STATE OF CONNECTICUT

CONNECTICUT SITING COUNCIL

In Re:

APPLICATION OF NEW CINGULAR WIRELESS PCS, LLC (AT&T) FOR A CERTIFCATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED FOR THE CONSTRUCTION, MAINTENANCE, AND OPERATION OF A TELECOMMUNICATIONS TOWER FACILITY AT 8 BARNES ROAD IN THE TOWN OF CANAAN (FALLS VILLAGE), CONNECTICUT

DOCKET: 409

July 16, 2011

RENEWED MOTION OF THE INLAND WETLANDS/CONSERVATION COMMISSION OF THE TOWN OF CANAAN (FALLS VILLAGE) TO STRIKE THE APPLICATION AND FOR COSTS

The Inland Wetlands/Conservation Commission of the Town of Canaan (Falls Village) ("IW/CC") hereby respectfully renews its motion to the Siting Council to strike the application and for costs on each of the following grounds:

A. No Established Legal Right to Build on Site.

B. No Wetlands Permit.

C. Application Based on Misstatements and Misapplication of State and Federal Requirements.

A. No Established Legal Right to Build on Site.

If the Applicant fails to submit an attorney opinion establishing the Applicant's right to build the project proposed under this docket, required by the Council (see Trans. 6/16/11 page 89, line 1 to page 90, line 5), or if the opinion discloses any legal dispute as to the property rights at issue, IW/CC moves that the Council direct the Applicant to make whole all parties to this proceeding for their costs and attorney fees expended in participation in this proceeding, or, in

the alternative, to refer the matter to the Superior Court under Article 1, Sections 1, 10 and 11, and Article 5, section 1 of the State Constitution.

A1. Application With Inherent Property Dispute

The filing of an application in the face of a property dispute about the terms of an easement on which the Applicant relies, and continuation with an application, once documentary evidence of a dispute is made a matter of record marginalizes the role of the Council and all parties where "certification" may be rendered moot. This may also prove to constitute both a frivolous application and effect a deprivation of due process on the parties.

A2. Frivolous Application and Initiation of Proceedings Without Necessary Documentation

Without evidence of a right to actually build the project proposed under this docket, the Applicant initiated a process that embroiled in it volunteer town officials and an abutting property owner, all of whom have expended resources in presenting their cases. Should the Applicant fail to file proof of its right to build this project as an *ex post facto* matter of proof, it will have deprived other parties of property and liberty through a state-approved process, an unconstitutional deprivation.

B. No Wetlands Permit.

The Applicant failed to submit an application for a permit to the IW/CC Commission of the Town of Canaan (Falls Village). To initiate a proceeding before the Siting Council without a Town wetlands permit is a violation of Town, State and Federal laws. (See IW/CC Post Hearing Brief at pp. 44-49, incorporated here by reference.) To start the Siting Council certification process before obtaining an Inland Wetlands permit from the appropriate town agency renders the certification application frivolous.

C. Application Based on Misstatements and Misapplication of State and Federal Requirements.

The IW/CC has shown in its original Motion to Strike the Application (February 15, 2011) that the Applicant has been unresponsive to the bona fide inquiries of a municipal commission pursuing its statutory mandates. In addition, the IW/CC demonstrated in its Post-Hearing Brief (July 16, 2011) that the Applicant made the following errors, omissions and material misrepresentations in applying state and federal law in the application, and in its consultants' factual statements:

C1. False Entry on NEPA Checklist as to Viewshed of a National Register Building

NEPA Environmental Affects Checklist, Question 4, regarding the viewshed of a building * * * eligible for listing on the State or National Register for Historic Places (Application, Tab 7, page 4)[1]

C2. False Entry on NEPA Checklist Regarding Significant Change in Surface Features

On its NEPA Environmental Affects Checklist, Question 7, regarding significant change in surface features. (Application, Tab 7, page 4)

C3. Application of Wrong USFWS Standard to Area to be Reviewed

On its USFWS Endangered Species Review (Application at Tab 7, pages 9 and 10). The area to be reviewed refers to "the area directly or indirectly affected by the proposed action. This area will usually be larger than the project footprint." The letter of "No Effect" obtained by the Applicant and incorporated into the application was generated by applying the wrong standard, and the Applicant was not entitled to the letter .

