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February 20, 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: Argument on Reconsideration
File No. 02 104238
Applicant: Cingular Wireless
Appellant: Mike and Kim Myhre

Dear Examiner Backstein:

Please accept the following Argument on Reconsideration on behalf of applicant Cingular Wireless. This Reconsideration Argument will serve to emphasize critical portions of the record primarily focusing on compatibility and the fact that this site and modified design offer the least intrusive means and only available site for adequately providing service to the targeted service area.

This site has no doubt become a focal point for neighborhood opposition. However, as more fully demonstrated below, the appellants' unsubstantiated and factually unsupported arguments serve primarily as thinly veiled substitutes for their "Not In My Back Yard" concerns.

Cingular strives to be a good neighbor. In this Argument that desire will be evidenced by the company's offer, made at the expense of coverage at the fringes of the target area, to reduce tower height by 20 feet and to flush-mount Cingular's antennae **to reduce visual impact and ensure a higher degree of compatibility.**

This argument is divided into three sections. The first points out several minor misstatements or scrivener's errors contained in the January 27, 2003 Report and Decision. The more substantive discussions are contained in sections dealing with the two main portions of the decision which we believe to be in error: compatibility and the necessity for location of this facility at the subject site. A final section deals with the interplay between local and federal law.

In reviewing the "compatibility" and "necessity" arguments, two major points should be kept in mind:

- Closing this gap in coverage is absolutely critical to Cingular's ability to provide a seamless network. The company **must** be able to locate a wireless facility in the Mount Forest neighborhood. As more fully discussed below, **there is no acceptable alternative available to this location. Further, there is no alternative means, via different sites or a combination thereof, or via alternative technology, to provide necessary levels of service;**
- In light of the critical need for this site, and in order to minimize visual impacts to the maximum extent possible, Cingular invites two conditions of approval. As more fully explained throughout this document, Cingular is willing to **reduce maximum tower height by 20 feet to 130 feet.** Further, the company will commit to utilizing only **flush-mounted antennae**, as opposed to the proposed platform antennae included in the original application. Cingular invites these conditions knowing full well that these actions will compromise the coverage at the outer edges of the target area. It may also impact the desirability of the lowest co-location site. However, if such actions are necessary in order to obtain approval for this site, then the company is willing to live with the consequences.

References in the following argument to specific sections of the Report and Decision are denoted by an abbreviation for the appropriate section of the Decision and to the numbered paragraph therein. The Public Hearing section is abbreviated PH with a succeeding number indicating whether from the first or second day of the hearing. Thus, PH1-8 refers to paragraph 8 of the summary of first day of public hearing testimony. References to a specific Finding are indicated by an "F" followed by the paragraph number of that Finding. A "C" and a number similarly refers to that specific Conclusion.

I. Scrivener's Errors.

We assume that the misstatement contained at PH1-8 to be either a scrivener's or typographical error. This paragraph states that John Kilpatrick of Mundy Associates, appearing on behalf of Mr. Myhre, testified that Cingular's expert witness Sheridan Shaffer "did not visit the site or go out there." The clear implication is that Ms. Shaffer's testimony regarding the minimal impact, if any, of the proposal on nearby property values was less credible as a result of her lack of familiarity with the site. However, it was Mr. Kilpatrick himself, not Ms. Shaffer, who drafted a report and testified thereon without visiting the site. Any negative implication flowing from this fact must be directed at Appellant, not at Cingular.

Similarly, at PH1-6, the statement is made that Ms. Shaffer stated that she has never done an appraisal for a neighbor. Ms. Shaffer has asked that we correct that statement to reflect the fact that she is currently performing appraisal work for the neighbors on a similar application.

Finally, at F9 a Finding is made that a Landscape Modification under SCC 18.43.031 is not required because the site is heavily vegetated and tall alder and evergreen trees. We believe a more accurate statement would be that a Landscape Modification is appropriate because the existence of heavy site vegetation and the presence of tall trees surrounding the tower makes landscaping which would otherwise be required unnecessary.

