

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 LOCATED AT 522 COLEBROOK  
ROAD COLEBROOK, CONNECTICUT

DOCKET NO. 440

DECEMBER 9, 2013

NEW CINGULAR WIRELESS PCS, LLC ("AT&T")  
BRIEF ON THE CONCEPT OF FUTURE ACCESS TO SHARED BACKUP POWER  
GENERATING CAPACITY AT THE TOWER FACILITY PROPOSED IN COLEBROOK

Respectfully Submitted,

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## **PRELIMINARY STATEMENT**

New Cingular Wireless PCS, LLC (“AT&T”), by its attorneys, Cuddy & Feder LLP, respectfully submits this post-hearing brief to address individual Siting Council member questions and comments in Docket 440, and other recent Dockets where AT&T has been a party, regarding the concept of shared backup power generators being deployed at new tower sites in the State of Connecticut. AT&T is taking the time and opportunity to submit a brief on the matter in this site specific Docket so that it may highlight in writing the numerous legal impediments to the Council requiring actual deployment of shared generators, much of which has been previously acknowledged by the Council, AT&T and others in Docket 432. Indeed, and only to the extent the Council intends on discussing the concept of a shared generator in its deliberations on the tower site proposed in Docket 440, we would encourage the Council to seek advice from the Attorney General’s office as it implicates matters well beyond the specific circumstances of this Docket and not every legal issue associated with the Council’s concept is being briefed by AT&T at this time.

## **SUMMARY OF FACTS**

The State of Connecticut, with the leadership of the Governor and the General Assembly, has conducted multi-faceted inquiries into the resiliency of electric and communication networks in the wake of several storms in 2011 - 2013, most notably Tropical Storm Irene and Superstorm Sandy. AT&T demonstrated in these and several other forums, including the Two Storm Panel, the resiliency and reliability of its communications networks and its storm and outage restoration capabilities in the State of Connecticut. As a general matter, much of the State’s current effort has now moved into the implementation phase of the State’s Two Storm Panel recommendations

with a major focus on further hardening of the electric distribution system in the State of Connecticut and increasing resiliency to electric outages.

As the Siting Council is aware, in the wake of Connecticut's storm experiences, it was given a discrete role as an administrative agency to study wireless networks and report back to the General Assembly. The General Assembly specifically directed the Siting Council to conduct a study regarding Federal Communications Commission ("FCC") licensed wireless providers and their ability to provide backup power to their facilities during an electric service outage, their plans concerning such backup power and legal options the State might have regarding backup power at cell sites. Public Acts 2012, No. 12-148, § 8 (a) & (b) (codified at General Statutes §§ 16-50*l* (a) & (b)). The Siting Council's report was completed approximately ten months ago and provided to the General Assembly in January of 2013 ("Council's Report").

The Council's Report, which has been administratively noticed in this Docket, was predicated on various facts and legal opinions developed in Docket 432, a proceeding in which AT&T and other major wireless carriers were invited to participate. AT&T appreciated the opportunity to participate in Docket 432 and did so voluntarily. The Docket afforded AT&T and others in the industry the ability to share information with the Council and address the legal, factual and other practical aspects of backup power generation at cell sites in Connecticut, and specifically do so in a forum dedicated to the discussion.

Ultimately, and as the Council is aware, the General Assembly did not adopt state mandates related to wireless network infrastructure and back-up power and no such amendments were made to the Public Utilities and Environmental Standards Act, 16-50*i* et seq. ("PUESA"), the Council's enabling legislation. As such, the only legislative action by the General Assembly

was to keep in place the annual disclosure mechanism codified at Section 16-501l of the Connecticut General Statutes (“C.G.S.”). That section of PUESA simply requires confidential annual disclosures to the Siting Council, as an administrative matter, of each FCC wireless providers ongoing efforts related to deployment of backup power at wireless facilities in Connecticut. Of note in this regard, AT&T just recently filed its annual report under Section 16-501l and a copy of AT&T’s enclosure letter dated October 1, 2013 is annexed hereto (without a copy of the confidential report). We encourage individual Council members to review AT&T report, and other carrier’s reports on file at the Council’s offices, as it outlines AT&T’s significant investments in backup power capacity at its cell sites in Connecticut.

