

STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL

IN RE:

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

DOCKET NO. 409

July 22, 2011

NEW CINGULAR WIRELESS PCS LLC (AT&T) OBJECTION TO
TOWN OF CANAAN INLAND WETLAND/CONSERVATION COMMISSION
LATE FILED BRIEF, DRAFT FINDINGS OF FACT AND RESPONSE TO
RENEWED MOTION TO STRIKE AT&T'S APPLICATION & FOR COSTS

New Cingular Wireless, PCS, LLC ("AT&T") by its attorneys, Cuddy & Feder LLP,
respectfully submits this objection to the Town of Canaan (Falls Village) Inland
Wetlands/Conservation Commission (IW/CC) post hearing brief, draft findings of fact and
opposes its renewed motion to strike AT&T's Application in this proceeding and for costs.

The IW/CC Post Hearing Brief And Draft Findings of Fact Must Be Rejected As Untimely

At the conclusion of the hearing for this proceeding and in accordance with Section 16-50j-31 of the Regulations of Connecticut State Agencies (R.C.S.A.), the Siting Council established July 16, 2011 as the deadline by which any party or intervenor could file proposed findings of fact and briefs. See Siting Council June 28, 2011 Notice Memorandum. By its own admission in its certification of service, the IW/CC untimely filed and served its post hearing brief and draft findings of fact on the Siting Council on July 18, 2011, two days after the Siting Council's deadline. The Applicants representatives did not receive a copy of the IW/CC motion until July 21st, five days after the July 16th deadline. This failure by the IW/CC to timely submit and serve its post hearing brief and draft findings of fact is also evidenced by the attached United

States Postal Service confirmation, which clearly shows that the documents were accepted by the post office on July 18th. As such, the IW/CC post hearing brief and draft findings of fact should be rejected in their entirety as untimely. See R.C.S.A. §§ 16-50-j-3, 5, 6, 9.

AT&T's Opposition to IW/CC's Renewed Motion

IW/CC's most recent motion is supported by lay opinions of the writer and evidences a lack of understanding regarding the interplay of federal, state and local laws regarding wireless facility siting. Moreover, this latest motion repeats and reasserts several points of contention that have been previously raised by the IW/CC and resolved as part of the administrative record or otherwise rejected by the Siting Council and other agencies. For the reasons more fully set forth herein, AT&T opposes the IW/CC motion in its entirety and submits it should be dismissed by the Siting Council.

A. The IW/CC lacks standing to challenge AT&T's property rights and a Siting Council administrative proceeding is not a legal forum for any adjudication of such rights.

In its renewed motion, the IW/CC alleges that a real property dispute exists and that AT&T does not have the right to "build the project proposed under this docket". IW/CC Motion, Point A. First and foremost, the IW/CC has absolutely no legal standing to challenge AT&T's property rights at all, let alone in this administrative proceeding before the Siting Council. The IW/CC has no legal interest in real property at all related to AT&T's project. As such, the IW/CC would have no standing to challenge AT&T's property rights in any State Superior Court proceeding.

As such, this entire line of discussion by the IW/CC should be rejected by the Council. Indeed, as confirmed by the Siting Council at the June 16th hearing in this Docket, the Siting

Council itself has no legal authority to consider objections by property owners as to the real estate interests and access rights an applicant maintains. Moreover, the Siting Council denied this very same motion at the June 16th hearing based on the fact that the Siting Council cannot resolve real property disputes. 6/16/11 Hr. Tr., pg.163.

B. The Siting Council has exclusive jurisdiction over AT&T's proposed facility and no local wetlands permit is required for the project.

Pursuant to Section 16-50x(a) of Connecticut General Statutes ("C.G.S."), the Siting Council has exclusive jurisdiction over wireless telecommunications facilities. Review and approval by the Siting Council of AT&T's proposed Facility in this proceeding are "in lieu of all certifications, approvals, and other requirements of state and municipal agencies...." C.G.S. Section 16-50x(a). As such, no local land use, zoning, wetland or other permits are required for AT&T's proposed Facility.

The Siting Council's exclusive jurisdiction over wireless telecommunications facilities is well established. See Westport v. Connecticut Siting Council, 260 Conn. 266, 796 A.2d 510 (2002), holding that the exclusive jurisdiction of the Siting Council precluded the town from applying its zoning regulations and other local laws; and Corcoran v. Connecticut Siting Council, 50 Conn.Supp. 443, 934 A.2d 870 (Super. Ct. 2006), holding that the Siting Council's exclusive jurisdiction over wireless facilities under C.G.S. 16-50x(a) allows it to override municipal provisions. Given the Siting Council's exclusive jurisdiction over AT&T's proposed Facility in this proceeding, compliance with local regulations is not required.