II. Compatibility.

Cingular respectfully submits that the "Compatibility" portions of the Report and Decision are internally inconsistent and are more importantly incompatible with the provisions of the Snohomish County Code. The essence of this portion of the discussion and Decision is contained at C2 which states as follows:

"In this regard, Condition 5 of SCC 18.72.060 requires that there must be an assurance of the degree of compatibility being maintained, with respect to the particular use of the particular site and consideration of other existing and potential uses, within the general area in which the use is proposed to be located. The Examiner does not believe that this burden has been met by the applicant."

This Conclusion is based on F12 wherein it is stated that:

" . . . the Examiner does find that from the evidence presented by the Mount Forest Homeowners Association and those persons appearing in opposition to the request, that they have submitted substantial evidence to raise questions regarding the location and the

compatibility of the request for the tower in this particular area and at this particular location.”

Similarly, at F16 the following Finding is made:

The Examiner recognizes that the applicant must carry the burden of proof to support this request. In this particular instance the Examiner cannot find where this burden of proof has been born by the applicant, especially with regard to compatibility with the area.”

At F8, the Decision references Section 18.72.060 SCC regarding conditional use permits. The key “compatibility” requirement upon which much of the Decision is based is located at (5) thereof. It reads as follows:

“When considering an application for a conditional use permit, the hearing examiner shall consider the applicable standards, criteria and policies established by this title as they pertain to the proposed use and may impose specific conditions precedent to establishing the use. The conditions may:

(5) Assure that the degree of compatibility with the purpose of this title shall be maintained with respect to the particular use on the particular site and in consideration of the other existing and potential uses, within the general area in which the use is proposed to be located.” (emphasis added)

Thus, the actual code language makes clear that the “compatibility” determination is not with surrounding property but with the purpose of Title 18 SCC. The Statement of Purpose for Title 18 is found at Section 18.11.010. It provides as follows:

“The purpose and intent of this title is to provide the authority for and the procedures to be followed in guiding and regulating the physical development of unincorporated Snohomish County with a view toward assuring for the public the highest standards of environment for the living, the operation of commerce, industry, agriculture and recreation, to maximize economies in order to conserve the highest degree of public health, safety, morals, and welfare and to implement the policies and objectives of the Snohomish County comprehensive plan.”

Significantly, at F2 the Decision finds that the “PDS staff report has correctly analyzed the nature of the application, the application’s consistency with adopted codes and policies and land use regulations, and the State Environmental Protection Act (SEPA) evaluations with its recommendations and conditions. This report is hereby adopted by the Examiner as if set forth in full herein.” Thus, this Finding states that the Staff Report’s analysis which found the

application to be consistent with all codes and which recommended approval are deemed correct and are adopted by the Examiner.

Despite this Finding which we deem to evidence final and unchallenged compliance with the code-required compatibility analysis, Cingular nonetheless wishes to directly address compatibility issues as viewed by the Examiner. In so doing, we first note the difference in the geographic scope between the hearing testimony, also as reflected in the Decision, with the requirement of Section 18.72.060(5) which talks in terms of the “general area” surrounding the application site. Nearly all of the testimony at hearing dealt specifically with the adjacent Myhre property and that of other abutting or nearly adjacent neighbors. This code provision requires a broader analysis and recognizes that impacts, no matter how great or small, will necessarily impact those closest to the subject site to some greater extent than more distant neighbors. However, the code recognizes that the overall good must control over the self-interest of immediately adjacent neighbors.

Visual Impacts. Any discussion of the visual impacts of the proposed facility, and those portions of the Decision which address those impacts, must now take into account Cingular’s proposal to reduce tower height and use much less visible antennae.

Cingular’s decision to seek approval for 150 foot monopole was dictated by both its own needs and the county’s preference for towers which afford co-location possibilities. The 150 foot height is more than necessary just for Cingular’s purposes. This height was chosen in order to provide sufficient room on the tower for two co-locations below Cingular’s. The height of the bottom co-location site must still be above the tree line. Given the Examiner’s decision and the strong management directive that this is a priority site for the provision of seamless coverage, Cingular’s engineers have revisited technological design and coverage requirements. As a result, we have been authorized to offer a modified design in order to hopefully obtain a more favorable result. Thus, to mitigate visual impacts, Cingular invites a condition of approval that tower height shall be limited to 130 feet—a reduction of 20 feet. This means that only the upper 24 feet of the tower would extend above the average height of the tallest trees on the Jordan property. The unfortunate result, from the carrier’s perspective, is that the coverage to be provided from this site will be eroded at the fringes. There may also be coverage issues for the second of the potential co-locators. Cingular and that prospective co-locator will, however, deal with those issues at a later time.

