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

ORIGINAL

July 16, 2011

POST HEARING BRIEF OF THE INLAND WETLANDS AND CONSERVATION COMMISSION OF THE TOWN OF CANAAN (FALLS VILLAGE), CONNECTICUT

This post-hearing brief is respectfully submitted to aid consideration by the Connecticut Siting Council of the above-named application.

Introductory Comments Regarding Importance of Site Visit

The IW/CC is concerned that the DEP Wildlife Division (NDDB) and SHPO have rendered opinions regarding various impacts of the construction of the proposed tower without making independent on-site inspections. These agencies have relied solely on selective and incomplete information supplied by the applicant resulting in questionable assessments. Had these agencies inspected the site for themselves, they might well have reached different conclusions. Reliance on the Applicant's information and the questionable assessments made by DEP and SHPO renders any decision thereon factually unsustainable. In lieu of such reliance, site inspection would clarify a number of facts about which there has been confusion:

- The project area includes two distinct watersheds.
- The watershed containing the majority of the access road drains north into Robbins Swamp.

- The watershed containing the tower compound and the final portion of the access road drains to the southwest to the Hollenbeck River.

- Mr. Mercier asked Mr. Perkins "Is there any benefit for vehicle passage purposes of paving some of the steeper sections?" (6-16-2011 transcript Pg. 32, lines 2-4). A site inspection would have revealed that many sections have been paved and that the paving has washed out, leaving exposed bedrock.

The video presented as a "virtual tour" at the beginning of the February 17, 2011 hearing failed to convey the steep topography of the project area and the preponderance of bedrock and need for blasting along much of the access road. Members of the IW/CC have visited the site on several occasions and feel that in-person site inspection by all reviewing state officials, including the DEP, SHPO and Siting Council is indispensable for appreciating all the potential impacts of this proposed project.

Contents of this Post Hearing Brief

This Post Hearing Brief is structured to address significant issues raised under Cingular's application as follows:

A separate IW/CC Proposed Findings of Fact accompanies this Post Hearing Brief.

I. Jurisdiction of the Inland Wetlands Commission of the Town of Canaan

The Falls Village Inland Wetlands and Conservation Commission ("IW/CC"), a party in these proceedings, is a regulator that considers the impacts of proposed activities on inland wetlands and watercourses within the Town of Canaan. (See IW/CC Pre-Hearing Brief, Testimony; Exhibits IW1, IW2, IW3, IW4, IW5, IW6)

> * * * In 1972, the State legislature enacted the Inland Wetlands and Watercourses Act (Act), see sections 22a-36 through 22a-45 of the CT General Statutes. With this landmark legislation, The General Assembly recognized that the inland wetlands and watercourses of the State of Connecticut are an indispensable and irreplaceable resource * * * Furthermore, the inland wetlands and watercourses of Connecticut are essential to the well being of its citizens, and that it is necessary to balance the need for the economic growth of the State and the use of its land with the need to protect its environment.
>
> The Act created a regulatory process to consider the impacts of proposed activities on inland wetlands and watercourses; and in keeping with the home rule political culture of our state, the Act provided for municipalities to implement this regulatory process. * * * In 1987, the Connecticut Legislature amended the Act and provided language that clearly signaled its desire to have all municipalities administering this law. Section 22a-42 of the Act was amended to read, "To carry out and effectuate the purposes and policies of sections 22a-36 to 22a-45, inclusive, it is hereby declared to be the public policy of the state to require municipal regulation of activities affecting the wetlands and watercourses within the territorial limits of the various municipalities or districts". In addition, the amendment required that all municipalities establish an inland wetlands agency by July 1, 1988. As a result, all of Connecticut's 169 communities now have municipal inland wetlands agencies. * * *
>
> Today's municipal inland wetlands agency regulates activities that affect inland wetlands and watercourses within their municipal boundaries. These activities, often referred to as

"regulated activities", are those proposed or conducted by all persons other than state agencies. * * *

(http://www.ct.gov/dep/cwp/view.asp?A=2720&Q=443548) (Last visited 6/29/11) (Emphasis added.)

Most importantly, we are bound by the Inland Wetlands and Watercourses Act:

> **Sec. 22a-36. Inland wetlands and watercourses. Legislative finding.** The inland wetlands and watercourses of the state of Connecticut are an indispensable and irreplaceable but fragile natural resource with which the citizens of the state have been endowed. The wetlands and watercourses are an interrelated web of nature essential to an adequate supply of surface and underground water; to hydrological stability and control of flooding and erosion; to the recharging and purification of groundwater; and to the existence of many forms of animal, aquatic and plant life. Many inland wetlands and watercourses have been destroyed or are in danger of destruction because of unregulated use by reason of the deposition, filling or removal of material, the diversion or obstruction of water flow, the erection of structures and other uses, all of which have despoiled, polluted and eliminated wetlands and watercourses. Such unregulated activity has had, and will continue to have, a significant, adverse impact on the environment and ecology of the state of Connecticut and has and will continue to imperil the quality of the environment thus adversely affecting the ecological, scenic, historic and recreational values and benefits of the state for its citizens now and forever more. The preservation and protection of the wetlands and watercourses from random, unnecessary, undesirable and unregulated uses, disturbance or destruction is in the public interest and is essential to the health, welfare and safety of the citizens of the state. It is, therefore, the purpose of sections 22a-36 to 22a-45, inclusive, to protect the citizens of the state by making provisions for the protection, preservation, maintenance and use of the inland wetlands and watercourses by minimizing their disturbance and pollution; maintaining and improving water quality in accordance with the highest standards set by federal, state or local authority; preventing damage from erosion, turbidity or siltation; preventing loss of fish and other beneficial aquatic organisms, wildlife and vegetation and the destruction of the natural habitats thereof; deterring and inhibiting the danger of flood and pollution; protecting the quality of wetlands and watercourses for their conservation, economic, aesthetic, recreational and other public and private uses and values; and protecting the state's potable fresh water supplies from the dangers of drought, overdraft, pollution, misuse and mismanagement by providing an orderly process to balance the need for the economic growth of the state and the use of its land with the need to protect its environment and ecology in order to forever guarantee to the people of the state, the safety of such natural resources for their benefit and enjoyment and for the benefit and enjoyment of generations yet unborn.
>
> (Conn. Gen. Stat. §22a-36) (Emphasis added.)

As detailed in our Commission's pre-hearing memorandum of February 10, 2011, the Town of Canaan Inland Wetlands Commission ("IW/CC"), under Conn. Gen. Stat. §22a-42, is

authorized and required to regulate activities affecting wetlands and watercourses, including activities that take place upslope of such areas. This particular State statute is derived from the agreement of the State of Connecticut with the federal government under the Federal Clean Water Act. As a Conservation Commission created and operating under Conn. Gen. Stat. §7-131a, the Commission serves "...for the development, conservation, supervision and regulation of natural resources, including water resources, within [the town's] territorial limits." The Town of Canaan IW/CC requires the review of all activities in proximity to a wetland or watercourse and the issuance of a permit for such activities which might adversely impact a wetland. Under current procedures, the proposed activity to construct a telecommunications tower on Cobble Hill would require a permit from the IW/CC.

II. Major Effect Upon The Hollenbeck River and Robbins Swamp by the Proposed Project

The disturbance to the site and the area surrounding the site will be significant:

> MS. ALISON ORR-ANDRAWES: ....You mentioned that an area of about 1.9 acres would be disturbed by the construction of the access road. Could you tell us how much surface area would be disturbed by all of the project, including the compound, the drainage swales, the cuttings, the fillings, the drainage ponding, catchment basins, everything that would be disturbed in the project?
> MR. PERKINS: The 1.9 acres includes everything except the compound. And the compound is a hundred -- the leased area is a hundred by a hundred, so that would be 10,000 square feet.
>
> (Trans. 6/16/11, p. 92, line 21 to p. 93, line 7)

The compound alone is an area of disturbance of 10,000 square feet. Since one acre comprises 43,560 square feet, the proposed total disclosed area of direct disturbance would be 92,764 square feet (1.9 acres x 43,560 square feet = 82,764 square feet, plus the 10,000 square foot compound area).

The site is not clear at present. The existing so called "logging road" is currently "treed" and will require significant tree removal and blasting. (Trans. 6/16/11, p. 93, lines 22 - p. 94, line 2)

Tree Removal

Tree removal from the site will be substantially more than the Applicant asserted in the Application. In addition to the disclosed 110 trees to be removed (see Applicant's Supplemental Information, May 20, 2011 at p. 5, I.), the Applicant acknowledged that

> MS. KELSEY:....but would you agree that during this whole process of the access road, upgrading the drainage swales and everything, that there will be additional trees cut that are less than six-inch in diameter at breast height?
> MR. PERKINS: Yes.
> MS. KELSEY: Could you offer a ballpark figure?
> MR. PERKINS: No.
> MS. KELSEY: No? Would it be safe to say that there would be numerous additional trees under six inches that would be cut during this operation?
> MR. PERKINS: That's really subjective, but --
> MS. KELSEY: Well I don't think it's really too subjective. I mean when you go up there, there's --
> MR. PERKINS: More than one, less than a million.
> MS. KELSEY: * * * I've made my point --***that there is going to be [a] significant more amount of trees than 110 cut form more than 3,000 feet on both sides. So we're talking really in the area of 6,100 feet probably --
> ACTING CHAIRMAN TAIT: Miss Kelsey, you've made your point.
>
> (Trans. 6/16/11, page 110, line 10 to page 111, line 13) (Emphasis added.)

Material Alteration

It is noted by IW/CC that "somewhere in the neighborhood of thirty-eight hundred yards" of fill is proposed for transport up the slope for building the road and compound (Trans. 6/16/11 p. 186, line 20-23), some 200 tri-axle trucks-worth by the estimation of Engineer Richard Calkins (*Ibid.*). This contradicts the Applicant's assertions in its NEPA Environmental Affects Checklist form:

7. Will construction involve significant change in surface features (impacts to wetlands, deforestation, water diversion, etc.)? NO

Information source, Refer to VHB's Wetland inspection report dated August 25, 2010. No direct impact to wetlands or watercourses will occur.

