DOCKET NO. 448 – Cellco Partnership d/b/a Verizon Wireless application for a Certificate of Environmental Compatibility and Public Need for the construction, maintenance, and operation of a telecommunications facility located at Orange Tax Assessor Map 77, Block 3, Lot 1, 831 Derby Milford Road, Orange, Connecticut.	}	Connecticut Siting Council October 17, 2014

Staff Report
Intervenors' Motion for Order to Compel Production of Documents

On October 10, 2014, Intervenors, Subbloie, et al (Intervenors) submitted to the Connecticut Siting Council (Council) a Motion for Order to Compel Production of Documents (Motion) on the basis that the applicant, Cellco Partnership d/b/a/ Verizon Wireless (Applicant) has not agreed to produce certain records and/or data supporting the Applicant's claim that the proposed telecommunications facility is needed to provide capacity relief to the Applicant's network. On October 14, 2014, the Applicant submitted to the Council an Opposition to Intervenors' Renewed Motion to Compel Production of Documents on the basis that the Applicant has presented the Council with substantial evidence in support of the application and that the Intervenors have received the opportunity granted them under the law to participate in this proceeding. As set forth more fully below, the information requested by the Intervenors is not integral for the Council to render a decision on the application that complies with the federal Telecommunications Act (TCA), the state Public Utility Environmental Standards Act (PUESA) and the state Uniform Administrative Procedure Act (UAPA).

1. **The Council is preempted by the Federal Communications Commission (FCC) on any determination of public need under the TCA whether public need is based on coverage or capacity.**

The legislative purpose of the federal TCA is "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and *encourage the rapid deployment of new telecommunications technologies.*" (Emphasis added.)[1] Through the passage of this Act, Congress clearly vested the FCC with the authority to promulgate regulations to meet the stated goal. In exercising exclusive authority to grant licenses to telecommunications providers under the TCA, the FCC establishes design standards to ensure technical integrity and nationwide compatibility among all systems.[2] FCC regulations set forth technical standards for use of the spectrum and equipment in personal communications services, including antennas.[3] Verizon holds FCC licenses to provide wireless services in the 700 MHz, 850 MHz, 1900 MHz and 2100 MHz frequency ranges and pursuant to these FCC licenses, Verizon maintains and operates a network of cell sites to serve the

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. §151, *et seq.*)
[2] *Id.; City of New York v. FCC,* 486 U.S. 57 (1988) (FCC intended to preempt state technical standards governing the quality of cable television signals.); *New York SMSA Limited Partnership, et al v. Town of Clarkstown,* 612 F.3d 97 (2nd Cir. 2010) ("Congress gave the FCC exclusive authority to grant licenses to telecommunications providers and it intended the FCC to possess exclusive authority over technical matters related to radio broadcasting.")
[3] FCC Personal Communications Services Technical Standards, 47 C.F.R. §24.50 (2014); *City of New York, supra* note 2; *New York SMSA Limited Partnership, supra* note 2; *Cellular Phone Taskforce, et al v. FCC,* 205 F.3d 82 (2nd Cir. 2000) (State and local governments are preempted from regulating the operation and construction of a national telecommunications infrastructure, including construction and operation of personal wireless communications facilities.)

demand for advanced wireless services, including the provision of telecommunications coverage.[4] In accordance with the provisions of the TCA, FCC regulations promulgated thereunder and federal case law interpreting these provisions, it is well established that the FCC preempts state or local regulation on matters that are exclusively within the jurisdiction and authority of the FCC, including, but not limited to, network operations[5], radio frequency interference[6], radio frequency emissions[7], customer information[8], competition[9], and spectrum.[10] Preservation of state or local authority extends only to placement, construction and modifications of facilities based on matters not directly regulated by the FCC, such as environmental impacts. Telecommunications coverage is directly regulated by the FCC. Therefore, based on the provisions of the TCA related to rapid deployment of new telecommunications technologies and the interpretations of those provisions in federal case law, Congress clearly intended for the FCC to preempt any determination of public need for telecommunications coverage.

In 2010, the FCC released the National Broadband Plan "to ensure every American has access to broadband capability."[11] Section 706 of the TCA specifically relates to Broadband Data Improvement and states, "The Commission and each State commission with regulatory jurisdiction over telecommunications services *shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability* to all Americans.*"* (Emphasis added.)[12] As above, Congress clearly vested the FCC with the authority to promulgate regulations to meet the stated goal. In *Verizon v.*

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[4] Docket No. 448, Cellco Partnership d/b/a Verizon Wireless Application for a Certificate of Environmental Compatibility and Public Need, p. 8, received May 13, 2014.

