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

August 8, 2011

IDENTIFICATION BY THE INLAND WETLANDS AND CONSERVATION COMMISSION OF THE TOWN OF CANAAN (FALLS VILLAGE), CONNECTICUT OF ERRORS AND INCONSISTENCIES BETWEEN THE CONNECTICUT SITING COUNCIL'S DRAFT FINDINGS OF FACT AND THE RECORD

At the Council's invitation, the Inland Wetlands/Conservation Commission of the Town of Canaan (Falls Village) ("IW/CC") submits herewith its identification of errors and inconsistencies between the Connecticut Siting Council's draft findings of fact (dated July 28, 2011) and the record on Docket 409. The IW/CC also identifies material omissions from the Council's findings relating to legal mandates for consideration of any application. These omissions include failure to make findings relating to FCC mandatory application requirements; USFWS mandatory application disclosures and compliance; FCC regulations and Nationwide Programmatic Agreement ("NPA") and NHPA mandatory filings, disclosures and APE analysis compliance.

Identification of Errors and Inconsistencies Between the Connecticut Siting Council's Draft Findings of Fact and the Record

Draft Finding 11 recognizes the CEQ's questions regarding the application in compliance with the Council's consultation statute. The CEQ made a number of recommendations, not all of which appear to have been addressed in the Draft Findings, including the following:

"development of the site does not conform to town zoning regulations;"
"a comprehensive wildlife survey of the property should be performed;"
"the site is located in a relatively undisturbed area;"
"co-location on nearby electric transmission towers should be re-examined;"
"water and erosion control measures should be examined;"
"the relocation of the tower from its original pre-application location should be re-examined."

These material omissions from the Draft Findings constitute errors and inconsistencies between the findings and the record.

Draft Finding 20: "In issuing licenses, the federal government has preempted the determination of public need for cellular service by the states (etc.)" constitutes erroneous interpretation of state law, and would render C.G.S. §16-50p(a)(3)(A) a nullity:

> (2) The council's decision shall be rendered in accordance with the following:
> (3) The council shall file, with its order, an opinion stating in full its reasons for the decision. The council shall not grant a certificate, either as proposed or as modified by the council, unless it shall find and determine:
> (A) Except as provided in subsection (c) of this section, public need for the facility and the basis of the need;
>
> (Emphasis added.)

The Draft Finding would also render meaningless the certification proceeding expressly authorized for official determination of entitlement to a Certificate ("Certificate of Environmental Compatibility and Public Need (etc.)") (Emphasis added). This Draft Finding constitutes error and inconsistencies between the findings and the record, and is inconsistent with the title of the instant Application. The authority cited (Administrative Notice Item No. 7) does not appear to have any relevancy to the statement of law in this Draft Finding (see FN1 *infra.*)

Draft Finding 21 is in error. It cites as authority Administrative Notice Item No. 7[1], but the Notice Item deals with soils and has nothing to do with the Telecommunications Act. Therefore it has no proper cited legal authority. Nevertheless, the statement is outdated as a matter of law. The current Circuit Court rule is that of *T-Mobile USA v. City of Anacortes*, 572 P.3d. 987 (9th Cir. 2009). *City of Anacortes* holds that only where the applicant provides substantial evidence that the proposed site is the least intrusive option to serve a "significant gap," after providing evidence that it made a good faith search for feasible alternatives, does the burden of proof shift to the local jurisdiction. (Thereafter, the local jurisdiction must prove that there is a specific, feasible, less intrusive option that allows the carrier to provide service in the

[1] This citation also appears to be in error, as it is the "Connecticut Council on Soil and Water Conservation, State of Connecticut Department of Environmental Protection, Connecticut Guidelines for Soil Erosion and Sediment Control, DEP Bulletin 34 (May 2002, last revised September 2007), *available at* http://www.ct.gov/dep/cwp/view.asp?a=2720&q=325660&depNav_GID=1654 (last visited July 20, 2010)." and not a citation to case law or statute.

"significant gap." If the opponents or local jurisdiction fail to meet its burden of proof, the Telecommunications Act of 1996 requires the local jurisdiction to approve the application.) Therefore, this Draft Finding is in error and cites out-dated law.