(Application, Tab 7, page 4) (Emphasis added.)[1]

Cell Tower RF Effects on Birds and Wildlife

The objectives of the Clean Water Act of 1977[2], under which the IW/CC operates, provide, in pertinent part:

SEC. 101 [33 U.S.C. 1251] Declaration of Goals and Policy

(a) The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act--

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited; * * *

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this Act to be met through the control of both point and nonpoint sources of pollution. [101(a)(7) added by PL 100-41]

(b) It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority

[1] NEPA requires consideration and disclosure of both direct and indirect effects. The Applicant's response in its NEPA EA Checklist denied direct effects by affirmative statement, and denied indirect effects by omission.
[2] The Clean Water Act of 1977 amended the Federal Water Pollution Control Act.

under this Act. It is the policy of Congress that the States manage the construction grant program under this Act and implement the permit programs under sections 402 and 404 of this Act. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution. * * *

(g) It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. * * *

(33 U.S.C. §1251) (Emphasis added.)

Conn. Gen. Stat. §22a-36 provides similar protections.

III. Misrepresentations by the Applicant of the Effects of the Project

The Applicant misrepresented the effects of the project:

On its 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) (See full discussion below at page 39-42)

On its NEPA Environmental Affects Checklist, Question 7 (regarding significant change in surface features). (Application, Tab 7, page 4) (See full discussion below at pages 24-28.)

On its USFWS Endangered Species Review (Application at Tab 7, pages 9 and 10) (See full discussion below at page 11, ff.) since 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" (IW59) 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.

Coinciding with this failure to apply the correct definition, 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. (See full discussion below at pages 14, 34, 35)

On its CT DEP NDDB Review (Application, Tab 8, pages 2-4) (See full discussion below at pages 10-12, ff., 14-15, ff.).

By filing an application without the appropriate site specific Nationwide Programmatic Agreement compliance under the National Historic Preservation Act for mandatory

Section 106 Review (Application, Tab 9, pages 1-2; Trans. 6/16/11, p. 101, lines 6-10) (See full discussion below at pages 35-42)

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) (See full discussion below at pages 37-39).

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 p. 18, line 17, ff.)

This false statement 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 as well as NHPA compliance); Tab 7, page 4 (See full discussion below at pp. 31-39).

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 (see IW55, IW56, Gustafson testimony Trans. 2/17/11 (7:10pm) page 104, line 20) (See full discussion below at page 11-13, ff.).

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. 93 lines 20-22; p. 97, lines 20-24, p. 98, line 2) (See full discussion below at page 10-11, 16-20).

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) (Application, Tab 6, page 2) (See full discussion below at pages 30-41).

In its September 9, 2010 letter to SHPO, the Applicant describes a "0.5 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) (See full discussion below at pages 30, 39-40)

The filing of an application in the face of a property dispute about the terms of an easement on which the Applicant relies, and the continuation with the application here,

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 useless. This may prove to constitute both a frivolous application and effect a deprivation of due process on the parties. (See full discussion below at pages 44-46)

IV. Misapplication of Federal Standard for Proposed "Project Action Area"

Presence of DEP NDDB State Listed Species

The initial AT&T request for review by the DEP NDDB of the project site regarding the presence of state listed species resulted in a response from the NDDB indicating that there were no said species within the actual project site[3]. A subsequent letter from the DEP NDDB to the IW/CC (IW77) confirmed, however, that 82 state listed species and natural communities occur within a 2 mile radius of the proposed tower site. Numerous "NDDB Areas" are situated both on Cobble Hill in the area of the proposed tower and in the surrounding wetlands downslope from the areas of disturbance created by the project. While the original request for review reported no state listed species in the project area, the subsequent communication from the NDDB stated that the NDDB had made "no assessment on impacts or effects that this facility may or may not have on these species."[4] The legal requirement of consideration of the preponderance of state listed species in proximity to the project area and the potential impact of the project on the ecology of Cobble Hill and the surrounding lowlands of Robbins Swamp and the Hollenbeck River, is of paramount consideration in this docket.

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[3] However, the definition of the "site" was deficient for NDDB purposes (Trans. 2/17/11 at page 93, lines 20-22; page 97 lines 21 to 24 and page 98 lines 1-2). On the strength of the deficient NDDB inquiry, Mr. Gustafson stated (Trans. 2/17/11 at p. 105, line 5, ff.) that "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." This was a violation of the USFWS protocol (IW55 and IW56). Mr. Gustafson failed to apply USFWS mandatory Step 2 regarding the presence of habitat within the "Project Action Area." This violation was made a matter of record by IW/CC Chairman Sinclair. (Trans. 2/17/11, page 106 at line 14) [Mr. Sinclair's questioning of Mr. Gustafson was controlled and limited by exclusion, by the Chairman, of Sinclair's use of a pre-marked Federal Agency public record document (IW55 and IW56).

[4] IW77

Mr. Gustafson's representation that consultation with CT DEP on the NDDB species is "strongly recommended" by USFWS (Trans. 2/17/11 (7:10pm) page 104, line 20) is plain error of law. The requirement, according to USFWS is:

> Determine whether any listed, proposed, or candidate species (T/E species) are likely to occur within the proposed project action area based on location of the proposed project.
>
> (IW55, Step One of a mandatory Two Step Process)

Rather than apply "project action area" as defined by USFWS (IW56), the applicant's consultant defined the area which he disclosed to USFWS and DEP "as the proposed area of development and disturbance associated with the proposed facility." (Trans. 2/17/11, page 93, lines 20-22)

But this is not the definition used by USFWS or by DEP, which includes not only the directly affected areas, but all indirectly affected areas (for example, areas within the two watersheds receiving runoff and siltation, and other effects, resulting from the proposed project[5]), well beyond "200 feet of the proposed development." (Applicant's letter to CT DEP; see also IW56)

"Project action area" is a legal term with specific meaning (IW55, IW56) totally disregarded by the applicant's consultant. And once disregarded, the effects of this omission were then multiplied when the result was applied to mandatory State review as well.

The review is first of Federally listed species and then of State Endangered species. (IW55)

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[5] The Applicant's letter to the State DEP refers to "proposed Facility location and areas generally within 200 feet of the proposed development; and, proposed access drive route and areas generally within 100 feet." These areas are a far cry from the "Project Action Area" required for review by the USFWS (see IW55 page 1, "Step 1); see IW56 "Action Area: Action area refers to the area directly or indirectly affected by the proposed action. This area will usually be larger than the project footprint" (Emphasis added.)), and a far cry from the total area of ground disturbance now admitted by the Applicant to be 92,764 square feet (Trans. 6/16/11, p. 92, line 21 to p. 93, line 7) which is limited only to direct effects and neither maps out nor gives the extent of all indirect effects, which has never been done.

The mandatory second step of the USFWS protocol is:

> **Step 2.** - Determine whether any listed or proposed New England Species are likely to occur within the proposed project area by comparing the habitat present within the proposed project action area with habitat that is suitable for the species.
>
> (IW55) (http://www.fws.gov/newengland/EndangeredSpec-Consultation_Project_Review.htm) (Last visited 7/15/11)

This second mandatory USFWS step is entirely dependent upon the presence of the habitat of Federally Endangered species -- not the species themselves -- and a letter to USFWS for evaluation is recommended where the habitat is found. USFWS states:

> Why does this matter?- In a case where no habitat is present, a quick and easy determination can be made that further coordination is not necessary. In a case where habitat is present, but you believe that the project activities will not impact listed species, it is important to coordinate with us to ensure that all project activities and all potential effects (direct and indirect) have been considered.
>
> (*Ibid.*)

The Applicant's review failed to apply the correct definition of "action area," and entirely failed to fulfill Step 2, and therefore was not entitled to the letter it included in its application and upon which it based its other EA assertions. The Applicant failed to disclose the presence of known habitat for Federally Endangered Species as required by law and by FCC rules.

As a result, thorough inventory and assessment of the potential impact of the project on state listed species has yet been conducted. The IW/CC submits that, in the interests of the people of the State of Connecticut and in fulfillment of statutory mandates to protect these species, without such an inventory and assessment, the record here is incomplete and the application must be denied on this basis alone.

Misapplication of Standard

In its expert witness testimony, the Applicant gave equivocal and misleading responses not only about the "project area" as officially defined by the U.S. Fish and Wildlife Service ("USFWS"), but this then resulted in defective application of State review requirements:

> MR. GUSTAFSON:....I'm familiar with the graphic [IW56]....as well as the definition of action area provided by the New York Field Office. But I'm -- I'm not sure it relates to the review procedure that has been set up by the New England Field Office of the U.S. Fish and Wildlife Service.
>
> (Trans. 6/16/11 p. 97, lines 21 - 24, p. 98, lines 1-2)

Mr. Gustafson suggested that there is a different standard for different states under a federal, national Congressional mandate to enforce the Federal Endangered Species Act.

According to Mr. Gustafson, as long as the Applicant reviewed the "project area," which he defined in this case as "the proposed area of development and disturbance associated with the proposed facility" (Trans. 6/16/11 at p. 93, lines 21-22) against the USFWS's list of Federally Endangered Species in Connecticut towns, that was the end of the ESA review:

> MR. GUSTAFSON: ....The review procedure that's been set up for the New England region identifies species both by county, and then more specifically by individual towns. And the review procedure that's been set up by the New England Field Office is to -- and regardless of our action area -- or our action area no matter how large you consider it, is contained within the Town of Canaan. I think everyone can agree to that fact. We review it against the species list for the entire Town of Canaan.
>
> (Trans. 6/16/11 p. 98, lines 12 - 21)(Referring to the list appearing at Tab 7, page 11) (Emphasis added.)

This is plainly erroneous. Under USFWS protocol, one has to apply the USFWS-defined "Project Action Area" inclusive of all directly and indirectly affected areas (See IW55, IW56), and one has to perform mandatory "Step 2" of USFWS review for the presence of habitat of endangered species present within the "project action area." (See IW55, IW56). Gustafson, by his own admission, did neither of these, in violation of the Federal USFWS under the

Endangered Species Act (ESA), State ESA and DEP requirements, FCC regulations and, incidentally also, the requirements of NEPA review for such "indirect effects." (See discussion of NEPA requirements at pp. 34-35, *infra.*)

The IW/CC urges the Council to proceed through the entire USFWS protocol itself -- without omitting "Step 2" as provided there, to understand the material omissions engaged in by the Applicant. (See http://www.fws.gov/newengland/EndangeredSpec-Consultation_Project_Review.htm)

V. Presence of, and Effect on, Species of Concern, Listed, Threatened and Endangered Species

The Applicant's testimony substantiates its failure to follow USFWS protocol, thereby also misleading the State DEP when the Applicant's consultant provided its request for NDDB data and determination letter from CT DEP. By the Applicant's testimony disclosure that the site information provide was: "the proposed area of development and disturbance associated with the proposed facility" (Trans. 6/16/11 at p. 93, lines 21-22) and disclosed to CT DEP as: "proposed Facility location and areas generally within 200 feet of the proposed development; and, proposed access drive route and areas generally within 100 feet." (Vanasse Letter to DEP NDDB, 8/24/2010, Application Tab 8, page 2) which come nowhere near meeting the actual requirement of CT DEP NDDB for "the entire area impacted by a project, including any potential runoff or other associated disturbance, not just the project's immediate footprint" (see (http://www.ct.gov/dep/cwp/view.asp?a=2702&q=323466&depNav_GID=1628) (Last visited 7/13/11) -- an area substantially larger by several tens of thousands of square feet than Mr. Gustafson's report to DEP[6].