C4. Application of Wrong NEPA Standard to Area to be Considered

[1] For full discussion and detail of these misstatements and misapplication of state and federal requirements, please see IW/CC Post Hearing Brief, July 16, 2011, incorporated here by reference.

NEPA review also requires consideration of all areas affected, not just those "directly affected." The Applicant therefore also filed a defective NEPA statement (Application, Tab 7, page 4) where the Applicant states: "No direct impact to wetlands or watercourses will occur." The Applicant failed to comply with the requirements of NEPA.

C5. Application of Wrong NDDB Standard for Area to be Considered

On its CT DEP NDDB Review (Application, Tab8) the Applicant submitted a request for NDDB information, stating, as a reason for the request, that the request was submitted in order to fulfill the NEPA requirement for environmental assessment (Application Tab 8).

Apart from the question of what standard was applied for determining the area being considered (See C3 and C4 above), the response from CT DEP - NDDB stated that "consultations with the Data Base should not be substituted for on-site surveys required for environmental assessments" (Application Tab 8, Murray letter, par. 2).

AT&T failed to initiate a full on-site survey. Moreover, during testimony on June 16, 2011, the Applicant's consultant asserted that the NDDB letter fulfilled the Applicant's obligation to perform an on-site survey under the step process of USWFS:

> MR. GUSTAFSON: * * * The step process that's required by the U.S. Fish and Wildlife Service review, as Commissioner Sinclair has already indicated, part of that process is if there is -- there is a requirement for or its strongly recommended that consultation with the local agency that houses the data for rare species and rare communities be consulted --
> CHAIRMAN CARUSO: And did you --
> MR. GUSTAFSON: And we did. And we secured a letter dated September 2, 2010, which I've already read the results of that, that there are no known extent populations of federal or state endangered, threatened, or special concern species that occur at the site in question. Based on that conclusion from the Natural Diversity Database itself, we fulfilled the requirements of that step process from the U.S. Fish and Wildlife Service.
>
> (Trans. 6/16/11, p. 104, line 16-p. 105, line 8) (Emphasis added.)

This was a misrepresentation of material fact. The statement was untrue. The September 9, 2010 letter from CT DEP stated that "consultations with the Data Base should not be substituted for on-site surveys required for environmental assessments." (Emphasis added.)

C6. Failure to File a Mandatory Form 620

By filing an application without the appropriate site-specific Nationwide Programmatic Agreement Form 620 under FCC Rules for Section 106 Review under the National Historic Preservation Act (Application, Tab 9; Trans. 6/16/11 p. 101, line 10).

C7. Failure to Provide Accurate Visibility Statement

By making a material misrepresentation in the application that "[t]he monopole will not be visible from the South Canaan Congregational Church (also known as the South Canaan Meetinghouse)" (A false statement made at least five times in the Application: Application pages 14, 15, 16, Tab 9, pages 1 and 2). [Note: the Applicant subsequently retracted its assertion ten months later after the IW/CC offered incontrovertible proof of the falsity of the multiple application and official correspondence statements.) (Trans. 6/16/11 at p. 101)]

C8. Repeating Inaccurate, Untrue Statement to SHPO

By making the same material misrepresentation to SHPO that "we investigated the potential views from this NRHP property. The balloon was not visible from this property. As a result, it is VHB's opinion that the proposed undertaking will have no effect on this historic resource." SHPO adopted the Applicant's false assertion. (Application Tab 6, page 1) [Note: the Applicant subsequently retracted its assertion ten months later after the IW/CC offered incontrovertible proof of the falsity of the multiple application and official correspondence statements.) (Trans. 6/16/11 at p. 101)]

C9. Incorporation of Falsely Derived Official SHPO Determination Letter into NEPA Compliance

The false statement about visibility generated a determination letter from SHPO of "no effect" which letter and statement was incorporated into the Application (at Tab7, page 2 (an official communication to support and constitute purported NEPA Compliance); Tab 7, page 4).

