golf Course immediately adjacent to the Property. Areas of seasonal visibility would include approximately 39 additional acres, comprised largely of the Black Hall Golf Course located adjacent to the Property.[5] *(App., pp. 11-12; App. Ex. M; Libertine, p. 5.)*

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.)*

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[5] The Facility would be visible from the southern portion of the Great Island Wildlife Area. These views, however, would be distant and would be limited to the top of the Facility. *(App. Ex. M; Libertine p. 6; 3.2.10 Tr., pp. 162-63.)*

[6] The Facility, along with the facilities proposed in Dockets 391 and 392, would not have a detrimental, cumulative impact on the shoreline. *(3.2.10 Tr., pp. 59, 216.)*

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.)*

C. 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 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

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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.*

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 generally.

D. 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. THE INTERVENOR, BLACK HALL CLUB, INC., HAS OFFERED NO EVIDENCE TO SUPPORT PURPORTED CLAIMS UNDER GENERAL STATUTES § 22A-19 AND HAS NOT ESTABLISHED HARM

The Council granted intervenor status to the Black Hall Club, INC. ("BHC") under General Statutes § 16-50n and 22a-19. BHC is the owner of the Black Hall Golf Course ("Golf Course"), which abuts the Property. BHC's status as an intervenor is not supported by BHC's Petition to Intervene ("Petition") and the record.

A. Legal Standard For Intervention Under § 22a-19.

Section 22a-19 (a) provides in relevant part: "In any administrative, licensing or other proceeding, and in any judicial review thereof made available by law . . . any person, partnership, corporation, association, organization or other legal entity may

intervene as a party on the filing of a verified pleading asserting that the proceeding or action for judicial review involves conduct which has, or which is reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state." The standing conferred by § 22a-19 is limited strictly "to challenging only environmental issues covered by the statute and only those environmental concerns that are within the jurisdiction of the particular administrative agency conducting the proceeding into which the party seeks to intervene." (Internal quotation marks omitted.) *Pond View, LLC v. Planning & Zoning Commission*, 288 Conn. 143, 157, 953 A.2d 1 (2008).

A would-be intervenor must submit a "verified pleading" containing "specific facts." *Nizzardo v. State Traffic Commission*, 259 Conn. 131, 164, 788 A.2d 1158 (2002). The specific factual allegations must set forth the environmental issues that the intervenor intends to raise. *Id.*, 164-65. "A [verified pleading] does not sufficiently allege standing [however] by merely reciting the provisions of § [22a-19], but must set forth facts to support an inference that unreasonable pollution, impairment or destruction of a natural resource will probably result from the challenged activities unless remedial measures are taken." (Internal quotation marks omitted.) *Finley v. Inland Wetlands Commission*, 289 Conn. 12, 35, 959 A.2d 569 (2008).

The requirement to allege a sufficient factual predicate comports with the pleading standards of the Practice Book, which requires a pleading to contain the material facts upon which the pleader relies. *Nizzardo v. State Traffic Commission*, *supra*, 259 Conn. 163; Practice Book § 10-1. Ultimately, the would-be intervenor must

articulate a colorable claim of unreasonable pollution, impairment or destruction of the environment. *Finley v. Inland Wetlands Commission*, *supra*, 289 Conn. 35.

B. BHC's Petition Is Insufficient As A Verified Pleading And Fails to Articulate A Valid Basis for Intervention.

T-Mobile objected to BHC's Petition insofar as BHC sought intervention under § 22a-19 ("Objection"). T-Mobile objected on the grounds that the Petition did not (1) articulate any valid environmental claims and (2) set forth specific facts in support of BHC's purported environmental claims

As discussed in the Objection, BHC did not articulate any valid environmental claims which would trigger § 22a-19. The only claim discernable from the Petition is that BHC would be able to view portions of the Facility from the Golf Course. *(Objection, pp. 4-5.)* A neighbor's potential view of a proposed telecommunications facility, without more, does not constitute unreasonable pollution, impairment or destruction of the State's natural resources as required by § 22a-19. This allegation does not allow for a reasonable inference of such an impact. If this were the case, then most, if not all, tall structures would unreasonably impact the State's natural resources in violation of § 22a-19.

