STATE OF CONNECTICUT
SITING COUNCIL

New Cingular Wireless PCS, LLC : DOCKET # 447
Application for a Certificate of Environmental
Compatibility and Public Need for the construction,
Maintenance, and operation of a telecommunications
Facility located at
Stamford Tax Assessor Map 1, Parcel 1379
560 West Hill Road, Stamford, Connecticut.

: APRIL 8, 2014

REPLY TO AT&T'S OBJECTION TO MOTION FOR ACCESS

The West Hill Environmental Trust, is compelled to respond to AT&T's objection in order to further establish the legal basis for its motion and to refute the lies and arrogant innuendo contained therein.

1. AT&T claims "On April 3rd, counsel for the West Hill Environmental Trust ("WHET") telephoned and e-mailed counsel for Applicant to request access….At the time of the request, counsel for WHET had not indicated any intent to file any motions with the Siting Council."

   This is a lie. It is designed to malign and undermine Intervenor's counsel's credibility.

   See attached e-mails in which the undersigned, at Atty Laub's request, informed him of the scope of the requested access. In addition, I specifically informed Attorney Laub (after he responded to the access request "I'll ask my client, but I don't think that's likely to happen") that I would be filing a motion in order to set the process in motion.

2. AT&T creates another one its straw men when it claims that WHET seeks "unfettered and unsupervised access". The e-mails expose this lie. The scope of the requested access was quite clear and limited: A single visit for less than

three hours at a mutually agreeable time using non-destructive methods to assess the functions and values of the wetlands.

Hardly the unfettered mayhem insinuated by counsel.

3. AT&T expresses mock (at least I hope it is mock) outrage that WHET has requested access by formal process:

> We are frankly surprised and concerned that WHET has chosen to take a more adversarial approach in this administrative proceeding from the start and without simply trying to coordinate a telephone call among their and the Applicant's consultants to talk as professionals

Another lie.

Counsel for WHET "coordinated a telephone call" before filing the motion "to talk as professionals." The motion was only filed after AT&T indicated that "I don't that's likely to happen". The undersigned is baffled by the "concern" for the adversarial process. Contested administrative hearings are by their very nature, well, contested.

WHET asserts that if it were to rely on the largesse of AT&T for access to information, it may well starve.

4. AT&T's objection demonstrates a palpably strained ignorance of the law. AT&T has a lease on the premises. That lease, at paragraph 8[1] allows AT&T and the CSC access to the property for the purposes of testing related to applying for a governmental permit. That Mr. Finn, the owner of the premises, is not a party to these proceedings is a red herring and yet another straw man. If AT&T so chose*, in its sole discretion* it could allow access, but AT&T has chosen to take

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8. Access. (a) As partial consideration for the Rent paid by LESSEE pursuant to this Agreement, LESSEE shall have, throughout the Term hereof, the right to access the Leased Premises over and across the Property twenty-four (24) hours per day, seven (7) days a week for the purpose of ingress, egress, operation, maintenance, replacement, and repair of the Telecommunications Facilities (LESSEE's "Access Rights"). The Access Rights granted herein (i) include the nonexclusive right to enter the Property from the nearest public street and driveway, parking rights, and (ii) extend to LESSEE, its Customers, their contractors, subcontractors, equipment and service providers, governmental agencies of appropriate jurisdiction, and the duly-authorized employees, inspectors, representatives, and agents of each of them.

a slanderously arrogant position of denial. Otherwise, it would have said "We'll have to work out the details, but your expert will have reasonable access", instead of lying about how counsel failed to tell them about the motion and used administrative procedure to formally request a fundamentally fair hearing as guaranteed by Connecticut law. *Megin v. Zoning Board of Appeals*, 106 Conn.App. 602 (2008)[2].