C10. Failure to Apply Proper USFWS Standards for Review, and to Disclose, Presence of Habitat of Endangered Species in the "Project Action Area"

By failing to disclose the presence of potential habitat of Federally Endangered species in the "Project Action Area" in compliance with USFWS Endangered Species Consultation, the Applicant failed to comply with USFWS protocol for compliance with the Endangered Species Act (see IW55, IW56, Gustafson testimony Trans. 6/16/11 at p. 93, lines 20-22; p. 97, lines 21-24, p. 98, lines 1-2.).

C11. Failure to Properly Consult With Connecticut DEP, Resulting in Defective Report

This failure triggered failure to properly consult with the CT DEP under USFWS guidelines, resulting in defective report of State consultation compliance (see IW55, IW56, Gustafson testimony Trans. 6/16/11 at p. 97, lines 20-24, p. 98 lines 1-2; p.104, lines 16-22).

C12. Despite Actual Notice of Potential Effects on Historic Properties, Applicant Filed Untrue Assertion to SHPO

Upon receipt of a copy of the August 17, 2010 VHB letter rubber stamped by the SHPO, IW/CC Chairman Sinclair sent a letter with concerns about impacts to historic properties. Despite this actual notice, the Applicant failed to address the concerns of Sinclair's letter (under its NHPA and FCC obligations), nor did it then revise its formal assertion to SHPO that "The balloon was not visible from this property [Meetinghouse]." (Application, Tab 6, page 2). [Note: Under pressure from the Council after disclosure of the IW/CC's Exhibit 26 showing photographic proof of the visibility of the proposed tower from the National Register

Meetinghouse, the Applicant revised its prior statements (occurring at least five times in the Application) that the tower "was not visible" from this property. (Trans. 6/16/11, p. 101, lines 10-16)]

C13. Failure to Apply Proper National Programmatic Agreement Area of Potential Effect Standards Under NHPA and FCC Regulations

In its September 9, 2010 letter to SHPO, the Applicant describes a ".05 mile area of potential effect" for the proposed "150-foot tall monopole tower" contrary to the requirements of the National Programmatic Agreement ("NPA"), "APE" effects must be considered for a proposed tower's "overall" height, not simply the tower itself. (Application, Tab 6, page 1)

DISCUSSION

A. Due Process

The Council has, several times before, entertained applications for sites to which the industry applicant had neither filed with the Council -- nor had proof -- of its legal right to build on the site[2]. This practice is objectionable under the State and Federal Constitutions. The IW/CC moved to deny this application on the same grounds (IW/CC Motion to Deny or to Adjourn (Trans. 6/16/11 page 162, line 20-24)), but was denied on June 16, 2011.

Despite citizen efforts to remedy these deprivations of due process -- including sizeable out-of-pocket expenses by all-volunteer municipal commissions, as is true here, the situation is repeated once again:

> ACTING CHAIRMAN TAIT: We're going to be getting this afternoon, as I understand it, a title state[ment] from an attorney. I assume you folks have looked at that?
> MS. CIOCCHIO: Yes, we have.
> ACTING CHAIRMAN TAIT: Will there be an attorney certificate from the Applicant saying that you can do what you propose to do?
> MS. CIOCCHIO: We can provide that.
> ACTING CHAIRMAN TAIT: Because if you don't have the right to do it, you are wasting our time. We can't resolve the problem. Okay.

[2] See Petition 701 (Nextel), Docket 378 (SBA Towers II) [see also Trans. 6/16/11, page 163, line 6-14].

MS. CIOCCHIO: I'd be more than happy to put that in a statement, but --
ACTING CHAIRMAN TAIT: Yes --
MS. CIOCCHIO: -- as I said earlier, as far as AT&T is concerned, they have the right to use the existing road for access to their facility.
ACTING CHAIRMAN TAIT: And you are prepared to submit a title certificate -- an attorney's opinion that you have that right?
MS. CIOCCHIO: Yes.
ACTING CHAIRMAN TAIT: I would like it, yes.
MS. CIOCCHIO: Okay, yes, we can supply that.

(Trans. 6/16/11 page 89, line 1 to page 90, line 5) (Emphasis added.)