[5] *Id., New York SMSA Limited Partnership, supra* note 2 (Town provisions setting forth a preference for "alternate technologies" preempted because of interference with FCC's regulation of technical and operational aspects of wireless telecommunications technology, a field that is occupied by federal law.)

[6] *Freeman v. Burlington Broadcasters, Inc.,* 204 F.3d 311 (2nd Cir. 2000) (FCC preemption of local zoning board condition of a permit to construct and use a communications tower that requires the permittees to remedy any radio frequency interference from tower signals with appliances and devices in local homes.)

[7] *Cellular Phone Taskforce, supra* note 3 (The Telecommunications Act preempts state and local governments from regulating the placement, construction or modification of personal wireless service facilities on the basis of the health effects of RF radiation where the facilities would operate within levels determined by the FCC to be safe.); *Jaeger v. Connecticut Siting Council,* 2010 U.S. Dist. LEXIS 24394 (D. Conn. 2010) ("…the FCC is the entity with the express authority to regulate acceptable RF emissions levels for cellular tower facilities."); 47 U.S.C. §332 (2014) (No state or local government or instrumentality thereof may regulate the placement, construction and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.)

[8] FCC Safeguards on the disclosure of customer proprietary network information, 47 C.F.R. §64.2010 (2014).

[9] 47 U.S.C. §253 (2014) ("No state or local statute or regulation, or other state or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."); 47 U.S.C. §332 (2014) ("The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof-- (I) shall not unreasonably discriminate among providers of functionally equivalent services; and (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.")

[10] 47 U.S.C. §1302 (2014) ("The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans…"); 47 U.S.C. §1455(a) (2014) ("…a state or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.")

[11] Federal Communications Commission, National Broadband Plan, *available at* http://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf

[12] 47 U.S.C. §1302 (2014) ("Advanced telecommunications capability" is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.)

FCC, the District of Columbia Circuit Court of Appeals held that Section 706 of the TCA grants the FCC the affirmative authority to promulgate rules governing broadband providers.[13] The Court cites to the legislative history of Section 706 of the TCA that describes the provision "as a "necessary fail-safe" intended to ensure that one of the primary objectives of the Act- to accelerate deployment of advanced telecommunications capability- is achieved."[14] FCC regulations set forth standards for the use of spectrum and equipment in personal communications services, including antennas.[15] Verizon's proposed facility would provide mobile wireless broadband services and personal wireless services, including the provision of telecommunications capacity.[16] Based on the provisions of the TCA, FCC regulations promulgated thereunder and federal case law interpreting these provisions, it is well established that the FCC preempts state and local regulation on matters that are exclusively within the jurisdiction and authority of the FCC. Preservation of state or local authority extends only to placement, construction and modifications of facilities based on matters not directly regulated by the FCC, such as environmental impacts. Telecommunications capacity is directly regulated by the FCC. Therefore, based on the provisions of the TCA related to rapid deployment of advanced telecommunications capability and the interpretation of Section 706 of the TCA in *Verizon v. FCC*, Congress clearly intended for the FCC to preempt any determination of public need for telecommunications capacity.

2. The definition of "public need" under the state PUESA does not apply to telecommunications facilities.

The legislative purpose of the state PUESA is "to provide for the balancing of the need for adequate and reliable public utility services at the lowest reasonable cost to consumers with the need to protect the environment and ecology of the state."[17] Under §16-50p of the PUESA, "a public need exists when a facility is necessary for the reliability of the electric power supply of the state."[18] In 2011, Governor Malloy vetoed Public Act 11-107, An Act Concerning the Siting Council, on the basis that "the language of the proposed bill would apply an illogical standard of review to applications for the siting of proposed cell towers."[19] Specifically, Public Act 11-107 proposed the following language, "The Council shall not grant a certificate for a [telecommunications] facility… unless it finds and determines a *public benefit* for

