TELECOMMUNICATIONS AND THE CELL TOWER WARS

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I. Introduction

With its recent decision in Town of Westport v. Connecticut Siting Council, 260 Conn. 266 (2002), the Connecticut Supreme Court has narrowed the battlefield over siting local wireless communication towers from two venues to one. The court upheld a Superior Court ruling giving the Connecticut Siting Council exclusive jurisdiction over siting cellular and non-cellular wireless communication facilities. The Westport case thus has resolved Connecticut's formerly split jurisdiction scheme – unless, of course, the General Assembly acts to change the law.

Previously, tower developers, opponents, and regulators in Connecticut were embroiled in a controversy over whether jurisdiction resided with the state Siting Council or local zoning commissions. While jurisdiction over siting traditional cellular service towers was squarely with the Siting Council, siting "non-cellular" services such as personal communications services ("PCS") was less clear. Municipalities and the Siting Council argued jurisdiction for non-cellular towers fell to local zoning commissions; wireless communication carriers argued all jurisdiction lay with the Siting Council. In the span of just over one year, jurisdiction over non-cellular towers bounced back and forth four times, culminating with a Second Circuit Court of Appeals decision and a Connecticut Supreme Court decision vesting the Siting Council with exclusive jurisdiction.

The pragmatic problems generated by the previous split regulatory scheme and ensuing state of uncertainty were obvious. Applicants lacked reliable assurances regarding which venue was the proper authority for a siting decision. Furthermore, the wrong choice (or even the right choice) could have led to the siting of a tower without effective public input or subjected an approved permit to the risk of additional litigation regarding jurisdiction. In the wake of the Supreme Court's decision, those uncertainties are largely eliminated and pending court appeals of local commission decisions on siting issues were rendered moot. See Sprint Spectrum v. Town of Madison, et al., 2002 WL 31016424 (Conn. Super. 2002) (Booth, J.)

II. **Wireless Basics**

Proceedings for siting wireless facilities regardless of the venue occur in the context of complex (and often evolving) technical issues. It is essential to understand the substance of these issues to effectively counsel parties to the proceedings. The basic framework for personal wireless communication services involves a thorough network of radio antennae and transmitters (often referred to as "towers" or "facilities"). Wireless telephones operate by transmitting very low powered radio signals between the wireless telephone unit and the antenna towers or facilities. Once received by the antenna, the signal or call is then routed from the tower to an ordinary (land) telephone line and routed to its ultimate destination. If that ultimate destination is another wireless telephone, the signal is routed back through a tower and transmitter in the location of the receiving telephone.

Because wireless communication is "mobile" communication, users must be within range of an antenna to initiate service. It is also necessary for the signal both to and from wireless telephones to be handed-off seamlessly as the user travels between service areas.

These initial connections and hand-offs must be within relatively close range of a tower or facility in part because wireless telephones use relatively low power radio signals. The area around each antenna tower is referred to as a "cell." As a mobile user travels around, switching equipment and software ensure the mobile user is handed-off between towers or facilities, provided they are sufficiently close together to form a continuous network of cells. The range of each cell is a function of both the distance from the tower and the call volume within that distance. Generally, PCS cells are smaller than traditional cellular cells because the former use digital signals and operate at higher frequencies with less power.

Within this basic framework of service, several categories of personal wireless services are available. The most prominent are traditional cellular service and PCS service, each of which are licensed and regulated under the Code of Federal Regulations ("CFR"). Table 1 below lists various categories of personal wireless services, their corresponding CFR section, and the frequency at which they operate.