[6] The area of direct disturbance, by testimony of the Applicant, will total 92,764 surface square feet. (Trans. 6/16/11 at p. 93, lines 4 to 7) [Since one acre = 43,560 square feet, the proposed total area of disturbance would be 92,764 square feet (1.9 acres x 43,560 square feet = 82,764 square feet, plus the 10,000 square foot compound area).]

Area of Disturbance Grossly Underreported by Applicant

The taking of a federally Endangered Species, whether intentionally or unintentionally, is a violation of federal law (ESA). The IW/CC has shown that the Applicant failed to apply the appropriate USFWS criteria regarding the area affected by the project. Mr. Gustafson admitted that his area of review was only "the proposed area of development and disturbance associated with the proposed facility" (Trans. 6/16/11 at p. 93, lines 21-22) (and see Application, tab 8, page 2), and not the area of all direct and indirect effects, and not according to the USFWS definition of Project Action Area, because, according to Gustafson, "I'm not sure it relates to the review procedure that has been set up by the New England Field Office of the U.S. Fish and Wildlife Service." (Trans. 6/16/11 p. 97, line 24 - p. 98, line 2) (see p. 13, *supra.*) Such uncertainties in the context of compliance with strictly construed FCC regulations, the ESA and state equivalents that rely upon USFWS ESA consultation are unacceptable, and the Applicant's entire environmental assessment and the letters derived from it must be rejected as unreliable and in violation of federal law.

It is clear that the USFWS means by Action Area "the area directly or indirectly affected by the proposed action. This area will usually be larger than the project footprint" (Emphasis added.), so much greater than the total area of ground disturbance now admitted by the Applicant to be 92,764 square feet square feet (Trans. 6/16/11, p. 92, line 21 to p. 93, line 7).

The letter of "No Effect" obtained by the Applicant from USFWS (Application at Tab 7, pages 8, 9 and 10) and incorporated into the Application was generated with inadequate information and derived from the wrong standard. The Applicant was not entitled to the letter.

The compound alone is an area of disturbance of 10,000 square feet. (Trans. 6/16/11 at p. 93, line 7) This is only direct effect and is, of course, much smaller than any area of indirect effects of the project, the extent of whose disclosure is required under state and federal law despite its material omission from the application.

NDDB

As a state agency authorizing activities in NDDB mapped areas, according to DEP review processes and state mandates, the Council must guarantee that any proposed activity will neither affect any endangered or threatened species, nor adversely modify the habitat of such species. Effects include those from the construction process, access, vehicles and work done, all direct effects (such as blasting) and indirect effects of the construction (such as the closing of seeps and springs because of blasting); effects also include those of the operational project -- including maintenance access at all seasons of the year, the potential for fuel spills from vehicles as well as spills from maintenance shed back up batteries, and all effects from the operation of the tower antennas. Without a guarantee from both the Applicant and the Council that the proposed activity will not adversely impact endangered or threatened species, and that it will not modify the habitat of these species (as required under Conn. Gen. Stat. 26-310), the proposed project must be denied.

In compliance with the State Endangered Species Act, the IW/CC has called for an actual site survey, as described by the CT DEP (*Ibid.*, and see IW/CC Pre-Hearing Memorandum, Filed February 10, 2011, at page 12).

The Connecticut Endangered Species Act is binding on the IW/CC as it is binding on the Siting Council and the Applicant:

> **Sec. 26-310. Actions by state agencies which affect endangered or threatened species or species of special concern or essential habitats of such species.** (a) Each state agency, in consultation with the commissioner, shall conserve endangered and threatened species and their essential habitats, and shall ensure that any action authorized, funded or performed by such agency does not threaten the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat designated as essential to such species, unless such agency has been granted an exemption as provided in subsection (c) of this section. In fulfilling the requirements of this section, each agency shall use the best scientific data available.

(b) Each state agency responsible for the primary recommendation or initiation of actions on land or in aquatic habitats which may significantly affect the environment, as defined in section 22a-1c, shall ensure that such actions are consistent with the provisions of sections 26-303 to 26-312, inclusive, and shall take all reasonable measures to mitigate any adverse impacts of such actions on endangered or threatened species or essential habitat. * * *

(Conn. Gen. Stat. §26-310, in pertinent part) (Emphasis added.)

The Connecticut Environmental Protection Act is also binding:

Sec. 22a-1. Policy of the state. The General Assembly finds that the growing population and expanding economy of the state have had a profound impact on the life-sustaining natural environment. The air, water, land and other natural resources, taken for granted since the settlement of the state, are now recognized as finite and precious. It is now understood that human activity must be guided by and in harmony with the system of relationships among the elements of nature. Therefore the General Assembly hereby declares that the policy of the state of Connecticut is to conserve, improve and protect its natural resources and environment and to control air, land and water pollution in order to enhance the health, safety and welfare of the people of the state. It shall further be the policy of the state to improve and coordinate the environmental plans, functions, powers and programs of the state, in cooperation with the federal government, regions, local governments, other public and private organizations and concerned individuals, and to manage the basic resources of air, land and water to the end that the state may fulfill its responsibility as trustee of the environment for the present and future generations.

(Conn. Gen. Stat. §Sec. 22a-1) (Emphasis added.)

According to USFWS, harm to Endangered Species in this context can constitute "incidental take" under the Federal Endangered Species Act ("ESA"):

Why should we save endangered species? Congress answered this question in the introduction to the Endangered Species Act of 1973 (Act), recognizing that endangered and threatened species of wildlife and plants "are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people."

After this finding, Congress said that the purposes of the Act are "...to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such ... species..." Habitat Conservation Plans (HCPs) under section 10(a)(1)(B) of the Act provide for partnerships with non-Federal parties to conserve the ecosystems upon which listed species depend, ultimately contributing to their recovery. * * *

(http://www.fws.gov/endangered/what-we-do/hcp-overview.html) (Last visited 7/13/11)

Known Burbot Population and Essential Habitat

The IW/CC established, during the course of these proceedings, the known presence of the Burbot, an Endangered species of fresh water cod, in the Hollenbeck River directly below the proposed project. (IW/CC Testimony, par. 57) This is not disputed.

The Federal USFWS has invested significant federal taxpayer dollars studying the Burbot in this location in the Hollenbeck River in coordination with the State DEP (See IW/CC Testimony, pars. 53-57; See also IW85, attached to IW/CC Testimony).

The IW/CC also established, through its witness testimony, that the tower compound is within the Hollenbeck River watershed. This is undisputed. Changes in drainage patterns resulting from the proposed project have the potential to increase sedimentation into this known Burbot habitat threatening to obliterate this species from this location. (See testimony of Sam Dziegan; See also IW85, attached to IW/CC Testimony, and Testimony, pars. 53 to 57). (See IW70, IW71, IW72, IW73, IW74, IW75, IW76, IW77, IW78A & B, IW84)

Presence of "Critical Habitat" Disregarded By The Applicant

Nancy Murray, current Biologist/Senior Environmental Analyst, NDDB Program Coordinator for the Connecticut D.E.P. (App. Tab 8) in 1985 recognized Robbins Swamp (while staff biologist at the Connecticut Department of Environmental Protection) as

> "one of the most significant [inland wetlands] because of the high concentration of state-listed 'species of special concern'. Thirteen 'species of special concern' are known to be extant in Robbins Swamp. The names of species and locations are not provided due to their extremely sensitive nature."
>
> (Exhibit IW66)

This critical habitat is designated in a map attachment to the Application here, but never otherwise acknowledged or disclosed by the Applicant. (Application at Tab 7, map at page 5 (orange shaded area)).

Connecticut Critical Habitats provides the identification and distribution of a subset of important wildlife habitats identified in the Connecticut Comprehensive Wildlife Conservation Strategy.

The DEP Wildlife Division has developed a Comprehensive Wildlife Conservation Strategy (CWCS) for Connecticut that allows the Connecticut DEP and its partners to integrate the management of natural resources, build valuable partnerships, and support regional and national efforts to secure long-term funding for wildlife conservation. The "Conservation Strategy" identifies species of greatest conservation need and their affiliated habitats. The strategy also identifies the priority research needs and conservation actions needed to address problems facing these species and habitats. The goals of the "Conservation Strategy" are: To provide guidance and vision for wildlife conservation in Connecticut; To address the broad array of all fish, mammals, birds, reptiles, amphibians and invertebrate species; To use available funding to address the species in greatest need of conservation and their habitats; To identify actions needed to conserve species diversity and keep common species common; To build upon past efforts to conserve all species of wildlife; and To encourage the creation of partnerships with conservation organizations at local, state and regional levels to enhance opportunities for implementation of actions to conserve wildlife.

(http://www.cteco.uconn.edu/guides/resource/CT_ECO_Resource_Guide_Critical_Habitat.pdf) (Last viewed 7/7/11) (Emphasis added.)

VI. Proposed Project Violates USFWS Directives

The USFWS has made plain its recommendations that:

4. * * * Towers should not be sited in or near wetlands, other known bird concentration areas (e.g., State or Federal refuges, staging areas, rookeries), in known migratory or daily movement flyways, or in habitat of threatened or endangered species. * * *

(http://www.fws.gov/habitatconservation/com_tow_guidelines.pdf) (last visited 6/28/11) (Emphasis added.)

Under FCC Rules, all tower applicants must consider the impact of facilities under the ESA:

Section 1.1307(a)(3) of the Commission's rules, 47 C.F.R. §1.1307(a)(3), requires applicants, licensees, and tower owners (Applicants) to consider the impact of proposed facilities under the Endangered Species Act (ESA), 16 U.S.C. s. 1531 et seq. Applicants must determine whether any proposed facilities may affect listed, threatened or endangered species or designated critical habitats, or are likely to jeopardize the continued existence of any proposed threatened or endangered species or designated critical habitats. Applicants are also required to notify the FCC and file an environmental assessment if any of these conditions exist. The U.S. Fish and Wildlife Service (FWS)

provides information that Applicants may find useful regarding compliance with the ESA.