A tower’s visual impact is a function of both height and antennae design. For purposes of optimizing coverage, the design incorporated in this application is clearly preferred. A photo of that antennae design is included as Attachment 1. While providing optimal coverage, there is no doubt that this design has a greater visual impact than do flush mounted antennae. In order to further mitigate visual impacts, Cingular also invites an approval condition which specifies that

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only flush mounted antennae may be constructed on this tower. A photo of flush mounted antennae is included herein as Attachment 2.

Taken together, the reduction in tower height and use of flush mounted antennae mean that the visible portion of the tower will be greatly reduced in width and will be unscreened for only 24 feet above the average height of the tall Jordan trees. While we do not expect the neighbors to enthusiastically embrace these changes, they should do much to mitigate visual concerns of any fair-minded person.

With respect to the discussion regarding visual impacts in the Decision, a litany of neighborhood concerns is recited and adopted at C4. Supposed incompatibilities between a single monopole and “a very attractive rural area with roads that do not go through, underground utilities, many wetlands, pre-use of property by private planes and/or ultra lights, having many varieties of wildlife including eagles, adverse visual impacts” are used as the basis for denial. The testimony along these lines was certainly repeated nearly verbatim and certainly ad nauseam. The danger, however, is in accepting repetition for validity.

Of the above, “adverse visual impacts” certainly includes “very attractive rural area,” “underground utilities” and “wetlands.” In fact, wetlands was dismissed at F7 as a basis for concern or conditioning.

At its heart, the concern over “adverse visual impacts” obviously stems from the then proposed 150 foot tower height and what Cingular believes to be misconceptions as to how visible the tower would be after construction. We believe that professionally done photo simulations using a balloon test to show exact tower height are much more reliable and representative than amateur photos with all surrounding trees admittedly removed. The photos attached hereto as Attachments 3 (Cingular photo simulations from Myhre runway and front porch—Hearing Exhibits 84G and H) and 4 (Myhre photo simulations--Hearing Exhibit 98?) clearly demonstrate that difference.

At hearing, Mr. Myhre testified that his photos show much more exposed tower height because some of the existing trees are located on his property and he may decide to remove them for his own purposes. We acknowledge that Mr. Myhre certainly has that right. Thus, this discussion is limited solely to those trees on the subject site which will remain in perpetuity.

Hearing Exhibit 127 included a professional tree survey conducted at Cingular’s request on the Jordan property. A reduced version of that survey is included herein as part of Attachment 5. The tree types are listed as CE (cedar), DF (Douglas Fir), AL (alder) and MP (maple). Immediately following each type designation is a number which represents trunk

diameter. For taller trees, another number representing tree height is included immediately below the type designation and trunk diameter.

The survey clearly shows many trees surrounding the tower site. For ease of review, we have reproduced the map of the Jordan property showing only the tower site and those trees with heights over 90 feet which would immediately surround the tower. That map clearly shows 9 trees on the Jordan property which surround the tower location and which range from 90 to 124 feet.. These 9 trees include 4 cedars, 2 firs and 3 alders. The average height of these trees equals just under 106 feet. Thus, nearly 82% of the height of a 130 foot tower would be screened by protected trees on the Jordan property. Only the upper 24 feet of the newly proposed tower would be unscreened above average tree height. We believe this conclusively shows that the Myhre photos, which form the basis for much of the neighborhood discontent, are not at all accurate and must be discounted entirely. As stated, these numbers assume Mr. Myhre decides to remove a 116 foot douglas fir and 94 foot alder which are located on his property in immediate proximity of the common boundary.