5. AT&T raises the spectre of a Constitutional issue in an attempt to intimidate the Council into denying WHET's request for reasonable access. The United States Supreme Court has determined in *Camara v. Municipal Court*, 387 U.S 523, 87 S. Ct. 727, 18 L.Ed.2d 930(1967) ruled that inspections in non-emergency situations are reasonable within the meaning of the 4th amendment when a reasonable governmental interest in such a search exists. *See, Bozrah v. Chymurinski*, 303 Conn. 676 (2012). The reasonable governmental interest is twofold: (1) in conducting a fundamentally fair hearing that allows for a fair opportunity to present rebuttal evidence to AT&T's wetlands expert (See, *Grimes,* supra.)and (2) the legitimate interest in developing an adequate record upon which to determine that the application before the Council will protect the state's interest in wetlands resources under Conn.Gen.Stat. §22a-36 et seq., the Inland Wetlands and Watercourses Act. *See, Finley v. Orange*, 289 Conn.2 (2008)[3]. Since AT&T asks for permission to install an industrial facility on the

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[2] "[d]ue process of law requires that the parties involved have an opportunity to know the facts on which the commission is asked to act . and to offer rebuttal evidence." (Citations omitted; internal quotation marks omitted.) *Grimes v. Conservation Commission*, 243 Conn. 266, 274, 703 A.2d 101 (1997). In short, "[t]he conduct of the hearing must be fundamentally fair." *Bancroft v. Commissioner of Motor Vehicles*, 48 Conn.App. 391, 408, 710 A.2d 807, cert. denied, 245 Conn. 917, 717 A.2d 234 (1998);

[3] This court has recognized that the applicant has "the burden of proving compliance with the statutory requirements for a wetlands permit." *Strong v. Conservation Commission*, 226 Conn. 227, 229, 627 A.2d 431 (1993); see also *Samperi v. Inland Wetlands Agency*, supra, 226 Conn. at 593, 628 A.2d 1286. "The evidentiary burden imposed on the applicant to demonstrate that its proposal [meets the regulatory requirements] will ordinarily require an affirmative presentation to that effect." *Samperi v. Inland Wetlands Agency*, supra, at 593, 628 A.2d 1286. This court also has held that a claim that an application for a regulated activities permit does not comply with substantive wetlands regulations is cognizable under the Connecticut Environmental Protection Act. See *Windels v. Environmental*

edge of a wetland, AT&T has set in motion a process which triggers the governmental interest. As a CEPA party, WHET has a legitimate interest in both the wetlands and the right to due process and a fundamentally fair hearing.

6. Finally, AT&T asserts that WHET's motion is devoid of any relevant or genuine citation of law which supports its motion for access. AT&T itself references Conn.Gen.Stat. §22a-20 of the Connecticut Environmental Protection Act under which WHET is proceeding. That section provides explicitly "sections 22a-14 to 22a-20, inclusive, shall be supplementary to existing administrative and regulatory procedures provided by law…" It further goes on to provide that "[n]othing in this section shall prevent the granting of interim equitable relief where required and for as long as necessary to protect the rights recognized herein." §22a-20. Thus, the Council has the right to grant equitable relief (a reasonable inspection) in order to protect Intervenor's right to a fundamentally fair hearing and a fair opportunity to provide rebuttal evidence.

Protection Commission, supra, 284 Conn. at 293, 933 A.2d 256. It is clear, therefore, that if the wetlands agency has not made a determination, supported by substantial evidence, that the applicant's proposal complied with applicable statutes and regulations, a decision approving the permit cannot be sustained on appeal, regardless of whether the plaintiff has affirmatively established that the proposal will cause harm to the wetlands. We conclude, therefore, that an intervenor pursuant to § 22a-19 can prevail on appeal not only by proving that the proposed development likely would cause harm to the wetlands, but also by proving that the commission's decision was not based on a determination, supported by substantial evidence, that the development complied with governing statutes and regulations and would not cause such harm.

The Council should disregard AT&T's slandermongering and require them to provide reasonable access to the site for which they seek a governmental permit.

Respectfully Submitted,

West Hill Environmental Trust,

By Keith Ainsworth

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CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing was deposited in the United States mail, first-class, postage pre-paid this 8th day of April, 2014 and addressed to:

Ms. Melanie Bachman, Executive Director, Connecticut Siting Council, 10 Franklin Square, New Britain, CT 06051 (1 orig, 15 copies, plus 1 electronic) (US Mail/electronic).

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