Since the time that the General Assembly’s legislative session concluded in June of 2013, the overwhelming majority of cell tower applications and hearings administered by the Siting Council on tower dockets have been initiated by AT&T, which by all accounts is the most active wireless carrier in the State in deploying towers to bring new and reliable services to Connecticut’s residents.<sup>1</sup> Of note, every new tower application submitted to the Siting Council by AT&T in 2013 has included a proposal by it to deploy a fixed backup power generator at the site in addition to battery backup capacity installed in its shelters. AT&T has reasonably, responsibly and of its own accord made the business decision to provision these new tower sites with fixed backup power generation sources as part of its own network reliability plans which in fact differentiates it from several other wireless carriers. As part of that business decision, AT&T has further provided the Council with evidence in the form of reports and testimony, on a site by site basis, that its proposed 50kw generators will not create any significant adverse environmental impacts at the new tower sites it has proposed in these more recent Dockets.

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<sup>1</sup> All but one Docket from June of 2013 through the end of the year has involved AT&T as the applicant and/or co-applicant and it does not appear that the concept of a shared generator was discussed with that applicant.

Over the past several months, and despite the finding and conclusions in Docket 432, Council staff have started to ask AT&T in interrogatories whether or not AT&T would be willing to deploy a larger generator of some unspecified size at its proposed tower sites for the specific purpose of being shared by other FCC wireless carriers that may potentially co-locate at the tower site at an unspecified time in the future. The genesis of these interrogatories is not fully clear to AT&T, but in lieu of a procedural objection as to the relevance of the interrogatory and the scope of the Council's jurisdiction, AT&T and its consultants have provided the Council with additional information to the extent practical. In doing so, AT&T has also noted that it has legitimate business objections related to the size, maintenance, operation, funding and added capital expense of deploying a shared generator that would not benefit AT&T or its network subscribers directly. As such, while AT&T has routinely stated in response to staff interrogatories that it would not construct a larger generator for speculative use by future users of the tower site, AT&T has designed, in all its applications, tower site compounds that are large enough to accommodate the known equipment and other backup power sources used by its competitors.

At more recent hearings on specific tower sites, the concept of a larger single shared generator to accommodate all potential future co-locators in the marketplace has been queried by some members of the Council who appear to be advocating that the industry take such an approach when it comes to the development of new tower sites and the provisioning of fixed backup power generating capacity. In response, AT&T has typically referred back to the Council's Report in Docket 432, supplemented its application materials with data to address the comparable environmental effects of multiple versus shared generators, and otherwise demonstrated that there are no significant adverse environmental effects associated with its own

fixed generators as proposed, or even the potential for multiple generators at these tower sites. AT&T has further tried to understand why some members of the Council believe a shared generator is an idea worth pursuing by the wireless industry, but no specific opinion or details have been offered in full by the Council.

At the Council's most recent public hearing in an unrelated Docket, it was suggested that the Council might simply start conditioning approvals of tower facilities on the actual design and deployment of a large sharable generator at all tower sites. While AT&T still does not fundamentally understand why a single shared generator is believed to be more beneficial than smaller single carrier generators, this statement by the Council and the risk that such a condition might be unilaterally imposed on AT&T and other applicants puts AT&T in the position of having to address it through a legal brief on this site specific Docket in which the concept was raised by the Council. In this regard, we would respectfully request that the Council consider its legal authority and obtain the advice of its counsel. Further, that to the extent the Council were to consider any related conditions, that it only consider one consistent with the Council's jurisdiction as more fully set forth herein.

