

STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL

IN RE: :
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 :
 APPLICATION OF NEW CINGULAR WIRELESS PCS, : DOCKET NO. 408
 LLC FOR A CERTIFICATE OF ENVIRONMENTAL :
 COMPATIBILITY AND PUBLIC NEED FOR THE :
 CONSTRUCTION, MAINTENANCE AND OPERATION :
 OF A TELECOMMUNICATIONS FACILITY AT 95 :
 BALANCE ROCK ROAD, HARTLAND, CONNECTICUT :
 :
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 : JUNE 15, 2011

PARTY THOMAS H. SIRMAN’S POST-HEARING BRIEF

This post-hearing brief is submitted on behalf of party Thomas H. Sirman to set forth the factual and legal grounds why the captioned application should be denied.

I. PRELIMINARY PROCEDURAL MATTERS

A. Standing.

In response to his November 9, 2010 notice, the siting council granted party status to Mr. Sirman on November 18, 2010. (CSC Approval of Party Status 11/18/10.) Mr. Sirman also intervened as a party on January 13, 2011, under General Statutes § 22a-19 of the Connecticut Environmental Protection Act. (Thomas H. Sirman Request for Intervenor Status (G.S. 22a-19 (a)). Mr. Sirman has party and intervenor status in this proceeding.

B. Burden of Proof.

The applicant to an administrative agency bears the burden of proof. Samperi v. Inland Wetlands Agency, 226 Conn. 579, 593 (1993). “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.” (Internal quotation marks omitted.) Zhang v.

Omnipoint Communications Enterprises, Inc., 272 Conn. 627, 645 (2005), quoting Nikitiuk v. Pishtey, 153 Conn. 545, 552 (1966); see Komondy v. Zoning Board of Appeals, 127 Conn. App. 669, 678 (2011) (“[T]he burden rests with the applicant to demonstrate its entitlement to the requested relief.”); C. Tait, Connecticut Evidence (3d Ed.2001) § 3.3.1, p. 136 (“[w]hoever asks the court to give judgment as to any legal right or liability has the burden of proving the existence of the facts essential to his or her claim or defense”).

The applicant, New Cingular Wireless PCS, LLC, has the burden of proof to show it is entitled to a certificate of environmental compatibility and public need for the proposed cellular communications tower under the Public Utility Environmental Standards Act, General Statutes §§ 16-50g et seq.

C. Standard of Proof.

The statutes governing siting council consideration of applications for a certificate of public need are silent as to the standard of proof that the applicant must meet in order for the application to be granted. “In the absence of state legislation prescribing an applicable standard of proof . . . the preponderance of the evidence standard is the appropriate standard of proof in administrative proceedings . . .” Goldstar Medical Services, Inc. v. Dept. of Social Services, 288 Conn. 790, 821 (2008).

D. Due Process and Fundamental Fairness.

The requirements of fundamental fairness and due process apply to siting council procedures. Concerned Citizens of Sterling v. Connecticut Siting Council, 215 Conn. 474 (1990); Rosa v. Connecticut Siting Council, Superior Court, judicial District of New Britain, Docket No. HHB-CV-05-4007974-S (March 1, 2007), 2007 WL 829582, Torrington v. Connecticut Siting Council, Superior Court, judicial district of Hartford, Docket No. CV90-0371550-S (September 12, 1991), 1991 WL 188815.

In Grimes v. Conservation Commission, the Supreme Court defined the parameters of “fundamental fairness” in administrative proceedings:

Although no constitutional due process right exists in this case, we have recognized a common-law right to fundamental fairness in administrative hearings. “The only requirement [in

administrative proceedings] is that the conduct of the hearing shall not violate the fundamentals of natural justice.” Miklus v. Zoning Board of Appeals, 154 Conn. 399, 406, 225 A.2d 637 (1967). Fundamentals of natural justice require that “there must be due notice of the hearing, and at the hearing no one may be deprived of the right to produce relevant evidence or to cross-examine witnesses produced by his adversary....” Parsons v. Board of Zoning Appeals, 140 Conn. 290, 293, 99 A.2d 149 (1953), overruled on other grounds, Ward v. Zoning Board of Appeals, 153 Conn. 141, 146-47, 215 A.2d 104 (1965). Put differently, “[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.” Pizzola v. Planning & Zoning Commission, 167 Conn. 202, 207, 355 A.2d 21 (1974); see also New England Rehabilitation Hospital of Hartford, Inc. v. Commission on Hospitals & Health Care, 226 Conn. 105, 149-50, 627 A.2d 1257 (1993) (administrative agency “cannot properly base its decision ... upon [independent] reports without introducing them in evidence so as to afford interested parties an opportunity to meet them”); Huck v. Inland Wetlands & Watercourses Agency, 203 Conn. 525, 536, 525 A.2d 940 (1987) (administrative due process requires due notice and right to produce relevant evidence); Connecticut Fund for the Environment, Inc. v. Stamford, 192 Conn. 247, 249, 470 A.2d 1214 (1984) (same). The purpose of administrative notice requirements is to allow parties to “prepare intelligently for the hearing.” Jarvis Acres, Inc. v. Zoning Commission, supra, 163 Conn. at 47, 301 A.2d 244.

(Footnotes omitted.) Grimes v. Conservation Commission, 243 Conn. 266, 273-4 (1997).

The siting council is bound by these requirements in its consideration of this application.

II. PROPOSED FACTUAL FINDINGS

Party Thomas H. Sirman’s proposed factual findings are set forth in the appendix to this post-hearing brief, together with the evidence in the administrative record which supports them.

III. CLAIMS OF LAW

Connecticut General Statutes Section 16-50p sets forth the criteria that the siting council must follow in deciding an application in a certification proceeding: (1) whether the applicant has established a public need for the facility; and (2) whether the applicant has identified all adverse environmental impacts and conflicts with state policy and established that they are not sufficient to deny the application.

In this proceeding, the applicant has failed to demonstrate both public need and lack of adverse environmental impact.

