

STATE OF CONNECTICUT
SITING COUNCIL

DOCKET NO. 488 – Homeland Towers, LLC : DOCKET #488
and New Cingular Wireless PCS, LLC
d/b/a AT&T application for a Certificate of
Environmental Compatibility and Public Need
for the construction, maintenance, and
operation of a telecommunications facility
located at one of two sites:
Kent Tax Assessor ID #M10, Block 22,
Lot 38 Bald Hill Road or 93 Richards Road
Kent, Connecticut. : OCTOBER 22, 2020

POST-HEARING PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
OF PLANNED DEVELOPMENT ALIANCE OF NORTHWEST CONNECTICUT, INC.

Preliminary Statement

Planned Development Alliance of Northwest Connecticut, Inc. (“PDA”)¹ appreciates the need for wireless telecommunications, and is not opposed to wireless coverage, but the Applicant has failed to make a compelling case for the proposed ridgeline macro towers. PDA believes the Council’s charge of balancing public need for such services with environmental compatibility is vital to this docket where Kent’s scenic values are threatened by a one-size-fits-all technology.

Pursuant to §16-50j-1 of The Public Utility Environmental Standards Act (PUESA), Title 16, Chapter 277a, the Council is charged with:

(1) **balancing** the need for adequate and reliable public utility services at the lowest reasonable cost to consumers with the need to protect the environment and ecology of the state and **to minimize damage to scenic, historic, and recreational values;**
(emphasis added)

¹ The Council grouped PDA together with Intervenor Spectacle Ridge Association (SRA) and the South Spectacle Lake Residents (SSLR). While SRA and SSLR join PDA in its brief, SSLR would additionally like the Council to know that it strongly supports the Bald Hill Neighbors’ position that the Bald Hill site has a greater impact on scenic values than the Ridge Road Site.

Connecticut's northwest hills have sparse wireless coverage, but are treasured for their scenic and recreational values. People locate to Kent and surrounding towns for the scenic and unspoiled quality of the natural environment, making it an integral part of the economy.²

In this docket there is ample evidence that a small cell alternative exists which fulfills the balancing test without compromise of the design objectives. The record shows that “the use of utility-pole-mounted small cells along Rt 341 and environs can provide more useful coverage to more residences and more streets than the proposed tower at Bald Hill. Moreover, the small cell solution has far less impact to this region, which is recognized for its scenic value”³.

STANDARDS FOR ISSUANCE OF CERTIFICATE

General Statutes § 16-50p(3) sets forth the standards which the Council must consider in determining whether to issue a certificate of public need and environmental compliance (a “certificate”) for a cell tower project. As it provides, the Siting Council may not issue a certificate, “either as proposed or as modified by the Council, unless it shall find and determine: (A) ... a public need for the facility and the basis for the need, (B) the nature of the probable environmental impact of the facility ... including a specification of every significant adverse effect, including, but not limited to ... (iii) public

² The record contains multiple references to the value placed on the scenic nature of Kent. *See generally*, testimony of Kent Land Trust (Manes), Town of Kent Conservation Commission (Manes), PDA (Powell), SSLR (Donnenfeld), SRA (Sippel), Housatonic Valley Association (letter, Werner); and the Council on Environmental Quality comments.

³ Testimony of David Maxson of Isotrope, LLC, Exhibit III B 7.

health and safety, scenic, historic and recreational values ... [and] (C) why the adverse effects or conflicts referred to in subparagraph (3) of this subdivision are not sufficient reason to deny the application ” C.G.S. § 16-50p(3)(A) through (C).

In addition to these factors, C.G.S. § 16-50p(b)(1) requires the Siting Council, in every application for a cell tower project, to examine, among other things, “(C) whether the proposed facility would be located in an area of the state which the council, in consultation with the Department of Energy and Environmental Protection and any affected municipalities, finds to be a relatively undisturbed area that possesses scenic quality of local, regional or state-wide significance, and (D) the latest facility design options intended to minimize aesthetic and environmental impacts.” The Siting Council may deny an application “if it determines that ... (iii) the proposed facility would substantially affect the scenic quality of its location or surrounding neighborhood and no public safety concerns require that the proposed facility be constructed in such a location.” C.G.S. § 16-50p(b)(1)(iii).

