

**STATE OF CONNECTICUT  
CONNECTICUT SITING COUNCIL**

IN RE:

APPLICATION OF HOMELAND  
TOWERS, LLC FOR A CERTIFICATE  
OF ENVIRONMENTAL  
COMPATIBILITY AND PUBLIC NEED  
FOR THE CONSTRUCTION,  
MAINTENANCE AND OPERATION OF  
A TELECOMMUNICATIONS FACILITY  
AT 1837 PONUS RIDGE ROAD, NEW  
CANAAN, CONNECTICUT

DOCKET NO. 509

OCTOBER 27, 2022

New Canaan Neighbors Post-Hearing Brief pursuant to Connecticut  
General Statutes § 4-176, § 16-50n, Siting Council Rules of Practice 16-  
50j-31, and Connecticut Agencies Regulations § 25-32.

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**POST-HEARING BRIEF**

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New Canaan Neighbors (“NCN”)  
Justin Nishioka,  
NCN Representative

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## INTRODUCTION

In the history of this state, no telecommunications facility has dared to develop closer to a Class I drinking water source or Class II tributary stream.<sup>1</sup> The Connecticut Department of Public Health, the Connecticut Council on Environmental Quality, Aquarion Water Company, the Sierra Club, several engineers and scientists, and hundreds of New Canaan residents, all have warned as to the dangers of proceeding with the proposed telecommunications compound at 1837 Ponus Ridge Road. (*See*, Docket, Public Comments, NCN Response to Council Interrogatories, 06/20/22, A6, and Hearing Transcript, 09/06/22, at 165:3-169:21.)

The purpose of this brief is to provide the Connecticut Siting Council (“Council”) information showing why the proposed development cannot proceed. Specifically, New Canaan Neighbors<sup>2</sup> (“NCN”) discuss: (1) why the Council must treat the owner of the parcel as a water company under Connecticut General Statutes § 25-32, (2) how the proposed construction will harm the adjacent drinking water reservoir, (3) how the listed species in this state-designated protected habitat will be harmed, (4) how the site design is contrary to the local zoning regulations, and (5) better alternative sites for a facility in the identified area of need.

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<sup>1</sup> NCN Request for Administrative Notice, 06/20/22 [“NCN Admin. Notice”], Item 45, NCN Public Record 9, Freedom of Information Act response by the Council providing the telecommunications applications nearest Class I and II watersheds; *Compare with*, NCN Admin. Notice, Items 2-28.

<sup>2</sup> NCN is granted party status and CEPA intervenor status for this matter. (Council Decision on NCN Request for Party/CEPA Intervenor Status, 05/27/22.)

Based on the information lodged on the docket, at the evidentiary hearings, and in the public comments, NCN respectfully requests that the Council deny the Applicant's request for a permit for a telecommunications facility at 1837 Ponus Ridge Road in New Canaan, Connecticut.

## CLAIMS OF LAW

### I. THE OWNER OF THE PARCEL IS REQUIRED TO RECEIVE A PERMIT FROM THE DEPARTMENT OF PUBLIC HEALTH <sup>3</sup>

Water companies are restricted from developing Class I and II watershed lands.<sup>4</sup> A permit must be sought from the Department of Public Health if a water company seeks to lease or change the use of a Class I or II watershed property (*Ibid.*) A “water company” is defined as an “individual, partnership, association, corporation, municipality or other entity, or the lessee thereof” that supplies water service to two or more consumers. (§ 25-32a.<sup>5</sup>) The limited facts available concerning the property owner in this matter indicate that 1837 LLC constitutes a “water company” under the applicable water protection regulations.

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<sup>3</sup> Following NCN's request for the Council to allow cross-examination of Applicant to verify the applicability of § 25-32, the Council stated that the post-hearing brief is the requested medium to present this issue. (Hearing Transcript, 08/16/22, at 117:1-119:13.)

<sup>4</sup> “No water company shall sell, *lease*, assign or otherwise dispose of *or change the use of any watershed lands*, except as provided in section 25-43c, without a written permit from the Commission of Public Health. . . .” (Connecticut General Statutes [“C.G.S.”] § 25-32 [“§ 25-32”]; See also, *Town of Wallingford v. Dept. of Public Health*, 262 Conn. 758 [2003] [“*Wallingford*”], at FN1.) (Emphasis added.)

<sup>5</sup> *Compare with*, Hearing Transcript 08/16/22 at 116:19-20, 117:13-14, and 118:17-18: Applicant misrepresents the definition of “water company.” Mr. Gustafson and Attorney Chiochio claim that privately held land cannot be considered water company land, contrary to the plain language of the statute.

A. 1837 LLC Constitutes a “Water Company” Under § 25-32

It is undisputable that 1837 LLC constitutes an “individual, partnership, association,” or “corporation.” (NCN Admin. Notice, 06/20/22, Item 45, Public Records 4 & 5; NCN Third. Supp. Admin Notice, Item 8.) Evidence in the record also suggests that the member(s) of 1837 LLC provide water service to multiple “consumers,” making 1837 LLC a “water company” under § 25-32. (*Ibid.*)

One identified member of 1837 LLC is Thomas Nissley, a longtime commissioner for the Town of New Canaan, who resides at 30 Oenoke Lane in New Canaan. (*Ibid.*) Commissioner Nissley provides water service to the present “residents” at the property. (*Ibid.*; *See also*, Applicants Response to NCN Motion to Compel, referring to the 1837 Ponus Ridge Road “residents”; *See also*, C.G.S § 47a-7(6), requiring that landlords provide tenants “running water.”) It can be assumed that Commissioner Nissley also provides water service to the lessees of other rental properties he owns, such as the residents of 46 Buttery Road in New Canaan. (NCN Fourth Admin. Notice, Items 3-4.) In addition to Commissioner Nissley’s tenants, it is possible that Commissioner Nissley will provide the Applicant water service for regular facility “maintenance,” such as cleaning and unclogging of drainage pipes. (*See*, NCN Fourth Supp. Admin. Notice, 08/31/22, Item 2, which states that pipes filled with sediment require that the Applicant “occasionally clean the pipes with high-pressure jetting to flush the sediment.”<sup>6</sup>) Therefore, Commissioner Nissley has

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<sup>6</sup> *See*, NCN Third Supp. Request for Admin. Notice, Public Record 34, Redacted Ground Lease Agreement, which states that the “Leased Premises may be used by

at least two or more “consumers” to whom he provides water service, making him a “water company” as defined by § 25-32. (*See*, NCN Request for Admin. Notice, Public Record 10, Office of Leg. Review Report, 2002-R-0460.<sup>7</sup>)

Based on the limited information available, it is proper to assume that the “consumers” who lease Commissioner Nissley’s numerous rental properties throughout the state constitute two or more “consumers” under § 25-32.

#### B. The Legislative Purpose of § 25-32 Requires Broad Application

The fundamental objective of this Council is to ascertain and give effect to the apparent intent of the legislature. (C.G.S. § 1-2z.) As recognized by the Connecticut Supreme Court, the intent of § 25-32 is to ensure that land adjacent to our vital water supplies is closely guarded. (*See, Wallingford, supra*, at 777.) It is tasked with protecting our state’s drinking water supplies, restricting an “individual, partnership, association,” or “corporation” from developing land within 250 feet of a Class I watershed and 150 feet of a Class II stream. (§ 25-32.)

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LESSEE for . . . maintenance.” Applicant has the right to “utilities,” and to “install separate meters or sub-meters.” Applicant also has a right of access to “other utilities necessary to serve the Telecommunications Facilities,” along “with any buildings and improvements thereon.”; *See also*, NCN Supp. Req. for Admin Notice, Public Record 30, Option Agreement between 1837 LLC and Town of New Canaan, clause 1(c): “Upon exercise of the License Option, the Town will have the right to: i) access the Compound to the same extent permitted to Homeland Towers under the Ground Lease, and ii) operate and maintain the Public Safety Equipment on the tower and within the Compound for a term of ninety eight years.”