A. The Proposed Tower would Significantly Affect a Scenic Area of Statewide Significance and No Public Safety Concerns are Implicated.

General Statutes Section 16-50p (b) (1) (c) requires that the siting council examine “whether the proposed facility would be located in an area of the state which the council, in consultation with the Department of Environmental Protection, and any affected municipalities, finds to be a relatively undisturbed area that possesses scenic quality of local, regional or statewide significance. The council may deny an application for a certificate if it determines that . . . (iii) the proposed facility would substantially affect the scenic quality of its location and no public safety concerns require that the proposed facility be constructed in such a location.”

The proposed tower at 95 Balance Rock Road would be surrounded by Tunxis State Forest, a pristine woodland of statewide significance. (Proposed Finding of Fact (“PFF”) No. 1). The tower would also be adjacent to Barkhamsted Reservoir, the headwaters of the Farmington River, an important bird area, and a natural resource of statewide significance. (PFF No. 2). If constructed, the tower would be visible from many locations in Tunxis State Forest, from the summit of Pine Mountain, and from the bluffs overlooking the Barkhamsted Reservoir. (PFF No. 3, 4).

The applicant’s argument that the views of the proposed tower would be quite limited from the State Forest must be discounted. The applicant’s radio frequency engineer, in responding to a question as to why the proposed tower must be so high, testified that radio frequency signals basically follow line of sight, so a 190 foot tower at Site “C” is necessary to provide “coverage” for the applicant’s target area:

MR. GOULET: Sure. Radio frequency signals don’t behave like a waterfall, especially at these frequencies. It’s not the idea of you shooting say a hose of water over a hill and the signals are just going to drop down. It’s basically at these frequencies it’s line of sight and you have to get that line of sight through the trees and everything else that’s between the source and where you’re trying to cover. Shadowing is if you have -- if you’re elevated but the road that you’re trying to hit is down at a much lower elevation you get shadowed, if you will, the signal gets shadowed by the terrain and the topography and so you cannot get as strong a signal in that coverage gap that you need to get because of the blockage.

(Tr., 05/16/11, 1:05 p.m., pp. 23-24).

For his part, Mr. Libertine, the applicant's view shed "expert," agreed that the proposed tower would be visible from anywhere in the Tunxis State Forest where there was a direct line of sight between the viewer and the tower, although when pressed, claimed that the data were insufficient for him to be able to "say for sure":

MR. SHERWOOD: If you would take a look at AT&T's responses to the -- excuse me -- (pause) -- to the first set of Siting Council interrogatories at Tab F. This is the map that -- it's a foldable map. I guess the first question I want to ask you with respect to this map is if there was no vegetation at all involved, you would certainly see the tower, which is shown at 95 Balance Rock Road? You would certainly see the tower from any location on this map that was higher than the tower? And there's a number of ridges which are indicated to be approximately 425 meter in the immediate area which are within the state forest. So again, assuming that there was no forest cover at all, no trees at all, you would see -- you would certainly see them from the high spots?

MR. LIBERTINE: There would certainly be a direct line of sight, yes.

MR. SHERWOOD: And you would also -- again if there were no trees at all, you would also see them from many of the low spots?

MR. LIBERTINE: Certainly.

MR. SHERWOOD: Now -- obviously we know that that's not the case, at least we know it's not the case now. We know that as it stands now, most or all of Tunxis State Forest is forested. But there certainly are breaks in the forest. There certainly are meadow areas, trails, and things like that --

MR. LIBERTINE: Correct --

MR. SHERWOOD: -- and so is it not the case that there are almost certainly considerably more views within Tunxis State Forest of this tower than those that you have specifically identified? In other words, you give us a couple of shots along the trail. There certainly are other spots along the trail where that tower is visible?

MR. LIBERTINE: I can't say that for sure.

(Tr., 03/01/2011, 11:25 a.m., p. 154-156).

Mr. Libertine relies on the tree cover in the State Forest to justify his testimony that the views of the tower from the State Forest would be limited. Given his methodology and the assumptions underlying his analyses, this reliance is not warranted. First, Mr. Libertine estimated the type of trees in the Tunxis State Forest (deciduous or evergreen) by simply looking at aerial photographs. No field study was done. Second, he "guesstimated" the height of trees in the State Forest, making "some" measurements, and testified that he was uncertain of just what he meant when he reported that 65 feet

was the “average” height of the trees found there. He was certain, however, that a 190-foot cellular communications monopole would “tower” over the existing trees. (Tr., 03/01/2011, 11:25 a.m., p. 151-158).

The applicant never explained how line of sight can determine tower height but be irrelevant in determining visibility. The line of sight testimony from Mr. Goulet and Mr. Libertine suggests that anywhere the radio signal from the proposed tower reaches, the proposed tower will be visible.

Locating the tower at 95 Balance Rock Road would also adversely affect those citizens using the Tunxis State Forest Cross Country Ski Cabin. The Ski Cabin, which is located 0.41 miles from 95 Balance Rock Road, is listed on the National Register of Historic Places. (PFF No. 5). The primary road access and trailhead serving the cabin is the cul-de-sac at the end of Balance Rock Road, where even the applicant acknowledges that the tower would be visible. (PFF No. 6, 7).

The applicant has failed to demonstrate that public safety concerns require that the proposed facility be constructed at 95 Balance Rock Road. (PFF No. 8). The first selectman of the town of Hartland testified that the existing towers in his community offer cell phone coverage without interruption, and that once located on the two towers already existing, the town’s emergency service providers will have adequate service. (IV.B Town of Hartland Exhibits, 2, Pre-filed Testimony of Wade Cole, First Selectman, January 13, 2011; Tr., 05/16/11, 1:05 p.m., pp. 139-143). Mr. Vivian, the applicant’s consultant, testified that the town had not requested access to the proposed tower, even though it was offered to the town in writing. Mr. Vivian also acknowledged that the applicant had conducted no research or study to determine if the proposed tower would satisfy any public safety concerns. (Tr., 03/01/11, 11:25 a.m., pp. 175-176).

