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Chairman Robet Stein
The Connecticut Siting Council
10 Franklin Square
New Britain, CT 06051

July 29, 2013

RE: DOCKET: 409A APPLICATION OF NEW CINGULAR WIRELESS PSC, LLC (AT&T): 8 BARNES ROAD IN THE TOWN OF CANAAN (FALLS VILLAGE)

Dear Chairman Stein:

ORIGINAL

The Inland Wetlands and Conservation Commission of the Town of Canaan (Falls Village) is in receipt of your electronic mail correspondence of July 26, 2013 seeking the IW/CC's position on AT&T's request that the CSC take "administrative notice" of a letter from the State Historic Preservation Officer ("SHPO") dated June 28, 2013 regarding AT&T's "revised proposal" for a 120 foot telecommunications tower at the summit of Cobble Hill.

IW/CC objects to, and opposes AT&T's request and incorporates by reference all IW/CC filings, facts and arguments in Dockets 409 and 409A, and requests that the material be excluded for the following reasons:

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Material Not Noticeable

UAPA Sec. 4-178(6) provides for administrative notice of "judicially cognizable facts" only:

> (6) notice may be taken of judicially cognizable facts and of generally recognized technical or scientific facts within the agency's specialized knowledge;

Connecticut Rules of Evidence prohibit "administrative notice" of this document. It is not a fact :

> not subject to reasonable dispute in that it is either (1) within the knowledge of people generally in the ordinary course of human experience, or (2) generally accepted as true and capable of ready and unquestionable demonstration.

(Connecticut Code of Evidence Sec. 2-1(a))

AT&T attempts to convert its own (late) material evidence under a federal requirement (National Historic Preservation Act and FCC regulations) into a document AT&T proposes could be administratively noticed, in violation of UAPA 4-178(6) and (7). This is not a "noticeable" fact, and it may not properly be administratively noticed.

Untimely

AT&T seeks to violate rules of timeliness for a meaningful hearing. Even were the document noticeable under Rules of Evidence, AT&T's request is untimely and in violation of Connecticut Code of Evidence Sec. 2-1(d):

> (d) Time of taking judicial notice. Judicial notice may be taken at any stage of the proceeding.

The proceeding (the hearing on Docket 409A) was closed on June 11, 2013 and the record is now closed.

Works Prejudice

Were the Council to notice the proffered evidence, it would violate UAPA Sec. 4-177c and materially prejudice all parties and intervenors and all principles of fairness and guarantees of due process:

> **Sec. 4-177c. Contested cases. Documents. Evidence. Arguments. Statements.** (a) In a contested case, each party and the agency conducting the proceeding shall be afforded the opportunity (1) to inspect and copy relevant and material records, papers and documents not in the possession of the party or such agency, except as otherwise provided by federal law or any other provision of the general statutes, and (2) at a hearing, to respond, to cross-examine other parties, intervenors, and witnesses, and to present evidence and argument on all issues involved. * * *
>
> (Conn. Gen. Stat. Sec. 4-177c.) (Emphasis added.)

AT&T proposes to side-step requirements that evidence be available in a timely fashion to allow for examination and vetting:

> **Sec. 4-178. Contested cases. Evidence.** In contested cases: * * * (4) documentary evidence may be received in the form of copies or excerpts, if the original is not readily available, and upon request, parties and the agency conducting the proceeding shall be given an opportunity to compare the copy with the original; (5) a party and such agency may conduct cross-examinations required for a full and true disclosure of the facts; (6) notice may be taken of judicially cognizable facts and of generally recognized technical or scientific facts within the agency's specialized knowledge; (7) parties shall be notified in a timely manner of any material noticed, including any agency memoranda or data, and they shall be afforded an opportunity to contest the material so noticed; and (8) the agency's experience, technical competence, and specialized knowledge may be used in the evaluation of the evidence.

The hearing and record have closed. Not only is the material not "noticeable" under Connecticut Rules of Evidence, even if it were, it is too late, further prejudicing all parties and intervenors because of their diligent participation in Docket 409A, which has closed.

Violation of Due Process

The AT&T proposal to present material evidence after close of the hearing on Docket 409A at a minimum violates UAPA 4-177, including guarantees of notice, hearing, written record and opportunity to challenge and examine evidence. AT&T is too late, and the document must be excluded as a matter of law.

AT&T's proposal to add evidence outside the hearing record also violates UAPA Sec. 4-177(d)(3). Even if the CSC were to violate Rules of Evidence and notice the proposed document, the CSC could not act upon it.

Prohibited Extra-Record Evidence

The proposal may not be considered or included in the CSC's written record for purposes of consideration of a telecommunications facility under the Telecommunications Act for the foregoing reasons under Rules of Evidence and under the UAPA and all state laws applicable to CSC proceedings and state and federal due process guarantees, so the proffer is moot. "Extra-record" evidence is prohibited. It therefore cannot be considered by the agency, and may not constitute a basis in any resulting "written record."