<sup>7</sup> Investigation into the full extent of properties owned by Commissioner Nissley was limited by Council. (*See, supra*, Footnote 3.)

Following review of the “pertinent legislative history,” the Connecticut Supreme Court determined that § 25-32 applies beyond formally designated “water utilities.” (*Wallingford*, at 776-777.) It specifically addresses individuals that attempt to circumvent responsibility under § 25-32, saying that allowing such actors to evade the Department of Public Health permitting process “would create an invitation” for such persons “to frustrate the legislature’s intent and avoid the department’s regulatory jurisdiction by transferring the classified land to otherwise ‘exempt’ divisions.” (*Ibid.*, at 781.) The Court determined that the “legislature’s goal” in adopting § 25-32 is to provide “maximum protection for Connecticut’s drinking water supply.” (*Wallingford*, at 778.)

Additionally, § 25-32a specifically addresses property owners who try to evade its regulations through Balkanization, or creating distinct entities for each property. (§ 22-32a.) It states that “the number of consumers or persons supplied by *all such systems so controlled* shall be considered as owned by one company,” meaning, Commissioner Nissley’s water services for *all* his rental properties, regardless of whether a property is owned by an LLC, are considered a single water company under § 25-32a. (*Ibid.*, [emphasis added]; *See also*, NCN Request for Admin. Notice, 06/20/22, Item 45, Public Record 4; *See also*, *Wallingford*, at 781-782, stating that “[t]he courts of this state have never countenanced the tactic of avoiding regulation via organizational ‘Balkanization.’” “Where the statutory purpose could thus be easily frustrated through the use of separate corporate

entities, the Commission is entitled to look through corporate form and treat the separate entities as one and the same for purposes of regulation.”)

The Laurel Reservoir, a major drinking water source for 120,000 residents of our state, warrants the highest degree of protection. (Hearing Transcript, 08/16/22, at 53:21-54:20; *See also*, 2004 CT Stormwater Quality Manual, 8-6.) Both the lease of the property to Applicant, as well as the change in use for the parcel, require a permit from the Department of Public Health. (*Wallingford*, at 774.) Requiring a permit from the Department of Public Health ensures that the legislature’s desired high level of protection is properly met. (*Ibid.*, at 778.) Based on the information available, it is in alignment with the legislative purpose of § 25-32 and applicable case law to consider 1837 LLC and Commissioner Nissley a “water company.”

### C. The Watershed Lands at 1837 Ponus Ridge Road Are the Type of Lands § 25-32 Seeks to Protect

The proposed facility is a significant threat to the Laurel Reservoir, as indicated in the prescriptions of § 25-32. The site is not only on Class I and II watersheds, but also, water protection regulations suggest that the geographic features of the land make it unsuitable for construction near a public drinking water supply. (C.G.S. 25-37c; *See also*, Hearing Transcript 07/14/22, at 37:1-39:2.) The proposed site will totter on slopes of 50 percent, making those portions of the compound beyond 250 feet from the reservoir still fall within Class I watershed classification. (C.G.S. § 25-37c(a)(3); Hearing Transcript 06/28/22, at 47:22-24.)

Additionally, the proposed site lies on bedrock, again, warranting Class I watershed status. (C.G.S. § 25-37c(a)(6).<sup>8</sup>) The tributary stream on the parcel, which feeds directly into the Laurel Reservoir and is adjacent to “slopes fifteen per cent or greater,” has “very poorly drained soils as defined by the United States Soil Conservation Service.” (*Ibid.*<sup>9</sup>) It is land ripe for watershed disruption.

The parcel at 1837 Ponus Ridge Road is used exclusively for residential use, with only a single-family home existing on the property. (Hearing Transcript 08/16/22, at 137:2-6.<sup>10</sup>) No Department of Public Health approval was sought by the owner or by any of its agents to lease the property or change the use of the parcel as mandated by § 25-32 and the Connecticut Supreme Court in *Wallingford*. (*See*, Docket.) The proposed facility, absent this necessary Department of Public Health permit approval, cannot be constructed.<sup>11</sup>

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<sup>8</sup> *See*, Applicant Response to Council Interrogatories, A25, Attachment 4: “A total of 12 of 12 planned shovel tests were excavated throughout the proposed work area along the proposed access road and telecommunications facility compound. Nine of the 12 had to be terminated at the B Horizon due to large immovable rocks.”; Application, Attachment 9, p. 6: “This wetland area is formed in acidic glacial till deposits classified as Charlton-Chatfield complex and Canton and Charlton soils and underlain by schist bedrock known as the Trap Falls Formation.”; *See also*, Hearing Transcript, 08/16/22, at 11:21-12:19, and Hearing Transcript 09/08/22, at 128:22-129:8.

<sup>9</sup> *See*, Buschmann Supp. Admin Notice 08/08/22, Item 2, Attachment, ps. 13-15: “3—Ridgebury, Leicester, and Whitman soils,” “Drainage Class: Very Poorly drained.”

<sup>10</sup> *See*, § 25-32(f), which removes “existing structures” from Department of Public Health oversight.

<sup>11</sup> The Council has authority under C.G.S. § 4-176 to issue a declaratory ruling on the applicability of any statute or any regulation promulgated by it. (*Connecticut Mobile Home Assn., Inc. v. Jensen’s, Inc.*, 178 Conn. 586 [1979], at 589.) This grant of authority includes the power to interpret statutes and regulations. (*Ibid.*)

#### D. Applicant's Refusal to Provide Facts Showing that the Owner is Not a Water Company Requires a Denial of the Application

It is improper to assume that the parcel at 1837 Ponus Ridge Road is not Class I and II land absent facts supporting that assertion. (*Samperi v. Inland Wetlands Agency*, 226 Conn. 579 [1993], at 593.) "It is an elementary rule that whenever the existence of any fact is necessary in order that a party may make out his case or establish his defense, the burden is on such party to show the existence of such fact." (*Ibid.*; See also, *Komondy v. Zoning Board of Appeals*, 127 Conn. App. 669, at 678.) Applicant has not provided any facts supporting its claims that the owner of the parcel is not a water company as defined by § 25-32. (*See above, supra*, Footnote 5, regarding Applicant's misrepresentation of the definition of a "water company" under § 25-32.)

Nor does such blind assumption fit the general statutory scheme of § 25-32. (*See, Miller's Pond Co. v. City of New London*, 873 A. 2d 965 [2005], at FN 32.) The purpose of § 25-32 is to provide the Department of Public Health extensive jurisdictional authority over all matters concerning the purity and adequacy of any water supply source. (*Ibid.*) Allowing 1837 LLC and its member(s) to evade jurisdiction because of Applicant's refusal to provide relevant information concerning parcel ownership contravenes the broad scope of the statute and fails to afford "maximum protection" to the Laurel Reservoir. (*Wallingford*, at 778.)