Moreover, the repeated insistence by the IW/CC that it has jurisdiction over AT&T's project is belied by their own local wetlands regulations and the facts associated with AT&T's project. The local definition of a "regulated activity" as "any operation or activity within, or use

of, a wetland or watercourse involving removal or deposition of material, or any obstruction, construction, alteration or pollution of such wetlands or watercourses...”. See IW/CC Exhibit 1. The record reveals the AT&T’s project will not directly impact any wetlands and the nearest wetlands are 200’ from the access point on Barnes Road. See AT&T Exhibit 1, Tab 4. As such, even if local wetlands agencies had jurisdiction over tower sites, this project would not require a local permit. As such, the IW/CC’s continued portrayal of the facts and law as supporting their participation in these proceedings is totally misplaced and its assertion of this application to the Siting Council as frivolity is in and of itself incredulous.

C. The IW/CC allegations of misstatements, misrepresentation and misapplication of State and Federal requirements are bald unsupported opinions.

Throughout this proceeding, the IW/CC has sought to discredit AT&T’s expert witnesses and challenge the decisions rendered by various Federal and State Agencies regarding AT&T’s proposed Facility. This tactic has been tirelessly repeated and abusive to the process with little or no credible factual evidence to support the positions taken by the IW/CC. Of note, AT&T started this project over two years ago and the material facts have changed little despite the IW/CC’s protests to the contrary and their full and fair opportunity to vet the material facts. Indeed, where new information or changes to the project have been required, AT&T has brought that to the Council’s and parties’ attention. See for example, AT&T’s Ex. 2; “leaf-off” Visual Assessment and AT&T Ex. 8, Tab 4.

Indeed, agencies like the Connecticut Department of Environmental Protection (DEP) and the State Historic Preservation Officer (SHPO) have been consulted by AT&T’s experts and the IW/CC efforts to have the DEP reverse their own finding were rejected. See AT&T Ex.1, Tab 7, Tab 8, Tab 9; SHPO 6/21/11 letter. Yet, the IW/CC continues to assert that AT&T has

been inappropriate or misrepresented facts. The record just does not support these allegations and some brief rebuttals are in order:

- In a response to the IW/CC allegations made directly to that agency, the DEP confirmed its determination that there are “no Federal or State Listed species that occur within the project boundaries” and NDDDB reviews. IW/CC Ex. 77.
- NEPA is a federal environmental statute and IW/CC fundamentally fails to understand what is a “significant change in surface features” for federal purposes and FCC regulations. See 47 C.F.R. § 1.1301(a)(7) noting wetland fill, deforestation or water diversion as the examples and none of which are present in this case.
- The IW/CC does not understand the Section 106 consultation process or NEPA as related to the consideration of impacts on federally historic sites. Because the proposed tower would only be seasonally viewed through the trees from a historic resource located approximately 0.5 miles away, SHPO found it would have no adverse effect on historic resources, a finding un rebutted by any credible evidence, and totally appropriate based on prior SHPO determinations in the State of Connecticut for telecommunications projects. See SHPO 6/21/11 letter. It should also be noted that AT&T’s leaf-off visual assessment, submitted on January 11, 2011, included photosimulations from the South Canaan Meeting House. See AT&T Ex. 2.
- The IW/CC’s remaining assertions C3 through C13 ramble through various unsupported and conclusory opinions related to interpretations of various state and federal forms, regulations and other processes. These are simply not issues

based on the factual record and the Siting Council cannot address the IW/CC's allegations that rely on self-serving unsupported legal interpretations of other agencies rules, forms and processes.

Essentially, the IW/CC has chosen to present very little factual evidence in this proceeding notwithstanding an incredible volume of paper submitted to the Siting Council and continues to put itself in the position of other agencies with its own unsupported legal opinions.

D. Legal Discussion on the IW/CC Motion

The IW/CC voluntarily became a party in this proceeding and had no obligation to do so. Indeed, despite being made a party as a municipal entity, the IW/CC has no legal standing to challenge AT&T's real property rights, has no legal jurisdiction over the project and even in the absence of State preemption, would in fact have no permitting authority over this AT&T project as applied based on its own local wetland regulations and the lack of any "regulated activity". The legal reasoning advanced by the IW/CC in its latest and renewed motion is flawed and has been thoroughly rejected in this proceeding and other proceedings including Docket 378 such that AT&T simply notes that the Siting Council has no statutory authority to consider it. AT&T reasserts all of its prior objections and incorporates its legal arguments by reference and asks that the IW/CC motion be denied for the same reasons previously articulated by the Council in response to a similar motion in Docket 378.

E. The IW/CC participation and conduct in this proceeding appears less about the environment and more about wholesale opposition to wireless facilities needed to serve the public.

