

APPENDIX E
AT & T WIRELESS FACILITY SITING PLAN AMENDMENTS
WRITTEN PUBLIC COMMENTS

1. Alan B. Zublatt, Esq. - Law Office of Alan B. Zublatt
(August 4, 2003)

2. Ryan A. Marrone - Law Office of Alan B. Zublatt
(September 3, 2003)

Response by Barry J. Brady, Ph.D., Resource Planner, Pinelands Commission, to
comments of August 4 and September 3, 2003 (September 22, 2003)

3. Jay Perez, Senior Corporate Counsel - AT & T Wireless
(September 26, 2003)

4. Diane M. Constantine, Esq. - Law Office of Alan Zublatt
(September 29, 2003)

5. Ryan A. Marrone - Law Office of Alan A. Zublatt
(October 2, 2003)

6. R. Drew Patterson, Real Estate Project Manager, VelociTel, Inc., for Cingular
Wireless (October 3, 2003)

7. Theodore J. Korth, Program Manager for Law and Policy, Pinelands Preservation
Alliance (October 3, 2003)

AUG 5 - 2003

LAW OFFICES OF
ALAN B. ZUBLATT

PRINCETON EXECUTIVE CAMPUS
4301 RTE. 1, SUITE 210
P.O. BOX 510
MONMOUTH JUNCTION, N.J. 08852

TELEPHONE
(609) 951-0600

TELECOPIER
(609) 951-9693

REAL ESTATE TELECOPIER
(609) 951-0075

PLEASE REPLY TO:
PRINCETON EXECUTIVE CAMPUS
OFFICE

MAHWAH OFFICE
ONE INTERNATIONAL BLVD.
SUITE 400
MAHWAH, N.J. 07495-0016

TELEPHONE
(201) 512-8700

WEBSITE
www.zublatt.com

ALAN B. ZUBLATT
MEMBER OF N.J. & N.Y. BARS

STEPHEN J. MARSHALL
MEMBER OF N.J., N.Y. & TX. BARS
RULE 1:40 QUALIFIED MEDIATOR

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MEMBER OF N.J. BAR

RYAN A. MARRONE
MEMBER OF N.J. BAR

SUSAN S. STOCKER
MEMBER OF N.J. BAR

August 4, 2003

VIA OVERNIGHT COURIER AND FACSIMILE

Pinelands Commission
15 Springfield Street
New Lisbon, NJ 08064

Attn: John Stokes - Director
Larry Liggett - Manager of Planning
Dr. Bary Brady

Re: Analysis of AT&T Amendment to the PCS and CMP Plan

Dear Director Stokes, Mr. Liggett and Dr. Brady:

Our office has conducted a comprehensive analysis of the Amendment to the Comprehensive Plans for Cellular and Personal Communications Service to Include AT&T Wireless PCS of Philadelphia, LLC and its affiliates for Wireless Communications Facilities in the Pinelands ("Amendment"). This analysis included a comparative evaluation of the Amendment to the currently approved PCS and CMP Plans. The review process identified various provisions that raise issues and concerns. Set forth herein are our preliminary comments regarding those issues which we feel compromise the integrity of the previously approved plans and would only add to confusion and difficulty for the Pinelands Commission staff in processing future applications for Certificates of Filing. Please be advised that a detailed RF engineering analysis will be forthcoming. Once you have had an opportunity to review these items, please contact us to coordinate a meeting to discuss this matter in detail. Please note that the headings contained herein correspond to the headings delineated in the Amendment for ease of reference.

I. Plan Introduction.

While the general language of the Amendment is consistent with the prior plans, the introduction does not adequately identify the role of the Amendment nor how to resolve any conflict that exists between the contents of the Amendment and the previously adopted plans.

The Amendment is supplementary to the previously approved plans. Under no circumstances is it designed or intended to supercede anything previously approved and adopted by the Pinelands Commission. As discussed further herein, there are inherent discrepancies contained within the Amendment, particularly in relation to the numbering of facilities. Should the Pinelands Commission choose not to correct these deficiencies, or should others arise in the future, there should be language in the Amendment introduction to guide individuals in a determination as to what conflicting language is controlling. To accomplish this task, we suggest replacing the sentence: "This Amended Plan is not proposed to supercede the Comprehensive Plans but is in addition to and incorporates all documents that have been approved by the Pinelands Commission in regard to the Comprehensive Plans." With the following: *"This Amended Plan does not supercede the Comprehensive Plans but is in addition to, and supplementary of, those plans, and incorporates all documents that have been approved by the Pinelands Commission with regard to the Comprehensive Plans. Where a portion of this Amended Plan is in conflict with the Comprehensive Plans or other previously approved documents, the provisions set forth in the Comprehensive Plans and/or other previously approved documents shall be controlling, and the conflicted part of this Amended Plan shall be severed in part without affecting the remaining parts of the Amended Plan."*

II.A. AT&T Wireless Map Summary.

The method by which AT&T chooses to delineate facilities on its own map is inconsistent with the maps previously adopted in the Comprehensive Plans. *It is recommended that AT&T amend the mapping legend to be consistent with the previously adopted maps.*

II.B. Existing PCS Facilities In Which AT&T Wireless Proposes to Locate.

The Amendment improperly describes facility 061. The PCS Plan places this facility in the "height and least number of structures restricted" area.