Aside from the legal infirmities of BHC's purported harm, BHC's claim is also dubious on its facts. BHC previously supported the installation of a 190 foot telecommunications facility on property owned by Black Hall across the street from the Golf Course. This tall structure would have been visible from the Golf Course. BHC cannot claim that the Facility proposed by T-Mobile would harm BHC when BHC was willing to host a much taller facility on property adjacent to the Golf Course.

Finally, BHC argued that it is "an organization which utilizes the benefits of the coastal area scenic vistas" and therefore is "well situated to raise issues of protection of the scenic vistas both on and off its property." *(BHC Reply Br., pp. 4-5.)* However, the Petition is devoid of any facts indicating that the Golf Course has any "coastal vistas" on its property or enjoys nearby "scenic vistas." Moreover, BHC does not allege any facts in its Petition which would suggest an adverse impact to the "visual quality of a natural resource through an alteration of the natural features of the vistas." *See* General Statutes § 22a-93 (15).

The allegations in the Petition are vague, conclusory and merely parrot the language of the statute. Such allegations are an insufficient basis upon which to intervene under § 22a-19. Moreover, § 22a-19 pertains to claims of unreasonable pollution, impairment or destruction of "natural resources," and does not pertain to claims by a private property owner that it would have views of a new structure. The Petition, therefore, does not present a colorable claim under § 22a-19.

C. The Record Does Not Support Any Of The Alleged Bases For BHC's Intervention Under § 22a-19.

BHC's sole reason for intervening in the proceedings is the potential visual impact of the proposed Facility on the Golf Course. BHC did not intervene in the proceedings because it is concerned with, or claims any harm to, natural resources including, but not limited to, the Long Island Sound, other "coastal vistas" or "scenic vistas." The following colloquy crystallizes this fact:

> MR. LANGER: Okay, thank you. Is it fair to say that your primary concern is the visibility of the proposed tower on the golf course?
>
> MR. SCULL: Yes.

> MR. LANGER: Okay. Okay, thank you. And so -- then you really aren't concerned about the outlying portions, whether it's Long Island Sound or any other areas? It's really the impact of the tower on the golf course?
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> MR. SCULL: Correct. As good neighbors, you know, we certainly want the increased service, but our main concern is the visual impact on our course, correct.

(June 23, 2010 Transcript ["6.23.10 Tr.,"] pp. 166-67.)

Moreover, BHC offered no evidence in support of its position. The only evidence was the limited testimony of Mr. Scull and Groark, two members of the Golf Course Board. That testimony revealed that BHC's only concern is the potential views of the Facility from the Golf Course. BHC affirmatively disavowed any claim to natural resources, such as "coastal vistas" or "scenic vistas." Equally important, BHC did not produce any experts to establish that the Facility would unreasonably pollute, impair or destroy any of the State's natural resources.

Nor has BHC offered any expert testimony to rebut the qualified and credible testimony of T-Mobile's panel of experts. BHC did not submit <u>any</u> evidence refuting T-Mobile's articulated need for the Facility or the lack of an impact by the Facility on the environment.