In addition, FWS has formulated and published voluntary guidelines for the siting of towers intended to address potential effects on migratory birds. These guidelines and an accompanying tower site evaluation form are posted at U.S. Fish and Wildlife Service, Bird Issues. According to FWS, the guidelines reflect FWS' judgment of "the most prudent and effective measures for avoiding bird strikes at towers."

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

The FCC's environmental rules "require that all licensees and applicants prepare and file with the FCC an Environmental Assessment (EA) if, among other things, their proposed facilities "may affect" or "are likely to jeopardize" listed or proposed threatened or endangered species or designated critical habitats. [FN1: 47 C.F.R. 1.1307(a)(3) requires the preparation of an EA for facilities that "(i) May affect listed threatened or endangered species or designated critical habitats; or (ii) are likely to jeopardize the continued existence of any proposed or endangered or threatened species or likely to result in the destruction or adverse modification of proposed critical habitats, as determined by the Secretary of the Interior pursuant to the Endangered Species Act of 1973." (http://wireless.fcc.gov/siting/endangeredspeciesletter.pdf) (Last visited 7/13/11) (Emphasis added.)]

This FCC requirement explains why there might be a motivation for an Applicant for a new tower proposed to be placed in the largest inland calcareous wetland in the State of Connecticut to minimize the disclosed size of the potential "Project Action Area," or to misapply federal protocol for ESA compliance as was done here -- to, at most, a conservative 92,764 square feet area of direct actual disruption[7]. The Applicant never addressed the indirectly

[7] The area of disruption disclosed in the Application was more limited. See Gustafson letter to CT DEP Wildlife Division, Application Tab 8, p. 2. This later admission came out on cross examination on 6/16/11 (at Trans. 6/16/11 p. 92, line 21 to p. 93, line 7) See Gustafson letter to CT DEP Wildlife Division, Application Tab 8, p. 2.

affected areas[8], never defined or disclosed them, as required by law. This failure violates FCC rules and USFWS rules as well as State of Connecticut DEP rules and renders the application void.

USFWS Protection of Birds from Tower Kills and RF

The USFWS provides the following facts regarding towers and birds:

Tower Facts

- Construction of communication towers (including radio, television, cellular, and microwave) in the United States has been increasing at an estimated 6 percent to 8 percent annually since development of the cellular telephone, and construction continues at a rate of approximately 1,000 towers per month. The Federal Communications Commission (FCC) currently estimated the total number of towers at approximately 120,000.
- Loss of migratory birds at communication towers is estimated at 4-5 million annually. Potentially impacted resources include 90 bird species which are threatened or endangered and 124 non-game species of management concern. * * *
- Documented cumulative losses of birds since 1955 number over 1 million.

(http://www.fws.gov/habitatconservation/communicationtowers.html)
(Last visited 7/13/11)

The Service also provides an extensive bibliography of papers on tower kills, to which the Council is respectfully referred. (See Bird Kills at Towers and Other Human-Made Structures: An Annotated Partial Bibliography (1960-1998) By: John L. Trapp, U.S. Fish and Wildlife Service, Office of Migratory Bird Management) (at http://www.fws.gov/migratorybirds/CurrentBirdIssues/Hazards/towers/tower.html (Last visited 7/13/11)).

Increasing numbers of studies coming out of Europe and other parts of the globe show that the presence and operation of cell towers in flyways will result in millions more bird deaths. (See Ibid., and see Exhibits IW59, IW60, IW61).

[8] Required under FCC rules, ESA and NEPA.

This biological effect on birds has been shown to render birds incapable of successful nest-building and mating, and in at least one study has shown mice to be rendered completely infertile after five generations (IW76). Therefore, the USFW Service's directive not to place any tower "in or near wetlands" (http://www.fws.gov/habitatconservation/com_tow_guidelines.pdf) (last visited 6/28/11) (Emphasis added.) -- which includes any site surrounded by wetlands, as this site is -- must be enforced by agencies with the authority to do so.

The proposed project presents both site-disruption physical and electronic threats to the survival of the many listed species present in and near the proposed project site.

The reason for making wetlands 'off limits' to tower placement includes protection of the habitat function of wetlands -- including particularly food sources.

The primary inquiry and topic of concern in the USFWS's environmental impact review (IW55), is the presence of potential habitat of known listed species. Here, as the IW/CC has shown in its evidence, the Applicant was not entitled to any letter of "No Effect" (Tab 7), because it A) misapplied the criteria (see IW56); and B) failed to consider the presence of potential habitat within the "Project Action Area," -- including the area of indirect effects of the project.

The devastation to aquatic life presented by the presence of the proposed tower in a wetland with protected species is evident, where the Balmori study of tadpoles (IW70) exposed to RF at 140 meters (approximately 460 feet) had a 90% mortality rate, contrasted with a 4% mortality rate for tadpoles similarly exposed, but protected in an RF-blocking Faraday cage. The proposed tower is c. 800 feet from the Hollenbeck River (see NEPA Screen Map, Application at p. 5) The Balmori study has serious implications for any wetland.

USFWS Directive Under the Telecom Act

The USFWS guidelines are controlling here. The protection of the wetlands by the IW/CC requires elimination of cell towers "in or near" wetlands in order to protect the habitat and other natural benefits present in this major natural resource and critical habitat. (See IW 31, IW32, IW33, IW34, IW35, IW36, IW37, IW38, IW39, IW40, IW41, IW42, IW43, IW44, IW45, IW46, IW48, IW49, IW50, IW52, IW53, IW54, IW58, IW65, IW66, IW67, IW68, IW69). Cell towers may not be placed "in or near" wetlands. (See http://www.fws.gov/habitatconservation/com_tow_guidelines.pdf) (at p. 19, supra. Last visited 6/28/11)

VII. Other Considerations

Steep Slope

The IW/CC repeats here its objection to the Council's failure to make an in-person site visit to the project area and property that is now the subject of controversy in the face of restrictive guidelines for project proposals under local zoning regulations and Inland Wetlands Regulations. The steepness of the slope is a serious and formal consideration in our Town.

Additionally, it came out during direct exam of the IW/CC's engineer witness Calkins that the supplemental information called for by the Council revealed that the Applicant had increased the maximum steepness of the grade of its access road to 30%, not decreased it. (Trans. 6/16/11 at page 30, line 21).

The Council heard multiple witnesses and testimony on the hazards that exist in the development, maintenance and operation of at tower at this proposed site. (See *Ibid.* and incorporated here.)

Additionally, the proposed project, by the Applicant's admission, will require 3800 yards of fill, "a little over 200" tri-axle trucks. These trucks would have to back up that steep incline because, by the Applicant's admission (Trans. 6/16/11 at p. 186), there is no way such large vehicles can turn around.

The steepness of the proposed 30% grade also severely restricts -- if it does not preclude -- any traction for such vehicles (see Trans. 6/16/11 at pages 182 (Calkins) lines 22 ff; p. 183; p. 189, line 1).

Run-Off

The IW/CC has shown that the Applicant's canopy removal is extensive -- far more extensive than appears upon first reading of the application. On cross examination, the Applicant admitted that the total number of trees to be cut would be higher than the 110 trees indicated in the Supplemental Information (May 20, 2011, at p. 5, I.) provided by the Applicant, because smaller trees would also be cut (see Application at page 17; see discussion *supra* at page 6). This cutting would have a severe effect upon soil disturbance, which, in turn, the IW/CC has shown (see especially IW/CC Pre-Filed Testimony 2/1/11, pars. 9-16; and the Bormann and Likens Hubbard Brook watershed ecosystem study at Exhibit IW10), would alter the ecology of the wetlands in the "project action area" below the site (as defined by USFWS (IW56)).

The construction of the proposed access road and tower compound will permanently alter the forest floor, forest canopy and quantity, quality and nutrient composition of runoff water from Cobble Hill. (See Trans. 6/16/11 at pp.183, line 24 to p. 185, line 19; p. 187, lines 11 - 16)

Since the proposed project occurs within two watersheds (the Wangum Brook and Hollenbeck River watersheds), both of which are directly associated with the contiguous Robbins Swamp, this massive alteration is projected to have a deleterious effect on wetlands and

watercourses and the life in them. This effect is prohibited under the State's Wetlands and Watercourses Act and the State's Endangered Species Act as well as others. (See IW1, IW2; Discussion at page 14-17, *supra.*)

Sedimentation

The proposed access road modifications entail significant soil removal and deposition on steep slopes directly above an area recognized by numerous state officials as unique and worthy of protection (See Trans. 6/16/11 at p. 180, line 6 to p. 181, line 16; Exhibits IW66, IW67 and IW68). The fragile soils associated with the steep slopes of Cobble Hill are shallow to bedrock and are considered erodable. The project poses an increased risk for erosion and the migration of sedimentation of these soils into Robbins Swamp.

Drainage Adds to Destruction of Protected Habitat and Wetlands

The proposed extensive series of drainage swales and outflow areas -- too vaguely described (see trans. 6/16/11 page 187, lines 11 - 16; see also Engineer Calkins' Reports at IW9A and IW9B) to meet the requirements of an application to the IW/CC[9] -- add to the velocity and quantity of water flow from road and site runoff.

Even if the road and site were not directly above and within delicate protected habitat, the proposed alterations at the site would cause massive harm to the site and contiguous areas that are disallowed under local regulations (see IW1, IW2, IW5, IW8, IW9A, IW9B, IW11). Since the distances between swale outflows in several areas are up to several hundred feet, and since the level outflow areas cannot be shown to accommodate total water flow at each of these sites (see IW9A, IW9B; Trans. 6/16/11 page 187, lines 9-16), the IW/CC has shown that the Applicant has failed to demonstrate 1) the total amount of water flow at each exit area; 2)

[9] And therefore objected to by IW/CC in its Motion to Strike the Application, February 15, 2011.

whether any man-made structure can handle such accumulations -- let alone whether the proposed project might do so.

This failure of calculation and dismissive attitude in engineering for a pristine site under protection of the Commission, as well as the Council, deserves round rejection. It is clear that the Applicant has either not thought this serious issue of run-off through with due diligence, or gives it little or no significance.

We need not repeat here the environmental significance of Robbins Swamp to the State of Connecticut (See IW/CC testimony; and Exhibits IW65, IW66, IW67, IW68, IW69, IW78A, IW78B, IW79, IW80, IW81, IW82), but we do reiterate that multiple national, state and local authorities emphasize that any alteration of the quality, quantity and timing of the water flowing into Robbins Swamp will be detrimental to its unique calcareous ecosystem (Exhibit IW 65).