Animals/Wildlife. Among the most frequently stated concerns were those the tower would supposedly have on wildlife. Even the Decision at C4 includes “many varieties of wildlife including eagles” among the list of assumed impacts. The unstated assumption associated with such testimony and concern is that a single monopole would both kill birds and force wildlife to move elsewhere. There is no doubt that during construction wildlife would likely avoid the Jordan property, just as wildlife avoided each of the neighbor’s home sites during construction. Yet the wildlife returned after construction, just as it would here. No state or federal wildlife agency expressed any concern over the alleged wildlife impacts of this project. Similarly, County staff did its own investigation and determined there would be no negative impact. The concern, while perhaps well meaning, is entirely spurious.

The neighborhood opponents presented no evidence of any kind that the operation of the tower would have any impact on wildlife of any kind except for articles describing bird kills somewhere on the East Coast. Those problems associated with birds relate to tall guy-wired, lighted towers. During foggy conditions, birds can be distracted by the light and circle the lower in search of a place to land. They can’t see the guy wires and are injured on impact. That is not our situation. This tower is not to be lighted and will have no guy wires. That testimony is totally inapplicable to this situation.

With respect to impacts on eagles, we include at Attachment 6 a photograph of a monopole located immediately between State Route 520 and the Marymoor Park velodrome which shows that his tower is being used as an eagle nesting site. Just and the staff determined in its MDNS and the Examiner found in denying the neighbor’s SEPA appeal, there are no adverse wildlife impacts associated with this application.

The Airport Non-Issue. The proposed tower site is located at least 300 feet from the edge of Mr. Myhre's grass runway. The tower site is also at an elevation which is approximately 25 feet below that of the runway. The stand of mature trees on Mr. Myhre's property between the runway and the tower site (which are located at the same elevation as the runway) contain numerous mature trees, many of which reach heights of 100 feet. Some of these 100 foot trees are located within 50 feet of the runway. If Mr. Myhre sees no incompatibility between his runway use with 100 foot trees within 50 feet, then he can have no real issue with a tower with an effective height (as measured from the runway elevation and based on the 130 foot tower height) of an additional 5 feet, particularly when located at least an additional 250 feet distant from the edge of the runway.

III. Coverage/Alternative Site Issues.

Cingular vigorously disputes C3 which states that "No showing has been made to indicate that the proposed use must be in this exact location, and can be in no other or any combination of others; and therefore requires mandatory location at this particular spot." Cingular disputes this conclusion on two bases. First, this language misstates the required showing. No showing is required under any applicable law that the location of a wireless facility at a particular spot is mandatory and must be capable of being located at no other location. However, while such a showing is not required, the record is replete with a nearly identical demonstration. Cingular concedes that the Jordan site is not the only possible site by which service can be provided to the Mount Forest area. Ms. Carrasquero testified on several occasions that the Jordan site is the only available site by which satisfactory levels of service can be provided. While other sites could provide acceptable levels of service, the owners of those sites were unwilling to lease them.

The required showing on the need for a given use at a specific location is set forth in Section 18.72.060(5) which states that approval conditions may assure "that the degree of compatibility with the purpose of this title shall be maintained with respect to the particular use on the particular site and in consideration of the other existing and potential uses in the general area . . ." While the language is similar, this code provision only requires that the impacts of the specific use on the specific site be examined. It does not state that the particular use must only be capable of being located at that particular site.

We believe that the appropriate analysis could more accurately be stated as an examination of whether less intrusive means for providing the necessary service might be available, either at other locations or by alternative technological means. In so stating, we note that Mr. Myhre has suggested a number of alternative sites for placement of the tower. His

criteria, however, was not so much that these alternatives be less intrusive but merely that they be located somewhere not in or nearby his back yard. However, Section 18.72.060(5) requires the Examiner to take a broader view of the “general area” in which the use is proposed to be located. Relocating the tower, even if possible, may satisfy Mr. Myhre but it should not affect the analysis of whether this use is appropriate in this general area.

Mr. Myhre submitted a list of alternative sites which he suggested could serve as alternatives to the Jordan property (Ex. 119). The argument that Cingular could utilize one of those alternatives was repeated frequently and appears to have been incorporated into the Decision. However, Mr. Myhre acknowledged that he did not know whether any of these supposed alternatives would provide the level of coverage needed for appropriate levels of service.