Draft Finding 22 states that the TCA "prohibits any state or local entity from regulating telecommunications towers on the basis of the environmental effects..." (etc.). This Draft Finding contradicts the situation where the tower would otherwise violate federal law. The statement is in error as to federal law, although the TCA may preempt state law. It may not preempt federal law where there is a conflict of laws and where authority is expressly 'saved' under federal statutory schemes; and where certain official entities -- such as the Town of Canaan Inland Wetlands and Conservation Commission -- have express federally authorized jurisdiction. Additionally, this Draft Finding cites as its basis a document pertaining to soils, not law (see FN1, *supra.*).

Draft Findings 33-37 regarding "Site Selection" are in error and are inconsistent with the record evidence of a *bona fide* property dispute. (Trans. 6/16/11 p. 94, line 23 to p. 4; Trans. 6/16/11, p. 104, line 16-p. 105, line 8) If there is no clear right to use the site for construction, the application is a nullity and the Siting Council has no jurisdiction to entertain the application, because there is no available site. These Draft Findings regarding "site" are inconsistent with the Council's jurisdiction, and with proceedings under C.G.S. §§16-50k, 16-50l, 16-50m, 16-50n, 16-50o, *et seq.* which are not valid unless the applicant has the legal right to use the site.

Draft Finding 34 provides a list of "existing structures and potential properties." The evidence that these sites were "investigated and rejected" in good faith is lacking on this record; there is no evidence that any viable alternative site was considered. Under C.G.S. §16-50g the Council's mandate: "to promote the sharing of towers for fair consideration wherever technically, legally, environmentally and economically feasible to avoid the unnecessary proliferation of towers in the state particularly where installation of such towers would adversely impact class I and II watershed lands, and aquifers;" a good faith consideration of an alternative site means a potential site, not simply one that has no potential for the desired coverage. Therefore all properties listed where the property would not "meet coverage objectives" cannot be a legitimate alternative site for consideration, and should be omitted from this finding for lack of support in the record. ATT's response to the Chairman's inquiry into the feasibility of another tower arrangement was: "I'm not entirely sure." (Trans. 6/16/11, p. 48, line 10). Such uncertainty does not support this draft finding. Any alternative sites considered must be "viable alternative sites" evidence of which is missing from the record. (See IW16) ATT's witness Mr. Wells admitted that portions of the site search were pretextual: "We analyzed it just to finish the analysis, but it's not available." (Trans. 6/16/11, p. 45, lines 19-20) Therefore this finding is inconsistent with the record.

Draft Finding 43 stating that "The existing access to the property is within a recorded easement across several parcels" is a material error and is inconsistent with the record. It has not been proven that the existing access to the property is within a recorded easement. Rather, the opposite is a matter of record. The applicant's witness, Mr. Perkins testified: "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) This is evidence of the Applicant's knowledge of the existence of a defect in direct contradiction to the statement in this Draft Finding. (See discussion below at p. 10 ff. on material omissions relating to the property dispute.)

Draft Finding 46 addresses the steepness of the slopes, adopting wholesale the Applicant's proposal for "stabilization" without mentioning the substantial evidence in the record of the hazards of the steepness of the slope (IW9-A, IW9-B; public comment session, 2/17/11; Trans. 6/16/11, p. 186, lines 11-16) and the prospective injury to the environment from disturbance and massive runoff (IW10; Trans. 6/16/11 at pp.183, line 24 to p. 185, line 19; p. 187, lines 11 - 16). The area of disturbance is within the Hollenbeck River watershed. This is undisputed. (Testimony of Sam Dziegan; See also IW85, attached to IW/CC Testimony, and Testimony, pars. 53 to 57; Trans. 6/16/11 p. 148, lines 1-5). These material omissions from the Draft Findings constitute errors and inconsistencies between the findings and the record.

Draft Finding 47 describes the proposed facility's access road "wide curves," omitting the direct and indirect effects of the clearing, blasting, paving and development of the access road and curves (Trans. 6/16/11, p. 93, lines 22 - p. 94, line 2; Trans. 6/16/11, page 110, line 10 to page 111, line 13; Trans. 6/16/11 p. 186, line 20-23; Trans. 6/16/11 at p. 180, line 6 to p. 181, line 16). These material omissions from the Draft Findings constitute errors and inconsistencies between the findings and the record.

Draft Finding 48 addresses the overall height of the tower at an elevation of 1,198 feet plus 150 feet, but does not address the omission by the applicant of providing this overall height to SHPO nor proper application of this overall height for APE visibility effect. (Trans. 6/16/11, p. 101, lines 6-10) This material omission from the Draft Findings constitutes errors and inconsistencies between the findings and the record.