Finally, under C.G.S. § 22a-19, the Council may not approve the certificate if the project “does or is reasonably likely to unreasonably pollute, impair or destroy the public trust in the air, water or natural resources of the state if, considering all relevant surrounding circumstances and factors, there is a feasible and prudent alternative consistent with reasonable requirements of public health, safety and welfare.” R. Fuller, *Connecticut Land Use Law & Practice* § 32:6, p. 206 (2007 ed.), citing § 22a-19(b). Given the substantial evidence demonstrating the proposed towers’ unreasonable impact on the scenic vistas in this relatively undisturbed corner of the state, and the importance which federal, state and local authorities place on preserving

those scenic attributes, the burden is on the Applicants to demonstrate that, “considering all relevant surrounding circumstances and factors, there is no feasible and prudent alternative to the ... conduct and that such conduct is consistent with the reasonable requirements of the public health, safety and welfare.” C.G.S. § 22a-17; see *Waterbury v. Town of Washington*, 260 Conn. 506, 549-51 (2002).

PROPOSED FINDINGS OF FACT

PDA proposes the following findings of un rebutted facts from the record of this proceeding:

1. Northwestern Connecticut is among the State’s most scenic areas, and preservation of its vistas has both ecological and economic value. (Comments of the Connecticut Council on Environmental Quality (CEQ) ¶3)
2. People locate and travel to Kent and surrounding towns for the scenic and unspoiled quality of the natural environment, making it an integral part of the economy, so much so that the Town of Kent Plan of Conservation & Development invokes Kent’s “scenic rural character” on almost every page. (Testimony of Connie Manes Tr. 642, lines 9-22; 648, lines 17-22; Tr. 632)
3. The Housatonic Valley Association (“HVA”), a regional land trust and conservation organization, described the proposed locations for the wireless towers as being “in the heart of what is arguably the most exceptional stretch of Housatonic River Valley and the sweeping unspoiled ridgelines that define it. The region is a state jewel that is nationally recognized for its breathtaking views, natural beauty and world class outdoor recreation.” (PDA, Testimony of Powell, III B 3 attachments)
4. Millions in public and private funds invested through five decades of coordinated effort have yielded a vast network of publicly accessible lands and waters in this

region. Visitors from all over the world visit this area of the State to experience natural beauty and outdoor recreation, and support the region's inns, restaurants and shops. As a result, the scenic beauty and outdoor recreation are economic drivers for the entire region and contribute significantly to the state's economy. (PDA, Testimony of Powell, III B 3 attachments, HVA Letter pp.1-2)

5. Congress designated the northwest region of Connecticut, which includes the Town of Kent, as the Upper Housatonic Valley National Heritage Area – one of just 50 such designations in the country. (CEQ Comments; Council Administrative Notice Item #76 (National Heritage Areas Map; Testimony of Powell at p.4; PDA Admin Notice Items III A 3 and 4)
6. The purpose of the Upper Housatonic Valley National Heritage Area Act is “to assist communities, organizations, and citizens in the State of Connecticut ...in identifying, preserving, interpreting, and developing the historical, cultural, scenic, and natural resources of the region for the educational and inspirational benefit of current and future generations”. (PDA Admin Notice #1, §272(b)(4))
7. Pursuant to §16-50j-1 of The Public Utility Environmental Standards Act (PUESA), Title 16, Chapter 277a, the Council is charged with: (1) *balancing* the need for adequate and reliable public utility services at the lowest reasonable cost to consumers with *the need to protect the environment and ecology* of the state and *to minimize damage to scenic, historic, and recreational values*;.... (3) *encouraging research to develop new and improved methods oftransmitting and receiving... telecommunications signals with minimal damage to the environment.* (Council Rules of Practice, Article 1, Part 1)(emphasis added)
8. The Council has acknowledged that the terrain in this region makes finding acceptable sites particularly challenging. Consequently, the Council strongly encourages the wireless carriers serving this region to collaborate with each other, with municipal officials, and with any other parties having resources

relevant to the region's telecommunications infrastructure, on developing strategies to provide the needed services. (PDA Admin. Notice Item #1; Decision & Order in Docket 347 New Milford (Opinion at p.3))

9. While the legislature has directed the Council to minimize proliferation of towers, the Council recognizes that a potential strategy may be to include more but shorter towers or to identify a wider range of municipal sites, to expand stealth options, or to design coverage with the maximum use of new wireless technologies. (PDA Admin. Notice #1; Decision & Order in Docket 347 New Milford (Opinion at p.3))