### **DISCUSSION**

- I. The Council Has Already Concluded That Its Jurisdiction Over Tower Sites Is Limited To The Physical Aspects Of Proposed Wireless Infrastructure And Does Not Extend Into The Exclusive Authority Of The FCC Over Wireless Network Reliability

The Siting Council concluded in Docket 432 that all issues relating to backup power requirements for personal wireless services facilities are in the exclusive jurisdiction of the FCC acting pursuant to its legal authority under the Communications Act of 1934, as amended by the Telecommunications Act of 1996, and its own body of regulations. *See* 47 C.F.R. § 12.2, *et seq.* (2007); Siting Council Docket No. 432 (Final Feasibility Study). The Siting Council concluded

that it is legally not feasible for the State or it as an administrative agency to regulate the deployment of backup power at personal wireless services facilities. Siting Council Report Docket No. 432 at 18. To quote from the legal conclusions reached by the Siting Council in the Council's Report:

- Federal jurisdiction generally leaves no opening for state agencies to mandate backup power requirements.
- Even if some opening were discovered, now is not the time for a Connecticut agency to mandate backup power requirements, since the FCC seems about to adopt a new backup power ruling of its own.
- An approach similar to that in other states whereby the provision of backup power is conditioned upon ETC certification would not work in Connecticut since not all CMRS providers are ETCs in this state.
- Antenna installations not associated with a tower are subject to local jurisdiction and restrictive lease provisions. A statewide backup power mandate may be incompatible or unenforceable relative to these types of installations.
- To the extent that a statewide backup power mandate necessitates leasing additional space at any existing facilities, existing leases may make it infeasible.
- The most legally feasible approach to improving CMRS providers' performance in a disaster is a voluntary agreement such as the PURA Wireless Proposal. Not all CMRS providers in Connecticut are signatories to the Wireless Proposal. Nonetheless, it is feasible for any non-signatory to sign on.

Siting Council Report in Docket No. 432 at 18.

The Council's legal findings are indeed supported by long standing principles of federal law and the FCC's legal and regulatory authority in the field of wireless network reliability which

expressly preempts all other authority at the local, state, and federal levels. 47 U.S.C. §§ 151, 301, 303 & 332 (c) (3); *See also generally Cellular Phone Taskforce v. F.C.C.*, 205 F.3d 82, 96 (2d Cir. 2000), *cert. denied*, 121 S. Ct. 758 (Mem), 148 L.Ed.2d 661 (2001) (“The FCC has broad preemption authority under the Telecommunications Act.”). As it relates to back up power mandates and cell sites, the FCC has occupied the entire field and even addressed the specific question of backup power generation at cell sites by seeking to regulate same in the wake of Hurricane Katrina. *See CTIA – The Wireless Assoc. v. Federal Communications Comm’n*, No. 07-1475, Order (D.C. Cir. Feb. 28, 2008)(back-up power rule withdrawn). Indeed, as a result of its more recent Superstorm Sandy proceedings, we note that the FCC has moved away from regulatory mandates on backup power at cell sites and has continued to focus on market forces.<sup>2</sup> As such, the Council itself rightfully held in Docket 432 that any state law, regulation, or attempt to compel the inclusion of a source of backup power generation at a personal wireless services facility, or specific type of backup power generation, would be preempted by federal law.

II. State Enabling Legislation Does Not Authorize The Siting Council As An Administrative Agency to Require Deployments of Generators

The Siting Council’s statutory authority with respect to telecommunications tower facilities is set forth in the Public Utility Environmental Standards Act, Title 16, Chapter 277a of the Connecticut General Statutes (PUESA), codified at General Statutes §§ 16-50g — 16-50ll. The Siting Council’s overall scope of jurisdiction is limited to site specific proceedings for telecommunications tower facilities and consideration as to whether or not there is a public need for a new tower facility in a given area and the proposed facility’s potential for any significant