TABLE 1: PERSONAL WIRELESS TECHNOLOGY

Category	CFR	Radio Frequency
Traditional Cellular Service	Title 47, Part 22	824-875 MHz
PCS Service	Title 47, Part 24	1850-1990 MHz
Other Commercial Mobile Service (e.g., enhanced specialized mobile radio)	Title 47, Part 20	Various

III. Jurisdictional Basics

The now-resolved jurisdictional debate in Connecticut was driven by the text of the Public Utility and Environmental Standards Act ("PUESA"), Conn. Gen. Stat. §§ 16-50g

through 16-50aa. The PUESA vests the Connecticut Siting Council with exclusive jurisdiction over the siting of various public facilities. Conn. Gen. Stat. § 16-50x. As it pertains to wireless telecommunications, these "facilities" are defined as "such telecommunication towers, including associated telecommunications equipment, owned or operated by the state, a public service company or certified telecommunications provider or used in a cellular system, as defined in the Code of Federal Regulations Title 47, Part 22 as amended . . . ." Conn. Gen. Stat. § 16-50i(a)(6) (emphasis added).

The key phrase is "used in a cellular system as defined in the Code of Federal Regulations, Title 47, Part 22." This section of the CFR provides a broad definition of a cellular system.[1] However, other categories of personal wireless services are defined and licensed in separate CFR sections (e.g., PCS is regulated under CFR Title 47, Part 24). The jurisdictional question boiled down to whether the term "facility" limited the jurisdiction bestowed upon the Siting Council in Conn. Gen. Stat. § 16-50i to traditional cellular systems, or whether it included other personal wireless services licensed and governed elsewhere in the CFR, such as PCS. The court has resolved the issue in favor of a broad interpretation of the Siting Council's jurisdiction.

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[1] 47 CFR § 22.99 defines "cellular system" to mean:

> An automated high-capacity system of one or more multichannel base stations designed to provide radio telecommunication services to mobile stations over a wide area in a spectrally efficient manner. Cellular systems employ techniques such as low transmitting power and automatic hand-off between base stations of communications in progress to enable channels to be reused at relatively short distances. Cellular systems may also employ digital techniques such as voice encoding and decoding, data compression, error correction, and time or code division multiple access in order to increase system capacity.

The Supreme Court's decision in Town of Westport is consistent with the overarching principle of the federal Telecommunications Act of 1996 (the "TCA"), 47 U.S.C. §§ 151 et seq., to promote a "pro-competitive" environment for telecommunications services primarily by eliminating barriers to entry. See Cellular Tel. Co. v. Town of Oyster Bay, 166 F.3d 490, 492-93 (2nd Cir. 1999). It is important to note that despite its broad goals, the TCA does not express a preference for whether siting jurisdiction resides in a state or a local agency. Rather, it expressly

allows for either, provided the agency does not "prohibit or have the effect of prohibiting" personal wireless services and does not unreasonably discriminate among providers of functionally equivalent wireless services. Opponents argued that Connecticut's previous scheme violated this core TCA principle. Specifically, PCS providers claimed that subjecting them to town-by-town approval of their network components, while allowing cellular providers to benefit from uniform proceedings at the Siting Council, unreasonably discriminated between providers of functionally equivalent services in violation of the TCA, 47 U.S.C. § 332(c)(7).

IV. **Evolution Of Siting Jurisdiction: Rulings And Decisions**

Prior to November 2000, it was generally understood that jurisdiction for siting non-cellular providers such as PCS resided in local zoning agencies, while jurisdiction for traditional cellular towers (as well as towers owned or operated by the state) resided in the Siting Council. This interpretation was based on the language in Conn. Gen. Stat. § 16-50i(a) and supported by the Siting Council's own declaratory ruling to that effect. As discussed in greater detail below, that declaratory ruling set in motion the lawsuits that resulted in the recent flux in jurisdiction over non-cellular towers leading up to the Supreme Court's decision.

A. The Siting Council's 1997 Declaratory Ruling – Go See the Town

On October 29, 1997, Sprint petitioned the Siting Council for a declaratory ruling on several topics including whether it had jurisdiction over siting towers using PCS technology. In December 1997, the Siting Council ruled on Petition 384 that it did not have jurisdiction over PCS towers because they are not "facilities" within the meaning of Conn. Gen. Stat. § 16-50i(a)(6), the statutory basis for Siting Council jurisdiction. In effect, the Siting Council ruled that traditional cellular providers could seek approval for the components of their cellular network from the Siting Council, while PCS providers would need to seek their approvals from each "host" municipality.

