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

June 8, 2011

APPLICANT NEW CINGULAR WIRELESS PCS, LLC ("AT&T")
OBJECTION TO ADMISSION BY THE SITING COUNCIL OF CERTAIN EXHIBITS OF
THE FALLS VILLAGE INLAND WETLANDS/CONSERVATION COMMISSION

New Cingular Wireless, PCS, LLC ("AT&T") by its attorneys, Cuddy & Feder LLP, respectfully submits this objection to the admission by the Siting Council of certain exhibits of the Town of Canaan (Falls Village) Inland Wetlands/Conservation Commission and hereby moves the Siting Council under its authority pursuant to Section 4-178(1) of the Uniform Administrative Procedures Act (UAPA) to exclude certain Inland Wetlands/Conservation Commission exhibits. The Inland Wetlands/Conservation Commission filed eight-four (84) documents in this proceeding as exhibits. Many are subject to exclusion from the record by the Siting Council for the reasons more fully set forth below.

Irrelevant, Immaterial and Unduly Repetitious Evidence Should Be Excluded

Irrelevant and Immaterial Evidence

The Inland Wetlands/Conservation Commission does not state the purpose or relevance for admission by the Siting Council of several of the documents included in its list of exhibits in this proceeding. Several of the submitted documents include excerpts with no indication of the relevance of the information contained therein to this proceeding. As such, AT&T objects to the admission by the Siting Council in this proceeding of the documents listed below under its authority to exclude irrelevant and immaterial evidence under Section 4-178(1) of the UAPA.

- IW10: Bormann F. Herbert and Gene E. Likens, "Patterns and Process in a Forested Ecosystem; Disturbance, Development and the Steady State Based on the Hubbard Brook Ecosystem Study," Springer-Verlag, New York, 1979 (excerpts).
- IW11: Town of Canaan Town Road Inventory and Policy Recommendations.
- IW31: Petersen, Richard C., "Connecticut's Venomous Snakes: Timber Rattlesnakes and Northern Copperhead," State Geological and Natural History Survey of Connecticut, a Division of the Department of Agriculture and Natural Resources, Bulletin 103, 1970 (excerpts).
- IW32: "Wildlife in Connecticut, Endangered and Threatened Species Series (Fact Sheet), Bog Turtle (Clemmys muhlenbergii)," Connecticut Department of Environmental Protection, wildlife division (no date).
- IW33: "Bog Turtle (*Clemmys muhlenbergii*) Northern Population RECOVERY PLAN," U.S. Fish and Wildlife Service, Hadley, Massachusetts, prepared by Michael Klemens, Ph.D., Wildlife Conservation Society, Bronx, New York in cooperation with Pennsylvania field office, U.S. Fish and Wildlife Service, State College, Pennsylvania for Region 5, U.S. Fish and Wildlife Service, Hadley Massachusetts, May 15, 2001 (excerpts).
- IW37: Connecticut Environmental Conditions Online; Connecticut Critical Habitats.
- IW41: The Litchfield Hills Greenprint: The Case for Regional Conservation in the Litchfield Hills.
- IW44: U.S. Fish and Wildlife Service Endangered Species: Critical Habitat – What is it?
- IW45: Klemens, Michael W., "Amphibians & Reptiles in Connecticut, A Checklist With Notes on Conservation Status, Identification, and Distribution," Connecticut Department of Environmental Protection, Bulletin 32, 2000 (excerpts).
- IW46: Dowhan, Joseph J. and Robert J Craig, "Rare and Endangered Species of Connecticut and Their Habitats," State Geological and Natural History Survey of Connecticut, The Natural Resources Center, Department of Environmental Protection, Report of Investigations No. 6, 1976 (excerpts).
- IW47: Connecticut Audubon Society, "Connecticut State of Birds: Conserving Birds & Their Habitats" 2006; Sibley, David Allen, "Birds Make Good Indicators of Environmental Health"; Introduction by Robert Martinez, President, Connecticut

Audubon Society, Fairfield, Connecticut; "Recommendations from Connecticut Audubon Society" (excerpts); with letter of transmittal.