II.C. Existing Approved Cellular Facilities on Which AT&T Wireless Proposes to Locate.

While the description and language utilized for each of these facilities is accurate, the problem is that the Amendment renumbers each of the facilities. All of the previously adopted plans and documents provide consistent numbering of the facilities. The Amendment changes all of the Cellular Plan facilities to new three digit numbers which have no correlation to any previously approved plan or document. For example, facility 20 of the Comprehensive Cellular Plan would now be numbered 301. This renumbering has no rational basis, and AT&T should be maintain the previously established facility numbering scheme. Any deviation from the schemes which have been in place in excess of five years only creates unnecessary confusion. Furthermore, the Amendment does not adopt all of the Comprehensive Cellular Plan facilities, thus some would remain with only the original number and others would have the original number and the newly designated AT&T facility number further adding to confusion.

V.D. Access and Utilities.

The Amendment adds the qualifiers "Typically" and "Generally" to start each of the paragraphs in this section. The first paragraph describes the responsibility for provision of utilities and the second paragraph addresses access. The qualifiers should be redacted from the Amendment as they are inconsistent with the prior plans. Under the previous plans, Sprint and the other carriers are to have 24/7 access, "always", not "generally", and each co-locator is responsible for utilities, "always", not "typically".

V.E.3.Co-Location Procedures – Contract & Site Development.

The third paragraph of this section in the Amendment as written removes the right of Wireless Providers to prepare their own applications for regulatory site plan approvals. The sentence: "The WP will also contract with a design firm to prepare site plans and construction drawings as required by the WP and AT&T Wireless will prepare the application for all required regulatory site plan approvals." should be replaced with: "The WP will also contract with a design firm to prepare site plans and construction drawings as required by the WP and AT&T Wireless, *and prepare* the application for all required regulatory site plan approvals."

We will forward our detailed RF engineering analysis once it is finalized. In the interim, please contact our office to coordinate a meeting to discuss the issues set forth herein in greater detail. We look forward to hearing from you in this regard.

Very truly yours,

LAW OFFICES OF ALAN B. ZUBLATT

BY: 

Alan B. Zublatt

cc: Rob Cobane – SSLP
Carole Knarich – SSLP
Kimberly Demps - SSLP

LAW OFFICES OF
ALAN B. ZUBLATT

PRINCETON EXECUTIVE CAMPUS
4301 RTE. 1, SUITE 210
P. O. BOX 510
MONMOUTH JUNCTION, N.J. 08852

TELEPHONE
(609) 951-0600

TELECOPIER
(609) 951-9693

REAL ESTATE TELECOPIER
(609) 951-0075

September 3, 2003

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PRINCETON EXECUTIVE CAMPUS
OFFICE

MAHWAH OFFICE
ONE INTERNATIONAL BLVD
SUITE 400
MAHWAH, N.J. 07495-0016

TELEPHONE
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SUSAN S. STOCKER
MEMBER OF N.J. BAR
SPECIAL COUNSEL

VIA LAWYER'S SERVICE

John Stokes, Director
Larry Liggett, Manager of Planning
Dr. Barry Brady, Resource Planner
The Pinelands Commission
15 Springfield Street
New Lisbon, NJ 08064

Re: AT&T Cellular and PCS Plan Amendment

Dear Director Stokes, Mr. Liggett and Dr. Brady:

Please be advised that we are in receipt of Dr. Brady's memorandum dated August 13, 2003, providing a copy of the revised version of AT&T's proposed Amendment to Comprehensive Plan for Wireless Communication Facilities in the Pinelands and the Comprehensive Plan for PCS Communication Facilities in the Pinelands (hereinafter, the "Plans"). As Dr. Brady notes, N.J.A.C. 7:50-5.4(c)(6)(v) provides that "any such amendments shall be agreed to and submitted jointly by all the local communications providers who provide the same type of service or have a franchise within the Pinelands Area." This regulatory language makes it abundantly clear that this Amendment, and any other Amendment to the Plan, must be agreed to in its entirety and submitted jointly by Sprint Spectrum, L.P. ("Sprint").

The legislative history in adopting the currently applicable administrative code regulations for the Pinelands Commission demonstrates and sets forth the Commission's intent. Specifically, 27 N.J.R. 3158(a) provides that the changes that were made to N.J.A.C. 7:50-5.4(c)(6) were done in order to "clarify the Commission's intent in requiring the joint submission of Comprehensive Plans for the development of certain local communications facilities in the Pinelands. Participation in the creation of the initial Comprehensive Plan by all members of the effected industries is considered fundamental to the design of the Plan. Notice and opportunity to participate in the design of the Plan must be provided to all service providers in the Pinelands who utilize local communication facilities to provide service. The plan will only be considered by the

Commission when it is demonstrated that it represents the joint effort of the effected entities.”

As you will recall, on August 4, 2003 we submitted an analysis of the AT&T Amendment to the Plans. In that correspondence several suggestions were made for modification to the Amendment. Our review of the latest revision of the Amendment reveals that none of the items set forth in our previous correspondence were addressed.

Therefore, please accept this correspondence as notice of Sprint’s present objection to the Amendment in its current form, and of Sprint’s intent to continue to review the Amendment and recommend further modifications to the Amendment before agreeing to, and joining in submission of, the Amendment for consideration by the Pinelands Commission.

Should you have any questions or considerations with this regard, please do not hesitate to contact our office. We look forward to your anticipated cooperation with this regard.