Indeed, the evidence in the record suggests that there is very little public need whatsoever for the proposed tower. The proposed tower would provide coverage to a section of Route 20 with an average daily traffic count of only 450 trips per day (PFF No. 9), and most of the secondary roads in the

coverage area are gated. (PFF No. 10). These facts seemed to come as a surprise to the applicant's radio frequency engineers. (Tr., 03/01/11, 11:25 a.m., pp. 140-141 (Mr. Wells); Tr., 05/16/11, 1:05 p.m., pp. 55-56 (Mr. Goulet)).

The evidence in the record establishes that the proposed facility would "substantially affect the scenic quality of its location and no public safety concerns require that the proposed facility be constructed in such a location." The application should be denied on this basis.

B. The Applicant has not Rebutted the § 22a-19 Intervenor's Prima Facie Showing of Adverse Environmental Impact.

Mr. Sirman has intervened in these proceedings pursuant to General Statutes § 22a-19(a) of the Connecticut Environmental Protection Act, alleging that the proposed activity "involves conduct which has, or which 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." In his intervention petition, Mr. Sirman alleges that the applicant has "failed to provide the Connecticut Siting Council with sufficient information to allow it properly to evaluate the environmental impact of the proposed cellular communications tower on the on-site wetlands and watercourses, both with respect to the identification and delineation of the wetlands and their characteristics and functions,"¹ that the "application will likely result in a significant adverse impact on avian populations, particularly migrating songbirds and waterfowl,"² and that "the construction of the proposed cellular communications tower will adversely affect the view from the surrounding state forest areas and approaches to the state forest."³

In addition to being required to consider alternatives to the proposed tower under the Public Utility Environmental Standards Act, General Statutes §§ 16-50g et seq., other obligations are imposed

¹ Inland wetlands and watercourses are a "natural resource." General Statutes § 22a-36.

² Wildlife is a "natural resource" under the Act. See Paige v. Town Plan & Zoning Commission, 235 Conn. 448 (1995).

³ The aesthetic value of land is a "natural resource." See Tarnapol v. Connecticut Siting Council, 212 Conn. 157 (1989).

on the siting council pursuant to the Connecticut Environmental Protection Act as a result of the Mr. Sirman's intervention. Upon the filing of § 22a-19 petition, the administrative agency, besides considering the statutory and regulatory criteria otherwise applicable to the pending application, must consider whether the proposed project "does or is reasonably likely to cause unreasonable pollution, impairment or destruction" of "the public trust in the air, water or other natural resources of the state, and if so, to reject the project so long as, considering all the relevant circumstances, there is a reasonable and prudent alternative." Mystic Marinelife Aquarium Inc. v. Gill, 175 Conn. 483, 499 (1978).

The visual impact of the proposed tower on scenic resources of the state is discussed above, and the discussion will not be repeated here.

The testimony from Mr. Sirman's wildlife biologist, George Logan, and the recommendations on the application from the Connecticut council on environmental quality establish that the proposed tower may have a significant adverse impact on migrating birds. (PFF No. 11). The department of environmental protection identified two species of protected birds found in the vicinity of the project, the state endangered bald eagle and the state species of special concern, the saw-whet owl. (II. B. Applicant Exhibits, 4.a, Supplemental Response to Interrogatory 7; Letter from DEP dated November 16, 2009). According to Mr. Sirman's wildlife biologist, George Logan, the location of the proposed tower on a ridgeline, "within a major migratory flyway, and an area of significant bird concentrations," was a cause for concern "because the science literature shows that low (i.e., less than 200 feet in height) unlit telecommunications towers can cause significant bird mortality, particularly at night during foggy and rainy conditions (Manville 2005, Wylie 1977)." (III. B Party Thomas H. Sirman Exhibits, 9 , Pre-filed testimony of George Logan, January 4, 2011).

The applicant engaged a noted bird expert, Anton "Twan" Leenders, a conservation biologist from the Connecticut Audubon Society, had him prepare three field studies on the saw-whet owl, but

did not allow him to testify at the public hearing.⁴ Instead, the applicant presented the testimony of Lisa A. Standley, whose primary area of expertise was plants, to testify that the proposed tower would not cause bird mortality. (Tr., 03/01/11, 11:25 a.m., p. 172). Unlike Anton Leenders, she conducted no research at the proposed tower site, and her testimony was based on a “literature search.” (Tr., 03/01/11, 11:25 a.m., p. 173). Ms. Standley testified that she knew nothing about the migration height of saw-whet owls, and that “there’s very little literature on owls per se.” (Tr., 03/01/11, 11:25 a.m., p. 226). Mr. Leenders apparently declined to offer any opinion on the potential for bird mortality:

MR. SHERWOOD: Did you or anyone else on your team consult Mr. Leenders about the issue of the impact that the tower might have on migrating birds?

DR. STANDLEY: I’ll have to refer that to Mr. Gustafson. I did not have any contact with him.

MR. GUSTAFSON: I did have some limited correspondence with him. And essentially he consulted with his supervisor at Connecticut Audubon and declined because of a general overall lack of data with respect to impacts for low height tower facilities.

MR. SHERWOOD: So it would be fair to say that he -- that he could not provide any reliable information with respect to that?

MR. GUSTAFSON: He essentially refused to get involved because there is a general lack of scientific data on the effects of low or short tower facilities of this type.

MR. SHERWOOD: Thank you.”

(Tr., 03/01/11, 11:25 a.m., pp. 174-175).

The applicant’s experts also testified that none of them asked Mr. Leenders, who prepared the field studies of the saw-whet owl for the applicant, whether he thought that the proposed tower would threaten migrating saw-whet owls in the vicinity of the property. (Tr., 05/16/11, 1:05 p.m., p. 59).

