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May 15, 2003

Via Facsimile and Regular Mail

Robert J. Backstein, Hearing Examiner
Snohomish County Hearing Examiner's Office
M/S 405
3000 Rockefeller Ave.
Everett, WA 98201

RE: **Closing Argument**
File No. 02 104238
Applicant: Cingular Wireless
Appellant: Mike and Kim Myhre

Dear Examiner Backstein:

Please accept the following written argument on behalf of Cingular Wireless.

Federal Telecommunication Act Overlay

Cingular's application and Appellants' objections must be viewed in light of the dictates of the Federal Telecommunications Act of 1996, whose stated purpose is to create a pro-

competitive, deregulatory framework designed to accelerate deployment of telecommunications services. Section 332(c)(7)(B)(i) of the Act states in part as follows:

“The regulation of the placement, construction ... of personal wireless service facilities by any state or local government or instrumentality thereof—(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.”

More importantly, the Act goes on to state at subsection (iv) that:

“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.”

So it is against this backdrop that the Hearing Examiner must make two major determinations—the SEPA appeal and conditional use approval.

SEPA Appeal.

Cingular understands and acknowledges the Examiner’s ruling that the State Environmental Policy Act is an environmental disclosure law. The Examiner therefore ruled that very little will be deemed an inappropriate subject for hearing testimony. However, despite that ruling, the above-cited Telecommunications Act makes clear that health effects are off the table in terms of factors to be considered in making these determinations.

The burden is clearly on Appellants to demonstrate that the County's decision to issue a mitigated Declaration of Non-Significance was inappropriate. The County has made a point-by-point refutation of the bases for Appellants' appeal. Cingular again argues, after hearing all of the testimony offered on their behalf, that Appellants have clearly failed to meet the standard necessary to warrant the issuance of a Declaration of Significance and the attendant required preparation of a full Environmental Impact Statement. They have failed to demonstrate that any environmental impacts are probable, significant, adverse, and not properly mitigated by the MDNS conditions. We further remind the Examiner that, for the purposes of SEPA review, neither property values nor "business" interests are proper topics of review and are not to be considered in the SEPA decision-making process. Despite Appellants' wishes, the review of permits for the construction of a single monopole is simply not the type of action for which the preparation of an EIS was intended. To our knowledge, no element of SEPA, in the context of a Washington state wireless communications site application, has been determined significant and been upheld by an Examiner.

No Dispute Concerning Gap in Service

The evidence submitted at hearing (and throughout this application process) has made clear that there is no dispute concerning the existence of a significant gap in personal wireless service in and around the Mt. Forest area. But for this gap, Cingular would not have pursued this application—a fact which Appellants grudgingly accepted at hearing. Instead, Appellants have

contended, mostly in the form of speculation and without technical support, that Cingular Wireless must somehow be able to gain needed coverage with antennae at other locations or by other arguably less intrusive means. They have not disputed, however, that such a gap in coverage exists. Cingular's hard data, submitted in the form of computerized coverage maps and actual drive-by analyses, clearly demonstrates the gap and the attendant unacceptable level of service and dropped calls. Appellants argue that "not in my back yard" solutions must be utilized even if, as demonstrated at hearing and in Cingular's voluntary post-hearing analysis of all suggested alternative sites, such distant alternatives do not provide an acceptable level of service.

This gap in service exists in this dominantly rural residential neighborhood with dense tree cover. These factors necessarily lead directly to tower heights of the type contemplated herein if wireless functionality is to be achieved. Any tower, no matter where located, will be in someone's back yard. This site was chosen to provide the best wireless coverage available so as to rectify the gap in the network while minimizing to the extent possible the impacts on this rural community. There simply is no better technologically feasible cost effective solution.

Conditional Use Review--The Compatibility Analysis

Visual Impacts. The requirements for issuance of a Conditional Use Permit under the Snohomish County code are complicated by the Telecommunications Act overlay and its attendant Federal pre-emption. Again where, as here, radio frequency emissions are within the

standards promulgated by the Federal Communications Commission, local government cannot and must not consider the health effects allegedly attendant to wireless antennae. Nor can the County or Examiner consider disguised attacks, often in the form of property value or visual impact arguments, which serve as proxies for health or radio frequency concerns.

The proposed site is located in a rural, large-lot (5 acre minimum lot size) and heavily-treed location. As noted at hearing, the subject property provides substantial screening which matches or exceeds the screening available on any other available site located in the intended service area. Cingular's photo simulations, which were unaltered and showed exact existing conditions, clearly demonstrate that the pole will be well screened. We acknowledge the fact that wireless service requires and is dependent upon clear sight lines between antennae. Thus, antennae must be located above tree tops. The technology necessitates that such equipment be visible.

While considerable time was spent at hearing debating the integrity of Appellants' admittedly manipulated photo simulations, Cingular contends that the its independent tree survey, performed by professional surveyors Duncanson Co. Inc., offers the best and most reliable evidence of the height of the trees surrounding the tower site. Many of those trees reach well over 100 feet, thus screening in excess of two thirds of the tower. As testified at hearing, Cingular and the property owner invite an approval condition which requires that all trees located on the southerly half of the Jordan property be retained to insure maximum screening into perpetuity.

Property Values. The testimony and written report of Cingular expert witness appraiser Sheridan Shaffer was based upon personal inspection of both this site and other similar communities where she was able to accurately study the impact, if any, of the construction of a cell tower upon neighboring property values. Actual experience, as opposed to guess and presumption, clearly demonstrated that the property value impact of such construction was nonexistent or negligible at most.