- IW48: Connecticut's Comprehensive Wildlife Conservation Strategy: Creating a vision for the future of wildlife conservation, State Department of Environmental Protection, Bureau of Natural Resources, October 1, 2005: Introduction; Chapter 1: Connecticut's Wildlife Distribution and Abundance: Determination of Species of Greatest Conservation Need (GCN); Chapter 2: Habitats, Sub-habitats, and Vegetative Communities in Connecticut (excerpts); Chapter 3: Threats Affecting Species of Greatest Conservation Need (GCN) or their Habitats (excerpts); Chapter 4: Conservation Actions for Connecticut's Twelve Key Habitats and GCN Species.
- IW49: Connecticut DEP Endangered, Threatened & Special Concern Species in Connecticut Explanation Page.
- IW50: Connecticut DEP Endangered Species/Wildlife Income Tax Check-Off Funded Projects.
- IW52: U.S. Fish and Wildlife Fact Sheet : Small Whorled Pogonia
- IW53: U.S. Fish and Wildlife Fact Sheet: Bog Turtle.
- IW54: U.S. Fish and Wildlife "Endangered Species Program Overview" webpage (http://www.fws.gov/newengland/EndangeredSpec-Overview.htm) (last visited 2/8/11).
- IW55: U.S. Fish and Wildlife Protocol Relating to Applicant's Tab 7 Materials (http://www.fws.gov/newengland/EndangeredSpec-Consultation_Project_Review.htm) (last visited 2/8/11).
- IW56: U.S. Fish and Wildlife Definition of "Action Area" (hhtp://www.fws.gov/northeast/nyfo/es/actionarea.htm) (last visited 2/8/11).
- IW57: Webpage Linking U.S. Fish and Wildlife Website to Connecticut DEP Webpage Listing State Endangered Species (http://www.fws.gov/scripts/exit.cfm?link=http://www.ct.gov/Dep/cwp/browse.asp?A=2702) (last visited 2/8/11).
- IW58: Connecticut DEP "Insects Plants Endangered and Invasive Species" Webpage Linked From USFWS webpage (http://www.ct.gov/Dep/cwp/browse.asp?A=2702) (last visited 2/8/11).

Unduly Repetitious Evidence

Several of the documents included by the Inland Wetlands/Conservation Commission as exhibits are currently part of the record in this proceeding as administratively noticed documents by the Siting Council or contained in verified, admitted exhibits. Accordingly, these documents, which are listed below, are unduly repetitious and should not be admitted as exhibits by the Siting Council in this proceeding under its authority to exclude unduly repetitious evidence under Section 4-178(1) of the UAPA.

- IW1: Certified copy, Wetlands and Watercourses Regulations of the Town of Canaan, Connecticut, as amended October 1, 1975.
- IW6: Letter of January 15, 2011 to the Connecticut Siting Council from the Inland Wetlands-Conservation Commission of the Town of Canaan, Connecticut: Notice of Intent to be a party, Docket 409.
- IW7: Town of Canaan Falls Village 2002 Plan of Conservation & Development Planning & Zoning Commission, January 9, 2002 (excerpts).
- IW8: Certified copy, Town of Canaan, Falls Village Zoning Regulations (excerpt) 4.3. Steep Slope Overlay Zone; 5.1. Landscaping and Buffers.
- IW13: IW/CC Letter of September 21, 2009, to Stacy P. Montgomery, The Ottery Group, Inc.
- IW14: Cuddy & Feder Letter of October 29, 2009 to First Selectman Mechare, Falls Village, CT.
- IW16: Cuddy & Feder Letter of March 24, 2010 to IW/CC.
- IW18: Cuddy & Feder Letter of October 19, 2010 to Chairman Daniel P. Caruso, Connecticut Siting Council.
- IW34: Connecticut Department of Environmental Protection, A County Report of Connecticut's Endangered, Threatened and Special Concern Species, 12/1/2010: Litchfield County.
- IW35: Connecticut Department of Environmental Protection, Endangered Species Webpage.
- IW40: Housatonic Valley Association letter dated January 19, 2011 from Tim Abbott.

All Documents Related to Health and/or Environmental Effects of RF Emissions Should Be Excluded

As the Council is aware, it is preempted by Telecommunications Act of 1996 (TCA) from considering the environmental effects of radio frequency emissions as long as the applicant demonstrates compliance with the Federal Communication Commissions' (FCC) guidelines for radio frequency emissions. 47 USC §332(c)(7)(B). Moreover, the United States District Court held that the Council is preempted under the TCA from rendering a siting decision on the basis of any purported health effects from radio frequency emissions on wildlife. See: *Jaeger v. Cellco Partnership*, et al., 2010 WL 965730 (D. Conn. 2010), affirmed *Jaeger v. Cellco Partnership*, et al., 10-1347-cv (2nd Cir. 2010). (See also *Bornemann,* et al v. *Connecticut Siting Council*, et al., 287 Conn. 177 (2008), where the Connecticut Supreme Court held that the Siting Council does not have jurisdiction to consider the "biological effects of high frequency radio wave emissions on wildlife").

In fact, the Siting Council has taken administrative notice of the TCA and its preemption provisions with respect to environmental effects of radio frequency energy and the holdings in the *Jaeger v. Cellco Partnership* and *Bornemann v. Siting Council* cases in this proceeding and other communication facility proceedings. In addition, with respect to the siting of telecommunication towers and migratory birds, the Council has taken administrative notice of the Service Interim Guidelines for Recommendations On Communications Tower Siting, Construction, Operation and Decommissioning by the U.S. Fish and Wildlife Service (USFW), Division of Migratory Bird Management.

Given that the Council is preempted from consideration of environmental effects of radio frequency energy on both humans and wildlife and has taken administrative notice of the USFW guidelines on communication tower siting, any documents that concern RF emissions submitted by the Inland Wetlands/Conservation Commission, including those documents listed below, should be precluded by the Siting Council.