Violation of Section 106 of the National Historic Preservation Act

Even were the letter noticeable, the Council is now aware that any determination by the SHPO is not binding, but is advisory:

> (Advisory Council on Historic Preservation, Protecting Historic Properties: A Citizen's Guide to Section 106 Review) (http://www.achp.gov/docs/CitizenGuide.pdf) (Last visited 6/29/11)

However, compliance with the National Historic Preservation Act is mandatory, and a determination under Section 106 requires full and candid disclosure not only of the overall height of the proposed facility, in this case 120 feet (proposed "settlement site" "modified tower" with the altitude of the Hill upon which it sits, in this case, the peak of Cobble Hill, or 1,188 feet above sea level, for a total of 1,308 feet. The 120 foot proposed "settlement tower" is proposed for a prominent hill surrounded by flat wetlands in the sweeping Housatonic Valley -- a Valley as significant for its natural monuments as it is for its historic structures in view. (See Post Hearing Br. of IW/CC, Docket 409)

AT&T's disclosure to SHPO apparently was only that the facility was "not visible from anywhere on the South Canaan Congregational Church property or within the general area." (Proffered letter dated June 28, 2013)

According to the Advisory Council on Historic Preservation, Section 106 Review of "Adverse Effects" can be any of the following:

Adverse effects can be direct or indirect and include the following:

- physical destruction or damage
- alteration inconsistent with the Secretary of the Interior's Standards for the Treatment of Historic Properties
- relocation of the property
- change in the character of the property's use or setting
- introduction of incompatible visual, atmospheric, or audible elements
- neglect and deterioration
- transfer, lease, or sale of a historic property out of federal control without adequate preservation restrictions

(Advisory Council on Historic Preservation, Protecting Historic Properties: A Citizen's Guide to Section 106 Review)
(http://www.achp.gov/docs/CitizenGuide.pdf) (Last visited 6/29/11)
(Emphasis added.)

According to the proffered letter, AT&T apparently disclosed a distance from the landmark South Canaan Meetinghouse only. The proffered letter makes no reference of a site visit by the SHPO. It is not accompanied by any disclosures to SHPO by AT&T in compliance with Section 106 and the Nationwide Programmatic Agreement. Determination or disclosure of the "Area of Potential Effects" ("APE") is therefore materially and legally defective, due to deficient disclosures on the part of the applicant who apparently sought the SHPO determination. In any case, all parties had a right to vet the proffered material evidence during the evidentiary hearing. It is too late.

But AT&T's evidence, even if it were noticeable (which it is not), as the IW/CC pointed out during the pendency of Docket 409, where IW/CC demonstrated that AT&T's submission to SHPO was deficient, definition of the APE is a burden on the tower Applicant under the FCC Rules and the NPA:

Identification of Effects
Overview of Applicant's responsibilities

A. In preparing the Submission Packet for the SHPO/THPO and consulting parties pursuant to Section VII of the Nationwide Agreement and Attachments 3 and 4, the Applicant shall: (1) define the area of potential effects (APE); (2) identify Historic

Properties within the APE; (3) evaluate the historic significance of identified properties as appropriate; and (4) assess the effects of the Undertaking on Historic Properties. The standards and procedures in the following sections shall be applied by the Applicant in preparing the Submission Packet, by the SHPO/THPO in reviewing the Submission Packet, and where appropriate, by the Commission in making findings.

(http://wireless.fcc.gov/siting/npa/definitions.html) (Last visited 7/13/11)
(Emphasis added.)

The APE is defined by the NPA as:

Area of Potential Effects
C. Area of Potential Effects. (1) The term "Area of Potential Effects" is defined in Section II.A.3 of the Nationwide Agreement. For purposes of the Nationwide Agreement, the APE for direct effects and the APE for visual effects are further defined and are to be established as described below. (2) The APE for direct effects is limited to the area of potential ground disturbance and any property, or any portion thereof, that will be physically altered or destroyed by the Undertaking. (3) The APE for visual effects is the geographic area in which the Undertaking has the potential to introduce visual elements that diminish or alter the setting, including the landscape, where the setting is a character-defining feature of a Historic Property that makes it eligible for listing on the National Register. (4) Unless otherwise established through consultation with the SHPO/THPO, the presumed APE for visual effects for construction of new Facilities is the area from which the Tower will be visible: a. Within a half mile from the tower site if the proposed Tower is 200 feet or less in overall height; b. Within ¾ of a mile from the tower site if the proposed Tower is more than 200 but no more than 400 feet in overall height; or c. Within 1 ½ miles from the proposed tower site if the proposed Tower is more than 400 feet in overall height. (5) In the event the Applicant determines, or the SHPO/THPO recommends, that an alternative APE for visual effects is necessary, the Applicant and the SHPO/THPO may mutually agree to an alternative APE. (6) If the Applicant and the SHPO/THPO, after using good faith efforts, cannot reach an agreement on the use of an alternative APE, either the Applicant or the SHPO/THPO may submit the issue to the Commission for resolution. The Commission shall make its determination concerning an alternative APE within a reasonable time.