B. Judge Covello's November 2000 Decision – Go To The Siting Council

In response to the ruling on Petition 384, Sprint sued the Siting Council in the U.S. District Court under the TCA. The two count complaint requested declaratory and injunctive relief, asserting that (1) the Siting Council's interpretation of the key statutory term "facility" was inconsistent with and preempted by the TCA, which prohibits unreasonable discrimination between providers of functionally equivalent professional wireless services; or in the alternative, (2) the Siting Council's interpretation of Conn. Gen. Stat. § 16-50i(a)(6) was erroneous under state law.

After hearing oral arguments on cross-motions for partial summary judgment, then-Chief Judge Alfred V. Covello ruled from the bench that the Siting Council's interpretation of state law was erroneous and granted Sprint's summary judgment motion on that basis. Sprint Spectrum LP v. Connecticut Siting Council, No. 3:98 CV 33 (AVC) (D. Conn. Nov. 20, 2000). The court's decision was based on the fact that both parties agreed that Sprint's PCS

system generally fits the broad definition of a "cellular system" set forth in 47 CFR Part 22 and incorporated by reference into the General Statutes, notwithstanding the Siting Council's contention that PCS services were more accurately described and licensed under a separate section of the CFR. The decision effectively stripped local agencies of jurisdiction over the siting of telecommunications towers and vested it solely in the Siting Council. The Attorney General on behalf of the Siting Council appealed, as discussed below.

C. Judge Nevas' July 2001 Decisions – Go See The Town.

While the appeal of Judge Covello's ruling was pending, Judge Alan H. Nevas of the same U.S. District Court ruled, in two companion cases, that the Siting Council does not have exclusive jurisdiction over siting PCS facilities. SBA Communications, Inc. v. Zoning Commission of the Town of Franklin, 164 F. Supp.2d 280 (D. Conn. 2001); Connecticut Architectural Towers, L.L.C. v. Town of Monroe Zoning Commission, No. 3:01 CV 186 (AHN), 2001 WL 1829114 (D. Conn. 2001). The cases involved applications for PCS towers that were denied by local zoning boards. In both cases, the boards moved to dismiss the action in reliance on Judge Covello's earlier decision vesting jurisdiction over all towers in the Siting Council. Judge Nevas ruled against the towns, declaring that the towns had violated the TCA and in one case ordering the town to issue a special permit for the facility.[2]

Judge Nevas reasoned that the TCA makes a clear distinction between cellular and PCS carriers; that the federal regulations governing each are set forth in separate sections of the CFR; and that the state statutes establishing the Siting Council's jurisdiction refer to cellular service and not to PCS. He further noted that Congress could have combined

both technologies under a single regulatory scheme but chose not to, and further, that the state legislature could have specified both regulatory sections by amending its own statutes and chose not to. Interestingly, neither decision addresses or even mentions Judge Covello's earlier ruling from the bench.

D. The Second Circuit – Go To The Siting Council.

Five months later, on December 17, 2001, the U.S. Court of Appeals for the Second Circuit, in a per curiam decision based on a de novo review, affirmed Judge Covello's earlier ruling vesting exclusive jurisdiction over both cellular and PCS towers in the Siting Council. Sprint Spectrum LP v. Connecticut Siting Council, 274 F.3d 674 (2nd Cir. 2001).