Conversely, the sole “expert” on any subject testifying on behalf of Appellants acknowledged that he had neither visited the site nor had he ever performed or reviewed an actual study regarding the impact of cell towers on property values. His assumptions, based in part on Appellants’ deceptive photo simulations and his analogy to the impact of forest fires on property values, leaves his “conclusion” that a single monopole will have a larger negative impact on property values than would a forest fire leaves one wondering how to politely respond.

The County, in its staff report and presentation at hearing, demonstrated how each standard for the issuance of a Conditional Use Permit has been met. We will not repeat that argument here, except to add the obvious. Except on the topic of property values, the testimony provided by Appellants was offered by lay witnesses, voicing general and ambiguous concerns and fears. The visual impact analysis offered by Appellants, by way of admittedly manipulated photographic simulations, was deceptive and misleading, and cannot be considered as accurately representing either the post-construction appearance of the Cingular wireless site or the views from surrounding properties. As acknowledged by Mr. Myhre at hearing, the forest survey

offered into evidence by Cingular, showing the type and height of trees surrounding the proposed pole location, was ignored by Appellant in his photo simulations.

With the acknowledged gap in service and no real or acceptable alternatives to either this technology or location, plus the rural, large-lot, treed-site all present herein, an obvious question arises: If a wireless service provider cannot build at this location, then the goals and purposes of the Telecommunications Act have been negated and the overriding Federal policy considerations are being undermined by local government.

Legal Analysis

Among the exhibits submitted by Appellants was a copy of the Snohomish County Council decision regarding the appeal of an application by Nextel for the construction of a wireless communications facility. While no reference was made to this decision during the hearing, we assume this document was offered in support of the notion that the Council has in the past turned down a cell tower application. However, the facts involved in that circumstance was far different from those in this application. The Nextel decision involves a small-lot suburban residential area, not the large-lot, rural neighborhood involved here. In Nextel, the Council noted that the record contained no evidence that the tower could not be located in other areas which already had similar towers or structures. In this case, Cingular went to unusual lengths, including a post-hearing analysis of every alternative location suggested by Appellants, to show that there were no other acceptable means or locations by which this service gap could

be filled. We also note that the County has, since Nextel, approved a similar tower in a similar rural large lot area.

Appellants also submitted the Second Circuit Court of Appeals decision entitled Sprint v. Willoth. We are somewhat surprised that this 1998 decision was included, again assuming that Appellants intend to use this decision in support of their arguments. On the surface, the Willoth decision upholds a denial by local government of a cell tower application. However, the facts involved in Willoth are again far different from those at issue here. First, that application involved the simultaneous construction of three 150-foot towers. Local government there questioned the service provider whether all three towers were in fact necessary. Rather than answering local government's questions, Sprint insisted that the three towers were a package, and refused to analyze whether some less intrusive means of correcting the gap in service might be feasible. In its decision, the Second Circuit stated that local government may deny a cell tower application if less intrusive means are available to correct the gap in service. That showing was not made in Willoth. Here, substantial testimony was provided that no less intrusive means are available. Thus, the Willoth case supports the notion that where, as here, no such less intrusive means are available, then denial would be inappropriate.

We direct the Examiner's attention to the recently decided case of National Tower, LLC et al. v. Plainville Zoning Board of Appeals, 2002 U.S. App., Lexis, 14465, which was decided by the First Circuit Court of Appeals in July, 2002. Here the Circuit Court affirmed the district court's decision, ordering the town of Plainville to approve a tower application to construct a

170-foot lattice transmission tower on a two acre parcel. The district court ruled that the actions of the Board effectively prohibit the provision of seamless wireless service in the town of Plainville, in violation of 47 U.S.C. § 332(c)(7)(B)(i)(II). The evidence there, as here, was that the wireless provider was attempting to close a two-mile gap in its cellular coverage along specified routes.

The Court of Appeals found that it was undisputed that there was a significant gap in coverage. Therefore:

“The argument that no tower is needed is unavailable to the town. Several courts have held that local zoning decisions and ordinances that prevent the closing of significant gaps in the availability of wireless services violate the statute. See *Cellular Telephone Company v. Zoning Board of Adjustment*, 197 F.3d 64, 68-70, (3d Cir. 1999); *Sprint Spectrum LP v. Willoth*, 176 F.3d 630, 643 (2nd Cir. 1999); *Omnipoint Communications MB Operations LLC v. Town of Lincoln*, 107 F.Supp.2d 108, 117 (D. Mass. 2000). Finding their reasoning persuasive, we now join their numbers and will analyze [the service provider’s] claim with that standard in mind.”

The Court of Appeals noted that there is a tension between the two objectives of the Act: the objective “to facilitate nationally the growth of wireless telecommunications service,” and the objective “to maintain substantial local control over the siting of towers.” The Court of Appeals stated that the effective prohibition clause of the Telecommunications Act can be violated even if substantial evidence exists to support the denial of an individual permit, under the terms of the town’s ordinances.” (emphasis added)

Cingular submits that our situation is very nearly identical. Both involve an undisputed gap in service. No alternative means, location or less intrusive manner of providing seamless

May 15, 2003
Page 10

coverage is available. Federal law clearly supports Cingular's application. Local law is similarly satisfied. The SEPA appeal should be denied and the conditional use permit approved.

Respectfully Submitted,

KARR TUTTLE CAMPBELL

By Gary D. Huff
Counsel for Cingular Wireless

cc: Cingular Wireless
Erik Olson, PDS
Mike and Kim Myhre