[13] *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) ("We think it reasonable to believe that Congress contemplated that the Commission would regulate this industry, as the agency had in the past, and the scope of any authority granted to it… both by the boundaries of the Commission's subject matter jurisdiction and the requirement that any regulation be tailored to the specific statutory goal of accelerating broadband deployment is not so broad that we might hesitate to think that Congress could have intended such a delegation.")
[14] *Id.*; 47 U.S.C. §1302 (2014).
[15] FCC Personal Communications Services Technical Standards, 47 C.F.R. §24.50 (2014); *City of New York, supra* note 2; *New York SMSA Limited Partnership, supra* note 2; *Cellular Phone Taskforce, supra* note 3.
[16] Docket No. 448, Application for a Certificate of Environmental Compatibility and Public Need, p. 9, received May 13, 2014; In *the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901, Declaratory Ruling, WT Docket No. 07-53 (March 22, 2007) (The FCC determined that when a wireless provider's infrastructure is used to provide broadband services that are commingled with personal wireless service, this commingling of services does not change the fact that the facilities are being used for the provision of personal wireless services. This interpretation is consistent with the FCC's commitment to national broadband policy goals to promote the deployment of advanced telecommunications capability to all Americans in a reasonable and timely manner.)
[17] Conn. Gen. Stat. §16-50g, *et seq.*
[18] Conn. Gen. Stat. §16-50p(c)(3) (2014).
[19] Letter from Governor Malloy to Secretary of State Merrill, July 1, 2011, *available at* http://www.governor.ct.gov/malloy/lib/malloy/2011.7.1_Veto_Message_-_HB_6250.pdf; Journal of the House, Monday, July 25, 2011, Governor's Veto Messages.

the facility…" (Emphasis added.)[20] Under §16-50p of the PUESA, "a public benefit exists when a facility is necessary for the reliability of the electric power supply of the state or for the development of a competitive market for electricity."[21] Selection of the term "public benefit" over the term "public need" in Public Act 11-107 is telling despite the fact that both terms are equally inapplicable to telecommunications facilities. It is further evident in the passage of Public Act 12-165, the successor to Public Act 11-107, where new language included the phrase, "…the Council shall not render any decision pursuant to this subparagraph that is inconsistent with federal law."[22] Clearly, this language was inserted with the recognition that the Council is preempted by the FCC on a determination of public need and that the definition of "public need" under the state PUESA does not apply to telecommunications facilities.

3. The Intervenors will not be deprived of administrative due process rights under the state UAPA without the Applicant's submission of the requested FCC-regulated information.

In their Motion, Intervenors claim that Applicant's refusal to submit the requested information will deny the Intervenors' constitutional, statutory and common law rights to a fair and meaningful hearing. Intervenors made the same motion, which was denied, during the evidentiary hearing held on September 16, 2014 after an extensive discussion during cross examination of the Applicant regarding a question from Council member, Dr. Klemens, as to "when does the anticipation rise to the level of a public need?," to which Council Chairman Stein replied, "the FCC is the one who preempts the public need."[23] In their Motion, Intervenors' cite to Applicant's response to Intervenors' Interrogatory no 57 [66] that "the customer specific information… is confidential information that Cellco cannot disclose" as an example of the Applicant intentionally not producing "all of the records, reports and information relied upon to justify the need for the Orange North cell site," but under FCC regulations, there are provisions for safeguards on the disclosure of customer proprietary network information.[24] As indicated by FCC regulation and by the Council Chairman during the September 16, 2014 public hearing, the requested FCC-regulated information is relative to matters that are within the exclusive authority of the FCC under the TCA and is not integral to the Council's decision on this cell tower application.

Under the TCA, the PUESA and the UAPA, the Council is required to render a written decision based on substantial evidence.[25] In contested cases, the agency's experience, technical competence and specialized knowledge may be used in the evaluation of the evidence, including knowledge of agency records.[26] Intervenors presented an expert witness, Mr. Maxson, a radio frequency engineer who authored a report on Verizon's proposed telecommunications facility.[27] During the evidentiary hearing held on September 16, 2014, Council Siting Analyst, Mr. Mercier asked Mr. Maxson of his report, "Do you need Verizon's dominant server information to create any refinements to this map?"[28] Mr. Maxson replied, "I do not."[29] When an agency makes a decision in the face of disputed technical facts, the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.[30] Furthermore, even though experts may disagree, the FCC is the