Under State of Missouri v. Holland, 252 U.S. 416, 433 (1920), and the express savings clause of the Telecommunications Act of 1996, federal and international law protecting migratory birds supersedes conflicting provisions of the Telecommunications Act. Based on the evidence in the record,

⁴ Because the opponents to the application (parties Sirman, Krauland and the town of Hartland) thus were deprived of the opportunity to cross-examine Mr. Leenders, General Statutes § 4-178(3) of the Uniform Administrative Procedure Act (“a party may conduct cross-examinations required for a full and true disclosure of the facts.”) and General Statutes Section 16-50o (a) (all parties to a proceeding “shall have the right to present such oral or documentary evidence and to conduct such cross-examination as may be required for a full and true disclosure of the facts.”) require that Mr. Leender’s reports be excluded from consideration by the siting council.

the construction and operation of a cell tower at 95 Balance Rock Road is reasonably likely to unreasonably interfere with the flight of migratory birds after dark, causing tower strikes and mortality, and to result in the loss and degradation of the habitat of Connecticut protected species, the bald eagle and saw-whet owl.

In addition to the paucity of evidence of the potential impact of the proposed tower on migrating birds, there is also a lack of good information on the inland wetlands and watercourses at 95 Balance Rock Road and adjacent land. The applicant failed to provide adequate information to allow the council to evaluate the impact of the proposed tower on these natural resources. (PFF No. 14).

The on-site inland wetlands and watercourses and associated flora and fauna were not inspected or evaluated during the spring growing season, which is critical for an accurate and complete characterization. (PFF No. 13). The evidence in the record also established that the proposed tower may have a significant adverse impact on the water quality of Barkhamsted Reservoir. (PFF No. 12).

Section 16-50g of the General Statutes states that the Connecticut siting council was expressly created for the purpose of protecting Connecticut's environment:

The legislature finds that power generating plants and transmission lines for electricity and fuels, community antenna television towers and telecommunication towers have had a significant impact on the environment and ecology of the state of Connecticut; and that continued operation and development of such power plants, lines and towers, if not properly planned and controlled, could adversely affect the quality of the environment and the ecological, scenic, historic and recreational values of the state. The purposes of this chapter are: To provide for the balancing of 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; to provide environmental quality standards and criteria for the location, design, construction and operation of facilities for the furnishing of public utility services at least as stringent as the federal environmental quality standards and criteria, and technically sufficient to assure the welfare and protection of the people of the state; to encourage research to develop new and improved methods of generating, storing and transmitting electricity and fuel and of transmitting and receiving television and telecommunications with minimal damage to the environment and other values described above; to promote energy security; to promote the sharing of towers for fair consideration wherever technically, legally, environmentally and economically feasible to avoid the unnecessary proliferation of towers in the state particularly where installation of such towers would adversely impact class I and II watershed lands, and

aquifers; to require annual forecasts of the demand for electric power, together with identification and advance planning of the facilities needed to supply that demand and to facilitate local, regional, state-wide and interstate planning to implement the foregoing purposes.

Prior to granting a certificate, the council is required, pursuant to General Statutes § 16-50p (a), to find and determine the natural and probable impact of the proposed facility. "Within the context of that environmental impact analysis and evaluation, the council must specify every significant adverse effect and conflict with state policies which it finds, if any, and then indicate why said significant adverse environmental effect is not sufficient to deny the application." Torrington v. Connecticut Siting Council, Superior Court, judicial district of Hartford, Docket No. CV90-0371550-S (September 12, 1991), 1991 WL 188815.

The evidence in the public hearing record demonstrates that the proposed tower at 95 Balance Rock Road is reasonably likely to adversely affect the scenic resources of the state, to threaten avian populations, including the bald eagle and saw-whet owl, and to pollute and degrade the inland wetlands and watercourses on the property where the tower would be located as well as on adjacent lands.

C. The Siting Council Should Heed the Concerns Expressed by the Town of Hartland About the Proposed Location of the Tower at 95 Balance Rock Road.

General Statutes Section 16-50i (e) requires that the applicant for a certificate of environmental compatibility and public need consult with the municipality in which the cell tower is proposed to be located:

Except as provided in subsection (e) of section 16a-7c, at least sixty days prior to the filing of an application with the council, the applicant shall consult with the municipality in which the facility may be located and with any other municipality required to be served with a copy of the application under subdivision (1) of subsection (b) of this section concerning the proposed and alternative sites of the facility. For a facility described in subdivisions (1) to (4), inclusive, of subsection (a) of section 16-50i, the applicant shall submit to the Connecticut Energy Advisory Board the same information that it provides to a municipality pursuant to this subsection on the same day of the consultation with the municipality. Such consultation with the municipality shall include, but not be limited to good faith efforts to meet with the chief elected official of the municipality. At the time of the consultation, the applicant shall provide the chief elected official with any technical reports concerning the public need, the site selection process and the environmental effects of the proposed facility. The municipality may conduct public hearings and meetings as it deems necessary for it to advise the applicant of its recommendations concerning the proposed facility. Within sixty

days of the initial consultation, the municipality shall issue its recommendations to the applicant. No later than fifteen days after submitting an application to the council, the applicant shall provide to the council all materials provided to the municipality and a summary of the consultations with the municipality including all recommendations issued by the municipality.

The first selectman of the town of Hartland summarized the town's concerns as follows:

As First Selectman, I have a responsibility to represent the interests and concerns of the residents of our community in Hartland. Many residents as evidenced by the petition provided to me (copy attached) object to the site chosen by the applicant for the installation of their tower. These concerns are based squarely on the tower's negative impact on our community including its visual impact on both residents and those visitors to our community who come to enjoy our scenic vistas; the impact on nearby residential land value; and its inconsistency with our Plan of Conservation and Development.

(IV.B Town of Hartland Exhibits, 2, Pre-filed Testimony of Wade Cole, First Selectman, January 13, 2011.) The petition to which the first selectman refers contains over three hundred signatures. (Tr., 05/16/11, 1:05 p.m., pp. 130-131).

General Statutes Section 16-50x provides that the siting council "shall consider any location preferences or criteria . . . (ii) that may exist in the zoning regulations of said municipality as of the submission date of the application to the council." Additionally, the siting council's own regulations and application guidelines require that applicants provide a narrative summary of consistency of a proposed tower with a town's regulations and plans. Regs. Conn. State Agencies § 16-50j-74.