(http://wireless.fcc.gov/siting/npa/definitions.html) (Last visited 7/13/11)
(Emphasis added.)

"Overall" height means

a : in view of all the circumstances or conditions <*overall*, the sale was a success> *b* : as a whole : GENERALLY <doesn't do as well *overall*> *c* : with everyone or everything taken into account <was third *overall* in EARNINGS> <got 31 miles to the gallon *overall*>

(http://www.merriam-webster.com/dictionary/overall) (Last visited 7/13/11)

Once again, as in Docket 409, the applicant knowingly applied the wrong criteria for the "overall height" of the project to SHPO, and now proposes, after the record has closed, to represent this artifice to the Council and all parties.

The NPA also provides that where terms are not defined, the meaning is that set forth in the CFR Rules of the Advisory Council on Historic Preservation (ACHP):

> other terms
>
> All other terms not defined above or elsewhere in the Nationwide Agreement shall have the same meaning as set forth in the Council's rules section on Definitions (36 C.F.R. § 800.16) or the Commission's rules (47 C.F.R. Chapter I).
>
> (http://wireless.fcc.gov/siting/npa/definitions.html) (Last visited 7/13/11)

The CFR provides further clarification of the application of the "APE" and the scale of the proposed project and its visual effects:

> **§ 800.16 Definitions.**
> (a) *Act* means the National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470-470w-6. * * * (d) *Area of potential effects* means the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.
>
> (http://www.achp.gov/regs-rev04.pdf) (Last visited 7/13/11)
> (Emphasis added.)

The Applicant has, once again, knowingly applied the wrong scale to its project and provided erroneous and deficient "Area of Potential Effects" data to SHPO and now tries to generate an "application" (in violation of state and federal law) through this defective effort.

Not Only Untimely, a Violation of Administrative Law and Rules of Evidence, But A Violation of the Nationwide Programmatic Agreement and FCC Regulations

As the Council is aware, compliance with federal law -- including the National Historic Preservation Act -- is required for consideration and approval of any telecommunications infrastructure. AT&T's patched together purported application for a "modified" tower on a "settlement site" is no exception. The proposal to offer compliance with federal law as an afterthought in this way is characteristic of the legion of defects in AT&T's papers and attempts to bypass state and federal law under Docket 409A. As the agency serving the public interest, the CSC should not allow such insufficient, materially factually and legally deficient submissions.

AT&T Inc., whose 2011 Reported Consolidated Revenue was $126.7 billion, is a Fortune 500 company whose common stock is listed on the New York Stock Exchange -- one of the 30 stocks tracked in the Dow Jones Industrial Average. (http://www.att.com/gen/investor-relations?pid=5711) (Last viewed 7/28/13) It is well aware of its obligations under law and the procedure in an administrative agency.

The letter offered for "notice" is untimely, violates procedure and rules of evidence, and constitutes a material omission and legal defect in AT&T's effort to cobble together a second bite at the apple in its failed application for certification of its original site on Cobble Hill. AT&T is acting in violation of established law and established procedure and invites the Council to join AT&T in this illegal conduct.

The administrative hearing process is intended, above all, to be fair. Were the CSC to take "administrative notice" of the proffered letter -- it would violate not only the most basic tenets of fairness, but also constitutional guarantees of due process.

We urge the Council to reject the proffer and to close this ill-conceived and illegal docket, and direct AT&T to pay the costs incurred by all parties and intervenors herein.

On another matter, IW/CC is in receipt of the new and revised transcript of the June 11, 2013 Docket 409A session. This transcript was received by IW/CC on Friday July 26, 2013, the day after IW/CC had submitted its post hearing brief. IW/CC repeats its position (see IW/CC Post Hearing Brief filed on Thursday, July 25, 2013) that the transcript cannot be remedied *ex post facto* to serve the purpose of a written record under UAPA 4-177(d) or for any requirement under administrative and federal law including the Telecommunications Act. The written record of an administrative proceeding must be made available at a meaningful time, and must be coherent and in a usable form. Even if it were possible for the agency to correct the transcript on such poor acoustical conditions, it has supplied the transcript after the time that would be meaningful to the parties. Apart from the written record, the CSC cannot remedy the failure of the amplification in the hearing room on June 11, 2013 that made the proceedings inaudible, in violation of UAPA 4-177(d)(5) and tenets of due process.

Respectfully submitted, Susan J. Kelsey

Susan J. Kelsey, Secretary for the
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CERTIFICATE OF SERVICE

I hereby certify that on this day, an original and fifteen copies of the foregoing was served on the Connecticut Siting Council by First Class U.S. Mail, and copy of same was sent postage prepaid to:

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A copy was also delivered by hand to:

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Town of Canaan Planning & Zoning Commission
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Falls Village, CT 06031

Marc Rosen and Susan Pinsky
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Falls Village, CT 06031

Michael Burke
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Falls Village, CT 06031

Susan J. Kelsey

Susan J. Kelsey

Dated: July 29, 2013