Draft Finding 58 states that "ledge may be encountered during construction." This is in error and is inconsistent with the record. (Abbot Testimony at p. 3; IW9-A, p. 5) Mr. Abbot testified that "Rock-Outcrop-Hollis Complex 45-60% slopes [exist] at the Cobble Hill Site" (Abbot Testimony at p. 3); and Engineer Calkins stated "the soils in the area are known to be shallow to bedrock with rock outcroppings. The application should indicate if blasting will be required and the amount of blasting expected." (IW9-A, p. 5) This Draft Finding is therefore in error and is inconsistent with the record evidence. The material fact that remains unaddressed and about which this Draft Finding is misleading is the extent of blasting of bedrock known, and established in the record, on the site.

Environmental Considerations

Draft Findings 64-80 fail to define the term "Site" as used as a material term. Federal and state laws required consideration of effects of the proposed project construction and operation on the direct and indirect impacts not just from the "site" (a term left undefined in the Council's Draft Findings), but also from the "Project Action Area" (IW55, IW56) a USFWS term having specific regulatory definition. (Trans. 2/17/11, p. 97, lines 20-24 to p. 98, line2) This

material omission from the Draft Findings constitutes errors and inconsistencies between the findings and the record.

Under FCC Rules, all tower applicants must consider the impact of facilities under the Endangered Species Act (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 ESA.
(http://wireless.fcc.gov/siting/environment_compliance.html)
The Applicant never addressed the indirectly affected areas, required under FCC rules, ESA and NEPA. This admission came out on cross examination (Trans. 2/17/11, p. 97, lines 16-24 to p. 98, line 2; p. 99, lines 7-13; Trans. 6/16/11 p. 92, line 21 to p. 93, line 7) and directly implicates a far more comprehensive definition of "site." (IW55, IW56)

USFWS mandatory environmental impact review (IW55), required identification of the presence of potential habitat of known listed species. The Applicant conceded that "rare species and rare habitat [] exists in the surrounding area." (Trans. 2/17/11, p. 105, lines 10-11) Since the Applicant failed to consider the presence of potential habitat within the "Project Action Area," -- including the area of indirect effects of the project, all reference to "site" here is error and inconsistent with the record. The proposed site is surrounded by wetlands. 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. (47 C.F.R. 1.1307(a)(3))
(http://wireless.fcc.gov/siting/endangeredspeciesletter.pdf) The Draft Findings incorporating the term "Site" in the absence of any definition of that term in the Finding endorses and invites violation of federal and state law, and is a material omission from the Draft Findings constituting error and inconsistency between the findings and the record. (IW55, IW56, IW57)

State DEP definition of "Site"

Draft Finding 56 documents the 8,563 cubic yards of cut and 7,854 cubic yards of fill, without applying this quantity of material and extent of disruption to the undefined "site" term used in the Draft Findings. (Trans. 6/16/11 at p. 186) This constitutes inconsistency between the findings and the record.

Draft Finding 64 depends on the State DEP definition of "site." As noted above, the definition determines whether state listed species are known "at the proposed site." It appears that this Draft Finding refers to the tower footprint only, and is therefore inconsistent with the record. (IW1, IW2; IW55, IW56) 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." (IW77) Additionally, the area of disturbance is surrounded by NDDB circles, even overlapping the compound "site" itself, as well as the proposed access road. (IW66, IW67)

Draft Finding 67 is inconsistent with the reality that there are no Important Bird Areas in the region, not because none exist, but because Audubon has not yet assessed the region. The Council Administrative Notice Item No. 30, reportedly appearing at:
http://ct.audubon.org/BirdSci_IBAs.html

apparently no longer appears at that address. However, Audubon's Connecticut Important Bird Areas are described at Audubon's official IBA site:
http://ct.audubon.org/IBAs.html (Last visited 8/6/11)
and this official site expressly states that "Connecticut currently has 27 publicly announced IBAs and is working to announce additional sites in the future." (Emphasis added.) (See also Audubon's description of its prioritization "with limited capacity."
(http://web4.audubon.org/bird/iba/prioritizedibas.htm)) (Last visited 8/6/11.)
Since Audubon has admittedly not yet designated all Important Bird Areas in Connecticut, this Draft Finding has no foundation in fact as to whether this is an IBA, and constitutes error. Additionally the webpage address cited as a record basis has apparently expired.