Cingular’s extensive efforts to locate an appropriate site and its reasons for selecting the Jordan property are only briefly referenced in the Decision. At PH1-3 the Decision notes Ms. Carrasquero’s testimony regarding gaps in coverage and Cingular’s unsuccessful efforts to first locate the tower in a commercial or nonresidential area. Also noted at PH1-4 was Ms. Ligia’s testimony concerning the fact that the company was attempting to close a 1.5 to 2 mile gap in coverage. However, her site-by-site analysis as to why Mr. Myhre’s alternatives were not suitable was ignored. While her coverage maps were mentioned, the fact that they clearly demonstrated the unsuitability of each of the alternatives was ignored. Subsequent listings in the summary of hearing testimony continue to emphasize supposed alternatives while omitting the reasons for their rejection: Myhre testimony about alternative locations (PH1-9); Myhre’s alternative sites (Ex. 119); Mowery testimony about nearby water tank (PH2-4); Nicole Myhre’s testimony concerning use of power lines as potential sites (PH2-7).

As testified to by Ms. Ligia, adequate coverage requires that antennae be located approximately every 2 miles since the signal from extends approximately 1 mile in each direction from a given site. This fact appears to have been ignored by Mr. Myhre. Many of his suggested alternatives are too distant from the intended coverage area to provide even minimal levels of service. Others already house Cingular sites. Ms. Ligia testified on two occasions concerning her analysis of each site suggested by Mr. Myhre and why each such alternative was unacceptable. However, in order to remove any possible question or misunderstanding regarding the unsuitability of such suggested alternatives, Cingular agreed to the unusual step of having Ms. Ligia re-examine post-hearing every alternative suggested by Mr. Myhre and his neighbors. This analysis included not only alternative locations but alternative means of providing coverage by way of the use of multiple towers or microcell technology. That analysis was submitted on December 19, 2002 (Ex. 130). That report demonstrates the following with respect to each of the alleged alternative sites:

- Existing water tank at 240th and Aspen Way:

tower height	rounded to 80'
height of fir trees on east side of tank	90'
fir trees on horizon	90-100'

Conclusion: "This level of coverage is significantly less than the coverage expected from the Mt. Forest 150' monopole, which would provide the higher, in building level of coverage to all these areas, with the exception of a decrease down to in-car level of service for about a .2 mile stretch along 155th. While the water tank site would allow for improved in-car service in the targeted coverage area, it would not allow for complete, in-building coverage, which would allow customers to place and receive calls inside their homes.

In summary, the water tank site would enhance coverage at the SW side of the targeted area, but would not provide an adequate level of in-building coverage to all of the targeted coverage area."

- Split coverage with antennae both on the above water tower and on that location along the power line to the north of the site which would provide the best coverage, as suggested by Mr. Myhre:

tower height	80'
power line height	125'
distance from 228 th (well north of Jordan site) to power line	1.25 miles

Conclusion: ". . . coverage gaps would still be experienced, and the gaps would be very similar to those experienced from the water tank only. In other words, even if a site were built in these two locations, coverage gaps would continue to be experienced. The coverage gaps would be similar to those shown in the coverage plot shown for the water tank alone. The power line location failed to provide significant additional coverage, primarily due to its distance from the intended coverage area . . . As shown on the coverage map, the power line would provide excellent coverage to the north of the intended coverage area, but at 228th, the additional coverage would be marginal, and no coverage would be provided further south.

In summary, as shown on the coverage map, the additional power line would not provide any additional coverage to the targeted area, even when combined with the water tank site, as it is located too far away from the targeted area to provide any significant additional coverage.

- Microcells along 228th, 155th and NE 200th at .3 mile intervals (total of 8 microcells):

Used for locations in densely populated areas where a high volume of calls are being processed through a very limited geographic area such as a busy intersection. Also used where trees and buildings will not degrade signal levels. Coverage area of only ¼ mile.

Conclusion: “Given the limited coverage that a microcell provides, it would not be possible to substitute it for a more typical cell site . . . Microcells would not be a feasible option in this area for the following reason: Use of microcells would require placement of approx. 8 sites just to cover the main roads. However, while the microcells could be placed along 228th and 155th at intervals, they would not cover surrounding residential side streets and residential properties, as the existing tree stands would block signals. Therefore even by greatly increasing the number of sites, coverage could not be provided to the entire targeted coverage area. From a technical and economic standpoint, it would be impossible to cover a widespread, forested area with microcells.”