Very truly yours,

LAW OFFICES OF ALAN B. ZUBLATT

&

By: 

Ryan A. Marrone

Cc: Rob Cobane, Site Development Manager
Carole Knarich, Senior Project Specialist
Kimberly Demps, Project Specialist
Alan Zublatt, Esq.
Judith Babinski, Esq.



State of New Jersey
THE PINELANDS COMMISSION
PO Box 7
NEW LISBON NJ 08064
(609) 894-7300

JAMES E. MCGREEVEY
Governor

JOHN C. STOKES
Executive Director

September 22, 2003

Alan B. Zublatt, Esq.
Law Offices of Alan B. Zublatt
Princeton Executive Campus
4301 Rte. 1, Suite 210
P.O. Box 510
Monmouth Junction, NJ 08852

Re: Comments Regarding the Proposed
AT&T Amendment to the Comprehensive
Local Communications Facility Siting Plan

Dear Mr. Zublatt:

Thank you for your comments, dated 8/4/03 and 9/3/03, regarding the proposed amendment to the wireless communications facility siting plan for the Pinelands which was submitted by AT&T and its affiliates. Should the Commission decide to approve AT&T's amendment (tentatively scheduled for consideration at its meeting of 11/7/03), a formal response to these comments will be included in the Executive Director's Report, which will summarize the amendment, its conformance with the standards of the Comprehensive Management Plan (CMP), and all comments received. However, we wanted you to be aware of the staff's initial reaction to your submission and the recommendation we are preparing concerning it.

Our staff does not feel that the concerns you have raised are of sufficient weight that we would recommend that the amendment not be approved. At this point, we anticipate recommending approval of the amendment as presented. While the AT&T submission is not without minor errors, they are no more egregious than those in the previously adopted cellular and PCS plans (in which Sprint participated) and certainly do not rise to the level of a fatal flaw.

With regard to the specific items raised in your letter of 8/4/03, I will respond according to the same headings you used:

I. Plan Introduction

Our review of the AT&T amendment does not indicate that there are any conflicts or discrepancies between it and the adopted plans that are of a substantive nature. Renumbering of the facilities to be consistent with the adopted cellular and PCS plans might be helpful, but it is certainly not



<http://www.state.nj.us/pinelands/>
E-mail: Info@njpinelands.state.nj.gov

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required by the CMP. Moreover, the additional wording you suggested is not necessary to establish the relationship between the adopted plans and any amendments.

II.A. AT&T Wireless Map Summary

There is no legal requirement that the legends and symbols of the AT&T map conform to the earlier maps. Although we agree that this would have been preferable, our preferences are not legally enforceable.

II.B. Existing PCS Facilities In Which AT&T Wireless Proposes to Locate

We had also noted this discrepancy between the AT&T and the adopted PCS amendments; our GIS staff determined that the lat/long listed in both documents is in a Regional Growth Area.

In any event, similar errors occurred in the PCS plan, e.g., facility #38 was identified as being in a Regional Growth Area, but is actually in a Special Agricultural Production Area. The staff decided at that time that such occasional errors should not prevent the plan from going into effect. They can be addressed and corrected at the time a development application is filed.

II.C. Existing Approved Cellular Facilities on Which AT&T Wireless Proposes to Locate

Again, consistency in the facility numbering scheme, while desirable, is not required by the CMP.

V.D. Access and Utilities

Our staff feels that the current wording of the amendment is sufficient to obligate each co-locator to provide for and maintain its services and equipment and to allow for adequate access. The terms you find objectionable are vague and do not seem to us to prevent installation, maintenance or access.

V.E.3. Co-Location Procedures

Since the sentence you find objectionable refers to the Wireless Provider preparing site plans and construction drawings and the sentence following refers to the Wireless Provider securing permits, it does not appear to us that the other providers are prevented in any meaningful way from submitting applications for local permits. However, we will discuss this wording further with AT&T's representatives.

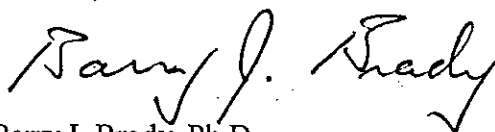
Finally, the Pinelands Commission does not agree with your interpretation of the language of NJAC 7:50-5.4(c)6.v. The intent of that section was to allow providers an opportunity to examine a proposed amendment and suggest ways whereby service could be enhanced while allowing for collocation, to the extent possible, and the fewest number of towers overall. We appreciate your

comments on the proposed amendment, but your concurrence is not required for the Commission to consider it for approval.

Please note that you may submit additional comments at the public hearing, which will be held at our offices on October 1. Moreover, the written comments you have submitted will be appended to the Executive Director's Report on the amendment, as will all written comments received by October 3. At the Commission's discretion, an opportunity for additional public comment will be provided at its meeting of November 7, when, presumably, the Commission will take action on the proposed amendment. However, comments must be confined to the record developed at the public hearing.

Please feel free to contact us with any other questions or comments.

