

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), CONNECTICUT

DOCKET: 409

Feb. 17, 2011

**REPLY TO NEW CINGULAR WIRELESS PCS, LLC (AT&T) REPLY TO THE TOWN
OF CANAAN (FALLS VILLAGE) INLAND WETLANDS/CONSERVATION
COMMISSION MOTION TO STRIKE AT&T'S APPLICATION**

The Inland Wetlands/Conservation Commission of the Town of Canaan (Falls Village) ("IW/CC") hereby respectfully moves the Siting Council to strike the application and to direct the applicant not to present any evidence since the IW/CC's ability to cross examine has been blocked. The arguments in AT&T's Reply fail for the following reasons:

Westport v. Siting Council is Inapt

Rather than defend its assertion throughout its responses to IW/CC's interrogatories that the Siting Council "regulates" under Conn. Gen. Stat. §16-50x (IW/CC Mot. at p.3), AT&T abandons that stance and retreats to the holding of *Town of Westport v. Connecticut Siting Council*, 260 Conn. 266, 766 A.2d 510 (2002). While the *Westport* decision upholds the Siting Council's jurisdiction over locating facilities "used in a cellular system" within the meaning of General Statutes 16-50i(a)(6) where the town of Westport's zoning regulations were at issue, here, the Inland Wetlands Commission of the Town of Canaan derives its authority not just from state law and the Tenth Amendment, but also from formal agreements between the State of Connecticut and the federal government under the Clean Water Act. As such, this question of

independent jurisdiction has, to our knowledge, not been considered or decided before, and *Westport v. Siting Council* is inapt here.

Additionally, in *Westport*, the issues regarding environmental impact and application of zoning regulations were decided upon the hearing record, and not, as here, on a failure to supply full information for the evidentiary hearing. In *Westport*, the Supreme Court considered the town's assertion that the Siting Council's actions were procedurally and substantially illegal -- whether the Council's findings were supported by

substantial evidence in the record and whether its decision approving the application subject to certain modifications reflected a proper application of the pertinent statutory factors set forth in the Public Utility Environmental Standards Act.

(Ibid. at 273) (Emphasis added.)

The "modifications" included deference to town concerns and environmental factors:

the [trial] court rejected the town's procedural claim, concluding that the council had recognized the town's concerns, including the factors encompassing environmental and residential objections, prior to the application approval, as evidenced, in part, by it conditioning its approval on Celco's compliance with some of the town's recommendations.

(Ibid. at 274) (Emphasis added.)

Untimeliness of Material Information

The issue here is also the timeliness of provision of answers to the Town Inland Wetlands/Conservation Commission's interrogatories. The Commission's concerns cannot be addressed by untimely referral by the applicant to what it intends to provide after it should be granted its certificate when it files its D&M plan. (AT&T Reply at p.1-2) Indeed, AT&T once again defies the call for the very information IW/CC requires for determination of environmental effect in an environmentally highly sensitive area by answering IW/CC's motion with the same response given in its non-responsive answers to IW/CC's interrogatories:

"Accordingly, pursuant to the procedures set forth in RCSA, the D&M plan is prepared after issuance of a Certificate by the Siting Council."

(Reply at p. 1)

and

"Accordingly, information that is provided in a D&M plan after issuance of a Certificate is not warranted for review."

(Reply at p. 2)

AT&T is engaging in a specious argument: answering objections to a failure to provide responses with the same failure to provide responses. "After" issuance of a Certificate is too late for the purposes of both the Inland Wetlands/Conservation Commission to fulfill its statutory mandates, and it is also too late for the Connecticut Siting Council to fulfill the obligation it has, recognized in both the *Westport* and *Corcoran* decisions (cited by AT&T in its Reply) to make a full record so that the Council can base its findings on "substantial evidence," (*Westport* at 271).

The *Westport* decision required the Council to recognize the town's concerns:

[T]he court rejected the town's procedural claim, concluding that the council had recognized the town's concerns, including the factors encompassing environmental and residential objections, prior to the application approval. * * *

(*Westport* at 274) (Emphasis added.)

AT&T blocks all such timely information on factors material to both the Siting Council's and the IW/CC's obligations under law. Rather, it is proposing to withhold material facts until the filing of a D&M plan, long after the mandatory provision and consideration and use of such facts will have passed, and long after their materiality to whether the applicant is entitled to application approval is over. AT&T's argument, therefore, fails as a matter of law.

Avoidance of the Statutory Authority of C.G.S. §16-50x

Additionally, AT&T selectively cites C.G.S. §16-50x in this context again (At Reply p. 2):

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...." CGS Section 16-50x(a).

(Reply at p. 2)

This is not at all what C.G.S. §16-50x provides in full. Selective citation of statutory authority fails *de facto*. As IW/CC cites in its original motion (at p.4):

Conn. Gen. Stat. §16-50x provides that the Council:

shall give such consideration to other state laws and municipal regulations as it shall deem appropriate. Whenever the council certifies a facility pursuant to this chapter, such certification shall satisfy and be in lieu of all certifications, approvals and other requirements of state and municipal agencies in regard to any questions of public need, convenience and necessity for such facility.

