



April 13, 2011

***VIA FEDERAL EXPRESS OVERNIGHT***

Mr. Frank Benesh, Chairman  
Jackson Zoning Board of Adjustment  
54 Main Street  
Jackson, NH 03846

Re: AT&T Wireless Communication Facility at Black Mountain Road  
**Narrative Supporting Application for a Variance**

Dear Zoning Board Members:

This application is being submitted by New Cingular Wireless PCS, LLC d/b/a AT&T Mobility (“AT&T”), appearing by and through Downs Rachlin Martin PLLC, its attorneys, and with the assistance of Site Acquisitions, Inc. (“SAI”), its consultants, to request that the Board of Adjustment grant a variance from the requirement that telecommunications facilities be located within the designated Telecommunications Overlay Zone as set forth in Section 14.6.3.3 of the Town of Jackson Zoning Ordinance (“Ordinance” or “JZO”). AT&T is requesting this variance in order to permit the replacement of an existing, co-located personal wireless services facility with a new wireless facility support structure (as described further herein, the “Facility”) to be located at Black Mountain Road, Map R-17, Lot 31 B (the “Property”), near so-called Lift Tower 14.

Enclosed we have provided an application for a variance as well as a check for seventy-five dollars (\$75.00), representing the application fee for the Board of Adjustment review of this application. The abutter list is also enclosed. In the event there are any additional fees, please let me know and I will forward such fees to you immediately.

## I. Overview

In October of 2009, AT&T submitted an application and documentation for Site Plan Review of a ground-mounted wireless telecommunications facility on Black Mountain. This application was denied, in part because AT&T was required to seek a variance from Section 14.6.3.3. *See Exhibit A* (Selectboard's March 25, 2010 Denial Letter). AT&T then submitted a new proposal in October 2010 to extend an existing communications facility located on top of the ski lift tower. *See Exhibit B* (October 4, 2010 Project Narrative). While that application was pending, AT&T sought and obtained a permit to swap out the three antennas on the existing ski lift facility with new, smaller antennas. *See Exhibit C* (November 17, 2010 Cover Letter to Application for Building Permit). This temporary facility was intended to provide some coverage for the ski area during the 2010-2011 ski season, pending the town's approval of the extension project.

Subsequently, AT&T determined that it could not complete the ski lift extension project as proposed because the ski area's engineers concluded that the added load would compromise the structural integrity of the ski lift tower. Simply put, Lift Tower 14 can support three antennas for GSM-based phone service, but it cannot support additional antennas needed to bring 3G and eventually 4G service to Black Mountain and surrounding areas.

Accordingly, AT&T is submitting a new application for a building permit to the Jackson Selectboard, seeking approval to install a communications facility consisting of the following elements: (i) a 45' tall monopole tower located immediately adjacent to the existing shelter near Lift Tower 14; (ii) nine (9) panelized antennas each measuring roughly 55" h x 11" w x 5" d; (iii) utility connections for power, telephone and antenna connections (including a new ice bridge from the Shelter to the Tower for antennas); and (iv) one pole-mounted GPS antenna to be mounted on the ice bridge. AT&T proposes to locate its equipment within the existing 10' x 12' equipment shelter purchased from RCC Atlantic and Mr. Fichera. Each feature of the Facility is described and depicted in more detail on the Zoning Drawings prepared by Hudson Design Group and attached as *Exhibit D* to this application. Photo Simulations depicting views of the proposed tower from various vantage points are enclosed as *Exhibit E*. *See also Exhibit F* (March 31, 2011 Cover Letter to Application for Building Permit).

Based on recent communications with the Building Inspector, AT&T understands that the Selectboard has agreed to allow AT&T to apply to the Board of Adjustment for a variance at this time.

## II. Project Objective

The purpose of the Facility is to provide Global Systems for Mobile Communications ("GSM") and High Speed Packet Access ("HSPA") / Universal Mobile Telecommunications Service ("UMTS") wireless coverage in and around the Town of Jackson, including GSM-standard 3G wireless technologies for simultaneous circuit switched voice and packet switched data communications. Coverage is also needed to enable the use of Enhanced 911 ("E-911") service so that emergency responders can pinpoint the location within the Town from which a wireless call or message is placed.