The location of the proposed tower at 95 Balance Rock Road would not comply with the town of Hartland's land use regulations, namely, its Plan of Conservation and Development, (PFF No. 18), its Zoning Regulations, (PFF No. 17), nor with its Inland Wetlands and Watercourses Regulations. (IV.B Town of Hartland Exhibits, 4, Pre-filed Testimony of William H. Emerick, Chairman of Inland Wetlands Commission, January 11, 2011 (Emerick Letter, January 6, 2011)).

Although former siting council chairman Caruso opined at the public hearing session held on March 1, 2011 that the council "need not concern [itself]" with the Hartland Plan of Conservation and Development, (Tr., 03/01/11, 11:25 a.m., p. 221), consultation with municipal leadership and consistency with municipal regulations is certainly part of the statutory and regulatory scheme

governing the location of cellular communications towers in the state of Connecticut. The council should deny this application in light of the strong municipal opposition and the failure of the proposed tower to conform to the land use regulations of the town of Hartland.

D. The Siting Council Should Implement the Recommendations of the Council on Environmental Quality and Reject 95 Balance Rock Road as a Tower Location.

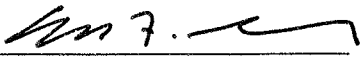
The Appellate Court has held that the siting council has a statutory duty to seek input from and the expertise of other state agencies. “The legislature clearly contemplated the involvement of other state agencies to supply information to the council in order to render its decision on the granting or denying of a certificate.” Town of Preston v. Connecticut Siting Council, 20 Conn. App. 474, 479 (1990); see also General Statutes § 16-50j (h) (“Prior to commencing any hearing pursuant to section 16-50m, the council shall consult with and solicit written comments from the Department of Environmental Protection, the Department of Public Health, the Council on Environmental Quality, the Department of Agriculture, the Department of Public Utility Control, the Office of Policy and Management, the Department of Economic and Community Development and the Department of Transportation.”)

The siting council received comments from the Connecticut council on environmental quality recommending against approval of the proposed tower at 95 Balance Rock Road if it was the site of illegal wetlands activity. (I. E. State Agency Comments, 3. State of Connecticut Council on Environmental Quality, February 22, 2011). The evidence in the public hearing record strongly suggests that the proposed tower location at 95 Balance Rock Road has been the site of illegal wetlands activity on numerous occasions. (PFF No. 15, 16). The siting council should not implicitly sanction such activity by allowing the erection of a cellular communications tower at the site of these violations.

IV. CONCLUSION

The applicant for this certificate of environmental compatibility and public need has failed to carry its burden of proof under the Public Utility Environmental Standards Act and the Connecticut Environmental Protection Act. The application should be denied.

Respectfully submitted,
THOMAS H. SIRMAN

By 

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CERTIFICATE OF SERVICE

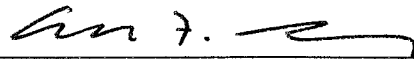
I hereby certify that on the 15th day of June, 2011, a copy of the foregoing document and attachments was sent, first class U.S. mail, postage prepaid, to:

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David F. Sherwood
Commissioner of the Superior Court

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**APPENDIX TO PARTY THOMAS H. SIRMAN'S POST-HEARING BRIEF -
PARTY THOMAS H. SIRMAN'S PROPOSED FINDINGS OF FACT**

STATE OF CONNECTICUT
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PARTY THOMAS H. SIRMAN'S PROPOSED FINDINGS OF FACT

Party Thomas H. Sirman offers the following proposed findings of fact for consideration by the council in its decision on the above-captioned application. Proposed findings of fact are in bold; following each proposed finding are citations to the evidence in the record supporting the proposed finding.

1. The proposed tower at 95 Balance Rock Road would be surrounded by Tunxis State Forest, a natural resource of local, regional, and statewide significance.

"This site also raises concerns because it abuts the Tunxis State Forest. In light of these important objections, AT&T should reconsider its decision. I ask that Council review these important issues and follow its statutory mandate to consider alternative sites that would limit any impact on the citizens of East Hartland and Connecticut. . . ." I. G. Public Officials Limited Appearance, 1. Attorney Richard Blumenthal Comment, November 17, 2010.

"I believe that the proposed location is poorly sited due to its close proximity to a residential neighborhood and would disturb the rural environment of said neighborhood." I. G. Public Officials Limited Appearance, 2. State Senator Kevin Witkos, 8th District, December 6, 2010.

"The proposed location for the tower is visible from several important scenic areas and should be evaluated as a potentially "relatively undisturbed area that possesses scenic quality of local, regional, or state-wide significance. . . . The potential scenic impacts deserve careful scrutiny and deliberation by the Siting Council." I. E. State Agency Comments, 3. State of Connecticut Council on Environmental Quality, February 22, 2011.

"As First Selectman, I have a responsibility to represent the interests and concerns of the residents of our community in Hartland. Many residents as evidenced by the petition provided to me

(copy attached) object to the site chosen by the applicant for the installation of their tower. These concerns are based squarely on the tower's negative impact on our community including its visual impact on both residents and those visitors to our community who come to enjoy our scenic vistas; the impact on nearby residential land value; and its inconsistency with our Plan of Conservation and Development." IV.B Town of Hartland Exhibits, 2, Pre-filed Testimony of Wade Cole, First Selectman, January 13, 2011.

"MR. SHERWOOD: And would it be fair to say that the Tunxis State Forest is a large undeveloped tract of land, that it's basically pristine woods? You've been there presumably quite a bit?

MR. LIBERTINE: I have. Yeah, I would say that's certainly a fair description."
(Tr., 03/01/11, 11:25 a.m., p. 151).

2. The proposed tower is proximate to Barkhamsted Reservoir, a natural resource of local, regional, and statewide significance.

"The application shows that the tower will be visible from Route 20 as one looks across the reservoir toward the site, an area that nearly anyone would consider scenic." I. E. State Agency Comments, 3. State of Connecticut Council on Environmental Quality, February 22, 2011.