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<sup>2</sup> Improving the Resiliency of Mobile Wireless Communications Networks; Reliability and Continuity of Communications Networks, Including Broadband Technologies, 78 Fed. Reg. 69018-01 (proposed Nov. 18, 2013) (to be codified at 47 C.F.R. pt. 4) (“we seek comment on a proposal to require facilities-based Commercial Mobile Radio Service (CMRS) providers to submit to the Commission for public disclosure, on a daily basis during and immediately after major disasters, the percentage of cell sites within their networks that are providing CMRS.”).



adverse effects on the environment. C.G.S. § 16-50p (a) (3). PUESA as recently amended by the General Assembly in 2013 expressly limits the Council's jurisdiction in this regard:

In evaluating the public need for a cellular facility described in subdivision (6) of subsection (a) of section 16-50i, there shall be a presumption of public need for personal wireless services *and the council shall be limited to consideration of a specific need for any proposed facility to be used to provide such services to the public.*

(Emphasis added.) C.G.S. § 16-50p (b) (i) as added by Section 61 of Public Acts 2013, No. 13-298. As such, the Siting Council is simply not authorized by PUESA to regulate backup power requirements at cellular tower facilities and for purposes of PUESA.

III. There Is No Nexus To Legally Support Siting Council Conditions On Tower Site Approvals That Might Require Actual Deployment Of Shared Generators by Applicants

Beyond the need for a new tower, the Council's scope of review is limited to consideration of any potential environmental effects an applicant's proposed tower site may create and whether such effects are significant or not. Moreover, conditions the Council might impose on issuance of a certificate for a specific tower facility must have a nexus to the Council's jurisdiction and the tower site as proposed by the applicant. *See Corcoran v. Connecticut Siting Council*, 50 Conn. Supp. 443, 449, 934 A.2d 870 (Conn. Super. Ct. 2006), *aff'd*, 284 Conn. 455, 934 A.2d 825 (2007) (Certificate conditioned on certain design features to minimize visibility of facility); *Town of Westport v. Connecticut Siting Council*, 47 Conn. Supp. 382, 404, 797 A.2d 655 (Super. Ct. 2001), *aff'd*, 260 Conn. 266, 796 A.2d 510 (2002) (Certificate conditioned upon abandonment of septic system, planting of dense vegetation and relocation of fuel tank); *Town of Preston v. Connecticut Siting Council*, 20 Conn. App. 474, 492, 568 A.2d 799, *cert. denied*, 214 Conn. 803, 573 A.2d 316 (1990) (condition in Certificate must relate to Siting Council's statutory authority). *See also Dolan v. City of Tigard*, 512 U.S. 374,

391, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994) (conditions in land use permit must bear “essential nexus” to legitimate state interest and “reasonable relationship” to impact of proposed development); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987) (conditions in land use permit must bear “essential nexus” to legitimate state interest).

An emergency back-up power generator is only “associated equipment” at a tower site. Regs. Conn. State Agencies § 16-50j-2a; C.G.S. § 16-50p (a) (3). In this particular Docket, AT&T, its consultants and the Council engaged in a fair amount of discussion regarding the concept of one larger shared generator in comparison to individual generators that are deployed by AT&T and possibly future carriers that may site transmitting equipment at the tower site. To demonstrate that there are no adverse environmental impacts associated with AT&T’s generator plans, and even those of future carriers assuming a speculative and cumulative effect that four carriers would collocate at the site and each deploy a fixed generator, AT&T’s consultants prepared reports and testified as follows:

- Vehicle Trips - four individual carrier generators at the tower site would not result in any appreciable traffic impact as routine generator fueling is limited to bi-annual vehicle trips. AT&T Ex. 8, A.2, Tab 1. Of note, standard operations of four carriers (i.e. routine vehicle trips for overall site inspections) would only be an average of 4.67 vehicle trips per month to the tower site versus a single family residence, which averages 289 trips per month. Id.
- Noise - Four 50kW generators operating simultaneously is only a 4 db different than one 200kW generator. Further, the only time all four carriers’ generators would operate at the same time is during an emergency event while a shared generator would be tested every week and as such have greater overall noise on a weekly basis. AT&T Ex. 8, A.2, Tab 2.