(Emphasis added.)

By avoiding a response on the merits of this basis for IW/CC's motion, AT&T engages in the same tactic of being unresponsive. AT&T does not cite in full the very statutory language at issue here. The Council's jurisdiction reaches "in regard to any questions of public need, convenience and necessity for such facility." (*Ibid.*) (Emphasis added.) That statutory language is a limitation on the Council's jurisdiction and does not in any way limit the jurisdiction of an Inland Wetlands Commission.

The holding of *Westport* supports the IW/CC's contention that as to other factors to be considered, the Council shall defer to these, prior to approval and to the filing of a too-late-for-consideration D&M plan by:

recogniz[ing] the town's concerns, including the factors encompassing environmental and residential objections, prior to the application approval, * * *

(*Westport* at 274) (Emphasis added.)

Cases Dealing With Municipal Zoning Regulations Are Not Applicable Here

AT&T cites *Corcoran v. Connecticut Siting Council* in its Reply (Reply at 2) in error for the premise

that the Siting Council's exclusive jurisdiction over wireless facilities under CGS 16050x (a) allows it to override municipal provisions.

(Reply at 2) (Emphasis added.)

The holding in *Corcoran* stands for no such premise, and is bad authority because the Inland Wetlands/Conservation Commission derives its authority from different sources than a town Zoning Commission. The violation of town zoning regulations was at issue in *Corcoran* -- not the violation of town inland wetlands regulations and the jurisdiction of the town's Conservation Commission. In *Corcoran* the issue was that the proposed, approved tower violated a specific section of the New Canaan zoning regulations. The trial court found the Siting Council had exclusive jurisdiction over the "location and type of facilities" and that it "shall give such consideration to other state laws and *municipal regulations as it shall deem appropriate....*" *Corcoran* at 448 , citing C.G.S. 16-50x(a). The court found that while

Section 16-50x (a) clearly contemplates that, in the event of such a conflict, the council's position should prevail. It should be further noted that the council did consider the town zoning regulations because they were presented to the council as part of [the] application.

Corcoran v. Connecticut Siting Council, 50 Conn.Supp. 443, 449 (Super. Ct. 2006) (Emphasis added.)

The IW/CC challenges that such a holding would apply to a municipal commission duly formed under town ordinance under a state statutory scheme depending on express agreements with the federal government under the Clean Water Act. AT&T provides no legal authority to dispute this.

AT&T Reply Fails as a Matter of Law

The decisions cited by AT&T to defend its failure to provide sufficient, proper and material information in response to IW/CC's interrogatories do not support their contention that the Connecticut Siting Council may "override municipal provisions" (AT&T Reply at p. 2) There is simply no support for this position in law or reason, in addition to which both cases cited to support AT&T's position relate to Zoning regulations and Boards, and not to a municipal Inland Wetlands/Conservation Commission whose statutory authority is entirely different. AT&T can provide no law, including the decisions in *Westport* and *Corcoran* to allow it to disregard the IW/CC's request for specific information pertaining to the applicant's plans within the bounds of the Town of Canaan (Falls Village).

CONCLUSION

The applicant AT&T has put the wheels of the Siting Council's procedures in motion. It has a heavy burden of proof under the requirements of a Certificate of Environmental Compatibility and Public Need and the statutory mandates for AT&T's application and the Siting Council's review thereof (see IW/CC Pre-Hearing Brief, February 10, 2011, pages 2-23). The stringent requirements and diligent inquiries into specifics of any plan that would disturb the wetlands and environment under the particular care of the Inland Wetlands/Conservation Commission of the Town of Canaan (Falls Village) must be met in addition to such reviews incumbent upon the Siting Council. Those inquiries can be met here during this proceeding in good faith, or they can be defied. Defiance of jurisdiction and statutory duties simply delays a duty, it does not dispose of it.

There is no support for AT&T's assertions in its responses to interrogatories, in Conn. Gen. Stat. §16-50x, in its Reply to the IW/CC's motion or in the Connecticut decisions it

cites for its position. The issue of an Inland Wetlands Commission's independent jurisdiction in this context is a matter of first impression and the authorities cited by AT&T do not apply.

Wherefore, the Inland Wetlands/Conservation Commission of the Town of Canaan moves the Siting Council to strike the application and to direct the applicant not to present any evidence concerning issues as to which it has refused to provide responsive answers to the IW/CC's Interrogatories.

/s/

Ellery W. Sinclair, Chairman
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CERTIFICATE OF SERVICE

I hereby certify that on this day, an original and twenty copies of the foregoing was served by hand on the Siting Council and a copy was served by hand on all parties at the Siting Council Hearing at the Kellogg School in Falls Village:

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/s/

Ellery W. Sinclair

Dated: February 17, 2011