Applicant's failure to provide information supporting its conclusory claims that the parcel owner is not a "water company" is dispositive. (*Samperi, supra*, at

593; *See also*, Hearing Transcript 08/16/22, at 117:1-119:18.) Since the Applicant refuses to provide any fact showing that the owner of the parcel is not a “water company” as defined by § 25-32, the Council must reject the application. (*Ibid.*)

## **II. THE LAUREL RESERVOIR WILL BE HARMED IF THE PROPOSED FACILITY IS CONSTRUCTED**

Various water protection guidelines illustrate that Applicant has failed to identify “the nature and probable environmental impact of the facility . . . including a specification of every significant adverse effect” on “water purity” and other environmental factors affecting the watershed. (C.G.S. § 16-50p.) The proposed site is “challenged with the steep slopes and existing ledge on the parcel.” (NCN Admin. Notice, 06/20/22, Item 45, Public Record 26; *See also*, Hearing Transcript, 06/28/22, at 120:19-20: “This is an area that is challenged with topography and terrain.”<sup>12</sup>) It is tough terrain. (Hearing Transcript 06/28/22, 44:3-9.) It contains highly erodible soils that do not lend themselves to infiltration.<sup>13</sup> The proposed access road will be “quite steep,” with slopes “over 19 percent” for 250 feet. (Hearing Transcript,

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<sup>12</sup> *See also*, Hearing Transcript, 06/28/22, at 84:6-7: “The terrain is very challenging in this area.”; *Compare with*, Council Admin. Notice, Item 44, Bureau of Water Management, p. 11: “[T]he greater the slope of the land being developed, the greater the potential threat of damage to adjacent wetlands and watercourses from erosion and sedimentation.”

<sup>13</sup> *See*, Buschmann Supp. Admin Notice 08/08/22, p. 25: “Runoff Class: High” and “Land capability classification (nonirrigated): 7s”; NCN Fourth Admin Notice, Item 1: “Class 7 soils have very severe limitation” and “[s]ubclass s is made up of soils that have soil limitations within the rooting zone, such as shallowness of the rooting zone, stones, low moisture-holding capacity, low fertility that is difficult to correct, and salinity or sodium content.”; *See also*, Hearing Transcript 09/08/22, at 128:18-129:14: “I see no evidence in the record that infiltration will be successful on the [sic] site.”

06/28/22, at 47:22-24.<sup>14</sup>) Over one hundred mature trees require clearing in order to conform the proposed site to the intended use. (Applicant Supplemental Submission, 09/15/22.<sup>15</sup>) It is a site that is adjacent to a vital drinking water supply that serves 120,000 residents of the state. (Hearing Transcript 09/06/22, at 144:15-19; NCN Admin. Notice 06/20/22, Item 45, Public Record 3.) Ultimately, it is not a site that should have ever been considered by the Applicant. (Hearing Transcript 09/06/22, 132:14-17, Buschmann expert witness David Ziaks, when asked how he would design the site if he were the engineer, responded, “I probably wouldn’t want to get involved in this. . . .”; Hearing Transcript 06/28/22, at 83, whereby Applicant concedes: “Believe me, if we didn’t have to go that high, we wouldn’t.”)

Sites with significant resource limitations, such as 1837 Ponus Ridge Road, “should be developed in conformance with the capacity of the site to support such development, rather than by attempting to modify a site to conform to a proposed activity.” (Council Admin. Notice, Item 35, 2002 Guidelines for Soil Erosion and Sediment Control, 3-7. [“2002 Guidelines for Soil Erosion and Sediment Control”].) However, the Applicant hopes to do the opposite, and piecemeal various “2-foot deep swales,” a “stilling basin” and “catch basin” to offset the increased stormwater resulting from the proposed construction. (Hearing Transcript, 06/28/22, at 51:12-

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<sup>14</sup> *Compare with*, 2002 CT Guidelines for Soil Erosion and Sediment Control, 4-10, stating that “construction access roads should conform to the contours of the land, avoiding grades steeper than 10%.”

<sup>15</sup> *Compare with*, Council Admin Notice, Item 51, p. 14: “Trees reduce flooding, stormwater runoff, and erosion problems. Trees increase soil permeability (the ability of the soil to hold water), help recharge drinking water aquifers, and tree roots serve as anchors that reduce erosion and sediment flowing into our streams.” “100 mature trees will catch about 139,000 gallons of rainwater per year.”

52:3; *Compare with*, Council Admin. Notice, Item 36, 2004 CT Stormwater Quality Manual, 8-6 [“2004 CT Stormwater Quality Manual”]: “Swales and infiltration basins cannot be used on steep terrain.”) During construction, right at the toe of slope, a filter sock or silt fence will attempt to remove sediment flowing into the tributary stream and reservoir. (Hearing Transcript 06/28/22, at 39:17-19; *Compare with*, 2004 Stormwater Quality Manual, at 8-2 stating that treatment systems that rely on gravity or physical separation of particles are less effective than biological systems,<sup>16</sup> and at 8-4, which states that treatment practices that seek to remove pollutants from access roads “do not address all the water quality impacts.”) As shown below, these mitigation measures proposed by Applicant are inadequate in protecting the high-value drinking water reservoir adjacent the proposed site. (*Ibid.*)

#### A. Downslope Impacts Will Harm the Laurel Reservoir

No down slope analyses were performed by the Applicant. (Hearing Transcript 08/16/22, at 95:21-24: “MR. NISHIOKA: And what down slope analyses were performed for water runoff outside the parcel? THE WITNESS (Burns): None.”) This is despite the recommended guideline for the Applicant to “evaluate the environmental conditions in areas down slope and up slope from the

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<sup>16</sup> It should be noted that the Department of Public Health recommends a rain garden be integrated into the site design. No rain garden has been integrated into the site design (Applicant’s Supp. Submission 08/31/22), and moreover, the topographical constraints of the site cannot accommodate a rain garden. (*See*, 2002 CT Guidelines for Erosion and Sediment Control, at 5-11-45, stating that vegetated filters are only applicable “where contributing slopes are no steeper than 10%” and “where slopes in the vegetated filter area are no steeper than 10%.”)

construction project.” (2002 CT Guidelines for Soil Erosion and Sediment Control, 3-7.)

Failing to address down slope impacts is problematic because “[d]own slope wetlands and watercourses (especially those containing drinking water reservoirs) which will receive runoff from the site are concerns.” (*Ibid.*<sup>17</sup>) Circumstances where the engineer uses a piecemeal approach to capture runoff are particularly concerning because such practices are callous to downstream impacts. (Hearing Transcript, 06/28/22, at 51:21-24: “It’s difficult for us to put any kind of retention pond or anything similar to that out here, so this design is kind of pieced together to do that.”; *Compare with*, 2004 CT Stormwater Quality Manual, p. 3-8: “The piecemeal approach may adequately solve localized drainage problems, but seldom addresses downstream impacts.”) Such pieced together drainage solutions provided by the Applicant “may actually increase downstream flooding.” (2004 CT Stormwater Quality Manual, p. 3-8.) It will not be until the water source is harmed, after down slope impacts are imparted, that the Applicant will have any indication that the down slope drinking water reservoir has been damaged by the proposed compound. (*See*, Hearing Transcript 08/16/22, at 79:15-81:10.<sup>18</sup>)

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<sup>17</sup> Unlike most other wetlands, the harm imparted upon a drinking water source is measured in the parts per million. (2004 CT Stormwater Quality Manual, at 5-5, C-3.)