- IW59: Letter of January 14, 2011 Division of Migratory Bird Management, U.S. Fish and Wildlife Service, to FCC re: Comments of the U.S. Fish and Wildlife Service's Division of Migratory Bird Management filed electronically, on WT Docket No. 08-61 and WT Docket No. 03-187, Regarding the Environmental Effects of the Federal Communication Commission's Antenna Structure Registration Program.

- IW61: Briefing Paper on the Need for Research into the Cumulative Impacts of Communication Towers on Migratory Birds and Other Wildlife in the United States *Division of Migratory Bird Management (DMBM), U.S. Fish & Wildlife Service* – for Public Release, LAST UPDATED: January 23, 2009, Albert M. Manville, II, Ph.D., Senior Wildlife Biologist, Division of Migratory Bird Management, U.S. Fish and Wildlife Service; 4401 N. Fairfax Dr. – MBSP-4107, Arlington, VA 22203. 703/358-1963; Albert_Manville@fws.gov.
- IW70: Balmori, Alfonso, "Mobile Phone Mast Effects on Common Frog (*Rana temporaria*) Tadpoles: The City Turned into a Laboratory," Electromagnetic Biology and Medicine, 29:31-35, 2010.
- IW71: Balmori, Alfonso, "Electromagnetic pollution from phone masts. Effects on wildlife." Pathophysiology, 2009.
- IW72: Frey, Allan H. and Edwin S. Eicher, "Modification of Heart Function With Low Intensity Electromagnetic Energy," Journal of Bioeletricity 5(2), 201-210 (1986).
- IW73: Balmori, Alfonso, "The incidence of electromagnetic pollution on the amphibian decline: Is this and important piece of the puzzle?" Toxicological & Environmental Chemistry, Apr/-June 2006; 88(2): 287-299.
- IW74 : Everaert, Joris and Dirk Bauwens, "A Possible Effect of Electromagnetic Radiation from Mobile Phone Base Stations on the Number of Breeding House Sparrows (Passer domesticus), Electromagnetic Biology and Medicine, 26: 63-72, 2007.
- IW75: Balmori, Alfonso, "Possible Effects of Electromagnetic Fields From Phone Masts on a Population of White Stork," Electromagnetic Biology and Medicine, 24: 109-119, 2005.
- IW76: Magra, Ioannis N. and Thomas D. Xenos, "RF Radiation – Induced Changes in the Prenatal Development of Mice," Bioelectromagnetics, 18: 455-461, 1997.
- IW84: Kato Yasuko, "RF Effects on Plants, Summary," Shukan Kinyabi, July 2, 2004, pp. 27-29. Translated for Japan Focus by Jean Inglis.

Public Comments and Limited Appearance Statements Should Not Be Admitted as Inland Wetlands/Conservation Commission Exhibits

AT&T objects to the admission of public comments and limited appearance statements as Inland Wetlands/Conservation Commission exhibits on the grounds that the authors of such comments and statements are not parties and/or intervenors in this proceeding and as such, are not available for cross examination. Therefore, the information contained in such comments and statements cannot be fully evaluated by the Council, the applicant or any other party in this proceeding for a full disclosure of the facts as provided in Section 16-50o of Connecticut General Statutes (CGS), Section 4-178(5) of UAPA and Section 16-50j-28 of RCSA.

Documents containing public comment are properly considered part of the public comment file in this proceeding and should not be admitted as an exhibit for the Inland Wetlands/Conservation Commission. Similarly, comments received from an elected official not associated with municipalities should be treated as limited appearances and administratively noticed in the record in accordance with the CGS Section 16-50*l* and Siting Council policy.

Accordingly, the following public comments and limited appearance statements should not be admitted as Inland Wetlands/Conservation Commission exhibits:

- IW27: November 17, 2010 Letter from Susan Pinsky and Marc Rosen to Connecticut Siting Council.
- IW29: January 28, 2011 Letter from Hon. Andrew Roraback and Hon. Roberta B. Willis to Connecticut Siting Council.
- IW38: Affidavit of Mary Lu Sinclair dated February 7, 2011.
- IW39: "Rattlesnake Spotted Slithering in Sharon: Snake Measuring 4 Feet Spotted By Viewer," WFSB.com, September 1, 2010.
- IW51: February 7, 2011 Letter from Hank Gruner to Connecticut Siting Council.
- IW69: Letter of January 13, 2011 to Connecticut Siting Council Chairman Daniel Caruso from the Housatonic River Commission.
- IW81: Friends of Wangam Valley Mission Statement, 2003.
- IW83: Affidavit of Bonnie H. Burdick, dated February 9, 2011.

For the foregoing reasons, AT&T objects to the Council to the admission by the Siting Council of certain exhibits of the Town of Canaan (Falls Village) Inland Wetlands/Conservation

Commission and hereby moves the Siting Council under its authority pursuant to Section 4-178(1) of the Uniform Administrative Procedures Act (UAPA) to exclude certain Inland Wetlands/Conservation Commission exhibits as detailed herein.

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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Dated: June 8, 2011

Lucia Chiocchio

Lucia Chiocchio

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