It is clear from the IW/CC's own conduct and statements in this proceeding that it is part of a larger group whose mission is far broader than the project at hand and AT&T's effort to provide

important wireless services to the public in this area of the State. Throughout this proceeding, the IW/CC made unsupported assertions and continually challenged the Siting Council's jurisdiction over AT&T's proposed facility. The IW/CC submitted documents regarding the health effects of telecommunications facilities on humans and wildlife even after the Siting Council took administrative notice of its Conclusions of Law in Docket 360.¹ See IW/CC Ex. 59; 61; 70 through 76; 84. The IW/CC repeatedly renewed motions that were previously denied by the Siting Council, including this current motion to strike AT&T's Application, the motion in opposition to the video of the site walk and their motion challenging the Siting Council's jurisdiction over wetlands review. 2/17/11 3pm Hr. Tr., pgs. 11 & 17; 6/16/11 Hr. Tr. pg. 163. These actions by the IW/CC are part of a disturbing pattern of conduct by various parties most notably in Dockets such as 360 (Verizon Falls Village) and 378 (SBA Warren).

In this proceeding, the IW/CC continually abused the Siting Council process and procedures with late filings and complete lack of respect to the participants and the need for a fair and orderly presentation of information. After months of technical consultations and having AT&T's Application in its hand for over four months, the IW/CC sought to intervene and filed eighty-one interrogatories to the Applicant less than one week before responses were due, most of which responses were already contained in the application materials. These actions were taken just weeks before the first public hearing to be held by the Siting Council ensuring a long drawn out process. Thereafter, the IW/CC untimely submitted eight-four (84) exhibits and then had the audacity to submit opposition to AT&T's responses to the Siting Council interrogatories

¹ Docket 360 Conclusions of Law: 3. The TCA preempts the Council from considering thermal and non-thermal effects of radio frequency (RF) emissions on human health when those emissions comply with the levels established by the FCC. 4. The TCA preempts the Council from considering effects of radio frequency (RF) emission on wildlife when those emissions comply with the levels established by the FCC.

seeking further facts in response to the IW/CC submissions. See IW/CC Objection to AT&T's Responses to Siting Council Request for Additional Information.

Most recently, the IW/CC's conduct at the June 16th hearing involved inappropriate coaching by others who were with IW/CC representatives and trying to assist them procedurally and substantively and without identifying themselves for the record. Upon information and belief, these individuals were either attorneys and/or leaders of private non-profit environmental groups in the Litchfield County area known to oppose wireless siting altogether. These actions all took place while IW/CC witnesses were under cross examination by the Siting Council. Indeed, at one point during the hearing when it was obvious that the IW/CC panel was being coached, the Siting Council noted that the IW/CC did not have an attorney of record in this proceeding and despite the passage of hand written notes from these unidentified individual(s). 6/16/11, Hr. Tr. pg. 151.

The Siting Council need not look far to understand the IW/CC's true motivation and connections to groups universally opposed to wireless siting as it provided its own evidence in this regard. At the June 16th hearing, the IW/CC adamantly requested that a page included with their Exhibit 71 be removed and destroyed. 6/16/11 Hr. Tr. pg. 199. This page was a copy of a Whitney N. Seymour, Jr. email from someone seeking his advice regarding RF emissions from a rooftop wireless facility. The Siting Council is well aware of Mr. Seymour's participation in other Dockets as counsel and the connection to the IW/CC is self evident.

Conclusion

It is unfortunate that the IW/CC, through its tactics and counseling by others, has chosen to portray this Docket as one pitting the wireless industry against the environment. In reality, wireless services are essential to the public's health safety and welfare as determined by The

Congress, FCC, and State of Connecticut Legislature.² Projects like the one proposed by AT&T in this proceeding are a necessary means to provide these services to those residents and visitors to Falls Village and who travel along important thoroughfares such as Route 7. Without such infrastructure, and a reasonable balance of any environmental effects created thereby, the public's need is being unmet in large measure due to unsupported statements of environmental impact by a few including in this case a local wetlands agency which has no jurisdiction over the project whatsoever. For the reasons set forth herein, it is respectfully submitted that the IW/CC renewed motion to strike AT&T's Application and for costs should be denied in its entirety.

Respectfully submitted,



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² See, generally, History of Wireless Communications, *available at* http://www.ctia.org/media/industry_info/index.cfm/AID/10388 (2011)
and

Connecting America: The National Broadband Plan, *available at* <http://www.broadband.gov/plan/> at X1 (2010)



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CERTIFICATE OF SERVICE

I hereby certify that on this day, a copy of the foregoing was sent electronically and by overnight delivery to the Connecticut Siting Council with copy to:

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