"Referring to the viewshed map in Exhibit 7, please note that visibility is predicted from portions of the Route 20 transportation corridor west of the Barkhamsted Reservoir (for a total of approximately 700 to 800 lineal feet) at distances of nearly 1.5 miles. In addition, visibility appears along a portion of the northwest shoreline of the Barkhamsted Reservoir, which is a limited access public water supply." II. B. Applicant Exhibits, 19, Responses to Krauland Interrogatories, February 22, 2011, A 3.

"The scenic overlook that Professor Tait refers to in the 03/01/2011 transcript at p. 14 is not on a blue-blazed trail. However, it ranks among the most lovely landscapes in the State of Connecticut and it is a very popular place for motorists to pull off Route 20 and take photographs. For example, the scenic overlook was the site of the recent First Congregational Church of Hartland Easter Sunday sunrise service." III. B Party Thomas H. Sirman Exhibits, 12, Supplemental Information, May 9, 2011, A-1.

"One thing about the tower where it's presented right now is it would be very visible from the lookout over the reservoir, which is one of the most beautiful views in the Town of Hartland." (Tr., 01/13/11, 7:05 p.m., p. 12, Testimony of Wade Cole).

"MR. TAIT: . . . I have a question for Ms. Standley. You are aware that -- that the Barkhamsted Reservoir is only a few places in Connecticut where Bald Eagles nest and fledge?

DR. STANDLEY: Yes, I am.

MR. TAIT: Without disclosing secrets, is it on the west side or the east side of the reservoir?

DR. STANDLEY: I don't know the specifics.

MR. TAIT: Would it make a difference --

DR. STANDLEY: No, it wouldn't --

MR. TAIT: -- as to the placement of the tower?

DR. STANDLEY: No, it would not.

MR. TAIT: You don't think a tower even in close proximity to a nesting Bald Eagle would --

DR. STANDLEY: No, I don't.

MR. TAIT: Why not?

DR. STANDLEY: Because there are -- there are cell towers and larger towers in proximity to Bald Eagle nesting sites in many places across New England.

MR. TAIT: Any in Connecticut?

DR. STANDLEY: Not that I'm aware of."

(Tr., 03/01/11, 11:25 a.m., pp. 41-42).

"This proposed telecommunications facility lies in the watershed of the MDC's Barkhamsted Reservoir public drinking water supply. We ask that proper precautions be taken to protect the quality of those resources." I. E. State Agency Comments, 2. Metropolitan District Commission Comments, January 4, 2011.

3. The proposed tower location at 95 Balance Rock Road would be visible from many parts of Tunxis State Forest.

II. B. Applicant Exhibits, 22, Responses to CSC's Request for Additional Information, May 9, 2011, Attachment 6 (Comparative Viewshed Analysis map).

"MR. SHERWOOD: Just to clarify. There is -- your study area was a two mile radius with a tower in the center?

MR. LIBERTINE: Correct.

MR. SHERWOOD: But there are views of the tower outside of that two mile radius, High [Pine] Mountain being a good example?

MR. LIBERTINE: There certainly can be, sure.

MR. SHERWOOD: And you didn't study that?

MR. LIBERTINE: We took a look at some of the -- in response to some of the questions that came up to look beyond the two miles.

MR. SHERWOOD: But you didn't do any general study beyond the two mile radius?

MR. LIBERTINE: No."

(Tr., 05/16/11, 1:05 p.m., p. 50).

"MR. SHERWOOD: If you're correct about the average tree height --

MR. LIBERTINE: Mmm-hmm --

MR. SHERWOOD: -- we assume that every tree in Tunxis State Forest is 65 --

MR. LIBERTINE: Well that's a modeling assumption we have to make just because of some of the limitations placed on the model, so --

MR. SHERWOOD: But -- but the tower is going to be a hundred feet higher than your --

MR. LIBERTINE: Absolutely, the tower is certainly towering over the trees, yes.

MR. SHERWOOD: Right. So what we have in your visual resource evaluation report is a computer construct based on some data that you've gathered, and that's a guess about the visibility of the tower.

And it's focused on areas where you think people will be traversing, for instance the trails, roads, but there certainly is going to be some visibility of this tower within Tunxis State Forest?

MR. LIBERTINE: Potentially, yes."
(Tr., 03/01/11, 11:25 a.m., p. 163).

"MR. MARTIN: Heike. AT&T states that there are many vista points overlooking the reservoir. Can you indicate where they are?

MS. KRAULAND: The vista points? Well, there would be the lookout on Route 20, which is on the west side -- actually the whole road coming from East to West Hartland, Route 20, especially at this time of year the entire road there's vista points along the entire way. The area is used by hunters and hikers and that kind of stuff and you can really see a lot of points of it. And then going all the way out to West Hartland, Center Street, there's another vista point, which is also Tunxis State Forest where you can also look and see the ridgeline, the pristine ridgeline and the reservoir.

MR. MARTIN: But in your opinion will the proposed tower interrupt the vistas from these points?

MS. KRAULAND: It would. Right now it's a pristine ridgeline. You can't see any manmade structures over it. So this tower would actually be smack dab in the middle of that ridgeline and it would be the only visible manmade tower, so yes, in my opinion."
(Tr., 05/16/11, 1:05 p.m., pp. 145-146).

4. The proposed tower would be visible from Pine Mountain.

"Pine Mountain rises to a ground elevation of approximately 1,391 feet AMSL and is located roughly 2.85 miles to the southwest of proposed site B. Pine Mountain is located outside of VHB's two-mile radius study area and was therefore not included as part of the Visual Resource Evaluation Report prepared in December, 2010. Pine Mountain was hiked by VHB staff as part of another Application (Docket No. 387) and based on that particular reconnaissance, we cannot preclude the possibility of limited visibility associated with the proposed monopole." II. B. Applicant Exhibits, 22, Responses to CSC's Request for Additional Information, May 9, 2011, A 2.