Ms. Lima concludes her supplemental report by attaching a map with 15 lettered flags, each showing Mr. Myhre’s suggested alternative sites. Also attached is that portion of the SEPA checklist for this application which includes a discussion as to why each such lettered location is unacceptable for this intended purpose. Those reasons are as follows:

<u>Site Designation</u>	<u>Explanation</u>
A	Existing Cingular site.
B	Too distant from coverage area.
C	Close to two existing Cingular sites. Too distant and too low.
D	Existing Cingular site and too distant from intended coverage area.

E	Too distant (3.7 miles) and between two existing sites.
F	Too distant (4.7 miles) and close to an existing site.
G	Existing Cingular site.
H	Existing Cingular site.
I	Existing Cingular site.
J	Too low. Won't provide coverage.
K	Too close to an existing Cingular site.
L	Too close to an existing Cingular site and too distant (4 miles).
M	Existing Cingular site.
N	Too low, too distant (2 miles) and behind a hill. Won't provide coverage.
O	Too close to an existing Cingular site and would not provide coverage.

Ms. Lima's report also includes both a colored drive test map, showing the degraded signals levels and dropped call experience in the Mount Forest area, and computer generated color coverage maps. The maps graphically demonstrate beyond any reasonable doubt that none of the alleged alternatives adequately provide a required coverage levels. Once again, there simply are no real and adequate alternatives.

Based on the above, Cingular has a very difficult time understanding Conclusion (C3) which states that "No showing has been made to indicate that the proposed use must be in this exact location, and can be in no other or any combination of others; and therefore requires location at this particular spot." There is no Finding in the Decision to support this Conclusion. There is nothing in the record supporting this Conclusion except the above cited appellant testimony to the effect that there must be some other site that would work, as long as its not near them. Yet to provide coverage, this facility must be located within a very limited area and must be located in the Mount Forest neighborhood. Cingular has shown that: 1) no other acceptable site is available for lease; 2) of the 15 alternative sites suggested by Mr. Myhre, 6 are existing Cingular sites, 4 are too close to existing Cingular sites, 7 are too distant and none will provide, either alone or in combination with others, minimally acceptable levels of service to the target area.

The Interplay Between Local Regulation and Federal Law.

The Decision evidences an obvious fact: that local regulations remain subject to federal legislation. F15 regarding federal preemption concerning health effects marks necessary deference to federal authority. However, the remainder of the Decision ignores other aspects of federal law which must necessarily influence deliberations in this matter.

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.” (the “effective prohibition” clause)

This application stands on its own merits and satisfies all local requirements and criteria for the issuance of a conditional use permit. However, it must be noted that federal courts are becoming increasingly active in assuring that local permitting authorities act in a manner consistent with the dictates, policy considerations and federal pre-emption associated with the regulation of the telecommunications industry.

In this regard, 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 subject local jurisdiction 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 local government, in denying a tower application, effectively prohibit the provision of seamless wireless service 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, with the support of the Planning Staff and their report, asserts that it has satisfied all such local requirements. However, the gap in service and the impact of a denial in this matter on not only Cingular but several other providers and potential co-locaters with similar coverage gaps is not in dispute.

We also point to National Tower LLC v. Frey, 164 F. Supp. 2d 185 (2001) where the federal district court found that where a cellular provider showed, through investigation and computer simulations, that there were no alternative sites for a tower which would correct a two mile gap in service, then the application should be approved even if the proposed site was natural and sensitive (in that case a watershed protection area). If a federal court is willing to find that service is “effectively prohibited” if an application is denied for a tower in such a location, then it is a near certainty that similar court would look with disfavor on a denial because there was no area without underground utilities where a tower could be placed.

While the emerging federal court interpretations of the TCA are of interest, the facts herein make reliance on federal precedent unnecessary. Cingular has established and the record herein demonstrates compliance with the criteria for issuance of a conditional use permit. County staff has agreed. The necessary showings are well documented in the record. The Report and Decision should be amended, the conditional use permit issued and this work allowed to proceed without further interruption.

Respectfully Submitted,

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