Lastly, the record reveals that BHC's claim of harm is disingenuous at best. BHC had agreed previously to locate a 190 foot telecommunications facility on its property, an old quarry site, located across the street from the Golf Course ("BHC Facility"). The BHC Facility would have been located approximately 320 feet west of Buttonball Road directly across the street from the Golf Course. The BHC Facility was proposed by

another wireless provider and considered by the Council in Docket 202.[8] *(Docket 202; Suppl. Libertine, pp. 3-4.)*

The BHC Facility would have been visible from the Golf Course. The total acreage of year-round visibility from the Golf Course would have been similar to the views on the Golf Course of the proposed Facility (approximately 11 acres). The BHC Facility would have been significantly more visible to the surrounding area than the proposed Facility, particularly to the south and southwest, including the Long Island Sound and residential neighborhoods. The BHC Facility would have been visible from approximately 1,719 acres of the Study Area, while the Facility would be visible from approximately 289 acres of the Study Area. *(Suppl. Libertine, pp. 3-4.)*

Ultimately, the BHC has failed to allege and establish standing under § 22a-19. The Petition does not constitute a "verified pleading" as required by the statute. Regardless, the allegations do not form a valid environmental claim contemplated by § 22a-19. The record belies any of the BHC's contentions and highlights the fact that the BHC is not claiming any harm to the natural resources of the State.

T-Mobile, however, has worked with BHC to address BHC's concerns regarding the proposed Facility. As discussed above, representatives of T-Mobile and BHC met at the Golf Course and conducted a balloon float to assess the views of the Facility from the Golf Course and to discuss alternative configurations of the Facility. These efforts culminated in a Joint Stipulation between the parties. *(Suppl. Libertine, pp. 3-4.)*

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[8] The old quarry site was the primary site for the BHC Facility in Docket 202. Although the applicant withdrew one of the alternative sites from consideration, the applicant did not withdraw the old quarry site from consideration. Ultimately, the Council selected the second alternative site over the old quarry site for the telecommunications facility in Docket 202. *(Docket 202, Findings of Fact.)*

D. Joint Stipulation Between T-Mobile and BHC.

On or about April 9, 2010, T-Mobile and BHC executed a Joint Stipulation, whereby the signatories agreed, subject to the approval of the Council, to re-configure the Facility so that it would consist of a "brown stick" tower at the originally proposed height of 100 feet AGL. T-Mobile would attach its antennae to the tower with flush mounts as opposed to T-arms. To achieve its coverage objective, T-Mobile would require two positions on the Facility at 97'9" and 87'9" AGL. The re-configured Facility would accommodate up to two additional wireless carriers. *(Joint Stipulation; 4.20.10 Tr., pp. 114-15.)*

The fenced compound area would host T-Mobile's equipment and the equipment of up to two other wireless carriers. The re-configured Facility would include an 8 foot high cedar fence along the two sides of the Facility compound that face the Golf Course. *(Joint Stipulation; 4.20.10 Tr., pp. 114-15.)*

T-Mobile and BHC agree that the re-configured Facility would balance T-Mobile's coverage needs and provide opportunities for co-location, as well as further minimize the visual impact of the Facility. T-Mobile respectfully requests that the Council adopt the re-configured Facility.

V. 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, as proposed, three other wireless providers, which would limit the proliferation of telecommunications facilities. Should the Council adopt the re-configured Facility, as proposed in the Joint Stipulation, the Facility would afford co-location opportunities for municipal public safety communications systems and up to two other wireless providers, which would also limit the proliferation of telecommunications facilities.

Verizon and AT&T would also provide coverage to this area from their existing facilities and/or their relative positions on the telecommunications facility proposed by T-Mobile in Docket 391. Accordingly, this Facility, in conjunction with the facilities proposed in Dockets 391 and 392, 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,
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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:

The Honorable Timothy C. Griswold
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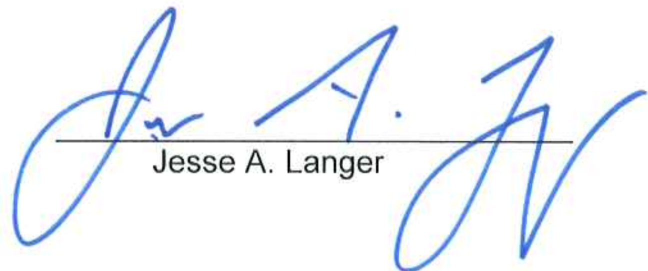

Jesse A. Langer