Invasive Species

The Applicant failed to address the harm presented in the likely introduction of invasive species through its land-moving equipment and activities. (See IW/CC Testimony, 2/10/11 at par. 13) Invasive species have the potential to alter and degrade the unique habitats in Robbins Swamp.

Fragmentation

IW/CC witness Tim Abbot described the deleterious effects of habitat fragmentation, how and why such considerations are pertinent here relating to a wetland of state-wide importance:

> MR. MARLOW: * * * Could you explain to me some of what you meant by forest fragmentation and -- and why it's applicable to this application?
> MR. ABBOTT: Certainly. The * * * idea of an intact forest system is one that does not have an open canopy or large openings within it, but it is one contiguous stretch of woodland. And although Connecticut is 75 percent forested, in much of the state those forests are in particularly small patches. They therefore can only provide habitat to a

limited number of the species that may be common but only if they have sufficient size and location of that habitat to exist. * * * The bottom line is that at this site both our own internal analysis and the State's identify an area that's over 500 acres in size without a significantly fragmenting feature. In other words, the existing road with its closed canopy and hunting cabin do not, at least at the level at which the analysis was done, contribute a substantial fragmentation effect. The effects of fragmentation are the degradation of habitat. It breaks it into smaller parts. It allows access for nesting parasite birds that can throw the eggs out of interior nesting songbirds, it allows access for light loving invasive species. The concern that I raised about fragmentation with this site is not necessarily that it would split it in t[w]o so you would have two 250 acre things, but that it provides deep penetration by widening, by clearing, by having an open canopy into what is now core forest. You're going to have to take the State and our buffering of 300 feet into consideration then for impacts because they discounted 300 feet buffered in from all fragmenting features when they came up with this. That's the area you'll see invasive species from disturbance, that's the area that the birds can penetrate. So it affects a much larger area than just the footprint of the building envelope, which is why I said it can't be mitigated.

(Trans. 6/16/11 at pp.183, line 24 to p. 185, line 19) (Emphasis added.)

In light of the Council's mandate for certification considerations at C.G.S. §16-50p (B) and (C), this consideration alone is sufficient grounds for the denial of the application. The Council must consider:

(B) The nature of the probable environmental impact of the facility alone and cumulatively with other existing facilities, including a specification of every significant adverse effect, including, but not limited to, electromagnetic fields that, whether alone or cumulatively with other effects, on, and conflict with the policies of the state concerning, the natural environment, ecological balance, public health and safety, scenic, historic and recreational values, forests and parks, air and water purity and fish, aquaculture and wildlife;

(C) Why the adverse effects or conflicts referred to in subparagraph (B) of this subdivision are not sufficient reason to deny the application; * * *

RF Effects

Under C.G.S. §16-50p, the Council must consider effects "including, but not limited to, electromagnetic fields that, whether alone or cumulatively with other effects, on, and conflict with the policies of the state concerning, the natural environment" including "ecological balance, * * * water purity and fish, aquaculture and wildlife."

Both the Council and this Commission must consider the growing body of scientific studies showing adverse effects on organic life, including sparrows (IW74); storks (IW75); mice (IW76); frogs (IW70, IW73); and trees (IW84) (See also IW71 and IW71). The significance of RF effects is in the wetlands themselves, which will be affected by the reduction in fertility and the potential decrease in food sources, affecting the wetlands as they are known and designated by the State: A Critical Habitat. (IW37, Application, Map at Tab 7, page 5; See also IW44)

Since the FCC has failed to set safety standards on these "non-thermal biological" effects, and has failed to update its "thermal" only standards in 14 years, it falls to the local governing agencies to consider this serious harm in the context of protecting wetlands under their statutory care.

The IW/CC considers all evidence of harm on wildlife to be reason enough to exclude a tower from a protected wetland, about 800 feet from a known population of protected Burbot, and within known potential habitat for the federally-protected Small Whorled Pogonia (IW52); and the Timber Rattlesnake (IW31), Bog Turtle (IW32) and others. In light of the CT DEP NDDB documented presence of 82 protected species within a 2 mile radius (NDDB Data letter, IW77, IW78A, IW78B), the proposed project is therefore prohibited under the statutes that guide both the IW/CC and the Siting Council.

No "Gap in Service"

> [I]t matters a great deal...whether the "gap" in service merely covers a small residential cul-de-sac or whether it straddles a significant commuter highway or commuter railway.
>
> *360' Commun. Co. v. Bd. of Supervisors*, 211 F.3d 79, 87 (4th Cir. 2000)

The Applicant is unable to assert a significant gap in service here. This application presents, perhaps for the first time, the conflict between wilderness and a giant telecom industry member's commercial desire for a foothold at the boundary of one state in close proximity to two

other states[10] at the cost of sacrificing nature. Congress already addressed the issue when it stated:

> "....Yellowstone National Park or a pristine wildlife sanctuary, while perhaps prime sites for an antenna and other facilities, are not appropriate [tower sites] and use of them would be contrary to environmental, conservation, and public safety laws."
>
> (H.R. Report 104-204 at p. 95) (Emphasis added.)

In applying FCC guidelines, Congress plainly intended exceptions to be made where environmental, conservation, and public safety values are at stake, and such is the case here where the ESA, the Clean Water Act and other state and federal environmental laws apply due to the presence of a documented rich environment.

Under the Siting Council's mandate, the Council must consider only those areas where there is a proven public need. Cingular has failed to establish that such a gap exists in the Town of Canaan. Portions of the proposed coverage area are mapped inside the bounds of the 1,569-acre Robbins Swamp Natural Area Preserve. No human-made structures can sit on swampland. And frogs do not have cell phones. Since the area of proposed coverage comprehends an area of extensive undeveloped land, the application presents an issue of first impression: whether a "gap" can exist where no possible market for cell service can exist: in the largest preserved and protected inland wetland in the state.

VIII. Applicant Misapplies Town Zoning Regulations

In Supplemental Information Section V., AT&T gives the misleading impression that the proposed tower project would be an acceptable land use under the Town of Canaan Zoning Regulations. The opposite is, in fact, the case. AT&T cites the uses permitted in the

[10] Since there is no 'after-built' monitoring of any cell tower in the U.S. by the FCC or any independent monitor, the operator is self--policing as to the tower's compliance with power density output as represented in the compliance document. In light of the manifold material misrepresentations in the Application combined with the high sensitivity of wetlands, we urge the Council, if it grants the application, to require regular independent reports on power levels to insure that the Applicant's promises are kept.

Residential/Agricultural Zone (schools, stables, etc. - Section 2.2 of the Zoning Regulations) but omits the fact that the Steep Slopes Overlay Zone (Section 4.3 of the Regulations) is specifically designed to allow additional restriction of activities on steep slopes. Of particular concern are projects involving major disturbance of surface soils, alteration of water runoff, safety concerns about access for emergency vehicles, and adverse visual impacts. While minor projects might be allowed under Special Permit, any of these factors alone would be sufficient to deny a Special Permit for this project. For example, by its own calculations AT&T estimates its proposed project would disturb 1.9 Ac of surface and involve moving 3,830 cu. yds. of dirt (AT&T's Responses, Tab 4 sheet CO2D). These are not trivial amounts and are exactly the sort of massive soil disruption that the Steep Slopes regulations were designed to prevent from occurring in these fragile, steep, and highly visible areas of our town.

IX. Visibility and Historic Effect

Against the IW/CC's hard photographic evidence (IW26) of the visibility of the proposed tower from the National Register South Canaan Meetinghouse, and during the course of the proceedings, the applicant revised its statement that the tower was not visible from the Meetinghouse. (Trans. 6/16/11 p. 18, line 17, ff.)

Visibility From the National Historic Register South Canaan Meetinghouse and "Effect" Upon A Historic Property

On June 29, 2011, the Chairman of the IW/CC received a communication from the SHPO stating:

> While the materials submitted by the Town of Canaan and VHB, environmental consultants for AT&T, indicate that the subject telecommunications tower will be visible seasonally on the distant ridge from the South Canaan Congregational Church, in the opinion of this office, the proposed undertaking will have no adverse effect on the defining characteristics of the National Register-listed building and its site.
>
> (David Bahlman Letter of June 21, 2011)

(Emphasis in original.)

It is our understanding that this letter was called for as a "late filing" by the Council and that it will become a part of this record. As the Council knows, the SHPO's job is to

> administer the national historic preservation program at the State level, review National Register of Historic Places nominations, maintain data on historic properties that have been identified but not yet nominated, and consult with Federal agencies during Section 106 review. SHPOs are designated by the governor of their respective State or territory.
>
> (http://www.achp.gov/shpo.html)

The Council may not be aware that any determination by the SHPO is not binding, but is advisory:

> In the National Historic Preservation Act of 1966 (NHPA), Congress established a comprehensive program to preserve the historical and cultural foundations of the nation as a living part of community life. Section 106 of the NHPA is crucial to that program because it requires consideration of historic preservation in the multitude of projects with federal involvement that take place across the nation every day. Section 106 requires federal agencies to consider the effects of projects they carry out, approve, or fund on historic properties. Additionally, federal agencies must provide the ACHP an opportunity to comment on such projects prior to the agency's decision on them. Section 106 review encourages, but does not mandate, preservation. Sometimes there is no way for a needed project to proceed without harming historic properties. Section 106 review does ensure that preservation values are factored into federal agency planning and decisions. Because of Section 106, federal agencies must assume responsibility for the consequences of the projects they carry out, approve, or fund on historic properties and be publicly accountable for their decisions.
>
> (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)

Additionally, under the Section entitled "Understanding Section 106 Review," the Advisory Council states:

> * * * Appointed by the governor, the State Historic Preservation Officer (SHPO) coordinates the state's historic preservation program and consults with agencies during Section 106 review. * * * To successfully complete Section 106 review, federal agencies must do the following:

□ gather information to decide which properties in the area that may be affected by the project are listed, or are eligible for listing, in the National Register of Historic Places (referred to as "historic properties");

□ determine how those historic properties might be affected;

□ explore measures to avoid or reduce harm ("adverse effect") to historic properties; and

□ reach agreement with the SHPO/THPO (and the ACHP in some cases) on such measures to resolve any adverse effects or, failing that, obtain advisory comments from the ACHP, which are sent to the head of the agency.

(http://www.achp.gov/docs/CitizenGuide.pdf) (Last visited 6/29/11)

This historic property review is dictated by the NHPA Section 106 in this context. The IW/CC notes the conditional language in the SHPO's recent letter that has absolutely no basis in fact in this record, that the putative evidence

"....indicate[s] that the subject telecommunications tower <u>will be visible seasonally</u> on the <u>distant ridge</u>...."