Subsequently, the Applicant asserted the affirmative right:

MR. ROVEZZI: If I can just respond to that? You just indicated that you have the right to use the existing road?
MS. CHIOCCIO: Correct.

(Trans. 6/16/11 page 90, line 9-line 125)

This is an affirmative assertion of fact at an evidentiary hearing.

To date, to the IW/CC's knowledge, the Applicant has not filed the requested opinion (Trans. 6/16/11 page 90, ff.). There is a bona fide property dispute regarding the right to build the access road, and the right to put earth-moving equipment and trucks on abutting properties for the purpose of clearing and building the access road and compound.

The property rights dispute (Party Rovezzis' case) appears to center around the issue of an "existing road." The Applicant admitted on cross exam that the obliteration of the route of the existing logging road places that landmark into legal controversy:

MR. PERKINS: I'm not a land attorney, but if the existing centerline -- a term like existing road -- if that existing road has been obliterated, I don't know what the hierarchy would be to reestablish it -- * * * but there would be no way to know what the term existing road meant."

(Trans. 6/16/11 p. 94, line 23 to p. 4)

The IW/CC has not seen or received any copy of the legal proof, and formally requests as a party to these proceedings to be served with the promised attorney opinion.

CSC Duty to Prevent Unfairness

Once the property dispute became plain, the application should have been denied, or at a minimum, the proceedings should have been adjourned in order to save all parties additional expense. (See IW/CC Motion to Deny or to Adjourn (Trans. 6/16/11 page 162, line 20-24)).

Instead, the Council denied the IW/CC's motion, and, as a result, has continued to require the IW/CC -- and all other parties to these proceedings -- to incur what may be completely unnecessary expenditures -- all from an all-volunteer citizen-populated Town Commission.

Administrative Fairness

The Appellate Court recently stated:

> As this court has observed, "[a]dministrative hearings, * * * are informal and governed without necessarily adhering to the rules of evidence or procedure. Nonetheless, administrative hearings must be conducted in a fundamentally fair manner so as not to violate the rules of due process.
>
> *Julio Flamenco v. Independent Refuse Service, Inc., et al.*,
> Appellate Court Docket No. AC 32881 (July 19, 2011)

Where the very fundamental question of whether a project is permitted by law on the site proposed by an applicant is placed at issue in an administrative proceeding, the administrative agency has a duty to protect all others appearing before it, by halting the proceeding and requiring proof to satisfy the question. Failing this, where no proof -- or where defective proof -- is submitted, the matter should be referred to a court for appropriate remedy under Conn. Gen. Stat. §52-99 and the State Constitution.

Threshold Proof Required to Satisfy Constitutional Guarantees

As a threshold matter, in order for this proceeding to comply with due process requirements, the Applicant -- who bears the burden of proof in the entire process -- must be able to -- and be required to -- prove that if granted a certification, it could actually legally build the proposed project -- with all permits, Inland Wetland permits and legal title to do so in place.

This is a certification proceeding "to construct." (Conn. Gen. Stat. §16-50l, and see title of Cingular's application herein.) To embroil private parties and volunteer town officials in an administrative hearing where there is no right to build is frivolous and deprives these parties of time, mileage, resources and all the effort involved in gathering documents and presenting witnesses in the hearing process. The IW/CC objects to this practice.

To date, the IW/CC has expended hundreds of hours preparing its direct case on this docket and has been required to prepare a comprehensive record while neglecting other duties, professional, volunteer and personal. The IW/CC has also been required to make cash expenditures, including mileage, phone expenses, printing expenses, meeting expenses, research and copying expenses, and related expenses.

An applicant for certification may not initiate such a proceeding without proof of the right to build the proposed project in a proceeding that admits adverse parties to represent their own interests. The adversarial process immediately invokes guarantees of due process:

> The judicial power does not extend to the determination of abstract questions. *Muskrat v. United States,* 219 U.S. 346, 361; *Liberty Warehouse Co. v. Grannis,* 273 U.S. 70, 74; *Willing v. Chicago Auditorium Assn.,* 277 U.S. 274, 289; *Nashville, C. & St.L. Ry. Co. v. Wallace,* 288 U.S. 249, 262, 264. * * * *New Jersey v. Sargent,* 269 U.S. 328.
>
> Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 324 (1936) (Emphasis added.)