[20] Public Act 11-107, An Act Concerning the Siting Council, *available at* http://www.cga.ct.gov/2011/ACT/PA/2011PA-00107-R00HB-06250-PA.htm
[21] Conn. Gen. Stat. §16-50p(c)(3) (2014).
[22] Public Act 12-165, An Act Concerning the Siting Council, codified at Conn. Gen. Stat. §16-50p(a)(3)(G) (2014).
[23] Docket No. 448, September 16, 2014 Public Hearing Transcript, pp. 523-524; 553-562.
[24] FCC Safeguards on the disclosure of customer proprietary network information, 47 C.F.R. §64.2010 (2014).
[25] 47 U.S.C. §332 (2014); Conn. Gen. Stat. §16-50p (2014); Conn. Gen. Stat. §4-180 (2014).
[26] Conn. Gen. Stat. §4-178 (2014); *FairwindCT, Inc. v. Connecticut Siting Council*, 313 Conn. 669 (2014).
[27] Docket No. 448, David Maxson, *Isotrope Report on Analysis of Proposed Cell Tower*, dated September 8, 2014.
[28] Docket No. 448, September 16, 2014 Public Hearing Transcript, pp. 362-363.
[29] *Id.*
[30] *Cellular Phone Taskforce, supra* note 3.

entity with the express authority to regulate coverage and capacity matters for telecommunications facilities.[31]

Under the UAPA, each party and the agency conducting the public hearing shall be afforded the opportunity to respond, to cross examine other parties, intervenors and witnesses, and to present evidence and argument on all issues involved.[32] The Connecticut Supreme Court held that an agency is not required to use the evidence and materials presented to it in any particular fashion as long as the conduct of the hearings is fundamentally fair and due process requires not only that there be due notice of a hearing, but at the hearing parties involved have a right to produce relevant evidence, and an opportunity to know the facts on which the agency is asked to act, to cross examine witnesses and to offer rebuttal evidence, all of which represent administrative due process rights.[33] This application was submitted to the Council on May 13, 2014. Intervenors participated in the pre-hearing teleconference for this proceeding that was held on June 24, 2014 and were granted intervenor status on July 17, 2014. To date, three evidentiary hearings have been held on this application for which the Intervenors were provided due notice, the right to produce relevant evidence, an opportunity to know the facts on which the Council is to act and an opportunity to cross examine witnesses. These evidentiary hearings were held on July 17, 2014, August 12, 2014 and September 16, 2014. Another evidentiary hearing is scheduled to be held on October 23, 2014 at which time Intervenors will have another opportunity to cross examine the Applicant. Therefore, the Intervenors will not be deprived of administrative due process rights under the UAPA without the Applicant's submission of the requested FCC-regulated information.

Conclusion

Based on FCC preemption in matters including, but not limited to, network operations, customer information, and spectrum, this Council has never requested a cell tower applicant to submit link budgets, modeling tools, or customer specific data into the evidentiary record. There is no provision in the PUESA that requires the submission of this type of FCC-regulated information. There is no provision in the PUESA that requires a determination on public need. There is a provision in the PUESA that the Council may deny an application for a proposed telecommunications facility if it determines that shared use is feasible, the applicant would not cooperate relative to the future shared use of the proposed facility or the proposed facility would substantially affect the scenic quality of its location or surrounding neighborhood and no public safety concerns require that the proposed facility be sited in such a location.[34] In the most recent application for a cell tower to provide telecommunications capacity relief, the Council rendered a decision on a record of substantial evidence in accordance with the TCA, the PUESA and the UAPA that did not include the type of FCC-regulated information requested by Intervenors' Motion.[35] Therefore, since the FCC preempts the Council on a determination of public need for telecommunications coverage and capacity, the definition of "public need" under the PUESA does not apply to telecommunications facilities, and the Intervenors will not be deprived of administrative due process rights under the UAPA, the requested FCC-regulated information is not integral for the Council to render a decision on an application for a telecommunications facility to provide capacity relief.

[31] *Id.*, *Jaeger*, *supra* note 7.
[32] Conn. Gen. Stat. §4-177c (2014).
[33] *FairwindCT, Inc.*, *supra* note 26; *Connecticut Fund for the Environment v. Stamford*, 192 Conn. 247 (1984); *Palmisano v. Conservation Commission*, 27 Conn. App. 543 (Conn. App. 1992).
[34] Conn. Gen. Stat. §16-50p(b) (2014).
[35] Connecticut Siting Council, Docket No. 446, June 26, 2014.