Draft Finding 68, subpart 4: the Draft Finding does not answer the inquiry whether the Council is "discouraging" the siting of towers near the wetlands of record. The Finding statement that "Site is 200 feet from the nearest wetland" does not correlate or respond to the FWS Recommendation at Draft Finding 68, subpart 4. The wetlands at issue on this docket are known and designated by the State as A Critical Habitat. (IW37, Application, Map at Tab 7, page 5; IW44) Additionally, the repetition that the "Site is four miles from an Audubon designated Important Bird Site" has no factual basis in light of Audubon's express concession that it has not completed Connecticut designations of IBAs. (See comment under Draft Finding 67.) This is error and is inconsistent with the record. (IW59, IW60, IW61)

Draft Finding 68, subpart 7: The site footprint 100 x 100 foot "lease area" appears to define the "site" as limited to this footprint for environmental impact analysis, despite USFWS and CT DEP definitions of "project action area" and direct and indirect impact areas to the contrary, in this record. This is an error and inconsistent with the record. (IW55, IW56, IW77)

Draft Finding 69. Since the FCC does not itself monitor after-built emissions (FCC Administrative Notice Item 1), and the USFWS Briefing paper cited in this Draft Finding cites "Cumulative Impacts" (IW61), and cites "the need to cumulatively assess the impacts of communications towers on migratory birds both from collisions and radiation..." the Draft Finding is in error stating "To the extent that the facility complies with FCC's regulations..." The FCC, by its own admission (Admin. Notice Item 1, p. 17) does not monitor emissions. Therefore this Draft Finding is contrary to the authority it cites, is in error and is inconsistent with the record, since licensing makes no provision for monitoring or compliance (See *Ibid.*). Therefore the Draft Finding is inconsistent in stating that "[t]o the extent that the facility complies with the FCC's regulations concerning radio frequency emissions, the Council is preempted...." because there is no evidence of compliance, and licensure is not the functional equivalent of compliance. To avoid this inconsistency, the Finding must be amended to say that "conditioned upon after-built proof of compliance with FCC standards, the Council is preempted....", and with a Draft Finding providing for after-built monitoring to insure compliance. Without such provision, preemption exists only for the first day a facility is brought on line. This is error and is inconsistent with the record. (*Ibid.*)

Draft Finding 73 states that "[s]ite construction would disturb approximately three acres of land area." It is unclear whether this three acre calculation includes the area where the access road is being reconfigured, which would increase the total area of disturbance. (Trans. 2/17/11

p. 29, lines 11-24, p. 30, lines 24) Under CT DEP and USFWS standards, the area of disturbance, its direct and indirect effects are to be considered. (IW55, IW56, IW57) Regarding the number of trees to be cut, an indeterminate number of trees to be cut are under 6 inches diameter. (Trans. 6/16/11, page 110, line 10 to page 111, line 13) This Draft Finding is incomplete, is in error and is inconsistent with the record.

Draft Finding 74 states "[c]onstruction of the site would not have a significant effect on forest fragmentation." This is contradicted in the record at Trans 6/16/11, p. 185 lines 6-19 and Tim Abbot Pre-Filed Testimony, February 10, 2011. This Draft Finding is therefore an error and is inconsistent with the record.

Draft Finding 75 "Site" is not defined (see discussion at pp. 4-5). It is unclear whether this term refers to the entire area of disruption, or only to the access road. This draft finding describes the discharge of water associated with the construction activity but omits mention of runoff from the tower compound that has the potential of reaching Route 63 and the Hollenbeck River (see discussion of ATT admission, at Draft Finding 77 below.).