The Council has a Declaratory Ruling Petition Proceeding for such hypothetical cases, and the Applicant here chose not to initiate such a Petition.

A party cannot maintain a suit "for a mere declaration in the air" (*Giles v. Harris*, 189 U.S. 475, 486 (1903)) where the purpose of the proceeding is "for the construction of a telecommunications facility at 8 Barnes Road." (See title of Application submitted by New

Cingular Wireless PCS, LLC.) Here, PUESA contemplates the construction of the project under any certification proceeding:

> (c) The applicant shall submit into the record the full text of the terms of any agreement, and a statement of any consideration therefor, if not contained in such agreement, entered into by the applicant and any party to the certification proceeding, or any third party, in connection with the construction or operation of the facility. This provision shall not require the public disclosure of proprietary information or trade secrets.
>
> Conn. Gen. Stat. §16-50o (c)

The very title of the application and all subsequent filings by the Applicant states "for the construction, maintenance and operation of a wireless telecommunications facility in Canaan (Falls Village), Connecticut." There is no hypothetical statement here. The public notice required by law and completed by the Applicant also indicates this intention (Application, Tab 12, page 1) and invites "Interested parties" to "review the Application" at either the Council offices or Falls Village Town Hall. (*Ibid.*) This notice inviting the involvement of "interested parties" then encourages those parties (as it did here) to file either their notice of intent to participate (as the IW/CC did) or their request to become a party under Conn. Gen. Stat. §16-50l.

Such participation is authorized in a "contested case" (as here) upon demonstration that "the petitioner's legal rights, duties or privileges shall be specifically affected by the agency's decision in the contested case." (UAPA §4-177a.)

This is not a hypothetical set of facts or 'mere declaration in the air,' but a contested case affecting the legal rights of the parties.

The Applicant Has Already Submitted to Council Jurisdiction, It May Not Close the Door

By rendering its application and thereby submitting to the jurisdiction of the Connecticut Siting Council, AT&T (New Cingular) has waived its right to challenge that jurisdiction. It has also done so affirmatively during the evidentiary hearing:

ACTING CHAIRMAN TAIT: We're going to be getting this afternoon, as I understand it, a title state[ment] from an attorney. I assume you folks have looked at that?
MS. CIOCCHIO: Yes, we have.
ACTING CHAIRMAN TAIT: Will there be an attorney certificate from the Applicant saying that you can do what you propose to do?
MS. CIOCCHIO: We can provide that.
ACTING CHAIRMAN TAIT: Because if you don't have the right to do it, you are wasting our time. We can't resolve the problem. Okay.
MS. CIOCCHIO: I'd be more than happy to put that in a statement, but --
ACTING CHAIRMAN TAIT: Yes --
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MS. CIOCCHIO: Okay, yes, we can supply that.

(Trans. 6/16/11 page 89, line 1 to page 90, line 5) (Emphasis added.)

Constitutional Guarantees Regarding Case or Controversy

Under principles of due process, the courts do not exist to render "advisory opinions." (See U.S. Const. Article III). Here, AT&T has no standing to bring a Siting Council proceeding if AT&T has no right to erect the tower, since AT&T chose to file an application for certification, not a petition for declaratory ruling. Under its certification proceeding, the Council has no jurisdiction over anything that is not a genuine case or controversy, since the certification is for a "certificate of environmental compatibility and public need for the construction, maintenance and operation of a telecommunications tower facility at 8 Barnes Road in the Town of Canaan (Falls Village), Connecticut," and not for a hypothetical set of facts.