10. Through the Federal Telecommunications Act of 1996, Congress seeks to promote competition and encourage technical innovations for telecommunications services. (Council Admin. Notice, no. 4, Telecom Act 1996)

11. Either of the proposed macro towers would have a substantial negative impact on scenic values and scenic vistas. (Manes, Transcript 648-651; Sippel, Tr. 344, Donnenfeld, Tr. 345-347, Powell, Pre-filed testimony III B 3)

12. Kent became a leader among Connecticut communities when it crafted a zoning Horizon Line Conservation Overlay District (Kent Zoning Regulations section 5600) and more recently adopted its Telecommunication Provisions (section 9600), the purpose and intent of which include the preservation of scenic views and vistas that are critically important to the rural landscape and the character of the Town of Kent. (Application, II B 1(b) Kent Zoning Regulations and Map; PDA Pre-filed Testimony Powell, HVA letter attachments; Manes, Tr.649-650; Winter, Tr. 518-519)

13. The proposed macro tower facilities would violate the Horizon Line Conservation Overlay District regulations. (Application, II B 1(b) Kent Zoning Regulations and

Map; PDA Pre-filed Testimony Powell, HVA letter attachments; Manes, Tr.649-650; Winter, Tr. 518-519)

14. The Northwest Connecticut Land Conservancy testified that “[t]hese towers could be visible from important public destinations like the Appalachian Trail and South Spectacle Pond in Kent and Lake Waramaug in Warren. Clearly, the impact from these potential towers is significant and would persist for decades.” (PDA Pre-filed Testimony of Paul Elconin, III B 6)

15. The Applicant would require more macro tower sites than a single proposed facility at Site A or Site B in the area to provide needed coverage. (Lavin, Tr. 114-115, lines 1-15)

16. The coverage analysis provided by Isotrope demonstrates that coverage from only seven small cells along Route 341 would cover more homes and more miles of road than the Bald Hill tower (PDA Pre-filed testimony of Isotrope (III B 8).

Facilities	Square Miles	Number of Residences	Miles of Streets (includes Rt 341)	Miles of Rt 341
Bald Hill Road	3.7	148	8.8	1.9
7-Node Small Cells	3.9	178	11.4	3.7

Table 1- Comparison of Bald Hill and Small Cell Deployments using the contiguous footprints at -93 dBm

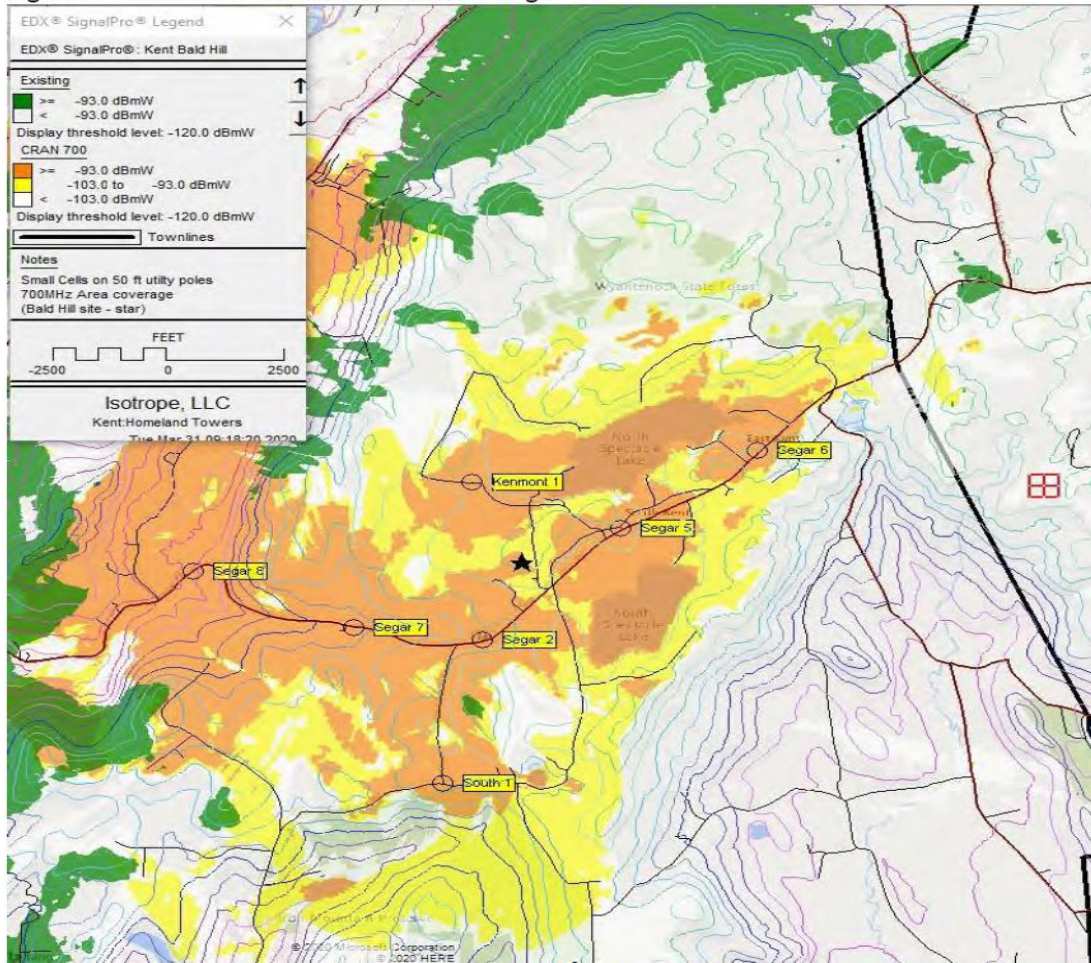
17. Applicant’s coverage statistics for its macro towers are overstated because they utilize a Census Tract model which artificially spreads population evenly over open land within a census tract. This results in an over-estimation of coverage need in areas that are forested and without actual structures. In contrast, Isotrope’s coverage statistics are based on actual house counts within the projected coverage area. (Lavin, Tr. 65-66, 232; Maxson, 338-339)