<sup>18</sup> Applicant witness, Ray Vergati, in Hearing Transcript 08/16/2, at 79:15-81:10, when asked whether Applicant will know if the proposed site is harming the reservoir, stated: “You know, you can make the same argument, a house across the street from the reservoir with a septic system, that homeowner goes away for six months, that septic overflows and leaches, who’s watching that, who’s monitoring

Two high value drinking water resources either abut or lie on the selected site, the nearest being a tributary stream. (Buschmann Admin. Notice, Item 9.) This tributary on the parcel feeds into a cross culvert that flows directly to the Laurel Reservoir. (Hearing Transcript 08/16/22, at 86:5-87:9.) Applicant has no intention of maintaining the cross culvert, nor any sense of the condition of the cross-culvert infrastructure. (Hearing Transcript 08/16/22, at 87:21-88:13.) Nothing in the record indicates that the cross culvert is built to withstand the increased water and sedimentation flowing into the pipes. (*Ibid.*; *See also*, 2002 CT Guidelines for Soil Erosion and Sediment Control, 5-8-2: “The design and installation of subsurface drains shall be based on detailed surveys and investigations. Where failure could cause damage to structures such as roadways . . . a more detailed engineering design may be required.”) Nothing provided in the application explores the point of discharge on Aquarion Water Company land. (*Ibid.*, at 5-8-2: “Damage may also occur at or near the point of discharge.”) These factors are essential to understanding the levels of harm to be imparted onto the drinking water supply. (2002 CT Guidelines for Soil Erosion and Sediment Control, 3-7, and 2-6: “Sediment pollution causes physical, chemical and biological damage.” “[L]and use changes are the source of much of the sediment that pollutes our streams, rivers, lakes, ponds and reservoirs.”)

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that. So I can play the game all day long what if.” “These are unmanned facilities. No one is there on a daily basis, just like a homeowner that leaves their house for six months, no one would know that that septic is leaching into a reservoir or drinking water.”)

Applicant also concedes that water will flow from the constructed access road, over Ponus Ridge Road, and then into the reservoir. (Hearing Transcript 8/16/22, at 96:6-11.) Roads carry high stormwater pollutant loads, including sediments, metals, chlorides, and hydrocarbons. (2004 Stormwater Quality Manual, 2-10 & 8-4.) The increased stormwater created by the facility will carry harmful pollutant loads from Ponus Ridge Road, along with erosion and sedimentation, as well as deicing treatments, into the Laurel Reservoir's drinking water supply. (*Ibid.*; *See also*, Hearing Transcript 08/16/22, at 70:9-11, and Hearing Transcript 09/08/22, at 128:9-129:8; *See also*, Council Admin. Notice, Item 44, p. 6, stating that sediments arising from "road sanding" is a non-point source of pollution to wetlands and watercourses.)

Applicant's conclusory claims do not obviate the facts. (Hearing Transcript 07/14/22, at 104:19-105:8.) Even though the Applicant assumes, without reason or justification, that the water quality flowing from the property will not degrade or increase in volume, the guidelines show us otherwise. (*Ibid.*<sup>19</sup>) Contrary to Applicant claims, guidelines noticed by the Council suggest that clearing trees, paving roads, facility construction, filling, and excavation will increase stormwater runoff and degrade water quality. (Council Admin. Notice, Item 44, ps. 6-8, 11; 2002

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<sup>19</sup> Testimony from both Applicant and Buschmann witnesses indicate that no definitive claims can be made as to erosion, sedimentation, and the quantity of stormwater runoff without a geotechnical investigation or drainage study. Even though this information is critical to understanding the proposed construction's environmental impact, Applicant concedes that no such investigation has been conducted. (Hearing Transcript 06/28/22, at 44:22-45:6, and 55:14-19; Hearing Transcript 07/14/22, at 28:16-19, 90:24-91:9, 92:24-93:2, 103:7-105:14, 106:9-15, and 112:17-24.)

CT Guidelines for Soil Erosion and Sediment Control, 3-7, 5-11-45; 2004 CT Stormwater Quality Manual, at 2-10, 3-8, 5-5, 5-6, 8-4, 8-6, C-3; Buschmann Admin. Notice, Item 39, p. 2.) Furthermore, the Department of Public Health warns that “[t]he proposed access road will increase the amount of impermeability on the parcel and will increase the risk of runoff” and that this “runoff is a significant concern to drinking water source quality.” (Dept. of Public Health Comments, 06/01/22.)

Applicant’s “treatment practices provide some treatment benefit but do not adequately address all of the water quality impacts associated with this land use.” (2004 Stormwater Quality Manual, at 8-4.) Because of the downslope impacts to a major drinking water supply, “some treatment benefit” is not adequate. (*Ibid.*; *See also*, Hearing Transcript 08/16/22, at 60:24-61:16.) As stated before, the Laurel Reservoir deserves the highest degree of protection. (Hearing Transcript 08/16/22, 52:14-54:20.) The measures taken by Applicant, noticeably lacking of any off-site concern or consideration, will increase the downslope impacts as the applicable guidelines warn, and will harm the high-quality drinking water resources adjacent to the parcel.

**B. The Distance of the Limit of Disturbance from the Tributary is Contrary to Multiple State Recommended Guidelines**

The Public Health Code recommends a minimum distance of 100 feet between a treatment practice and a tributary stream, though this distance should be increased depending on the parcel slope feeding into the watershed. (State of Connecticut, Department of Energy and Environmental Protection [“DEEP”],

Council Admin. Notice, Item 44, Guidelines: Upland Review Area Regulations, Connecticut's Inland Wetlands and Watercourses Act, p. 10-11.)

The treatment practices employed by the Applicant will lie right at the “toe of slope,” 107 feet from the tributary feeding the Laurel Reservoir. (Hearing Transcript 06/28/22, at 39:17-19; Applicant Site Plan.) Public Health Code regulations “require 100 feet of separation between drainage or treatment practice outlets and public water supply tributaries,” a number which should be increased based on the upland slope adjacent to the tributary. (Council Admin. Notice, Item 44, DEEP, p. 10-11: “By enlarging the width of the upland review area in proportion to its slope upward from the wetland and watercourse, the wetland agency may have a better opportunity to protect wetlands and watercourses from sedimentation originating from upland construction activities. For example, where the minimum 100-foot upland review area slope exceeds 5%, regulations could add 5 feet (or other reasonable measure).”) Since the slope from the limit of disturbance into the tributary stream is approximately 2:1 (or 50%), the width of separation between the Applicant's treatment practices should be approximately 150 feet from the tributary watershed. (Hearing Transcript, 07/14/22, at 89:1-90:1; Hearing Transcript, 08/16/22, at 72:6-12.<sup>20</sup>) There is no indication that pushing back the area of

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<sup>20</sup> *See also*, Applicant Wetland Delineation Field Form, Applicant Response to NCN Interrogatories, p. 314 of 317: “Due to the steep topography located between the proposed facility and Wetland 1, APT recommends review of the final site plans to assess potential impacts to Wetland 1 due to its sensitivity being a contributing resource to a nearby public water supply resource [Laurel Reservoir].”; *See also*, Buschmann Admin. Notice, item 9, CT DEEP identifying the tributary stream on the parcel as “Class 1.”

disturbance 150 feet from the Class 1 stream, per the recommended DEEP water protection guidelines, is feasible. (*Ibid.*)

Furthermore, the Applicant's Site Plan does not integrate the recommended 5-to-10-foot distance of separation between the silt fence treatment practice and the toe of slope. (Applicant Supp. Submission 08/31/22; Hearing Transcript 08/16/22, at 68:4-8; 2002 CT Guidelines for Soil Erosion and Sediment Control, at 5-11-35.) If the Council affords the Laurel Reservoir a high level of protection and requires a 10-foot distance between the silt fence and the limit of disturbance, this will not only push the limit of disturbance within the 100-foot buffer, but will also conflict with the increased 150-foot upland review area discussed above. (*Ibid.*) The slope and proximity to the tributary does not allow for the guidelines to be followed on this site.

Either the topographical slope into the tributary needs to be reduced or the distance of the treatment practice needs to be increased to minimize the proposed compound's impact on the tributary, both of which are impracticable. (*See*, Council Admin. Notice, Item 44, p. 6 & 10.) Every rendition of the site plan will violate either DEEP recommendations or the Public Health Code. Providing the Laurel Reservoir with a high level of protection is not possible for the proposed telecommunications compound because of the geographic and topographical constraints imposed by the tributary stream lying on the selected parcel.