(David Bahlman Letter of June 21, 2011)
(Emphasis added.)

The IW/CC disputes the SHPO's suggestion and is concerned that its information was based on applying "APE" visibility standards under the Nationwide Agreement for a 150 foot tower instead of the actual "overall" tower height of 697 feet from the valley floor[11]. If so, the letter depends upon the following facts not in evidence:

That a) the visibility is "seasonal"

[11] The applicable rule of statutory interpretation is the Rule to Avoid Surplusage: that is, the presumption that every word and phrase adds something to the statutory command. Accordingly, it is a cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant. Every word in a statute must be given its plain meaning and effect. Taken alone, the term "height" has the meaning advanced by the Applicant. However, the regulatory term is "overall height," not simply "height." Since the term "height" with the added modifier "overall" changes the meaning, and since the second term may not (under the rules of statutory interpretation) simply be considered redundant, the term "overall" alters the plain meaning of "height," under the applicable rule. Therefore, by ignoring the term "overall," the Applicant failed to comply with the rule.

This is disputed, since the Orr-Andrawes affidavit and testimony was made during conditions in November, 2010 and her photographs clearly show the balloon well above the tree canopy (leaf-on conditions) (IW26);

and b) that the tower would appear on a "distant ridge," since the tower base is within 1/2 mile from the historic property and 547 feet above it. The testimony of the Applicant's witness Libertine on 2/17/11 made quite clear that the tower would be visible from a distance of two miles (Trans. 6/16/11 at p. 49, line 11, ff.). Therefore the determination by the SHPO must be considered without merit and of questionable value. The Council may look rather to the evidence of its own eyes and the photos provided by IW26.

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.)

The "change in the character of the property's use or setting" and the "introduction of incompatible visual, atmospheric, or audible elements" are both patent here -- in the highly visible, modern, technical, steel 150' tower with multiple galleries of proposed co-locating carriers' antennas, all triangulated on that tower and 697 feet above the valley floor, monopolizing a view that once was marked by a chaste white timber steeple. There is ample evidence of these drastic visual and incompatible effects in the record.

ATT Violated FCC Rules When It Failed to File a Site-Specific Form 620 for NHPA Review

In the February 17 hearing, when asked whether SHPO was notified about the contradiction to their original statement to SHPO about visibility, ATT responded "yes." When asked at the 6/16 hearing about the filing of a second, site-specific Form 620, required for NHPA Section 106 review under FCC Rules, Mr. Libertine, ATT's consultant conceded:

> MS. ORR-ANDRAWES: Do you know whether a second 620 was filed after the site of the tower was moved a little lower down on the hill to the new site?
> MR. LIBERTINE: No, another form 620 was not.
>
> (Trans. 6/16/11, p. 101, lines 6-10)
> (Emphasis added.)

There are no applicable exemptions for new tower builders to the filing of a Form 620[12].

This failure to file the appropriate Federal form has spawned other progeny in this project. The NEPA Environmental Affects Checklist (appearing at Application, Tab 7, page 4), another federally-required filing contains this material falsehood:

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[12] Indeed, even where a tower applicant is exempted from filing -- not the case here -- the applicant is required to retain documentation of the basis of exemption:

> The categories of new tower construction that are excluded from historic preservation review under Section 106 of the NHPA are described in Section III of the Nationwide Programmatic Agreement. Where an undertaking is to be completed but no submission will be made to a SHPO or THPO due to the applicability of one or more exclusions, the Applicant should retain in its files documentation of the basis for each exclusion should a question arise as to the Applicant's compliance with Section 106.
>
> (http://transition.fcc.gov/Forms/Form620/620.pdf) (Last visited 7/7/11)

4. Will the facility be located in, on, or within the viewshed of a building, site, district, structure or object, significant in American history, architecture, archeology, engineering or culture, that is listed, or eligible for listing on the State or National Register for Historic Places?

Answer: NO.
Information Source, Consultation with State Historic Preservation Officer (SHPO) and Public Notice Fulfillment (See attached SHPO "no effect" letter and public notice documents.)

(Application, Tab 7, page 4)

Likewise, the NEPA form contains:

7. Will construction involve significant change in surface features (impacts to wetlands, deforestation, water diversion, etc.)? NO
Information source, Refer to VHB's Wetland inspection report dated August 25, 2010. No direct impact to wetlands or watercourses will occur.

(Application, Tab 7, page 4)

The Applicant's filing re-defined the question as one of "direct" impacts. But that is not what NEPA provides. Under NEPA, not only must direct impacts be considered and reported, but indirect, and cumulative impacts (or effects) are also required[13].

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[13] The intent of the NEPA checklist is to determine the environmental impact of new telecommunication tower sites, pursuant to 47 CFR Chapter 1, FCC Rules implementing the National Environmental Policy Act of 1969 (42 U.S.C. 4321-435). According to FCC regulations, new towers which may have significant environmental impact would require further environmental investigation in the form of an Environmental Impact Statement (EIS).

Federal Communications Commission Regulations (47 CFR §1.1307) require formal Environmental Assessments where:

> Sec. 1.1307 Actions that may have a significant environmental effect, for which Environmental Assessments (EAs) must be prepared.
>
> (a) Commission actions with respect to the following types of facilities may significantly affect the environment and thus require the preparation of EAs by the applicant (see Sec. Sec. 1.1308 and 1.1311) and may require further Commission environmental processing (see Sec. Sec. 1.1314, 1.1315 and 1.1317):
> (1) Facilities that are to be located in an officially designated wilderness area.
> (2) Facilities that are to be located in an officially designated wildlife preserve.
> (3) Facilities that: (i) May affect listed threatened or endangered species or designated critical habitats; or (ii) are likely to jeopardize the continued existence of any proposed endangered or threatened species or likely to result in the destruction or adverse modification of proposed critical habitats, as determined by the Secretary of the Interior pursuant to the Endangered Species Act of 1973.

The IW/CC has shown that the SHPO determination was made without a Form 620 filing and therefore there was no entitlement to a SHPO letter, nor right to refer to it in the "NEPA Checklist" in fulfillment of an entirely free-standing other Federal requirement. (*Ibid.*) The filing of an application for a new tower without the FCC required Form 620 is a fatal defect in this application.

Materiality of Visibility Issue and Adverse Visual Impact

In light of the substantial number of false statements by the Applicant in the original application of the non-visibility of the proposed tower (Application pages 14, 15, 16, Tab 9, pages 1 and 2), the Applicant recognizes the materiality and essential importance of this issue. It is a specific mandatory consideration of the Council under C.G.S. §16-50p ("The council may deny an application for a certificate if it determines that * * * (iii) the proposed facility would substantially affect the scenic quality of its location and no public safety concerns require that the proposed facility be constructed in such a location." This independent ground for denial of an application applies here, where the misrepresentations of the application relating to this issue are legion, and where there is a continuing lack of candor in the face of hard evidence contradicting the Applicant's misrepresentations on this issue.

The visibility of the proposed facility -- and the extensive and steep access road requiring substantial tree clearing -- is of paramount importance on this docket, since it affects a splendid

---

Note: The list of endangered and threatened species is contained in 50 CFR 17.11, 17.22, 222.23(a) and 227.4. The list of designated critical habitats is contained in 50 CFR 17.95, 17.96 and part 226. To ascertain the status of proposed species and habitats, inquiries may be directed to the Regional Director of the Fish and Wildlife Service, Department of the Interior.

(47 CFR §1.1307) (Emphasis added.)

scenic valley recognized as "noted for its scenic landscape" by the National Park Service (See IW20, page 22 of exhibit). It is equally of paramount importance in its effects upon an early and pristine 19th century structure on the National Register. The scenic quality of the location of the proposed tower is an express consideration under Council mandates (C.G.S. §16-50p) and under FCC regulations.

The Federal Communications Commission describes the purpose of the Form 620 as:

> * * * before any construction or other installation activities on the site begin. Failure to provide the Submission Packet and complete the review process under Section 106 of the National Historic Preservation Act ("NHPA") prior to beginning construction may violate Section 110(k) of the NHPA and the Commission's rules.
>
> (http://transition.fcc.gov/Forms/Form620/620.pdf) (Last visited 7/7/11)

ATT has not only failed to file the appropriate Form 620 reporting the coordinates of the site proposed for Cobble Hill under Docket 409, but has made a representation to the Council during these proceedings (see Trans. 6/16/11page 101 line 10, ff.) that it is in compliance with the requirement, shifting the blame of its own failure to SHPO.

The filing of the Form 620 is an affirmative obligation of the Applicant for a new tower for NHPA Section 106 review. (*Ibid.*) The filing of the form must be current as of the date of the application. "Each document required to be filed as an exhibit should be current as of the date of filing." (*Ibid.*) Failure to file the current Form 620 is not just a violation of FCC regulations, but also of the National Historic Preservation Act. Section 110(k) of the NHPA provides:

> (k) Each Federal agency shall ensure that the agency will not grant a loan, loan guarantee, permit, license, or other assistance to an applicant who, with intent to avoid the requirements of section 106, has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the agency, after consultation with the Council, determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant.

According to the FCC and the Nationwide Programmatic Agreement (NPA), it is the Applicant's burden under the NPA to prepare full disclosure in great detail to SHPO (See, http://wireless.fcc.gov/siting/npa/identification.html) (Last visited 7/7/11). The Applicant has not only failed to do so in this application, its failure to provide the "overall height" of the proposed tower and the actual visibility from the National Historic Register building would appear to serve only one purpose: to mislead the Council in rendering a decision on the application, and to cause the Council, and the Applicant, to violate Section 110(k) of the NHPA.

Violation of Due Process Under a Federal Regulatory Scheme

The Nationwide Programmatic Agreement (see *Ibid.*) that dictates the filing of the Form 620 also provide for public comment on the filing of the form:

> Required FCC Form 620 (new towers) * * * The Applicant shall prepare a Submission Packet and submit it to the SHPO/THPO * * * (2) The SHPO/THPO shall have 30 days from receipt of the requisite documentation to review the Submission Packet. (3) If the SHPO/THPO receives a comment or objection, in accordance with Section V.E, more than 25 but less than 31 days following its receipt of the initial submission, the SHPO/THPO shall have five calendar days to consider such comment or objection before the Section 106 process is complete or the matter may be submitted to the Commission.
>
> (http://wireless.fcc.gov/siting/npa/forms.html) (Last visited 7/7/11) (Emphasis added.)