The court rejected the Siting Council's argument that PCS systems do not fall within the definition of "cellular systems" as incorporated into the General Statutes because PCS systems are more accurately defined and are licensed under a separate section of the CFR. Instead, the court found that the plain meaning of the definition of "cellular system" in Conn. Gen. Stat. § 16-50i(a)(6) and CFR Title 47, Part 22 is clear and therefore it is not necessary to review other sections of the CFR or the legislative history to divine their meaning. The court found that both parties had acknowledged that PCS systems fit within the general definition of "cellular system" and thus the Siting Council had jurisdiction over both.[3]

E. The Connecticut Supreme Court: *Town of Westport v. Connecticut Siting Council*.

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[2] It is also noteworthy that in the SBA Communications case, Judge Nevas held that violation of the TCA can support a civil rights claim under 42 U.S.C. § 1983, granted the applicant's motion for summary judgment on its § 1983 claim, and awarded attorneys' fees.

[3] In a footnote, the court dismissed Judge Nevas' decisions as "unpersuasive because they disregard the plain language of the regulation." Id. at n.3.

Despite the decision of the Second Circuit, the question of jurisdiction was not yet squarely or satisfactorily resolved. Because the Second Circuit decision involved federal interpretation of state law, the potential still existed that the state courts would disagree.[4] In Town of Westport v. Connecticut Siting Council, the Supreme Court laid that potential to rest.

The Town of Westport case involved a dispute regarding jurisdiction over a "mixed-use" tower. The applicant applied for and received approval from the Siting Council for a tower hosting cellular, PCS, and other services; the Town of Westport appealed. Subsequently, the town's zoning enforcement officer refused to issue a zoning certification on the grounds that the applicant did not have the required local approval. The applicant appealed to the Zoning Board of Appeals and then to the Superior Court.

The trial court sided with the applicant, and the town appealed. The arguments were largely the same as the arguments in the cases described above, with the additional argument regarding whether there can be concurrent jurisdiction over "mixed-use" towers. In a per curiam decision, the Supreme Court upheld the "thoughtful and comprehensive" decision of the trial court and agreed that "the legislature intended to give the council exclusive jurisdiction over telecommunications towers, including those that are shared by cellular and noncellular carriers." Although the court's ruling makes no reference to the Second Circuit decision in Sprint, it confirms the Siting Council's exclusive jurisdiction, as in Sprint, and eliminates local zoning jurisdiction over the siting of telecommunications towers.

F. Potential Legislative Developments.

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[4] The state Supreme Court is not bound by the federal court's interpretation of state law. Anderson v. Ludgin, 175 Conn. 545, 552 n.6 (1978).

Although several municipalities were upset by the loss of zoning authority over telecommunications towers, efforts to pass legislation restoring local authority have not succeeded up to this point and do not appear to have broad support in the 2003 legislative session. Many municipalities had adopted extensive zoning regulations governing the siting of towers and antennas and expressed great interest in regulating tower locations and appearance. Near the end of the 2002 legislative session, legislators from several such municipalities proposed bills, after the Sprint decision was released, to either restore local jurisdiction over non-cellular towers or to amend Siting Council procedures to give municipalities a larger role. Two such bills made it out of the committee process, but neither was adopted by the legislature.

At the beginning of the 2003 legislative session, several similar bills were offered, but none survived the committee process. Barring any last minute amendments, it appears that efforts to restore local jurisdiction over telecommunications towers have lost steam and the legislature (and maybe the municipalities) for the time being are willing to wait and see how local zoning concerns are addressed at Siting Council proceedings.

Thus, for the present, the Siting Council has exclusive jurisdiction over wireless communication tower siting applications in Connecticut. Under existing law, the host municipality is entitled to (1) receive a copy of a tower application filed with the Siting Council, (2) be made a party to the proceeding upon filing a written notice of its intent to be a party, (3) participate in the proceedings, and (4) appeal the Council's decision. Conn. Gen. Stat. § 16-50l through 50q. Furthermore, the Council is obliged by law to consider local zoning concerns. Conn. Gen. Stat. § 16-50x. It remains to be seen whether municipalities (and applicants) will be satisfied with the balance struck by the Siting Council.