Sincerely,



Barry J. Brady, Ph.D.
Resource Planner

P10A/LLL/SR

cc: Judith A. Babinski, Esq.
Warren Stillwell, Esq.
Charles Krudener for Cingular
Margie Weber for Nextel
Scott Wiatrowski for Verizon

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Subject:

Date: Fri, 26 Sep 2003 10:28:17 -0500

From: "Perez, Jay" <jay.perez@attws.com>

To: planning@njpines.state.nj.us

Jay Perez
Senior Corporate Counsel
AT&T Wireless
15 East Midland Avenue
Paramus, NJ 07652
(201) 576-7529
(201) 576-3179 fax
jay.perez@attws.com
www.attwireless.com

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LAW OFFICES OF
ALAN B. ZUBLATT

PRINCETON EXECUTIVE CAMPUS
4301 RTE. 1, SUITE 210
P.O. BOX 510
MONMOUTH JUNCTION, N.J. 08852

TELEPHONE
(609) 951-0600

TELECOPIER
(609) 951-9693

REAL ESTATE TELECOPIER
(609) 951-0075

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ONE INTERNATIONAL BLVD.
SUITE 400
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TELEPHONE
(201) 512-8700

WEBSITE
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DIANE M. CONSTANTINE
MEMBER OF N.J. BAR

RYAN A. MARRONE
MEMBER OF N.J. BAR

SUSAN S. STOCKER
MEMBER OF N.J. BAR
SPECIAL COUNSEL

September 29, 2003

Via Overnight Mail & Facsimile

The Pinelands Commission
15 Springfield Street; PO Box 7
New Lisbon, NJ 08064

Attn: John Stokes, Director
Larry Liggett, Manager of Planning
Dr. Barry Brady

**RE: Legal Commentary: Proposed AT&T Amendment to the Comprehensive
Local Communications Facility Siting Plan**

Dear Director Stokes, Mr. Liggett and Dr. Brady:

Please accept this legal commentary in response to Dr. Brady's advices: (1) that the Pinelands Commission staff intends to have AT&T include a provision in its "Amendment to the Comprehensive Plans for Cellular and Personal Communications Service to include AT&T Wireless PCS of Philadelphia, LLC and its affiliates for Wireless Communications Facilities in the Pinelands", requiring wireless service providers to utilize Distributed Antenna Systems ("DAS") along certain areas of the Pine Plains, more particularly, along Route 72 and (2) should AT&T decline to include DAS technology in its plan amendment, the Pinelands Commission may consider imposing the use of DAS technology as a condition of approval of the plan amendment.

It is our position that such action would constitute rulemaking on the part of the Pinelands Commission in accordance with the criteria set forth in Metromedia, Inc. v. Dir. Div. of Tax., 97 N.J. 313, 331-32 (1984), mandating compliance with the procedural notice requirements of the Administrative Procedure Act., N.J.S.A. 52:14B-1 et. seq. . Additionally, the Pinelands Commission has no authority to dictate the type of

technology a wireless provider should deploy as part of its network build-out. The Federal Communications (“FCC”) is the sole agency charged with licensing and regulating the implementation of personal wireless communications services. System integration, service coverage and technology platforms are within the regulatory purview of the FCC, and not the Pinelands Commission. Although the Pinelands Commission is authorized to make determinations with regard to the siting of wireless telecommunications facilities, pursuant to Sections 253(a) and 704 of the Telecommunications Act of 1996 (“TCA”) such determinations may not create a barrier to entry or prohibit or have the effect of prohibiting the provision of personal wireless services. Should the Pinelands Commission require the implementation of DAS technology within, or adjacent to, the Pine Plains areas, that determination will effectively prohibit the provision of wireless services in violation of the TCA.

I. The Requirement that DAS Technology be Utilized in the Pinelands Management Areas Adjacent to the Pine Plains near Route 72 Constitutes Agency Rulemaking

In order to implement legislative policy, an agency has discretion to choose between rulemaking, adjudication, or an informal disposition in discharging its statutory duty. Northwest Covenant Med. Ctr. v. Fishman, 167 N.J. 123, 137 (2001). However, the manner in which the agency exercises its discretion in choosing an appropriate procedure may implicate the procedural requirements of the APA. Ibid. If an agency’s action constitutes a rule, it must comply with the APA requirements of notice and opportunity for comment. N.J.S.A. 52:14B-4(a) (1), (2); Woodland Private Study Group v. State, Dep’t of Env’tl. Prot., 109 N.J. 62, 63-64 (1987). The purpose of the notice requirements is “to give those affected by the proposed rule an opportunity to participate in the rule-making process not just as a matter of fairness but also as “a means of informing regulators of possibly unanticipated dimensions of a contemplated rule.” In re Adoption of Regulations Governing Volatile Organic Substances in Consumer Prods., N.J.A.C. 7:27-23, 239 N.J. Super. 407, 411 (App. Div. 1990) (quoting American Employer’s Ins. v. Commissioner of Ins., 236 N.J. Super. 428, 434 (App. Div. 1989)).

An “administrative rule” is defined in the APA as follows:

An agency statement of general applicability and continuing effect that implements or interprets law or policy, or describes the organization, procedure or practice requirements of any agency. The term includes the amendment or repeal of any rule, but does not include: (1) statements concerning the internal management or discipline of any agency; (2) intra-agency and interagency statements; and (3) agency decisions and findings in contested cases.

N.J.S.A. 52:14B-2(e).

In the seminal case of Metromedia, Inc. v. Dir. Div. of Tax., supra, the court set forth six factors to be assessed in determining whether agency action constitutes rulemaking. They include whether the agency action:

(1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is, prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.

Id., 97 N.J. at 331-32.