Draft Finding 76 This finding assumes facts not in the record: 1) that total volume of water flow off the site was calculated (Trans. 2/17/11 p. 62, lines 15-17; p. 62, lines 20-24 to p. 63, line 7); and 2) that therefore there can be no support for the statement in this Draft Finding that "development of the site would not increase the volume of water flows." This assertion is therefore assumed with no basis in fact or in the record. In order for the applicant to determine that there would be "no[] increase [in] the water flows off the site," calculations for total water flow would need to be done for current pre-construction conditions, as well as post-construction conditions. Neither calculation has been done, and do not exist in the record. Therefore this Draft Finding is in error and is inconsistent with the record. (IW10, and see *Ibid.*)

Draft Finding 77 states that "[t]here are no wetlands or watercourses on the proposed site and construction activities would not occur in such areas." This statement is irrelevant to the analysis under state and federal law of the direct and indirect impacts upon wetlands under the Council's consideration and under the IW/CC's jurisdiction. The application admits that the Cobble Hill site is "bounded geographically by Hollenbeck River and the Wangum Lake Brook." (App. at p. 5) The major considerations of water direction and flow management (Draft Findings 75, 76, 77, 78) contradict this statement, because of the proximity of the Hollenbeck River, Wangum Brook and Robbins Swamp to the project area. Again, the term "site" used in this draft finding is misleading as it is not defined, and left too vague for application of state and federal environmental protection laws, including the Clean Water Act. This Draft Finding is therefore in error, inconsistent with the record (IW65, IW66, IW67, IW68, IW69), and omits material facts. Additionally, the Finding mentions Barnes Road, "and a residence with a maintained lawn" about which no evidence was offered in the record. This statement is misleading and irrelevant.

ATT's supplemental filing of May 20, 2011 at A9 implies, without expressly stating, that runoff southwest toward Route 63 will be contained by an "existing swale": "The discharge from these points will flow to the west and begin infiltrating. Any water that does not infiltrate will be collected in the existing swale on the eastern side of Route 63 located approximately 350' to 500' away." (ATT 5/20/11 at Q9-A9). ATT's statements suggest that the existing swales

along the north side of Route 63 will contain all runoff associated with construction activity and subsequent site runoff. [The Council is requested to take administrative notice that there are currently several CONNDOT culverts under Route 63 in this location that drain directly into the Hollenbeck River.] This is the same location established -- and undisputed on this record -- of a known population of protected endangered Burbot. (IW/CC Testimony, pars. 53-57; IW85, attached to IW/CC Testimony; testimony of Sam Dziegan; IW70, IW71, IW72, IW73, IW74, IW75, IW76, IW77, IW78A & B, IW84) Notable here is ATT's concession, in its May 20, 2011 response (A9) that runoff from the site will travel "approximately 350' to 500' feet away."

Even though Draft Finding 77 states that "there are no wetlands or watercourses on the proposed site and construction activities would not occur in such areas," ATT's supplemental filing establishes that runoff from the site will travel up to 500 feet away, placing potentially sediment-laden water well within range of protected wetlands and watercourses.

Draft Finding 78 states that "A comprehensive erosion and sediment control plan and a stormwater management plan would be developed to ensure run-off does not affect off-site wetland and watercourse resources." This Finding presents a material omission from record evidence and is insufficient to meet the Council's and IW/CC's wetlands effects review. Since the said stormwater management plan is not a matter of record here, this Finding is irrelevant, inconsistent with the record, and comes too late for compliance with state and federal laws.

Visibility

Draft Findings 84-102: Throughout the Draft Findings on visibility only the tower and its compound are considered. Inconsistent with the record and with other Draft Findings, all reference to the visibility impact of the access road, with its clearing, large amounts of fill, rip-rap, drainage swales -- mentioned in Draft Findings 46, 56 and 73 -- is omitted under this heading. While reference to the visible construction elements (see Draft Findings 46, 56, 73) are incorporated into the Draft Findings, reference to their effect on visual impact is omitted. This material omission from the Draft Findings constitutes errors and inconsistencies between the findings and the record. Additionally, the Draft Visibility Findings are based on the Applicant's 1/2 mile visibility ring review, and not on the Nationwide Programmatic Agreement- mandated 1.5 mile radius. Therefore the Draft Findings omit material visibility considerations required under FCC regulations and the Federal National Historic Preservation Act (NHPA). These material omissions from the Draft Findings constitute errors and inconsistencies between the findings and the record.

The visibility table at **Draft Finding 87** states in error that the proposed tower is "not visible" from the South Canaan Meeting House (front). This is inconsistent with the record. (IW26; Trans. 6/16/11, p. 101, line 16). Additionally, the list of "Specific Location and Area Receptors" under this Finding, is misleading, in error and inconsistent with the record, in that it implies that these are results of a comprehensive visibility survey, and that such a survey has been done. The table must, at a minimum, be footnoted that it is not the result of a comprehensive survey of the area of potential visual impact, because it omits a large number of views.