### C. Snow Cannot Be Plowed Without Violating the Noticed Guidelines

It is evident that the Applicant did not consider waste snow as a possible contaminant. (*See*, Hearing Transcript 08/16/22, at 92:4-94:3.) When asked whether there is a place that plowed snow could be located on the parcel, the Applicant refused to answer. (*Ibid.*, at 94:2-3: “I’m not going to answer that right now.”<sup>21</sup>) The likely reason for Applicant’s recalcitrance is because the noticed guidelines show us that nowhere on the proposed parcel is there a safe place to plow waste snow. (2004 Stormwater Quality Manual, at 5-6.)

Sediment and deicing products contained within plowed snow will flow from the proposed access road and into the adjacent source waters. (Hearing Transcript 08/16/22, at 71:11-22; *See also*, Applicant’s Supp. Submission 08/31/22.) “Waste snow accumulated from plowing activities can be a source of contaminants and sediment to surface waters if not properly located.” (2004 Stormwater Quality Manual, at 5-6.) Snow from plowing “should not be located in the following locations: storm drainage catch basins, storm drainage swales, stream or river banks that slope toward the water, within 100 feet of private drinking water supply wells, or in public drinking water supply watershed areas.” (*Ibid.*<sup>22</sup>)

Here, the proposed access road embankments fall steeply into either the adjacent tributary stream or the reservoir itself, making the access road banks

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<sup>21</sup> Mr. Burns’ refusal to answer is contrary to § 16-50o(a) which requires he provide a “full and true disclosure of the facts.”

<sup>22</sup> *See*, NCN Request for Admin. Notice, items 6, 13, 14, 15, and 16, concerning private drinking water supply wells at 1837 Ponus Ridge Road and 59 Squires Lane; *See also*, NCN Request for Admin. Notice, item 33, whereby the EPA asserts that “water run-off from rainfall or snow-melt can contaminate private wells by washing microorganisms into the well system.”

unsuitable for waste snow (*Ibid.*; *See also*, Hearing Transcript 08/16/22, at 74:6-8.) The interior of the access road is a storm drainage swale, and storm drainage catch basins lie within that swale, both of which cannot contain waste snow. (Hearing Transcript 08/16/22, at 89:4-14.) The entirety of the facility compound and upland portions of the property are part of the water supply watershed where waste snow is prohibited. (Department of Public Health Comments, 06/01/22: “This project is contained within the public water supply watershed of Laurel Reservoir, an active source of public drinking water for Aquarion Water Company.”; *See also*, Aquarion Water Company Public Comment, NCN Admin. Notice 06/20/22, Public Record 3, stating that the parcel “is situated on source water watershed lands.”; *See also*, Buschmann Admin Notice 06/21/22, Item 2.) Again, nowhere on the proposed site is there a location for waste snow to be placed that will not threaten the Laurel Reservoir.

Nonpoint sources of contamination, such as sand, should not be taken lightly, because they will cause harm to the drinking water purity. (Council Admin. Notice, Item 44, p. 6; *See also*, 2002 CT Guidelines for Erosion and Sediment Control, 2-6 and 2-7, regarding Sediment Pollution and Damage, and 2-2, stating that sand increases “sheet erosion.”; NCN Fourth Supp. Admin. Notice, Item 2, stating that sand will cause “turbid water” and “sediment clogging” of drainage pipes.<sup>23</sup>) There is

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<sup>23</sup> Applicant concedes that “sand applied to a driveway” could have an effect on the adjacent reservoir’s water quality. (Hearing Transcript 09/08/22, at 45:16-21.)

no location that waste snow can be safely placed on the parcel.<sup>24</sup> Thus, the Applicant cannot abide by the guidelines. If a monopine facility proceeds as proposed, the guidelines relating to waste snow will be violated.

#### D. Damage to Wetlands Has Occurred in “Very Similar” Circumstances

The telecommunications facility constructed on Aspen Ledges Road in Ridgefield is considered by Applicant to be “very similar” to the proposed site at 1837 Ponus Ridge Road. (Hearing Transcript 06/28/22, at 42:9-43:11.) At the Ridgefield site, an erosion control failure resulted in damage to nearby wetlands. (Hearing Transcript 07/14/22, at 113:18-114:12.) Even though the Applicant identifies the Ridgefield site as “very similar,” a review of the challenges posed by the site proposed here show that 1837 Ponus Ridge Road actually presents far more dangers to its nearby watershed than the telecommunications facility in Ridgefield.

The site in Ridgefield only required 190 cubic yards of cut. (NCN Second Supp. Request for Admin. Notice, Item 2, Docket No. 445, Application, Attachment 3, p. 5.) The proposed site on Ponus Ridge Road requires 3500 cubic yards of cut.

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<sup>24</sup> It should be noted that Buschmann witness, David Ziaks, P.E., testified that salting of the access road may be necessary. (Hearing Transcript 09/08/22, at 131:12.) Excess salt in drinking water has been linked to health problems in infants such as “blue baby syndrome.” (2004 Stormwater Quality Manual, at 2-10.) Salt is also known to mobilize harmful metals sequestered in soil, such as radon and mercury.

(Site Plan.) The guidelines warn against excessive slope cuts. (2002 CT Guidelines for Soil Erosion and Sediment Control, 3-7.<sup>25</sup>)

The site in Ridgefield only required the removal of 15 trees. (NCN Second Supp. Request for Admin. Notice, Item 2, Docket No. 445, Application, Attachment 3, p. 16.) The proposed site on Ponus Ridge Road requires the removal of at least 103 trees above six-inch diameter, as well as all smaller diameter trees. (Applicant's Supplemental Submission in Response to Council's September 8, 2022 Request, 09/15/22.) Trees provide essential erosion control and water retention functions, protecting the reservoir and maintaining high water quality. (*See, supra*, Footnote 16, Council Admin Notice, Item 51, p. 14.<sup>26</sup>)

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<sup>25</sup> *See*, Hearing Transcript 09/08/22, at 28:22-31:9, where Applicant notes that acid rock drainage, which occurs from disruption of soil and exposed bedrock, can impact wells and reservoirs; *See also*, Application, Attachment 9, p. 6: "This wetland area is formed in acidic glacial till deposits classified as Charlton-Chatfield complex and Canton and Charlton soils and underlain by schist bedrock known as the Trap Falls Formation."; *See also*, Council on Environmental Quality, Supplemental Comments 08/09/22, noting concerns of acid rock drainage; Concerning the disruption of woodland soils, *compare*, the Centennial Watershed Forest Management Plan, p. 18: "Mature forest stands may have large stores of organic nitrogen in the soil, the forest floor litter layers, and the old trees," and the 2004 Stormwater Quality Manual, 8-6, stating that the release of excess nutrients, like nitrogen, are the cause of algal blooms in lakes and ponds, leading to eutrophication and degradation of water quality.

<sup>26</sup> *See*, Department of Public Health Comment 06/01/22, recommending a reduction in the number of trees cleared; *See also*, Hearing Transcript 08/16/22, at 82:2-8, whereby Applicant concedes that the steep slopes on the parcel in their natural vegetated state have achieved a state of stability not subject to excessive erosion; *See also*, 2002 CT Guidelines for Soil Erosion and Sediment Control, 1-2: "a construction site typically erodes at a rate of 50 tons/acre/year. This erosion rate is five times greater than cropland erosion and 250 times greater than woodland erosion." "These land use changes are the source of much of the sediment that pollutes our streams, rivers, lakes, ponds and reservoirs."