These factors are applicable whenever the authority of an agency to act without conforming to the requirements of the APA is questioned, for example, in adopting orders, guidelines, or directives. Doe v. Poritz, 142 N.J. 1, 97 (1995); Woodland Private Study Group, supra, 109 N.J. at 67-68; Bullet Hole, Inc. v. Dunbar, 335 N.J. Super. 562, 580 (App. Div. 2000). However, not all of these factors must be present for an agency action to constitute rulemaking; instead, each of the factors are weighed and balanced. Metromedia, supra, 97 N.J. at 332.

In the instant matter, review of the relevant factors indicates that imposition of a requirement that only DAS technology will be approved for the siting of wireless communications facilities within, or adjacent to, the Pine Plains near Route 72 constitutes rulemaking. First, the action is intended to encompass all personal communication service providers seeking to locate facilities in this area pursuant to the Comprehensive Plan for PCS Communications Facilities in the Pinelands satisfying the first two factors.

The third factor is satisfied because the proposed siting requirement is intended to operate prospectively. That is, if the plan amendment is adopted with the DAS siting requirement, going forward, all wireless service providers will be required to implement DAS technology within the specified area.

The fourth and fifth factors are present because this proposed directive regarding DAS technology is not expressly provided by, nor is it clearly and obviously inferable from the enabling legislation and was not previously expressed in any official and explicit agency determination, adjudication or rule. The facility siting criteria set forth in N.J.A.C. 7:50-5.4 (c) 4 (i) and (iii) respectively, provide that the thirty-five foot height limitation would not be applicable if an antenna and supporting structure could be located such that it meets technical operating requirements and avoids to the maximum extent

practicable, visual impact as viewed from the Pine Plains. In the proposed plan amendment, AT&T has stated, after investigation at the request of the Pinelands Commission, that DAS technology would not provide an acceptable level of service coverage required pursuant to its FCC license. At the recent carriers meeting, all of the carriers concurred that DAS technology was not utilized in the Pinelands because it was generally useful in controlled, smaller range stadium or indoor environments. This technology is not viable for longer range coverage and due to the increased number of antennas at lower heights required by this technology, it has a greater potential for radio frequency interference and degradation of the system network.

Plainly, the carriers have expressed their view that this alternative technology could not satisfy technical operating requirements. Further, it is clear that this technology will require numerous antennas to achieve the coverage radius that one, taller antenna, could satisfy. Evidently, the proposed DAS requirement represents a departure from the expressed legislative goal to limit the number of local communications facilities within the most restrictive Pinelands management areas. If the Pinelands Commission seeks to require lower heights for communication facilities adjacent to the Pine Plains with the goal of making such facilities less visibly intrusive, then it may only validly do so via rulemaking procedures in accordance with the APA. It cannot attempt to achieve the same result by circumventing the procedural requirements of the APA and including a requirement for DAS technology in specified management areas in the proposed plan amendment.

Turning to the final Metromedia factor, the proposed requirement reflects a decision on administrative regulatory policy in the nature of a general policy. That is, when it comes to the Pine Plains, the height requirements formerly permissible for communications facilities are no longer palatable and shorter facilities associated with DAS technology will now be required.

I note that visual conspicuity with regard to communications facilities and the Pine Plains has been a concern with one environmental organization and was discussed in the Executive Director's Report To The Pinelands Commission For Proposed Comprehensive Plan For PCS Communication Facilities In The Pinelands, December 29, 1999, p. 17. At that time, the Executive Director wrote:

Some members of the public remain opposed to any tower that affects or could affect such scenic resources [Pine Plains], even if the need were conclusively demonstrated to their satisfaction. Their concern, thus, is not with the PCS Plan per se, but with the regulations that clearly permit such siting in these cases. However, the PCS plan must be reviewed by the regulations as written and adopted.

In this regard, the Metromedia court explained:

Persons subject to regulation are entitled to something more than a general declaration of statutory purpose to guide their conduct before they are

restricted or penalized by an agency for what it then decides was wrong from its hindsight conception of what the public interest requires in the particular situation.

Id., 97 N.J. at 337.

This reasoning is equally applicable to the agency action contemplated here. Accordingly, the Pinelands Commission cannot legitimately require wireless service providers to utilize DAS technology in areas adjacent to the Pine Plains near Route 72 without amending its regulations in accordance with APA procedural requirements.

II. The Proposed DAS Requirement is Violative of the TCA and Falls Within the Regulatory Auspices of the FCC.

AT&T has unequivocally stated in its proposed plan amendment that utilizing DAS technology as part of its network within the Pinelands would not satisfy the required level of coverage it must provide pursuant to its FCC license. Nevertheless, it appears that implementation of this system in specific areas of the Pinelands may be required by the Pinelands Commission.

The FCC is charged with regulating and enforcing signal service levels as well as construction requirements for broadband PCS licenses. The FCC has established construction requirements for broadband PCS licenses to ensure that the broadband PCS spectrum is used effectively and made available to as many communities as possible. 47 C.F.R. §24.203. The Pinelands Commission may not mandate a particular technology application that would not satisfy FCC requirements and could place the provider's license in jeopardy.