AT&T’s representatives also testified that the concept of one larger shared generator at a tower site might adversely impact network reliability for the carriers as it would introduce a single point of failure in two instances. If the generator failed, then all carriers connected to the

generator would lose power with no redundancy of services in the area of the tower, or if even one of the carriers had an equipment failure, the other carriers relying on the shared generator might also experience failures. AT&T Ex. 8, A.2; Tr. III, 11/7/13, p.170-171. Tr. III, 11/7/13, p. 177-178.

There is simply no evidence in the record for Docket 440 that one larger shared generator would address any adverse environmental effects of the tower as proposed by AT&T. In fact, the only evidence in the record is that there are no significant adverse environmental impacts associated with AT&T's proposed fixed generator, or even future deployments of fixed generators by other wireless carriers that may choose to collocate at the tower site. As such, any theory that a shared generator might mitigate some adverse environmental effects of multiple smaller generators at a tower site is not supported by the facts in Docket 440.

Given the foregoing, the Council cannot simply rely on its general authority to impose conditions to require AT&T or others in the wireless industry to actually deploy a larger shared generator as a condition to approval of a tower site. Indeed, AT&T objects to any such condition that may be considered by the Council. Such a condition would ostensibly be solely for the benefit of competing wireless carriers that, unlike AT&T, choose not to deploy fixed generators at new tower sites (of which there are currently two) and which may or may not choose to install transmitting equipment on the tower proposed in Docket 440.

IV. The Council's Interest in Planning Tower Sites For Possible Future Deployment Of Shared Generators Could Be Accommodated by Applicants and AT&T Offers What Would Be An Acceptable Condition of Approval In Docket 440

AT&T respectfully submits that the Council may, as a matter of planning, further its own interest in the potential for deployment of shared generators through the development & management plan process generally associated with any tower site for which the Council

decides to issue a certificate. As noted by some Council members, tower compound layouts could be designed to accommodate the potential for future deployments of shared generators at tower sites at the wireless industry's option. Specifically, a tower site compound could be designed in such a way to provide future flexibility for the possible deployment of a larger shared generator should a tower site owner or the industry actually make the business decision to deploy one in the future, a decision which would be made on a site by site basis.

We believe the Council could, if it wanted to in any particular Docket, request that an applicant conceptually design a tower site compound in a manner that might make deployment of a shared generator easier in the future. We respectfully submit that such an approach is much more consistent with the Council's administrative and legal authority and, by confining the matter to planning and design, avoids intrusion into areas of wireless network reliability and the FCC's jurisdiction. As such, AT&T offers the following draft condition of approval that could be inserted into the Council's standard condition language at section 2 of its standard decision & order:

"The Development & Management Plan submitted by the Certificate holder for the facility shall incorporate a tower site design layout which would permit as an option the potential for future deployment of a 200kw shared generator at the tower site."

AT&T has been willing to take the Council's leadership in this regard and is willing, in Docket 440, to consent to such a condition and present such a tower site compound layout at the development & management stage of the process.

## CONCLUSION

The Siting Council is federally preempted from regulating back-up power requirements. The Siting Council is not authorized as a matter of Connecticut state law to compel the inclusion of a source of backup power generation at a tower facility. While the Siting Council does have authority to grant a Certificate for a proposed tower site subject to conditions, those conditions must relate to the need for the tower itself, not the service and its reliability during commercial power outages.