GSM is a technology used to provide digital cellular telephone service, and is the migration path chosen by AT&T to provide reliable wireless service to users who have purchased or will purchase GSM handsets. The benefits of GSM include ability to provide the user with higher speeds in data services, better phone selection, and greater mobility between networks in the United States (including enabling handset use by subscribers to other GSM subscribers), Europe and Asia. HSPA/UMTS technology is similar to GSM in function, but the distinct technology allows transmissions of data at much higher speeds, including for video transmissions. The combination of GSM and UMTS technologies results in 3G service being available for optimal use of multiple handheld devices such as the iPhone® and Blackberry®, as well as for laptop computers through use of a USB-based modem. AT&T 4G LTE service, which requires a combination of enhanced backhaul and modified 3G service, will become available over the next two to three years in the northeastern United States.

The immediate purpose of the project is to upgrade from GSM-only service at Black Mountain (based on the temporary facility on Lift Tower 14) to 3G service, while maintaining the same coverage footprint in the area. To do this, it is necessary to install additional antennas on a new support structure situated within the same general location as Lift Tower 14.

### III. Application Submittals and Criteria for the Variance

AT&T requires a variance in order to site the proposed 45' monopole, antennas and related equipment outside of the Telecommunications Overlay Zone as set forth in Section 14.6.3.3 of the Ordinance. Section 14.6.3.3 states:

To the extent that facilities under Paragraphs 14.6.3.1 and 14.6.3.2 [dealing with co-location of antennas on existing structures] are not available, preference will be given to siting a facility within the designated Telecommunications Overlay Zone, which shall consist of an area within 200 feet on either side of the traveled center line of NH Route 16 within the Jackson town limits.

RSA 674:33<sup>1</sup> authorizes the Zoning Board of Adjustment to grant a variance from the terms of the Zoning Ordinance provided that the applicant can satisfy the five criteria imposed under state law. In particular, an applicant must show: (1) the variance will not be contrary to the public interest; (2) the spirit of the ordinance is observed; (3) substantial justice is done; (4) the values of surrounding properties are not diminished; and (5) literal enforcement of the provisions of the ordinance would result in unnecessary hardship. RSA 674:33, I (b). AT&T details below how its proposed Facility meets each of these five criteria. The Board should also be guided by the New Hampshire Supreme Court's decision in *Daniels v. Town of Londonderry*, 157 N.H. 519, 527 (2008), regarding the interplay of the variance criteria and the Telecommunications Act of

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<sup>1</sup> Section 17.2.3 of the Town of Jackson Zoning Ordinance authorizes the Zoning Board of Adjustment to hear and authorize, upon appeal in specific cases, a variance from the terms of the Town of Jackson Zoning Ordinance ("Ordinance"), if the Board finds that the criteria set forth in RSA 674:33(I)(b), as amended from time to time, are met.

1996, 47 U.S.C.A. §332(c)(7) (2001). If additional items or information is requested, AT&T will supplement accordingly.

(1) *The variance will not be contrary to the public interest (RSA 674:33, I(b)(1)).*

A tower at this site would serve the public interest by alleviating a significant gap in AT&T's coverage in the Town of Jackson. The current non-existent 3G coverage, as well as coverage with the proposed tower activated, is shown on the enclosed propagation maps (Exhibit G).

Moreover, the requested variance would not be contrary to the public interest because siting the tower within a recreational area/ ski resort will not alter the essential character of the area where it is located and, as described more fully in connection with criterion (2), allowing the proposed project outside of the Telecommunications Overlay Zone will not threaten the public health, safety or welfare.

(2) *The spirit of the ordinance is observed (RSA 674:33, I(b)(2)).*

As noted above, Section 14.6.3.3 provides that to the extent that co-location is not possible, "preference will be given to siting a facility within the designated Telecommunications Overlay Zone, which shall consist of an area within 200 feet on either side of the traveled center line of NH Route 16 within the Jackson town limits." Reading this provision together with the "Purpose and Intent" provisions of Section 14 indicates that the overall goal of the Communications Ordinance is to "avoid and mitigate adverse impacts" that communication tower and antennas may create including visual, auditory, environmental, historical, health and safety impacts. *See* JZO Sections 14.1.1 – 14.1.6. The spirit of the ordinance will be observed by the grant of a variance in this case because (1) there are no feasible opportunities for co-location in the general vicinity where the equipment shelter and temporary facility is located, (2) siting a facility within the Overlay Zone will not allow AT&T to satisfy its coverage objective; and (3) the proposed facility will have a minimal impact on the area and will not threaten the public health, safety or welfare.