"The elevation of Pine Mountain is 1391 feet. The Pine Mountain lookout is approximately 2 1/2 miles southerly of 95 Balance Rock Road. Pine Mountain has a bedrock exposed summit with views in most directions, particularly northerly. Yes, the proposed tower would be clearly visible from the Pine Mountain lookout." III. B Party Thomas H. Sirman Exhibits, 12 , Supplemental Information, May 9, 2011, A-2.

"MS. KRAULAND: Yes. The first question I have is for Mr. Sirman. From Pine Mountain were there any other structures in Hartland that were visible from Pine Mountain?

MR. SIRMAN: Yes. I saw the -- well, I was with you and we saw the church steeple at the center, the Congregational Church I believe it is, and then you also see the smaller steeple at the Lutheran Church.

MS. KRAULAND: Okay. And in relation to those two church steeples, which were both visible from Pine Mountain where would the balloon be flying? Where was the balloon flying? I'm sorry.

MR. SIRMAN: Well, we were -- we hiked that area the day of the balloon flight and we saw the balloon. I mean, it was as significant distance, probably about three miles, three and a half miles from Pine Mountain summit, maybe more, but we could see the balloon basically between the two church steeples closer to the Lutheran Church steeple to the west.

MS. KRAULAND: Okay. And Pine Mountain Summit, is that on the Tunxis Blue Trail, which has been, you know, drawn in several of the maps?

MR. SIRMAN: Yes. It's there and it's also a cleared area for the lookout there, the Pine Mountain lookout.

MS. KRAULAND: Okay. And then many of the visibilities that were discussed aside from Pine Mountain, the ski cabin, which are all part of the Tunxis Blue Trail, and then also the lookout point, which is on Route 20, were there any other parts of the State forest or any other parts of the Tunxis Blue Trail where visibility was seen?

MR. SIRMAN: Yes. We entered the State forest through the Tunxis Trail north of Route 20 and we saw the -- we have pictures that we submitted of the tower, of both balloons we could see from the Blue Trail north of the proposed location. Also at the meadow on the west side of the reservoir where there's a State forest sign there you could see the tower or the balloons, excuse me, over there off of Center Street right adjacent to the State forest, where Route 20 runs by the State forest in the meadow there.

MS. KRAULAND: Okay. Thank you.”
(Tr., 05/16/11, 1:05 p.m., pp. 115-116).

5. The Tunxis State Forest Ski Cabin, which is located 0.41 miles from the proposed cell tower, is listed on the National Register of Historic Places.

“There is one resource within the APE for visual effects that is listed on the National Register of Historic Places. The Tunxis Forest Ski Cabin (NR#86001761) is a rustic ski cabin constructed by the Civilian Conservation Corps in 1937.” II. B. Applicant Exhibits, 1. Application for a Certificate of Environmental Compatibility and Public Need filed by New Cingular Wireless PCS, LLC, received October 13, 2010, and attachments and bulk file attachments, Tab 6.

“VHB has confirmed that the Tunxis State Forest Ski Cabin was built by the Civilian Conservation Corp in 1937. The cabin includes a working fireplace, a wooden table and four wooden chairs. Based on a recent visit to the cabin, the structure is currently in excellent condition. According to the DEP State Parks Division, they maintain the ski cabin for public general recreational use.” II. B. Applicant Exhibits, 22, Responses to CSC's Request for Additional Information, May 9, 2011, A 3.

6. The proposed tower would be visible from the end of Balance Rock Road.

II. B. Applicant Exhibits, 22, Responses to CSC's Request for Additional Information, May 9, 2011, Attachment 6.

7. The primary road access route to the trail leading to the Tunxis State Forest Ski Cabin is Balance Rock Road.

“MR. SHERWOOD: Would it be fair to say that cross country of the Tunxis State Forest ski cabin that the primary access to that cabin is along Balance Rock Road?

MR. LIBERTINE: Sure. Certainly.

MR. SHERWOOD: There’s a cul-de-sac there, that’s where most people park who access the trail at that point?

MR. LIBERTINE: I would say that’s probably one of the -- yes, certainly the easiest point of access from a car.”

(Tr., 05/16/11, 1:05 p.m., p. 50-51).

“The proposed tower location at 95 Balance Rock Road would be located adjacent to the Tunxis Trail trailhead that most cross-country skiers and hikers use to gain access to the CCC ski cabin and the Balance Rock Road trailhead is a popular entrance to the Tunxis State Forest. Also, the Balance Rock Road trailhead is a favorite for participants in the Connecticut Department of Environmental Protection Division of Forestry’s “Letterbox” program. The “Letterbox” is a plastic box that contains a stamp, stamp pad and record book. The clues for finding the “Letterbox” are published on the Department of Environmental Protection website. The idea is to find the box, record your name, stamp your own journal, and replace the box in its hiding place. It is used extensively by scouting programs and other youth groups.” III. B Party Thomas H. Sirman Exhibits, 12 , Supplemental Information, May 9, 2011, A-3.

“MR. VIVIAN: Right -- well Mr. Libertine actually has spoken to this and it’s -- it’s west of the original proposed Site A. Essentially what happens is Balance Rock Road comes to a cul-de-sac and there’s a trail that continues on beyond that to the west leading towards the reservoir. And the ski cabin is -- is over there. “

(Tr., 03/01/11, 11:25 a.m., p. 87).

8. No public safety concerns require that the proposed facility be constructed at 95 Balance Rock Road.

“Our residents have also raised questions about the applicant’s actual need for a tower in this location. There are already two existing towers in our community that offer service to other cell phone providers without coverage interruption.” IV.B Town of Hartland Exhibits, 2, Pre-filed Testimony of Wade Cole, First Selectman, January 13, 2011.

“In sum, we submit that on balance the negative impacts that this application would have on our community would far outweigh any advantages it may provide.” IV.B Town of Hartland Exhibits, 2, Pre-filed Testimony of Wade Cole, First Selectman, January 13, 2011.