18. Due to the hilly topography of Route 341, a small cell solution can (i) provide better coverage of Route 341, including the most dangerous S curve portion that is not served by either proposed tower and (ii) provide for a hand-off of coverage

from the cell tower in Kent Town Center which the proposed towers do not. (Powell, Pre-filed testimony III B 3; Isotrope, III B 7 at p.3, #2 and p.4, #6)

19. The coverage maps provided by Isotrope demonstrate that a small cell array can be configured to provide superior 700Mhz coverage to the area surrounding Applicants' proposed tower sites (PDA Pre-filed Test III B 8; Maxson, Tr.:

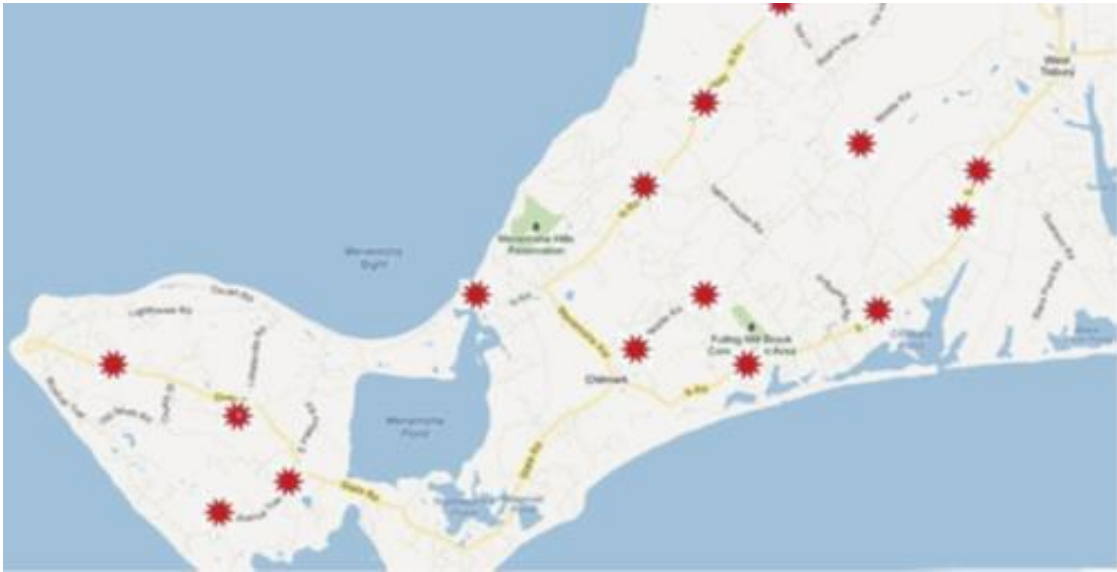
Figure 3 – Notional Small Cell Network Coverage



Note – Area of coverage including northern Cobble Road and Studio Hill Road obscured by legend.