Where an entity begins the wheels of a legal proceeding rolling -- whether in court or before an administrative agency -- as a threshold matter, it certifies the truth of all of its assertions, and that the case under consideration is an actual case. There is no provision under

our constitutional system for an advisory opinion where there is no case and controversy, just as here, there is no certification proceeding initiated on hypothetical facts. (See 16-50l)

The Council disclaims having such power. (*Ibid.*) But the Siting Council does have that power, for in entertaining an application based on disputed property rights, and lacking an Inland Wetlands permit, the Siting Council affects the property rights of others not the Applicant by entertaining the application. The very moment of the opening of a docket on which there is no proper title to the land on which is contemplated the "certification" by the Council, with all the particular facts relating to a particular parcel of land, the Council has affected the procedural and substantive due process rights of others not party to the instant contractual arrangement -- others who must gear up at great expense to defend their rights. The IW/CC is one of these, and they, in turn, represent the entire Town of Canaan, as husbands of the Town's interests.

When an applicant to a state agency seeks certification that affects real property, it cannot divorce that property from the world around it -- not from the real property, nor from the lives connected to the property, nor from volunteer local officials with statutory duties which they may not neglect under state or federal law. The certification procedure before the Siting Council necessarily affects and determines the property rights of others. Where no due process protections for parties other than the applicant in a contested certification proceeding exist, the custom and practice of the Council deprives those parties' civil rights under color of state law.

B. No Wetlands Permit

Failure to obtain an Inland Wetlands permit from the town in which an applicant proposes to build, as a threshold matter of proof of the ability to build, is a violation of due process in the same manner as absence of proof of the ability to build where there is a real property dispute. The bases described above also apply here and are incorporated by reference.

(See pp. 7-13 above.) Without the appropriate Wetlands permit, the Applicant may not break ground on any project within the bounds of the town under whose jurisdiction Inland Wetlands permits all building projects -- here, the Town of Canaan (Falls Village) Inland Wetlands/Conservation Commission.

C. Application Based on Misstatements and Misapplication of State and Federal Requirements

The Applicant is responsible for the accuracy of its assertions, and is charged with knowing the fundamentals of the federal rules and state and federal laws it is applying to the site-specific facts. (See Connecticut Practice Book 4-2. (b) Signing of Pleadings).

Here, the Applicant has invoked and submitted to Siting Council jurisdiction by requesting that the Council render a decision on its Application. (Docket 409, Application filed October 18, 2010).

Under rules of 'fundamental fairness' of administrative agencies in Connecticut ((see *Julio Flamenco v. Independent Refuse Service, Inc., et al.*, Appellate Court Docket No. AC 32881 (July 19, 2011) quoted *supra* at p. 9); the provision of the UAPA that only persons with "legal rights, duties or privileges [that] shall be specifically affected by the agency's decision in the contested case" may be made parties to the proceeding (UAPA §4-177a.); and State Constitutional guarantees of due process require the Council to reject an application where no proof of title to build, and no Inland Wetlands permit is in place at the time the application is submitted.

Where an applicant has filed an application for "certification to construct" and these preliminary proofs are found to be missing, the Council has an obligation to adjourn the matter.

Since the matter was not adjourned, but permitted to proceed, and the application and its bona fide bases have been shown to be defective, the applicant should be directed to reimburse

all parties for the costs incurred to defend their rights, and for the property already deprived through the hearing costs incurred.

CONCLUSION

For the foregoing reasons, the IW/CC respectfully requests that the Siting Council grant IW/CC's motion to dismiss the Cingular Application, and direct the Applicant to pay all costs connected with defending against this Application that has affected the due process and property rights of all persons involved.

Respectfully submitted,

Ellery W. Sinclair, Chairman
Inland Wetlands/Conservation Commission
Town of Canaan (Falls Village)
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Falls Village, CT 06031
(860) 824-7454
WML61@comcast.net

July 16, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this day, an original and twenty copies of the foregoing was served on the Connecticut Siting Council by hand and copy of same was sent postage prepaid to:

Christopher B Fisher, Esq.
Lucia Chiocchio, Esq.
Cuddy & Feder LLP
445 Hamilton Avenue, 14th Floor
White Plains, NY 10601

Michele Briggs
AT&T
500 Enterprise Drive
Rocky Hill, CT 06067-3900

A copy was also delivered by hand to:

Patty and Guy Rovezzi
36 Barnes Road
Falls Village, CT 06031

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

Ellery W. Sinclair

Dated: July 18, 2011