It is strictly within the purview of the FCC to regulate the type of technology and system integration that will satisfy its licensing requirements. Conditions attached to zoning approval may not impinge upon subject matters which have been preempted by the State or a higher governmental unit. See, F&W Associates v. County of Somerset, 276 N.J. Super. 519 (App. Div. 1994) and Freeman v. Burlington Broadcasters, Inc. 204 F.3d 311 (2d Cir. 2000), cert. denied, 531 U.S. 917 (2000) (local zoning board was preempted from enforcing a permit condition requiring the permittees (a radio station operator, a cellular provider and a volunteer rescue and fire company) to remedy any radio frequency interference from tower signals with appliances and devices in local homes). Recently, the FCC determined that federal law preempted provisions of a county zoning ordinance involving radio frequency interference. In the Matter of Petition of Cingular Wireless LLC for a Declaratory Ruling that Provisions of the Anne Arundel County Zoning Ordinance Are Preempted as Impermissible Regulation of Radio Frequency Interference Exclusively to the Federal Communications Commission, Memorandum Opinion and Order, WT-Docket No. 02-100 (7/7/03).

Further, Section 253 (a) of the TCA entitled, "Removal of barriers to entry" provides:

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. §253 (a).

Section 332 (c) (7)(B)(i)(II) of the TCA provides:

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

Should the Pinelands Commission insist upon requiring wireless service providers to utilize DAS technology in specific areas in which the providers have advised that DAS would not fulfill the significant gaps in their service coverage, the Pinelands Commission determination would effectively prohibit the provision of personal wireless services in violation of TCA Sec. 332 (c)(7)(B)(i)(II).

III. Conclusion

Imposition of a plan amendment requirement that DAS technology be utilized along certain areas of the Pine Plains is violative of APA procedural notice requirements attendant to rulemaking and violates Sections 253(a) and 332(c) (7)(B)(i)(II) of the TCA.

Sprint Spectrum L.P. could not endorse the proposed plan amendment should this requirement be imposed. Although the Pinelands Commission staff have maintained that N.J.A.C. 7:50-5.4(c) 6.v does not require provider concurrence with the proposed amendment, review of the regulatory language suggests otherwise. Pursuant to N.J.A.C. 7:50-5.4(c) 6: “Where more than one entity is providing the same type of service or has a franchise for the area in question, the plan shall be agreed to and submitted jointly by all such providers, where feasible...”[emphasis added]. This language references the initial plan and encourages the participation of all providers to develop a comprehensive siting plan. However, the phrase “where feasible” acknowledged that some providers may not have been ready to participate since they had not fully developed their network siting plans.

The “where feasible” qualifying phrase is conspicuously absent from N.J.A.C. 7:50-5.4(c) 6.v. That regulatory section is applicable to amending an approved plan and provides that: “Any such amendments shall be agreed to and submitted jointly by all of the local communications providers who provide the same type of service or have a franchise within the Pinelands Area.” Plainly, unanimity among the providers is now required to amend a plan that has been previously approved; otherwise, the initial plan signatories could be compromised by a plan amendment that vitiates the facility siting blueprint that they had worked to develop and have approved by the Pinelands Commission. Any other interpretation of this regulatory requirement contorts the plain meaning of its directive.

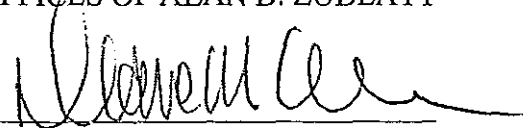
Should you have any questions with regard to this legal commentary, please do not hesitate to contact me. I look forward to your anticipated cooperation during the plan amendment approval process.

Very truly yours,

LAW OFFICES OF ALAN B. ZUBLATT

DMC/ac

BY:



Diane M. Constantine, Esq.

cc: Valerie Haynes, D.A.G.
Ellen Balint, D.A.G.
Carole Knarich, Sr. Property Specialist [SSLP]

10-1-2003

LAW OFFICES OF
ALAN B. ZUBLATT

ALAN B. ZUBLATT
MEMBER OF N.J. & N.Y. BARS

STEPHEN J. MARSHALL
MEMBER OF N.J., N.Y. & TX. BARS
RULE 1:40 QUALIFIED MEDIATOR

DIANE M. CONSTANTINE
MEMBER OF N.J. BAR

RYAN A. MARRONE
MEMBER OF N.J. BAR

SUSAN S. STOCKER
MEMBER OF N.J. BAR
SPECIAL COUNSEL

PRINCETON EXECUTIVE CAMPUS
4301 RTE. 1, SUITE 210
P.O. BOX 510
MONMOUTH JUNCTION, N.J. 08852

TELEPHONE
(609) 951-0600

TELECOPIER
(609) 951-9693

REAL ESTATE TELECOPIER
(609) 951-0075

PLEASE REPLY TO:
PRINCETON EXECUTIVE CAMPUS
OFFICE

MAHWAH OFFICE
ONE INTERNATIONAL BLVD.
SUITE 400
MAHWAH, N.J. 07495-0016

TELEPHONE
(201) 512-8700

WEBSITE
www.zublatt.com

October 2, 2003

VIA FACSIMILE & OVERNIGHT COURIER

John Stokes, Director
The Pinelands Commission
15 Springfield Street
New Lisbon, NJ 08064

Re: AT&T Cellular and PCS Plan Amendment

Dear Director Stokes:

Please be advised that Sprint Spectrum, LP ("Sprint") requests this correspondence along with the previous correspondence dated September 29, 2003, of which a copy is enclosed herein, be included in the public record of the Pinelands Commission's consideration of the proposed AT&T Wireless Amendment to the PCS and Cellular Plans. In addition to the positions set forth in the September 29, 2003 correspondence, Sprint proposes the Plan Introduction of the Amendment be modified to state:

"This Amended Plan does not supercede the Comprehensive Plans but is in addition to, and supplementary of, those plans, and incorporates all documents that have been approved by the Pinelands Commission with regard to the Comprehensive Plans including, but not limited to, Schedule "G". Where a portion of this Amended Plan is in conflict with the Comprehensive Plans or other previously approved documents, the provisions set forth in the Comprehensive Plans and/or other previously approved documents shall be controlling, and the conflicted part of this Amended Plan shall be severed in part without affecting the remaining parts of the Amended Plan."