Drainage systems for the Ridgefield site were built to support a 100-year storm event. (NCN Second Supp. Request for Admin. Notice, Item 2, Docket No. 445, Hearing Transcript, 06/03/2014, at 317:24-25.) The drainage design for the proposed tower here is only sized to withstand a ten-year storm event. (Hearing Transcript 07/14/22, at 22:13-22 and 93:3-8.) Water not captured by infiltration will ultimately overflow into the reservoir, as occurred in the catastrophic stormwater failures in Sprague and East Lyme. (Hearing Transcript, 8/16/22, at 96:6-11; NCN Admin. Notice, 06/20/22, Item 32, Petition 1056 East Lyme; Buschmann Admin. Notice, 06/21/22, Item 20, Petition 1178 Sprague.<sup>27</sup>)

Furthermore, the existing slopes for the Ridgefield facility site were up to 12.0%, with proposed slopes of up to 3.0%, with an access road grade up to 9.0%. (NCN Second Supp. Request for Admin. Notice, Item 2, Docket 445, Application, Attachment 3, p. 11, and Docket No. 445, Hearing Transcript, 06/03/2014, at 322:11-23.) The proposed facility here has steeper compound slopes, up to 50.0%, with existing tower location slopes up to 15.0%, steeper proposed facility slopes of up to 5.0%, and with a steep proposed access road “over 19 percent.” (Applicant Supp. Submission, 08/31/22, Site Plan, SP-2; Hearing Transcript, 06/28/22, at 47:22-24; *Compare with*, 2002 CT Guidelines for Soil Erosion and Sediment Control, 4-10:

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<sup>27</sup> The on-site drainage will only be cleaned approximately once every two years. (Hearing Transcript 06/28/22, at 53:4-21.) The cross-culvert will not be maintained by the applicant. (Hearing Transcript 08/16/22, at 87:21-88:13.); *See also*, NCN Admin. Notice 06/20/22, Item 34, stating that climate change leads to “more frequent and intense rain events” that “increase erosion and result in greater amounts of sediment washing into rivers, lakes and streams.” Increases in stormwater levels lead to “erosion, nutrient loading, and pollution of freshwater systems.” (*Ibid.*)

Construction access roads should avoid “grades steeper than 10%”; *See also*, Buschmann Admin. Notice, 06/21/22, Item 11, DEEP Centennial Watershed Management Plan, p. 18: “The greatest risk is through erosion and sedimentation during road construction and use,” and nitrate contamination to a drinking water supply is caused by “steep slopes and coarse-textured, shallow soils, or both, that encourage rapid runoff with little opportunity for biological uptake and retention of dissolve nitrate.”<sup>28</sup>) It is undisputed that the greater the slope, the greater the potential for erosion. (Hearing Transcript 08/16/22, at 85:19-86:4; Council Admin. Notice 44, Bureau of Water Management, p. 11: “The greater the slope of the land being developed, the greater the potential threat of damage to adjacent wetlands and watercourses from erosion and sedimentation.”<sup>29</sup>)

The warnings made concerning the site here on Ponus Ridge Road reflect those of a “very similar” project that resulted in damage to wetlands. (*See*, Docket No. 445, Hearing Transcript 06/03/14, at 187:25-186:20, intervenor witness stating concerns with the proposed erosion control measures; *Compare with*, Aquarion Public Comment, NCN Admin. Notice, 06/20/22, Public Record 3; Buschmann

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<sup>28</sup> The Ridgefield site was able to accommodate a retention basin, unlike the site here on Ponus Ridge Road which attempts a piecemeal approach to catching runoff. (*See*, Docket 445, Application, Attachment 3, Site Plan.) As noted earlier, this piecemeal approach will increase downstream impacts to the reservoir.

<sup>29</sup> At the evidentiary hearing for the Ridgefield matter, Dr. Danzer warned that a rain event would damage the nearby wetlands. The erosion and sedimentation concerns feared by Dr. Danzer occurred precisely as predicted. (Docket No. 445, Hearing Transcript 06/03/2014, at 180:19-184:5.) Similar warnings have been provided by Buschmann Witnesses Dr. Michael Klemens and David Ziaks, NCN hydrologist Chuck Dutill, the Aquarion Water Company, and the Department of Public Health.

witnesses Ziaks and Klemons Prefiled Testimony and cross-examination.<sup>30</sup>) The difference, however, is that the site on Ponus Ridge Road requires over 18 times more cut, the removal of over six times more trees, steeper grades for both the facility and access road, and the site here on Ponus Ridge Road involves a vital drinking water source that serves 120,000 customers. The failures in Ridgefield are instructive. The present facts, when compared to a “very similar” project, requires a denial of a permit for the proposed facility.

### **III. THE PROPOSED SITE IS A DEEP PROTECTED HABITAT FOR AT LEAST THREE STATE-LISTED SPECIES**

The Connecticut Department of Energy and Environmental Protection (“DEEP”) designated the proposed site a protected habitat, identifying three state-listed species as residing on or near the parcel. (NCN Admin. Notice, 06/20/22, Item 45, Public Record 12.) These species include the Little Brown Bat,<sup>31</sup> the Red Bat,<sup>32</sup>

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<sup>30</sup> As noted by Applicant, the Aquarion Water Company’s staff assessed a parcel downslope from the Laurel Reservoir and determined that it would not be impacted even though the proposed site was only 100 feet away from the reservoir, indicating that Aquarion Water Company is not obstructionist, but rather have assessed the proposed upgradient, steeply sloped parcel here on Ponus Ridge Road to present unique and specific dangers to its drinking water source. (Hearing Transcript, 08/16/22, at 77:18-79:6; *See also*, NCN Admin. Notice 06/20/22, Item 45, Public Record 3, Aquarion Water Company Public Comment.)

<sup>31</sup> The present Federal listing status for the Little Brown Bat is “under review,” though its listing status in Canada possibly indicates that the Little Brown Bat will ultimately receive protection under the Endangered Species Act. (Buschmann Admin. Notice 06/21/22, Item 22; NCN Admin. Notice, 06/20/22, Item 40; *See also*, NCN Response to Council Interrogatory, Answer 2.) The proposed site is the ideal habitat for the Little Brown Bat, as it prefers habitats near streams and marshes, and feeds over waterbodies. (*See*, Council Admin. Notice, Item 66, p. 411; *See also*,

and the Eastern Box Turtle.<sup>33</sup> (Application, Attachment 9, p. 40.) There is also indication that nocturnally migrating waterfowl, specifically the Pied-billed Grebe, will be harmed by the proposed facility, along with possibly the federally listed Northern Long-eared Bat and Bog Turtle. (NCN Admin Notice, 06/20/22, Items 42 - 44; Application, Attachment 5, p. 5 and 42, and Attachment 9, p. 5.<sup>34</sup>)

Even though DEEP recommends site-specific field investigations, Applicant has only conducted a “desktop analysis,” declining to conduct on-site surveys to take inventory of the listed species on the parcel. (*See*, Application, Avian Resources

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Hearing Transcript, 06/28/22, at 44:13-45:6; *See also*, Supplemental Council on Environmental Quality Comment, 08/09/22.)

<sup>32</sup> The ideal home for the DEEP-listed Red Bat is in woodland trees, most commonly along forest edges, such as in woodlands next to a waterbody. (Council Admin. Notice, Item 41, and Item 66, p. 418.) For feeding, Red Bats tend to follow the same route of about 100 yards in length. (*Ibid.*) If the proposed parcel is cleared of nearly an acre of trees, particularly if these trees lie within the route that Red Bats feed daily, the disruption of this habitat will harm the Red Bat population on site. (*Ibid.*; *See also*, NCN Response to Council Interrogatory, Answer 2.)