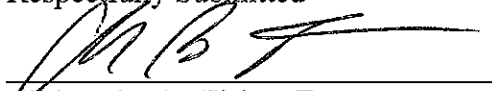
To the extent that specific carriers propose fixed back-up generators, there is generally no evidence to suggest that such generators create adverse environmental impacts alone or in combination at towers sites, which is considered on a site by site basis. Importantly, there is no evidence in this Docket to support the concept that a larger shared generator would be needed to address the speculative and cumulative effect of multiple smaller generators at the tower site. Indeed, to the extent other carriers choose to collocate at the proposed tower site in Docket 440 in the future and also propose fixed generators, AT&T has presented evidence that there would be no significant cumulative effects and it has already designed a compound large enough to accommodate their equipment.

In light of the Council's limited jurisdiction and in an effort to address the Siting Council's apparent interest in future deployment of shared generators at tower sites, AT&T has offered a condition it would consent to that relates solely to tower compound designs. AT&T submits that there is a meaningful legal distinction between designing for versus actual deployment of shared generators when it comes to the Council's jurisdiction.

On behalf of AT&T, we respectfully request that, to the extent the full Council is contemplating any conditions of approval with respect to generators at tower sites, including the

one proposed in Docket 440, that it seek the advice of counsel and consider AT&T's proposed condition which provides the Council with a meaningful tool to facilitate its interests now and in the future.

Respectfully Submitted



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October 1, 2013

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Re: Connecticut General Statutes §16-50//

**CONFIDENTIAL**

**ATTACHMENTS TO THIS LETTER ARE CONFIDENTIAL  
AND ARE NOT SUBJECT TO DISCLOSURE  
UNDER THE FREEDOM OF INFORMATION ACT**

Dear Attorney Bachman and Attorney Bergeron:

AT&T Mobility<sup>1</sup> responds to your August 23, 2013 letter sent to the undersigned; our outside counsel, Attorney Chris Fisher; and Michelle Briggs on behalf of the Connecticut Siting Council ("Council") and the Department of Emergency Services and Public Protection ("DESPP"), in which they request information in connection with Connecticut General Statutes §16-50//.

In that letter, the Council and the DESPP requested that each provider of telecommunications services submit a report for any telecommunications tower or antenna owned, leased or operated by such provider relative to the following:

1. the ability to provide back-up power during an electric service outage; and
2. plans concerning the provision of back-up power.

The letter further provides that any information provided in the report shall be considered confidential and not subject to disclosure under the Freedom of Information Act, as defined in section 1-200 of the Connecticut General Statutes.

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<sup>1</sup> New Cingular Wireless PCS, LLC does business under the name of AT&T Mobility.

In its previous filing on October 1, 2012, AT&T Mobility provided information concerning the performance of its wireless network during Hurricane Irene and Winter Storm Alfred as well as the specific information requested by the Council and the DESPP in connection with C.G.S. §16-50// (then Public Act 12-148). This year, AT&T Mobility provides Attachment A, containing updated information and demonstrating its efforts to further strengthen its wireless backup power in Connecticut.

AT&T Mobility submits that neither the state, nor any of its agencies have the authority to require backup power at cell sites because neither the Council nor DESPP have jurisdiction over wireless service providers or wireless service network reliability. Accordingly, AT&T Mobility's previous responses and the provision of the information in this letter in no way implies a waiver of its rights, nor does it constitute a consent to either the DESPP or the Council's authority over AT&T Mobility or wireless services.

AT&T Mobility works constantly to improve the resiliency and reliability of its wireless network, including its ability to operate in large scale commercial power outages. AT&T Mobility is executing a plan to enhance backup power at cell sites, increase the number of fixed generators at key locations, and improve its ability to connect generators at all locations. In addition, AT&T Mobility works constantly to improve the quality and coverage of its network. Wireless carriers need the flexibility to respond to unique events as they occur.

Should there be any questions concerning this submission, please do not hesitate to contact me.

Respectfully,

A handwritten signature in black ink, appearing to read "Jay Perez", with a stylized flourish extending to the right.

Jay Perez

Enclosures

Copies by email only:

Michelle Briggs  
Chris Fisher, Esquire  
Jay Foster  
Diane Iglesias, Esquire