Should you have any questions or considerations with this regard, please do not hesitate to contact our office.

Very truly yours,

LAW OFFICES OF ALAN B. ZUBLATT

By: 

Ryan A. Marrone

Cc: Rob Cobane, Site Development Manager
Carole Knarich, Senior Project Specialist
Kimberly Demps-Reed, Project Specialist

VIA ELECTRONIC MAIL

October 3, 2003

Dr. Barry Brady
Pinelands Commission
15 Springfield Road
New Lisbon, New Jersey 08064

RE: Cingular Wireless Comment on the AT&T Wireless PCS of Philadelphia, LLC
Amendment to the Comprehensive Plans for Cellular and Personal Communications Service

Dear Dr. Brady:

As a response to the above referenced Amendment, Southwestern Bell Mobile Syst
Insofar as the remainder of the Amendment is concerned, Cingular Wireless wishes to en
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Page 2
Dr. Barry Brady

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Cingular Wireless is interested in the findings of any study undertaken by the

Regards,

R. Drew Patterson
Real Estate Project Manager
VelociTel, Inc., for Cingular Wireless



VIA ELECTRONIC MAIL

October 3, 2003

Dr. Barry Brady
Pinelands Commission
15 Springfield Road
New Lisbon, New Jersey 08064

**RE: *Cingular Wireless Comment on the AT&T Wireless PCS of Philadelphia, LLC
Amendment to the Comprehensive Plans for Cellular and Personal
Communications Service in the Pinelands***

Dear Dr. Brady:

As a response to the above referenced Amendment, Southwestern Bell Mobile Systems, LLC d/b/a Cingular Wireless offers the following comments. In general, Cingular Wireless supports the AT&T Wireless PCS of Philadelphia, LLC Amendment to the Comprehensive Plans for Cellular and Personal Communications Service in the Pinelands. Cingular feels that the Amendment as proposed by AT&T Wireless with respect to the new and existing facilities is a positive attempt to provide reliable and seamless wireless coverage using the minimum number of new facilities and creating the least impact on environmentally sensitive areas. Cingular is interested in evaluating the new and rebuilt sites for its own needs in meeting the Federal Communications Commission ("FCC") requirements of its own license. However Cingular Wireless, as successor to Comcast Metrophone, wishes to reserve its rights under the approved Cellular Plan to construct its approved facilities on a timetable that meets its service deployment needs. That is not to say Cingular is unwilling to work in conjunction with the other licensed carriers in planning and building a previously approved structure. It is of no concern to Cingular Wireless, necessarily, which company owns the structure as long as it is subject to the accepted co-location policy and it provides a height sufficient for the effective and seamless operation of Cingular's network.

Insofar as the remainder of the Amendment is concerned, Cingular Wireless wishes to enter the following comments. In section VIII: Future Technology (page 29), Cingular notes the introduction to the debate of a technology known as Distributed Antenna Systems ("DAS"). Cingular's chief concerns are that this technology is both untested and severely limited in its ability to satisfy Cingular's FCC mandate for providing reliable and seamless wireless service to Cingular's license area. Furthermore, Cingular's experience with Nokia, its equipment vendor, is that this technology is designed exclusively for in-building coverage. Nokia does not design DAS for outdoor applications as is proposed in the aforementioned amendment. Given these limitations, it is unknown whether "DAS" could work with the existing Cingular network of sites.

An obvious limitation of DAS, assuming it could be designed for outdoor applications, would be its very limited coverage area. Specifically, intersecting roads or locations a short distance from the DAS could lack reliable coverage. This would



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Dr. Barry Brady

significantly impact the provision of emergency services in these areas not immediately adjacent to the antenna system. This contrasts greatly with the capabilities of a typical wireless facility whereby reliable service is provided over an approximate radius of three miles. Cingular Wireless would strongly object to any insistence by the Pinelands Commission to make DAS a required technology given its unproven feasibility and apparent limitations. Moreover, the lack of a published study on DAS means that Cingular Wireless cannot evaluate this technology in a timely manner for its suitability in the proposed application. It is therefore Cingular Wireless' opinion that no wireless carrier be prevented from constructing a facility which was previously approved in the Cellular or PCS Plans or be required to evaluate DAS in the manner proposed until such time as it has been proven an effective, seamless component of a fully developed wireless network.

Cingular Wireless is interested in the findings of any study undertaken by the Commission with respect to DAS and would welcome the opportunity to further discuss the above issues with the Pinelands Commission and the other licensed wireless carriers. Please contact me should you have any questions or comments.