<sup>33</sup> Eastern Box Turtles live in “woodlands, field edges, thickets, marshes, bogs, [and] stream banks . . .” (Council Admin. Notice, Item 66, p. 77; Council Admin. Notice, Item 41, species listed as “special concern.”) The proposed site, with the woodland area surrounding the stream feeding the reservoir, presents the ideal habitat for the Eastern Box Turtle.

<sup>34</sup> Pied-billed Grebes have been spotted recently at the Laurel Reservoir. (NCN Admin. Notice 06/20/22, Item 42.) The Pied-billed Grebe is listed as “endangered” by DEEP, (*Ibid.*, Item 43), and is known to be harmed by telecommunication towers. (*Ibid.*, Item 44: “Television and cell towers pose an extreme danger to nocturnally migrating individuals, for example 65 pied-billed grebes died at a television tower in Florida between 1955 to 1980 [Muller and Storer 1999].”; *See also*, NCN Admin. Notice, 06/20/22, Item 37; *See also*, NCN Admin. Notice, 06/20/22, Item 37, Declaration of Albert M. Manville, II, Ph.D., W.W.B.: “[T]here is substantial and highly credible scientific evidence of risk from human-based structures (e.g., communication towers, power lines, buildings, bridges and other structures) based on decades of research on many species of migratory birds in and around wetlands where many species tend to concentrate (i.e., to breed, nest, fledge, roost, feed, defend territories, stage and migrate.)

Evaluation.) This “desktop” approach fails to give the necessary assurance that the proposed activity will not adversely impact endangered or threatened species, and that it will not modify the habitat of these species. (C.G.S. § 26-310(a), stating that the Council “shall ensure that any action authorized” shall not “result in the destruction or adverse modification of habitat” of a threatened species, and that it “shall use the best scientific data available” when making this determination.) If the proposed construction is allowed, the woodland area adjacent to the reservoir, which is ideally located for these specific threatened species, will be cleared and commercially developed, harming those fauna that call this parcel home.<sup>35</sup> Failure to protect the state-listed species, as well as any federally protected species that a site investigation may uncover, violates the laws of the State of Connecticut and requires a denial of the Application. (C.G.S. § 26-310.)

#### **IV. A MONOPINE FACILITY VIOLATES THE TOWN OF NEW CANAAN’S ZONING REGULATIONS**

The proposed facility lies in a residential area in New Canaan. (Bulk Filing, Technical Report, General Facility Description, p. 481.) It is an area like most other family neighborhoods, without any tall structures, and largely undeveloped woodlands with intermittent single-family homes patterned in between. (*See*, NCN Admin. Notice, 06/20/22, Item 45, Public Records 18, 22; Hearing Transcript, 07/14/22, at 35:24-36:10; Hearing Transcript, 08/16/22, at 134:3-6.) The Town of

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<sup>35</sup> Applicant describes the proposed development as converting the residential land to a “commercial, hardened site.” (Hearing Transcript 06/28/22, at 91:8-15.)

New Canaan's Zoning Regulations state that a monopine structure, such as that which is proposed here by Applicant, is antithetical to its aesthetic preferences. (Bulk Filing, Technical Report, ps. 306-307; *See also*, NCN Third Supp. Admin. Notice, Item 6.<sup>36</sup>)

Specifically, the Town of New Canaan's preferences are as follow: "1. Small cell or other similar telecommunication facilities on existing utility distribution poles. 2. Totally enclosed within an existing structure (such as a steeple, chimney, or similar), 3. Externally mounted on the wall of an existing structure (such as a new steeple, chimney or similar architecturally compatible structure. 4. Mounted on or within a new purpose-built structure designed to fit New Canaan's overall character (such as a structure designed to look like a water tank, bell tower, clock tower, silo, barn, or similar), or 5. Externally mounted on the roof of an existing structure, such as a new steeple, chimney, or similar architecturally compatible structure." (Bulk Filing, Technical Report, ps. 302-313, Town of New Canaan Planning Regulations, Section 7.8.) Monopine structures, such as the one proposed, is considered "not preferred" under the Town of New Canaan's zoning regulations. (*Ibid.*, at 306-307.)

Other Town of New Canaan documents reiterate these preferences. As noted in the Town of New Canaan's Request for Proposal, the Town of New Canaan

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<sup>36</sup> C.G.S. § 16-50x recommends that the Council consider the Town of New Canaan's "zoning regulations." Testimony from Applicant indicates that the Applicant concedes that a monopine facility is not desired by the Town of New Canaan. (Hearing Transcript 08/16/22, at 134:22-143:16.)

desires to minimize the use and proliferation of telecommunications towers whenever feasible. (Hearing Transcript, 08/16/22, at135:11-24; NCN Third Supp. Admin. Notice, Item 6, Public Record 47, Request for Proposal, p. 5: The Town of New Canaan’s goal is to “design infrastructure within the parameters of the Town’s aesthetic preferences.”) Additionally, the Town of New Canaan’s Utilities Commission opined in the New Canaan Wireless Infrastructure Policy that “no one wants to see a tall tower thrusting up in the middle of their neighborhoods. These towers are ugly, obtrusive and have a negative impact on the local scenery.” (NCN Third Supp. Admin. Notice, Item 2, p. 2.) The Wireless Infrastructure Policy continues, stating that tall towers benefit “the carrier,” not the town, and that such towers do not align with the esthetics of the town. (See, NCN Third Supp. Admin. Notice, Item 2, p. 5: “The carriers are not our adversaries. But it would be a mistake to assume that the information and data they offer us in justification of their business goals is objective and unbiased.”<sup>37</sup>) Further support of the Town of New Canaan’s desires are illustrated in the Town of New Canaan Cell Study performed in 2015 which discusses the Town of New Canaan residents’ desire for “better service without intrusive tall towers.” (NCN Third Supp. Admin. Notice, Item 3, p. 27.)

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<sup>37</sup> For example, there is little credibility to the visual impact analysis provided by Applicant as photographic evidence and hearing testimony show that the Applicant misrepresents tower visibility. (See, NCN Supp. Response to Council Interrogatory No. 7, 06/23/22, NCN Exhibit 7, Photos 1 through 11; Hearing Transcript, 09/08/22, at 158:25-161:12.)

The preferences of the Town of New Canaan are a reflection of the desires of its residents. (*See*, Hearing Transcript, 09/06/22, at 165:3-169:21; *See also*, NCN Response to Council Interrogatory No. 6.) People living in the Lost District area of New Canaan appreciate this part of town for its natural landscape. (Hearing Transcript, 09/08/22, at 167:7-168:1.) The Laurel Reservoir and Centennial Watershed State Forest, which are unique landscapes that pay tribute to “Connecticut’s commitment to the protection of the beauty and character of our state,” should not be tarnished with a large, metal tower. (*See*, Buschmann Admin. Notice, 06/21/22, Item 5.) A monopine tower does not fit the surroundings, nor the zoning regulations adopted to maintain the character of a quaint New England community. (*Ibid.*; *See also*, Buschmann Supp. Admin. Notice 08/11/22.)