First, there are no options for co-location in the general area where the existing facility is located, keeping in mind that there is an existing equipment shelter, utility connections, and other basic infrastructure to support an antenna site. Though AT&T had planned to upgrade the existing facility on Lift Tower 14 with additional antennas, the determination from Black Mountain's structural engineer that the additional antennas would compromise the structural integrity of the lift tower has eliminated those plans. *See Exhibit H* (Email Correspondence from Black Mountain's Lift Engineer).

Second, siting a facility within the Overlay Zone will not satisfy AT&T's coverage objective. As a preliminary matter, the existing topography limits the locations where a tower could be sited and still provide adequate coverage to the ski resort. AT&T concluded that the only place where such coverage may be achieved (i.e., where there is more of a line of sight between

Route 16 and Black Mountain) is at a location approximately 200' from NH Route 16, as shown by Exhibit G (Propagation Maps 3 & 4). These maps show that a tower of 150' or even 200' would not satisfy the coverage objective of reaching users of wireless service at Black Mountain.

Finally, the overall impacts of the 45' monopole will be minimal. As demonstrated by the Photo Simulations, attached as Exhibit E, the tower will not be visible from surrounding locations. Moreover, the FAA does not require that a tower of this height and at this location be lit or marked. See Exhibit I (TOWAIR Report). As for auditory impacts, the only noise associated with the site will be generator "start tests" that will take place roughly once per week.

A communications facility at this site will not have an adverse effect on the environment or historic properties, as demonstrated by the NEPA Report, completed in connection with the installation of the RCC facility at this site in 2005. See Exhibit J. AT&T is currently in the process of obtaining an updated NEPA Report for this site and intends to submit this update to the Selectboard in connection with the building permit application.

With respect to concerns regarding health and safety, AT&T submits that the Maximum Permissible Exposure Study prepared by SAI Communications (Exhibit K) demonstrates that Facility will also comply with the radiofrequency emissions requirements imposed by the FCC. No anti-climbing device has been proposed based on a concern raised by Black Mountain regarding the intersection of trails in the area; however, the tower and shelter will be situated far enough from the trail to reduce impacts to recreational users of the ski trails. Thus, the proposed Facility will not threaten the public health, safety or welfare.

Given the minimal impacts of the proposed tower, coupled with the fact that there are no other reasonable siting opportunities available, granting a variance in this instance would observe the spirit of the ordinance.

(3) *Substantial justice is done* (RSA 674:33, I(b)(3)).

Substantial justice will be done by granting the variance because a facility at this site provides the only reasonable way for AT&T to alleviate its significant gap in coverage, while taking advantage of existing, permitted infrastructure at and adjacent to Lift Tower 14. AT&T has determined that locating a tower outside of the Telecommunications Overlay Zone represents the only feasible way alleviate the coverage gap in the Town of Jackson and provide coverage to the Black Mountain Ski Resort. AT&T's Rf engineers have prepared propagation studies indicating the coverage as it exists today as well as how it will be improved by the proposed tower. See Exhibit G (Propagation Maps 1 & 2). The location of the Facility is ideal from the general public perspective since there is already an existing tower at this location and the surrounding property is already developed as a ski resort. The impacts of a site in a new location are always more difficult to ascertain than one whose impacts are known. Thus, the Facility will not alter the essential character of the area, injure the rights of others or undermine the public interest.

(4) *The values of surrounding properties are not diminished (RSA 674:33, I(b)(4)).*

Given the Facility will be located near an existing communication facility within a developed, recreational area, it is more likely than not that the project will have no effect on the value of the surrounding properties. The Facility is located on a mountain and there are limited views of the Facility from the surrounding properties, as demonstrated by the Photo Simulations attached as Exhibit E. The existing trees surrounding the site provide suitable screening for the tower. Moreover, there are presently three communications facilities in the immediate vicinity of this Facility.