Here, by bypassing the entire process, the Applicant has not only rendered its Application to the Council defective and incomplete under FCC rules, it has rendered its submission to SHPO defective, and has, in the process, prevented fair hearing by SHPO of public comment to such submission -- a violation of due process under a federal regulatory scheme.

Presence of a State Scenic Road and Local Historic District

State-designated Road Route 7 runs the length of the Town of Canaan, right by the National Register South Canaan Meetinghouse. (Trans. 6/16/11, p. 97, line 19 to p. 98, line 2)

The Falls Village town center is a National Register Historic District, indicative of the rural character of the community as a whole, and so designated by the National Park Service, U.S. Department of the Interior. (Trans. 6/16/11, p. 98, line 10)

Misapplication of Federal Criteria for Visibility

The Applicant defined the area of "potential effect" ("APE") as views within a half mile of the proposed facility:

> MS. ORR-ANDRAWES: Potential effect. Alright. How does that get determined?
> MR. LIBERTINE: Well in the case of facilities that are less than 400 feet tall, it's been established that a general -- well in the National Programmatic Agreement the FCC developed in consultation with several agencies, including the Historic Preservation Office at the federal level, they determined a half-mile for facilities of this height to be the APE for the area of investigation. * * *
> MS. ORR-ANDRAWES: So it's a calculated figure based on the 400-foot height of the structures?
> MR. LIBERTINE: Less than 400 feet, that half mile was established as part of the National Programmatic Agreement, which governs telecommunication towers. And so it's used as the -- I'll call it the general rule of thumb for towers of this height.
> MS. ORR-ANDRAWES: And what is the height of the tower considered to be in this --
> * * *
> MR. LIBERTINE: A hundred -- 150 feet.
> * * *
> MS. ORR-ANDRAWES: So it doesn't take into account the fact that you have a structure on a very large isolated hillside? They don't add that height in, the height of the mountain?
> MR. LIBERTINE: The determination of what I'll call the APE --
> * * *
> MR. LIBERTINE: -- is not.
>
> (Trans. 6/16/11 page 98, line 14 to page 100 line 20) (Emphasis added.)

The half mile zone applies only to towers of 200 feet and under in "overall" height (See FN11, *supra.*). The proposed tower will be at 697' "overall" height, therefore the Applicant applied the wrong standard when it provided "APE" analysis[14].

[14] Under the National Programmatic Agreement ("NPA"), "APE" effects must be considered for a proposed tower's "overall" height:
Area of Potential Effects

The comprehensive viewshed analysis under the NPA APE is a burden of proof on the tower Applicant under the FCC Rules. (see http://wireless.fcc.gov/siting/npa/definitions.html) (Last visited 7/13/11)[15]

Since "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)

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.

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

[15] **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 Applicant applied the wrong criteria for the "overall height" of the project stating it was 150' high, when, according to the NPA rules, the visibility analysis for APE should have been "1 ½ miles from the proposed tower site if the proposed Tower is more than 400 feet in overall height." (NPA, found at http://wireless.fcc.gov/siting/npa/definitions.html) (Last visited 7/13/11) (Emphasis added.)

This erroneous data was provided to SHPO, to the Council and all parties on this docket, and an appropriate visibility study has yet to be filed. The failure to provide accurate "Area of Potential Effects" data in its application and evidence is a fatal defect.

The Correct and Appropriate Area of Potential Effects Under the NHPA and CFR

The ground where the tower would sit is about 547 feet above the ground where the National Register South Canaan Meetinghouse sits[16]. Height of the proposed tower itself adds 150 feet. For the purposes of NPA analysis, then, the top of the tower would be 697 feet above the flat land at the base of Cobble Hill where the Meetinghouse is located, and therefore the greatest viewshed basis of one and a half miles applies. (See FN14, *supra.*)

The calculated "overall" height of the project is therefore 547 feet higher (and more visible) than the data and assertions made by the Applicant in its application, its submission to SHPO and in sworn testimony before this Council and all parties. This mis-application of a federally-mandated standard for the "overall" height of a proposed project is a material error, omission or misrepresentation for which the Application must be denied as void under the provisions of the ACHP's CFR Rules, under the NHPA, the National Programmatic Agreement and FCC Rules.

[16] According to the topographic map in the Applicant's supplemental information (filed May 20, 2011), the base of the proposed tower appears to be about 1,197 feet above sea level. According to the USGS South Canaan quadrangle (found at Application Tab 5, "Site Location Map"), the Meetinghouse is about 650 feet above sea level.

X. Failure to Consider Alternative Sites

The Applicant's testimony describing its efforts to find alternative sites is vague and, considering the distance the proposed signals travel, evinces a lack of good-faith efforts and bona fide approaches to other property owners. In response to the Chairman's inquiry into the feasibility of another tower arrangement to the Applicant's consultant, the consultant responded: "I'm not entirely sure." (Trans. 6/16/11, p. 48, p. 10)

Additionally, no sufficient public need has been established for erecting a cell tower at the proposed location, as required by state law. (C.G.S. §16-50p)

The sole showing of need is putative "dropped" calls (Trans. 6/16/11 p. 112, lines 15 - 1), *de minimus* in quantity and unspecified as to location, therefore too vague to support a showing of need[17]; and the Applicant has failed to demonstrate that there are no alternative sites available that would be less intrusive or less harmful to the environment (as required under C.G.S. §16-50p).

The Applicant has also failed to demonstrate convincingly why co-locating or roaming arrangements are not feasible with one of the four existing providers who presently serve the area.

The FCC has explained present roaming requirements in its Notice of Proposed Rulemaking on Automatic and Manual Roaming Obligations (FCC 00-361) (at p. 4). It appears that there is no good reason why Cingular customers cannot have "seamless" coverage along Route 7 through an appropriate roaming arrangement:

> 7. In July 2000, the Commission generally affirmed the manual roaming requirement in the *Manual Roaming Order on Reconsideration*, while modifying the definition of which CMRS providers were "covered" as well as extending the rule's application to certain data providers. Thus the manual roaming requirement, as amended, applies to all

[17] The applicant conceded this vagueness and failure to support its claim of public need. (Trans. 6/16/11, p. 112, lines 15-24 to p. 113, lines 1 - 18).

> cellular, broadband PCS, and SMR providers that offer real-time, two-way switched voice or data service that is interconnected with the public switched network and utilizes an in-network switching facility that enables the provider to reuse frequencies and accomplish seamless hand-offs of subscriber calls.

Roaming options for wireless subscribers are explained in the FCC's publication "Consumer Facts," Understanding Wireless Coverage Areas (available at www.fcc.gov/cgb/consumerfacts/cellcoverage.html)

The Second Circuit's decision in *Sprint Spectrum v. Willoth* held that a state agency has a duty under state law to minimize the impact of the erection of a proposed cell tower. *Sprint Spectrum v. Willoth*, 176 F.3d 630 (2d Cir. 1999)

Following that decision, the Third Circuit stated in *APT Pittsburgh Limited Partnership v. Penn Township*:

> In order to show a violation of subsection 332 (c)(7)(B)(i)(II) under Willoth, an unsuccessful provider applicant must show two things. First, the provider must show that its facility will fill an existing significant gap in the ability of remote users to access the national telephone network. In this context, the relevant gap, if any, is a gap in the service available to remote users. Not all gaps in a particular provider's service will involve a gap in the service available to remote users. The provider's showing on this issue will thus have to include evidence that the area the new facility will serve is not already served by another provider. [Fn omitted.]
>
> Second, the provider applicant must also show that the manner in which it proposes to fill the significant gap in service is the least intrusive on the values that the denial sought to serve. This will require a showing that a good faith effort has been made to identify and evaluate less intrusive alternatives, e.g., that the provider has considered less sensitive sites, alternative system designs, alternative tower designs, placement of antennae on existing structures, etc.
>
> *APT Pittsburgh Limited Partnership v. Penn Township*, 196 F.3d 449, 480 (3d Cir. 1999) (Emphasis added.)

The Applicant has failed to carry both of these fundamental burdens of proof.

No Monitoring for the Signals Proposed

The FCC does not do any monitoring of compliance with their regulations subsequent to a tower's approved. As a result, there is no assurance of the assurances of the self-policing and

self-certifying applicant (See Application, Tab 4, page 5; See FN10, *supra.*). There must be some assurance of the operator's continuing (after-built) compliance with the FCC's safety regulations. Because of the extreme sensitivity of the wetlands community, industry self-policing is insufficient. In view of the Applicant's legion misrepresentations and misapplication of legal standards in this docket, were the Council to approve the tower, it must require a semi-annual independent monitoring and verification of compliance with FCC regulations.

XI. Countenancing An Application Where an Asserted Property Dispute Exists and Before Obtaining Local Permits is a Violation of Due Process Under the Federal and State Constitutions

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[18], objectionable under the State and Federal Constitutions. Despite citizen efforts to remedy these deprivations of due process -- including massive out of pocket expenses to all-volunteer municipal commissions, the situation is repeated here:

> 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 --
> 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.

[18] These sites include those at issue in Petition 701 (Nextel), Docket 378 (SBA Towers II) [see also Trans. 6/16/11, page 163, line 6-14].

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

To date, to the IW/CC's knowledge, the Applicant has not filed the requested opinion despite the evidence in the record (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 Rovezzi's 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 would place 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 disputes the Applicant's ability to provide the requested proof, and states its expectation as a party to these proceedings to be served with that promised opinion.

Once the information of the property dispute became plain in this record, the application should have been denied, or at a minimum, the proceedings should have been adjourned in order to save all parties additional expense (including the cost of the instant filing). (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, indeed, all parties to these proceedings -- to incur what may be completely unnecessary expenditures -- all from an all-volunteer citizen-populated Town Commission.

This is patently unfair and unconstitutional. In order for this proceeding to comply with due process requirements, as a threshold matter, 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 certificate, it could actually legally build the proposed project -- with all permits, Inland Wetland permits and legal title to do so in place. To embroil private parties and volunteer town officials in an administrative hearing where no right to build exists is frivolous and effects deprivation of time, resources and all the effort involved in gathering documents and witnesses involved in the hearing process. The IW/CC again objects to this practice. Where the Council entertains an application without proof of the applicant's legal right to build, the Council, as well as the applicant, effects a deprivation on the citizens of the state (through waste of Council resources) and on all other parties to the proceeding. An application entertained by a state agency in this way effects deprivation of rights under color of state law.