Regards,

R. Drew Patterson
Real Estate Project Manager
VelociTel, Inc., for Cingular Wireless



Pinelands
Preservation Alliance

114 Hanover Street Pemberton, New Jersey 08068 Phone 609894.8000 Facsimile 6098949455
E-mail: ppa@pinelandsalliance.org Website: www.pinelandsalliance.org

OCT 6 - 2003

October 3, 2003

Barry J. Brady, Ph.D.
Resource Planner
Pinelands Commission
Post Office Box 7
New Lisbon, New Jersey 08064

By Facsimile and U.S. Mail
609-894-7336

Re: Public Comment
AT&T Proposed Amendment to the Comprehensive Siting Plan
for Local Communications Facilities in the Pinelands
Submission Dated: August 5, 2003
Public Hearing: October 1, 2003

Dear Mr. Brady:

Please accept the following as the public comment of Pinelands Preservation Alliance to the aforescribed proposed amendments as solicited by your Memorandum of September 16, 2003.

1. Failure to Plan for a Ten Year Horizon.

Section VII (3) of the ATT proposal states that AT&T "developed [the proposed] plan to meet its anticipated service needs for the next five years" The use of such five year horizon directly contradicts the representations made by AT&T at the public hearing that the plan was designed for a ten year (10 yr.) period.

Because the proposed plan is not designed to meet service needs beyond five years, the proposal should not be accepted in its current form, and a ten year plan should be required.

2. Circumscribed Comment Opportunity.

The radio frequency report which will analyze the coverage area and distil existing need was not available prior to the close of public comment. Without access to the radio frequency report it is impossible for the public to independently ascertain that there is i) a significant gap in service, and ii) that the proposed facility is specifically designed to close such gap in the manner least intrusive to the purposes of the Pinelands National Reserve.

In effect, the opportunity for meaningful comment on the proposed AT&T plan is foreclosed by the withholding of this information. Radio frequency reports made for or used by the Pinelands Commission in passing on any proposal to construct communication towers in the Pinelands should be made available along with all other proposal documents when the matter is opened to public review.

3. Failure to Substantiate Need.

Ascertaining radio frequency information is particularly important when justification of service is not provided by the applicant during the submission process. For example, the proposal submitted by AT&T does not make clear that there is a significant gap in service justifying use of proposed sites 322, 358 and 372 (proposed new structures not located in "by-right" areas).

Complete information regarding the extent of existing gaps and the suitability of the proposed plan in closing such gaps is required to be produced by any applicant that relies on the Telecommunications Act of 1996 ("TCA"). The TCA, a federal law, will only preempt or interfere with state and local zoning determinations when an applicant i) clearly demonstrates that a significant gap exists in the ability of remote users to access the national network, ii) that the area the new facility will serve is not served by another carrier, and iii) that the manner by which the gap will be filled strictly conforms to the intent of the Pinelands Comprehensive Management Plan. *See Omnipoint Communications Enterprises, L.P. v. Zoning Hearing Board of Easttown Township*, 331 F.3d 386 (3rd Cir. 2003).¹ Absent these affirmative demonstrations, the TCA can not be used justify a less than strict application of the CMP.²

There is no question that a public need for wireless service exists generally throughout the Pinelands. There is a question as to whether there is a significant gap in existing service which justifies an implicating the resources of the PNR for AT&T.

The only section of the AT&T proposed plan which might be read as attempting to describe significant gaps in service appears to be Section VII (Level of Service). However, this section fails to identify any significant gap which the proposed sites will close. The mere explanation of why calls carried by AT&T may not be go through does not serve to identify any significant gap in service, does not establish the area or boundaries of such significant gap, and does not explain how that gap will be closed in the least Pinelands intrusive manner.

There is also a question as to whether if any significant gap in service were properly identified, that such gap would be closed by the proposed plan, in the least

¹ The TCA is a federal law. AT&T's reliance on any state court decisions which provide conflicting interpretation from that of the Third Circuit Court of Appeals is misplaced.

² AT&T has not raised any issue of competition with existing providers as the basis for these sites, and so the discrimination provision of the TCA (§322(c)(7)(B)(i)(I) are not addressed by this comment.

intrusive manner. Because no significant gap has been identified, the suitability of the plan in closing such hypothetical gap can not be ascertained.

Because the AT&T proposed plan fails to adequately demonstrate the extent of any existing need, and fails to exhibit a plan tailored to that need, sites 322, 358 and 372 should not be approved.

4. Issues Specific to Facility 358.

The approximately four thousand acre (4,000 ac.) New Jersey Natural Lands Trust Crossley Preserve is located immediately adjacent to, and virtually surrounds, the industrial park proposed to support facility 358. Used for low intensity recreation, the Crossley Preserve is a "low intensive recreation facility" as understood at *N.J.A.C. 7:50-5.4(c)(4)(ii)*.

Because the specific need for facility 358 (significant gap) has not been identified, and because there is no indication facility 358 has been tailored to provide for such need, facility 358 has not been shown to avoid to the maximum extent practicable any direct line of site from a low intensity recreation facility as required for approval under *N.J.A.C. 7:50-5.4(c)(4)(ii)*.

Additionally, facility 358 is near-by an existing airport, and should be determined to comply with Federal Aviation Administration requirements prior to approval.

This concludes the comments of PPA. Thank you for your time and attention.

Sincerely yours,



Theodore J. Korth
Program Manager for Law and Policy

cc: Judith Babinski (Counsel for AT&T)
by facsimile and mail