20. A small cell array can host general coverage wireless equipment that transmits on the same bands as AT&T service, including FirstNet in the 700Mhz band. This is demonstrated by AT&T's operation of a small cell array on Martha's Vineyard in Chilmark, Massachusetts which operates on FirstNet frequencies and uses backup generators. (PDA Late Filed Exhibits, Isotrope, III B 9; Fisher-Maxson dialogue Tr. 590)

21. No new cell towers have been constructed in Chilmark or Aquinnah on Martha's Vineyard since the construction of the small cell array in 2012, and the array covers an area of 23 square miles. (PDA Late Filed Exhibits, Isotrope, III B 9; Fisher-Maxson dialogue Tr. 588-589)



22. A small cell array can be configured using existing utility poles along road rights of way supplemented, if necessary, by new freestanding low profile poles up to 50ft in height with relatively no scenic resource impact. (Transcript 293, lines 4-21)

23. In 2019, Connecticut passed legislation, Public Act 19-163, that requires the Connecticut Department of Transportation to make state road rights-of-way available for the installation of small cells. (Maxson, Tr. 604-605; Town of Kent Admin. Notice #3)

24. The basic utilities required for a small cell array, fiber optic cable and power, are already present in the target area for coverage identified as the area around Route 341 in Kent. (Maxson Cross Ex. Tr. 607-608)

25. A small cell array is more resilient than a macro-tower site because each node is an independent source of coverage which may run independent of other nodes while a tower site will be completely taken off line if the communications or fiber lines are brought down in a storm. (Maxson, Transcript 308, 16-21; Tr. 613-614)
26. Small cell arrays can be outfitted with backup battery power, supplemented by fuel cells or generators at select locations to maintain minimum communications during a power outage. (Maxson, Transcript 294, 582; PDA Late Filed Exhibit G III B 9)
27. AT&T could deploy a small cell array in the target coverage area in Kent without the assistance of a third-party provider, and it is doing so in Connecticut. (Maxson, Tr. 616, 620-621)

PROPOSED FINDINGS OF LAW

A. The Applicants Have Failed To Demonstrate That The Environmental Compatibility Of A Macro Tower Is Balanced By The Public Need Given That There Exists A Feasible Small Cell Solution Which Creates Less Impact To Scenic Resources

The Telecommunications Act of 1996 mandates that only “significant gaps” be filled. Sprint Spectrum L.P. v. Willoth, 176 F.3d 630 (2d Cir. 1999). In that case, Sprint filed an application to build three cell sites with a 150-foot tower at each location in Ontario, New York. The zoning commission denied the application and Sprint appealed. The Second Circuit affirmed the District Court’s summary judgment ruling in favor of the commission. One of the issues raised by Sprint was that the commission’s denial of its application “prohibits or has the effect of prohibiting the provision of personal wireless services” in violation of §332(c)(7)(B)(i)(II) of the Act.

In that case, as in this one, the applicant argued that it has the right under the Act “to construct any and all towers that, in its business judgment, it deems necessary to compete effectively with other telecommunications providers.” Id. at 639. In rejecting this claim, the Second Circuit reasoned that since Sprint would never propose to build a tower it thought was unnecessary to compete, “such a rule would effectively nullify a government’s right to deny construction of wireless telecommunications facilities, a right explicitly contemplated in 47 U.S.C. § 332(c)(7)(B)(iii).” Id.

Instead, the Second Circuit held that “the Act’s ban on prohibiting personal wireless services precludes denying an application for a facility that is the least intrusive means for closing a significant gap in a remote user’s ability to reach a cell site that provides access to land-lines.” Id. at 643. Sprint v. Willoth, *supra*, has been followed by many courts, including the Third Circuit. In adopting the rule emanating from Willoth, the Third Circuit requires proof that: (1) “the facility will fill an existing significant gap in the ability of remote users to access the national network” and (2) “the manner in which it proposes to fill the significant gap in service ***is the least intrusive on the values that the denial sought to serve.***” APT Pittsburgh Limited Partnership v. Penn Township, 196 F.3d 469, 480 (3d. Cir. 1999)(emphasis added).