Regarding the finding that the proposed tower would be "not visible" from "Kellogg Rd. in front of Holabird House," this finding is not relevant, and omits the relevant finding that the proposed tower is fully visible from the Holabird house, a National Register designated historic structure. Visibility from the Holabird house, not from "in front of Holabird House" is legally material under the NHPA. "APE" effects must be considered for a proposed tower's "overall" height, not simply the tower itself, and not from "in front of" or "behind" an historic structure. (Application, Tab 6, page 1) (See National Programmatic Agreement, FCC Regulations for Form 620 mandatory disclosures, National Landmark Register Designation status, and terms under NHPA (Advisory Council on Historic Preservation, Protecting Historic Properties: A Citizen's Guide to Section 106 Review) (http://www.achp.gov/docs/CitizenGuide.pdf) Draft finding 95 properly addresses this issue. The finding under Draft finding 87 is irrelevant under FCC regulations and the NHPA, and should be omitted. Additionally, in the absence of the mandatory site specific Form 620, all visibility Draft Findings relating to National Register sites are irrelevant and immaterial, and constitute error and inconsistency with the record. (Trans. 6/16/11, p. 101, line 16).

Draft Finding 90: in light of the CEQ's comments and the statements in Draft Finding 11, the statement that the tower would be visible is inconsistent with the record without expanding this Finding to: "including, but not limited to".

Draft Finding 91 contains the following error: "Although there are no officially designated scenic roads in Canaan," this statement should read "no officially town-designated scenic roads." The current version is inconsistent with Draft Finding 90 and the record.

Draft Finding 94 omits the material fact that SHPO's original determination incorporated in the application was based on the applicant's misrepresentation that the tower "will not be visible" from the South Canaan Meetinghouse. (Application pages 14, 15, 16, Tab 9, pages 1 and 2) This finding also omits the material fact that the SHPO rendered a determination in the absence of a site-specific Form 620 mandated by FCC regulations under the Nationwide Programmatic Agreement. (Trans. 6/16/11 p. 101, lines 10-11.) This is omission of material facts from this draft finding, is therefore in error and inconsistent with the record. The Finding has the tendency to create a misimpression that SHPO's determination was properly and legally rendered. (*Ibid.*)

Draft finding 98 states that "the proposed tower would not be visible from the [Appalachian] trail." supported by ATT 8, Tab 2. But this material states only that "VHB's experience is that the visual intensity (i.e. its prominence on the visual landscape) of a typical telecommunications tower is substantially diminished when viewed at distances between two miles. That is not to say that such a structure is not discernible at these distances..." (*Ibid.*) This finding of fact has no basis in this record, and is in error. The visibility refers also to Bear Mountain, Mount Everett and the Mohawk Trail. (*Ibid.*)

Draft Finding 97, as shown by the IW/CC's post hearing brief, the appropriate visibility analysis under FCC regulations, the Nationwide Programmatic Agreement and the NHPA, the visibility ring should have been a 1.5 mile radius, and not the minimal .5 mile radius applied by the applicant. The standard to be applied by the radius is not just whether "the tower would be...

visible from the Falls Village Historic District," but rather, under the NPA, "APE" effects must be considered for a proposed tower's "overall" height, and not just for the tower itself, but for all areas of disturbance, including, here the access road:

> Area of Potential Effects
> 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, http://wireless.fcc.gov/siting/npa/definitions.html) (Emphasis added.)

Therefore, this draft finding is irrelevant, erroneous and should rather find:
Although the tower would not be directly visible from the Falls Village Historic District, approximately 1.8 miles west of the site, the NPA provides that "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." and that "the presumed APE for visual effects for construction of new Facilities is the area from which the Tower will be visible: Within 1 ½ miles from the proposed tower site if the proposed Tower is more than 400 feet in overall height." Since the Historic District Village Center is approximately 1.8 miles west of the site, and the access road will significantly scar Cobble Hill, this constitutes deleterious visual effect of the proposed tower in proximity to the National Historic District Falls Village town center. The current Draft Finding is in error and is inconsistent with the record.

Draft Finding 100 that "the proposed tower would not be discernible from these viewpoints" is not supported by the cited record. This is an error. See discussion at Draft Finding 98 above.