To the extent the Board has a legitimate concern that the value of the surrounding properties is likely to decrease due to the presence of the monopole, AT&T offers, as Exhibit L, the report of Mr. Andrew LeMay of Real Estate Consultants of New England, Inc. that was prepared for the Town of Sandwich, New Hampshire, in 2009. Mr. LeMay investigated the potential impact that cellular towers may have on adjacent residential property values through an extensive study of the residential real estate market in Northern New England and around the country. This report finds that home values do not diminish due to the proximity or the ability to see a tower from a residence. Mr. LeMay's conclusions were recently recognized and incorporated by the Town of Wolfeboro Zoning Board of Adjustment in granting a variance application.

(5) *Owing to special conditions of the property that distinguish it from other properties in the area, literal enforcement of the provisions of the ordinance would result in unnecessary hardship based on the two considerations below (RSA 674:33, I(b)(5)).*

(a) *No fair and substantial relationship exists between the general public purpose of the ordinance provision and the specific application of that provision to the property (RSA 674:33, I(b)(5)(A)(i)).*

Section 14.1 of the Jackson Zoning Ordinance ("Purpose and Intent" provisions) provides that the siting of communications towers and antennas should be accomplished so as to minimize adverse visual, environmental, historical, health and safety impacts. To that end, the ordinance expresses a preference for co-location when possible. The apparent intent of restricting communication facilities to an area within 200 feet on either side of NH Route 16 is to further minimize adverse impacts.

However, the proposed Facility on Black Mountain (an area outside of the Overlay Zone) will already have a minimal impact on its surroundings. As noted above, the proposed site is not located in an environmentally sensitive area or in a historically significant location. See Exhibit J (NEPA Report). The visibility of the Facility is limited by its location on a mountain, as well as its blending with the lift towers and existing infrastructure near the summit. See Exhibit E (Photo Simulations). The Facility will comply with federal radiofrequency emissions requirements and there is no other risk to public health, safety or welfare. Thus, the ordinance's goal of minimizing adverse impacts of a communication facility are accomplished even though the proposed facility will be located outside of the Telecommunications Overlay Zone.

Moreover, as noted above, installation at this site is necessary to fill a significant gap in coverage. The New Hampshire Supreme Court has recognized that

[w]hen an application to build a wireless telecommunications tower is designed to fill a significant gap in coverage, the suitability of a specific parcel of land for that purpose should be considered for purposes of determining hardship. The fact that a proposed location is centrally located within the gap, has the correct topography, or is of an adequate size to effectively eliminate the gap in coverage are factors that may make it unique under the umbrella of the [Telecommunications Act of 1996].

*Daniels v. Town of Londonderry*, 157 N.H. 519, 524-27 (2008). In the *Daniels* case, the court recognized that the Telecommunications Act (“TCA”) preserves local authority over the siting of wireless communications facilities but under certain circumstances a local board’s decision may be pre-empted in order to effectuate the TCA’s national policy goals of expanding the availability of wireless telecommunications services and increasing competition in the wireless communications industry.

The proposed location on Black Mountain is centrally located within AT&T’s coverage gap and provides the proper elevation to ensure optimal signal propagation. Recognizing this, AT&T attempted to co-locate its antennas on Lift Tower 14. As noted above, however, this plan is not feasible since the weight of the equipment will compromise the lift tower’s structural integrity. The temporary facility AT&T installed last fall (involving the swap-out of the existing RCC antennas on the lift tower) provided some coverage to the ski area but it is not sufficient to provide the service that visitors and residents at Black Mountain are seeking. There are no other structures tall enough in the immediately surrounding area to support AT&T’s equipment. Accordingly, there is no fair and substantial relationship between the general purposes of Section 14.6.3.3 and the specific application of that provision to the property, and a variance should be granted.

(b) *The proposed use is a reasonable one* (RSA 674:33, I(b)(5)(A)(ii)).

The proposed use is a reasonable one because a telecommunications facility had previously been operated in the same general area, without interference with the other purposes for which the property is used (i.e., recreation). Accordingly, the proposed use of the site for a 45’ monopole communications tower is reasonable.

#### IV. Conclusion

Based on the foregoing, AT&T requests that the Board of Adjustment find that the five variance criteria have been met and grant a variance from Section 14.6.3.3 of the Jackson Zoning Ordinance. We trust that this information is sufficient for the Board of Adjustment to schedule AT&T's application at the next public hearing in order to provide additional information concerning the application. We thank you in advance and look forward to making a presentation.

Sincerely,



Lisa A. Fearon

Enclosures

cc: Deepak Rathore, AT&T Mobility (via mail and email)  
Peter Demarco, SAI Communications

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