#### **V. ALTERNATIVE FACILITY LOCATIONS PROVIDE EQUIVOLENT OR BETTER SERVICE AND WILL NOT HARM THE ENVIRONMENT**

Far better options exist to place a telecommunications facility. (*See*, C.G.S. 22a-19(b).<sup>38</sup>) These alternative options present little to no risk to surrounding wildlife habitats, pose no danger to vital drinking water resources, and cover the identified area of need adequately, if not better, than the site proposed by Applicant. (Buschmann Witness List 06/17/22, 360°RF Pre-filed Testimony.) Public

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<sup>38</sup> Section § 22a-19 requires the Council consider any “feasible and prudent alternative,” if the proposed facility is “reasonably likely to have” “the effect of unreasonably polluting, impairing, or destroying the public trust in the air, water or other natural resources of the state.” (§ 22a-19(a)(1); *See also*, *Gardiner v. Conservation Commission*, 222 Conn. 98, at 109 [1992]; *See also*, *Paige v. Town Plan and Zoning Commission*, 235 Conn. 448, at 463 [1995].)

safety is not impacted by placing facilities at the alternative locations identified. (NCN Admin. Notice, 06/20/22, Item 45, Public Record 29.) The Centennial Watershed State Forest will not be impacted by the alternative sites. (Buschmann Admin. Notice, 06/21/22, Items 26, 38; *See also*, Buschmann Admin. Notice, 06/21/22, Item 5.) Because of these factors, the Council should reject Applicant’s proposed site and recommend a facility at one of the following locations: (1) an alternative spot on the parcel that will not damage the watershed, (2) place facilities on utility poles in the public right-of-way, or (3) site a tower at one of the properties on Oenoke Lane that is owned by the property owner(s) or the spouse of the property owner.

A. Placing a Facility on Existing Infrastructure Will Not Harm the Watershed

A telecommunications facility on an already existing structure, such as the single-family home on the parcel, will likely have little, if any, impact on the adjacent watershed.<sup>39</sup> Notably, § 25-32(f) removes “existing structures” from Department of Public Health oversight, stating that “nothing in this section shall prevent the lease or change in use of water company land to allow for . . . telecommunications antennas on existing structures.” This provision is indicative of the lower impact that facilities placed on existing infrastructure have on nearby water sources.

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<sup>39</sup> The Council limited testimony on this issue, as seen in Hearing Transcript 08/16/22, at 101:4-15. However, § 25-32(f) allows the Council to assume this fact.

Applicant believes that placing a macrocell on the existing driveway is a feasible option. (Hearing Transcript, 08/16/22, 74:20-75:12.) It cannot be denied that utilizing existing infrastructure to site a facility, such as the current single-family dwelling, would remove all risk of watershed contamination from erosion and sedimentation. (*Ibid.*, at 75:14-24; *See also*, Council on Environmental Quality Comments, 06/27/22 and 08/09/22.) Given the proximity to a vital drinking water source and the protected species that reside on the parcel, the Council should consider placing a facility on either the existing residence or on an installation in the existing driveway.

#### B. Utility Poles Provide Better Coverage and Will Have No Impact on the Watershed

Utility poles offer a better solution to the proposed monopine facility. (*See*, Buschmann Witness List 06/21/22, Pre-Filed Testimony of 360°RF, p. 68; *See also*, Hearing Transcript, 09/06/22, 134:2-141:4.) Usage and capacity are adequately addressed by placing utility pole facilities at the sites identified by 360°RF. (*Ibid.*; *See also*, Council Admin. Notice, Item 26, p. 8.) Utility poles also provide a cost-efficient alternative in comparison to a monopine structure. (Applicant Response to NCN Interrogatory 14, 08/08/22, stating a cost of \$50,000 - \$70,000.<sup>40</sup>) The Town of

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<sup>40</sup> Applicant claims that fiber cable will be a significant expense for a utility pole facility. (Applicant Response to NCN Interrogatory 14, 08/08/22.) However, fiber cable has already been wired throughout the town by multiple providers, likely making the lease of fiber fronthaul inexpensive. (*See*, NCN Third. Supp. Admin. Notice, Item 7, at 22:43, whereby the First Selectman discusses the fiber cable

New Canaan prefers utility pole installations, listing utility pole facilities as the most desired telecommunications facility option. (Bulk Filing, Technical Report, ps. 306-307, Planning and Zoning Regulations section 7.8; *See also*, NCN Third Supp. Admin. Notice, Item 6.) Utility pole installations, moreover, are environmentally preferable to towers, and will not harm the listed-species that reside on the parcel nor the drinking water reservoir. (Council Admin Notice, Item 30, p. 2 para. 2: “In the 2014 Wireless Order, the FCC finds that collocations of smaller facilities such as distributed antenna systems (DAS) and small cells on existing towers and other structures, such as utility poles in public rights-of way, are environmentally desirable because they obviate the need for construction of new towers.”)

It may be argued by Applicant that utility poles should only be used in high density areas. (Hearing Transcript 08/16/22, 144:20-145:13.) However, the Federal Communications Commission (“FCC”) disagrees, stating that utility pole installations should be employed in “rural and suburban communities that otherwise would be on the wrong side of the digital divide.” (Council Admin. Notice, Item 26, p. 3.<sup>41</sup>) Following the recommendation of the FCC is proper in the present context. Utility poles provide a cost-efficient and environmentally compatible option to service the wireless coverage needs identified by Applicant.

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presently being installed by Frontier and also recognizes the already existing fiber cable installed by Optimum.)

<sup>41</sup> The Council limited testimony on this issue. (Hearing Transcript 08/16/22, at 146:2-147:15.) However, it can be assumed, based on previous responses from Applicant, that the Applicant disagrees with the FCC recommendations noticed by the Council. (*See*, Hearing Transcript 08/16/22, 144:7-145:13.)

C. Alternative Monopine Facility Locations Provide Good Coverage and Service the Area of Need

Thomas Nissley resides with his spouse on Oenoke Lane in New Canaan. (Buschmann Witness List 06/17/22, 360°RF Pre-filed Testimony, p. 1-3, and 8; *See*, NCN Admin. Notice, 06/20/22, Item 45, Public Record 5.) Mrs. Nissley is the owner of record for contiguous parcels on Oenoke Lane. (*Ibid.*) These parcels provide good, if not better coverage than the proposed site, covering a significant portion of the identified area of need. (*Ibid.*)

The potential sites on Oenoke Lane are not within a DEEP-listed protected habitat. (NCN Admin. Notice, 06/20/22, Item 45, Public Record 12.) Oenoke Lane locations provide equivalent public safety benefits. (NCN Admin. Notice, 06/20/22, Item 45, Public Record 27, 29; NCN Second Supp. Admin Notice, 07/08/22, Item 4-5, Public Records 32-33; Hearing Transcript, 6/28/22, at 90:3-93:23.) They do not abut the Centennial Watershed State Forest or the Laurel Reservoir. (Buschmann Supp. Exhibit List, 08/11/22, p. 14; Buschmann Supp. Admin Notice, 09/02/22.) It is a location that provides comparable, if not better coverage, and presents an alternative location whose owner is likely amenable to having a tower sited on the property. (Buschmann Witness List, 06/17/22, 360°RF Pre-filed Testimony, p. 1-3, and 8; Hearing Transcript, 09/06/22, at 137:24-138:5.)

Because the Laurel Reservoir is such a vital resource for the state, alternative options such as the location on Oenoke Lane are preferred. The Council should deny the application and recommend a facility at an alternative site.

## CONCLUSION

This is a novel situation. No application to site a telecommunications facility to date has proposed siting a cell tower in such close proximity of Class I and II water sources. Steep slopes covered in ledge outcrop careen down into the drinking water supply and first-order Class 1 tributary. The Council would be remiss to ignore the water protection statutes that guide this application. They are there to assure that vital, high-quality resources such as the Laurel Reservoir are not harmed, so that clean drinking water can be provided to the current 120,000 residents the reservoir serves, and the many generations to come.

Therefore, it is imperative that the Siting Council recognize the significant threat the proposed site poses to the environment and natural resources of our state, and deny the Application.

RESPECTFULLY SUBMITTED,  
NEW CANAAN NEIGHBORS,

By                   /s/Justin Nishioka                  

Justin Nishioka, NCN Representative

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was electronically mailed to the following service list on October 27, 2022.

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