The burden of not only demonstrating the existence of a significant gap but also of proving that the manner in which that gap will be filled is the least intrusive means possible rests squarely with the Applicant. While the Intervenors do not dispute that there is a gap in coverage in southern and eastern Kent, the Applicants have not demonstrated that either tower is necessary to fill that gap or that a macro tower above scenic ridgelines in a National Heritage Area is the least intrusive means of filling that

gap, especially where the AT&T is currently utilizing such technology for broad coverage in at least one scenically sensitive location and is deploying small cell technology throughout Connecticut.

Moreover, the Applicants' suggestion that the small cell array is not viable is speculative in that the Applicant appears to have done very little to fairly consider a small cell solution. As one witness testified, Thomas Fuller, the 17th century philosopher, once said, "Nothing is easy to the unwilling." (Tr. 602, lines 10).

To the contrary, the Intervenors have demonstrated that there is a visually less-intrusive alternative which will provide coverage to more homes and miles of road for the target area using a type of system that AT&T is already using for general coverage and 700Mhz bands (the same used by FirstNet) in a scenically sensitive area.

The Council cannot dictate the type of technology an Applicant chooses, but it can deny the chosen configuration where a reasonably deployable alternative of lesser-impact exists. At the very least, the Applicant has failed to meet its burden of showing that there is no such alternative. *Hoffman v. Inland Wetlands Commission*, 28 Conn. App. 262, 265 (although applicant need not submit plans or drawings for all possible alternatives, burden of proof concerning feasible and prudent alternatives lies with applicant), *cert. denied*, 223 Conn. 925, 614 A.2d 822 (1992).

B. The Proposed Tower Will Have a Major, Negative Impact on a National Natural Heritage Area, Protected Ridgelines and Scenic Vistas, Thus a Tower is Not the Least Intrusive Means of Providing Service to the Identified Coverage Gap

Without undue repetition of the proposed findings of facts recited above, a small cell array alternative is more environmentally compatible because:

- a. It would be shorter in height.
- b. It would be seen from fewer homes.
- c. It presents a smaller visual impact to recreational and scenic lake resources.
- d. It presents smaller visual impacts to recreational trails and protected open space.
- e. It can be configured in part by utilizing already existing utility infrastructure.
- f. Even if additional coverage is required, additional small cell arrays can be deployed with similar low impact effect.

CONCLUSION

Based on the Applicants' inability to carry their burden of showing that the deficiency in coverage will be filled with the least intrusive means possible, the preponderance of the expert testimony that small cells not only meet, but exceed, the coverage of either of the proposed tower locations, and the testimony of the witnesses regarding the substantial adverse impact of a tower to the Town, and lack of witness support for the positions taken by the Applicants, it is clear that a tower at either location fails to meet the requisites of C.G.S. Section 16-50p and must therefore be denied.

Intervenors respectfully request the Council deny this Application on the grounds that the Applicant has failed to demonstrate that it has balanced the public need with the proposed facility's environmental impact.

PLANNED DEVELOPMENT ALLIANCE OF
NORTHWEST CONNECTICUT, INC.

By: _____

Keith R. Ainsworth, Esq.
Law Offices of Keith R. Ainsworth, Esq., LLC
51 Elm Street, Suite 201
New Haven, CT 06510-2049
(203) 435-2014
keithrainsworth@live.com

CERTIFICATION

This is to certify that, on the 22nd day of October, 2020, a copy of the foregoing was sent, electronically, and via first class United States mail, postage prepaid, to the following counsel and pro se parties of record:

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

Electronic copies to:

Homeland Tower/AT&T c/o Lucia Ciocchio, Esq., Cuddy & Feder, LLP, 445 Hamilton Avenue, 14th floor, White Plains, NY 10601 (203) 761-1300, (914) 761-5372 fax
lciocchio@cuddyfeder.com (electronic)

Michael D. Rybak, Jr., Esq.
Guion, Stevens & Rybak, LLP
93 West Street
PO Box 338
Litchfield, CT 06759 mdrjr@litchlaw.com ; afd@litchlaw.com
(all by e-mail)

Daniel E. Casagrande, Esq.
Cramer & Anderson, LLP
30 Main Street, Suite 204
Danbury, CT 06810
Telephone: 203-744-1234
Facsimile: 203-730-2500
dcasagrande@crameranderson.com ; daniel@rosemark.law (email)

Keith R. Ainsworth, Esq.