Draft Finding 101 that "most views are from a distance, silhouetted against the sky" is a statement contradicted by draft findings 84, 85, 87, 89, 90, 91, 92, 94, 95, and 100 and by the record supporting Draft Findings 98 and 100 (ATT 8, Tab 2) (See discussion at Draft Point 98 above). The Draft Finding is in error and is inconsistent with the record.

Omissions of Material Findings of Fact

The area of disturbance is surrounded by NDDB circles, even overlapping the compound "site" itself, as well as the proposed access road. (IW66, IW67) Omission of Findings relating to the DEP NDDB mapped documented existence of species of concern and presence of potential habitat of protected species constitutes material omissions from Findings relating to the state laws under which the Council and the IW/CC operate. (See discussion at Draft Finding 43, above). Since the proposed project would be 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, Findings must be included acknowledging these important environmental facts. Findings should be included regarding the CT DEP NDDB documented presence of 82 protected species within a 2 mile radius of the proposed tower. (NDDB Data letter, IW77, IW78A, IW78B).

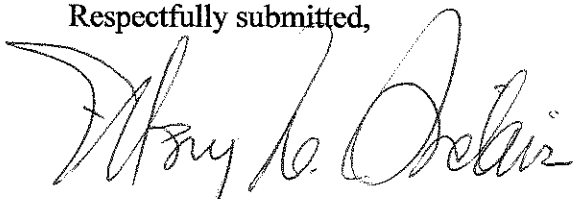
Draft Findings 3, 60 and 61: There is a bona fide property dispute about the property that is the subject of the application. Resolution of any property dispute is a pre-requisite for building the proposed tower. An applicant for certification violates the due process rights of others who participate in an adversarial process before the Council when the applicant initiates a proceeding before the Council before establishing clear title to build the project for which it seeks certification. The application is void *ab initio*, and is void on the record from the moment the property dispute is made a matter of record, here, at the latest, on June 16, 2011. (*Texas v. ICC,* 258 U.S. 158, 162 (1922)) Draft Findings 3, 60 and 61 omit all mention of this dispute, despite its being a matter of record. (Trans. 6/16/11 p. 94, line 23 to p. 4; Trans. 6/16/11 page 89, line 1 to page 90, line 5) The omission is therefore error and inconsistent with the record, and encourages and sustains violations of federal law.

The Applicant admitted during the evidentiary hearing that the obliteration of the route of the existing logging road on the property that is the subject of the application places that landmark into legal controversy (Trans. 6/16/11 p. 94, line 23 to p. 4). This admission constitutes the applicant's acknowledgment that it knew of the property dispute on the property at issue in this docket, implicating the obligation to dismiss the application before injuring other parties as to costs and time participating in a proceeding for which certification was rendered moot, until such time that proof of clear title to build is or was provided. All Draft Findings referring to the abutting property owners and others who became parties to this proceeding, and all Draft Findings referring to the "site" are factually deficient, erroneous and inconsistent with the record where they omit the record evidence of the property dispute.

Additionally, the Council's express demand for proof of the Applicant's clear title to build (Trans. 6/16/11 page 89, line 1 to page 90, line 5) is a material fact where the Applicant has submitted to the Council's jurisdiction, and where it has filed an application for certification as well as having formally provided notice to others who subsequently became parties to the proceeding initiated by the Applicant. The Council's jurisdiction, the property and due process rights of others are implicated and injuries sustained. Omission of any finding of fact on revelations during an evidentiary hearing before the Council on this issue would constitute legal and factual error, inconsistency with the record, the purpose of a record, and would violate the purpose and spirit of fairness of an evidentiary hearing as well as fundamental substantive and procedural rights. Omission of these material facts of record from the Draft Findings encourages and continues violation of state and federal law.

The Applicant's failure, to date, to place the proof requested by the Council on June 16, 2011, and promised by the Applicant, into the record, extends the due process injuries to all parties of record. Failure to include a formal Finding of this omission and the Applicant's defiance of the Council's request would compound the Applicant's violation of the due process rights of the parties and compromise the Council's role. Omission of any mention of the exchange, the promise and the express submission to the Council's jurisdiction is factual error by omission, inconsistent with the record, and would compromise the Draft Findings serving one party to the detriment of others, and rendering the Findings neither full nor fair under the standards of administrative law.

Respectfully submitted,



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

August 8, 2011

CERTIFICATE OF SERVICE

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

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

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

A copy was also delivered by hand to:

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

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

Ellery W. Sinclair

Dated: August 8, 2011