A Final Note on Visibility

The IW/CC has been struck by the material omission by the Siting Council and by the SHPO of an in-person formal site visit. The SHPO's omission being the most egregious in light of not one, but two determinations of "no effect" on a structure on the National Register of Historic Places under the protection of the National Park Service, and within a federally designated National Heritage Area (see IW20, IW21, IW22). These designations have required years of research, lobbying, inventorying, concerted preservation as well as the efforts of conservationists (Nature Conservancy (IW42, IW43, and see IW/CC Pre-Hearing Brief of February 10, 2011 at page 22); and preservationists (IW20, page 8 of exhibit, ff.,IW21, IW22, IW25, IW28).[19]

As a citizen of the town poignantly testified during the public portion of the hearing:

> I moved to this area because of the great regard and care that is taken in preserving what is one of the most beautiful and ecologically sound pieces of land in our country. * * *

[19] Northwestern CT is the northern-most terminus of the Highlands Coalition, authorized by Congress as the Highland Conservation Act to protect areas of high conservation priority.

> [W]hen the time comes to so-call upgrade the soon to be obsolete cell towers, they can claim a loss on the structure and walk away leaving specifically to this site a devastating scar to sacred ground, impacting why people visit our area for the unblemished natural beauty.
>
> (Dominick Caiati, Trans. 2/17/11 (7:10 p.m.), page 18, lines 13-16; page 21, lines 4-9)

The scar left by the 3,080 foot access road will present a particularly stark contrast with the wooded landscape in winter, running up a steep and very visible ridge presenting an unsightly gash against this hillside. The IW/CC asks that the Council also consider this winter view when determining the visual impact of this project.

The Council has before found a site to be so conspicuous as to ruin scenic qualities. Under its mandate, it has this power and this obligation:

> **Sec. 16-50p. Certification proceeding decisions: Timing, opinion, factors considered. Telecommunications and community antenna television facilities: Additional factors considered, conditions. Modification of location. Amendment proceeding decisions. Service and notice. "Public need" defined. * * ***
>
> (b) (1) (C) whether the proposed facility would be located in an area of the state which the council, in consultation with the Department of Environmental Protection and any affected municipalities, finds to be a relatively undisturbed area that possesses scenic quality of local, regional or state-wide significance.

In this regard, we have raised the issue of visibility not just as residents of Falls Village, but as citizens of a State that has made it its business and statewide policy to preserve an area of natural and historic beauty with the purpose of providing such a place for other citizens of the State and the Nation to enjoy. (See IW20, IW21 Upper Housatonic National Heritage Area)

The issue of tower visibility deserves close consideration because this effect is most conspicuous. It is the effect to be felt by all visitors and residents.

The Nature Conservancy's description of the area surrounding both the South Canaan Meetinghouse and Cobble Hill describes this as

> * * *[S]ome of our state's last untouched natural areas * * * A unique geography of limestone forests, ridges and wetlands * * * [A] vast chain of intact forests and waterways teems with more than 150 rare and endangered species, a spectacular concentration of plants and animals rivaled nowhere else in the state.
>
> * * * [U]plands like Canaan Mountain, * * * Rocky ledges, diverse vegetation and dense woodlands mark this natural area including 2,000 acres of forest that have been protected from indiscriminate logging for the past 50 years. * * *
>
> Adjacent to Canaan Mountain is the Hollenbeck River and its watershed, which includes Robbins Swamp, Connecticut's largest inland wetland. Robbins Swamp represents one of the region's most significant natural areas: the regions second largest calcereous wetland. Formed from limestone karsts—jagged broken rock formed from an ancient seabed—the bedrock of these open wetlands makes them alkaline, unlike most New England wetlands, which are acidic. Nearby Wangum Lake Brook, which drains into the Hollenbeck River, is also part of this calcareous wetland complex.
>
> The unique geology of Canaan Mountain and Robbins Swamp gives rise to a rich collection of plants, animals and natural communities, some of which are found nowhere else on Earth. The endangered timber rattlesnake and northern metalmark butterfly are found here as well as three rare bird species and 23 rare species of plants, including a variety of trees, flowering plants, grasses and sedges. * * *
>
> (http://www.nature.org/ourinitiatives/regions/northamerica/unitedstates/connecticut/placesweprotect/northwest-highlands.xml) (Emphasis added.)

Prior to the Council making its formal determination, we strongly recommend that the Council, as well as the State Historic Preservation Officer, make a formal site visit to better appreciate the extent of the sweeping vistas surrounding the site, and a more complete picture of how many places in the valley will see the tower. Without taking in these existing views, it is difficult to appreciate the overall effect of visual consequences of the presence of a 150 foot tall telecommunications tower, 697 feet above the valley floor, bearing four tiers of antennas.

The National Park Service recognized the area's natural beauty, not just today, but for years past, as an attraction to visitors. In applying the eight criteria upon which a proposed Heritage Area is deemed eligible for designation by Congress, the most notable in the case of the Upper Housatonic National Heritage area was number 3, "Provides outstanding opportunities to

conserve natural, historic, cultural, and/or scenic features," as summarized by the National Park Service, United States Department of the Interior:

> * * * The significance analysis examines the proposed heritage area in light of the National Park Service definition of a national heritage area, which "is a place designated by Congress where natural, cultural, historic and scenic resources combine to form a cohesive, nationally distinctive landscape arising from patterns of human activity shaped by geography. * * *
> The suitability analysis considers whether a specific type of resource is already adequately represented in the national park system. For heritage areas, suitability analysis analyzes the type, quality, and quantity of resources within the study area. * * *
>
> The analysis of the following eight criteria stipulated in the Upper Housatonic National Heritage Area Study Act of 2000 provides the material for evaluating whether the proposed Upper Housatonic Valley National Heritage Area is suitable and feasible for federal designation: * * *
>
> **3. Provides outstanding opportunities to conserve natural, historic, cultural, and/or scenic features.**
>
> * * * The upper Housatonic Valley has done an excellent job of conserving the natural environment with state, local, and private nonprofit preserves. The evidence is abundant in the region's scenic landscape. Nevertheless, development pressures create new conservation needs, especially open space protection. * * *
>
> The North West (Connecticut) Council of Governments is applying to extend the Scenic Highway designation of U.S. Route 7, which is currently applied to a small portion between Cornwall Bridge and West Cornwall, to the full stretch between Kent and the Canaan-North Canaan border. Although the upper Housatonic Valley is not undergoing the rapid growth of other areas of the country, the region still has concerns about preserving the traditional landscape and containing unwanted sprawl. Local residents recognize that protecting the integrity of the region's "sense of place" is fundamental to community pride and economic well-being. Both Massachusetts and Connecticut have state watershed protection programs focused on the upper Housatonic that promote innovative land use and conservation efforts. * * *
>
> (http://www.upperhousatonicheritage.org/pdfs/pubs/UHVNHAFeasibilityStudy.pdf) (Last visited 6/29/11) (IW20 at the 28th and 34th pages of the exhibit) (Emphasis added.)

The scenic beauty of the affected stretch of Route 7 -- visibility of the tower now conceded by the applicant (Trans. 6/16/11, page 101, line 16[20]) -- designated "scenic" by the

[20] Reference there was to visibility in the "southeast corner," a misstatement. What the witness apparently meant was the "southwest corner."

Connecticut DOT, and the Housatonic Valley near Cobble Hill recognized as "scenic" by the National Park Service, is therefore also recognized as "scenic" by the United States Congress. This formal recognition of the natural and historic beauty of this place is not just for the present, for the purposes of Congress's designation as having national importance, but for all time, as worth conserving[21].

CONCLUSION

This proceeding has provided an opportunity for constructive cooperation between the Connecticut Siting Council and the Town of Canaan Inland Wetlands and Conservation Commission to implement applicable state and local statutes in a positive fashion for the benefit of the residents of the Town and the State.

We adopt and incorporate by reference here -- to eliminate repetition -- among others, the statutory bases for our own jurisdiction as outlined in our Pre-Hearing brief (see Pre-Hearing Brief of IW/CC dated February 10, 2011, especially pp. 1-18). We will not, and indeed cannot take an official position on any proposed application for any project that may affect the inland wetlands and watercourses in the Town of Canaan until such time as an applicant submits its proposal to our Commission. That has not yet been done. However, as citizens and Commissioners in the State of Connecticut, we have provided significant evidence and legal argument to the Siting Council for its consideration in fulfillment of its own statutory mandate under Conn. Gen. Stat. 16-50p.

The errors, omissions, misrepresentations and failure to properly apply appropriate binding statutory and FCC regulatory rules by the Applicant calls into question the reliability of the Application as a whole.

[21] Under criteria number 3 of the federal Upper Housatonic National Heritage Area Study Act of 2000. See *Ibid.*

At the heart of this matter is the question of the State's commitment to its natural environment and the delicate life that environment supports. At the heart of this docket is the destiny of Robbins Swamp -- designated in 1984 by the legislature as a Natural Area Preserve. Its stated purpose in preservation was to maintain it "...in as natural and wild a state as is consistent with the preservation and enhancement of protected resources and educational, scientific, biological, geological, paleontological and scenic purposes."(Conn. Gen. Stat. §23-5c) (Emphasis added.) Citizens, officials, legislative officials and agencies of the legislature of the State of Connecticut all have the responsibility to protect the State's largest freshwater wetland and its associated uplands. These are not replaceable resources. As the State and its residents learn, almost daily, what is gone once is gone forever. Cobble Hill is an integral part of the ecology of this Preserve and an associated upland to Robbins Swamp, as the IW/CC has shown in its direct case. We therefore respectfully request that the Siting Council consider the unique qualities and value of this region to the State of Connecticut and to the nation.

For all of the foregoing reasons, the reasons given in all prior filings of this Commission, and the reasons stated during the course of the Docket 409 hearing, the Application should be rejected, the Applicant admonished for its attempt to place false information before this Council in a serious matter that affects property in the Town of Canaan, and the Applicant directed to make whole for all the costs incurred in defending against this frivolous application, all parties to the proceeding.

We thank the Council for the opportunity of participating in the Docket 409 hearing in the public interest, and provide this and the IW/CC's previous filings herein in the same spirit of laying bare the misrepresentations of the Applicant, and providing fuller and fairer responses in an effort to assist the Council in fulfillment of its statutory duties. The inappropriateness of the

proposed site for the proposed purpose is plain, and the Applicant has failed to bear its burden of proof. We therefore respectfully request that the Council deny the application.

Respectfully submitted,

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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:

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A copy was also delivered by hand to:

Patty and Guy Rovezzi
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Town of Canaan Planning & Zoning Commission
Town Hall, Main Street
Falls Village, CT 06031

Ellery W. Sinclair

Dated: July 18, 2011