“Hartland is a small town in population but a big town in natural resources, especially water. The MDC and the Tunxis State forest comprise over two-thirds of the entire town’s acreage. . . . In addition, Hartland is a town divided in half by a seven (7) mile long expanse of water created by the MDC when they began buying up the, then, Town of Hartland’s Hollow, during the Great Depression. That manmade geographical impasse creating East and West Hartland is exactly what the proponents of the proposed cell tower on 95 Balance Rock Road seek to transverse. This area, known as Hartland

Hollow, is totally uninhabited and is connected by a single State road. The lack of population in this part of Hartland makes full cell coverage unnecessary since emergency coverage does exist in this area rendering very little need for an additional tower.” IV.B Town of Hartland Exhibits, 4, Pre-filed Testimony of William H. Emerick, Chairman of Inland Wetlands Commission, January 11, 2011 (Emerick Letter, January 6, 2011).

“MR. SHERWOOD: But are the State Police on the East Hartland tower?

MR. COLE: No, they’re not on either tower right now.

MR. SHERWOOD: They want to go on the West Hartland tower?

MR. COLE: Yeah. They did a study and they have to come up with the money, we’re like third on the list.

MR. SHERWOOD: And if they are on -- so right now as far as the State Police are concerned coverage is not adequate in Hartland?

MR. COLE: It is not adequate in the Hollow.

MR. SHERWOOD: In the Hollow?

MR. COLE: Right.

MR. SHERWOOD: Which is the northern part of Hartland on the east side of the reservoir?

MR. COLE: Yes. Down between the two mountains on the flat.

MR. SHERWOOD: And if the State Police goes on the west tower owned by the Town would then in their opinion coverage be adequate?

MR. COLE: They did do a study and said it would be, but you know, until they actually do it they did do a study on it.”

(Tr., 05/16/11, 1:05 p.m., pp. 141-142).

“MR. SHERWOOD: So you’re ensuring the town’s public safety needs are satisfied by offering them space, but they have not requested space?

MR. VIVIAN: They didn’t request it. And my counsel reminds me that that offer was made in writing directly to the town as well.

MR. SHERWOOD: And has AT&T done any research or study with respect to the public safety concerns that this tower would satisfy?

MR. VIVIAN: I -- no, I don’t believe -- no, AT&T hasn’t done any specific public safety requirements.

MR. SHERWOOD: Thank you. Thank you, Mr. Chairman.”

(Tr., 03/01/11, 11:25 a.m., pp. 176-177).

9. The proposed tower would provide coverage to a section of Route 20 with a low average daily traffic count.

“MR. SHERWOOD: Now there were some questions about your coverage objectives on Route 20 and coverage objectives along Route 179 and whether your customers along -- you might have more customers along 179 than Route 20. Have you -- or to your knowledge has AT&T done any traffic studies to determine the average daily traffic count on either of those roads in the locations in question?

MR. WELLS: I -- I have a traffic map with me in those approximate areas.

MR. SHERWOOD: And would you tell us what the traffic counts are? And obviously what we're talking about are 179 and Route 20 in the area that you're proposing to cover with this application. Where did these traffic -- where did this traffic data come from?

MR. WELLS: I don't have the source written on this particular map. I believe it's from the State of Connecticut DOT.

MR. SHERWOOD: Is it part of the -- is it part of our record?

MR. WELLS: It is not. It's ancillary material that I bring with me.

MR. SHERWOOD: And what are those numbers?

MR. WELLS: Along -- along Route 20 approximately -- the count is approximately 450 --

MR. SHERWOOD: Is that trips per day?

MR. WELLS: Yes, that's my understanding. I'm not -- I'm not a -- it's a little outside my expertise. I'm not a traffic expert, but that's what I understand --"
(Tr., 03/01/11, 11:25 a.m., pp. 140-141).

"MS. KRAULAND: Okay. And then additionally the second part of that question was -- thank you for that answer -- was the surrounding area -- you were talking also quite frequently about surrounding area. What would you be considering the surrounding area when you're getting coverage for that three-mile stretch in Route 20? You keep talking about the surrounding area as well. What is that surrounding area just for my clarification please?

MR. WELLS: The surrounding area is a general statement. Obviously if you'll look -- again I'll refer you to those maps and you can see the difference in the proposed and -- the existing and the proposed coverage. There are some residences that will be coverage and -- well certainly there's not a lot of traffic along or in the state forest, and not the primary objection, but it is -- for safety reasons that it -- well again not for -- I hate to say this I guess because people -- for safety reasons it also provides an additional safety benefit for hikers, for -- (mic static) --

MS. KRAULAND: Wouldn't much of the surrounding area that you're referring to actually be Class 1 and Class 2, no trespass MDC watershed areas of the Barkhamsted Reservoir?

MR. WELLS: I'm not familiar enough with the region to say -- to say which -- where the majority of that is --"
(Tr., 03/01/11, 11:25 a.m., pp. 236-237).

10. Most of the secondary roads in the coverage area of the proposed tower are gated.

I. D. Administrative Notice taken by Council, 22. Mail-A-Map Street Map, Granby/Hartland, (2003)

"MR. WELLS: Both -- both are important if you look at the size of the gaps along Route 20 versus the length of the gap along Route 179. There's a significant --

MR. TAIT: My problem is two miles of nothing is not the same as one mile with a lot of houses. It's not the length of the gap necessarily, it's also who you are trying to cover. And when you're trying to cover state forests up north, it would seem to me that maybe a tower going south towards 179 would be more efficient. If --

MR. WELLS: It's --

MR. TAIT: If you were denied -- you can't have them hypothetically, you can't have the hollow, where would you put the tower to get your best coverage? On 179 south of Hartland center? Where would you --

MR. WELLS: I don't know if I can answer that --

MR. TAIT: Answer as -- answer as if we denied this application; if you can't go to the hollow, where would you come up to cover that area?

MR. WELLS: The objective is to cover Route 20. And I don't know that if the Council said you are not allowed to cover Route 20 --

MR. TAIT: Well not all of Route 20, but just the northern part of it; the hollow for instance, which is basically very little use other than somebody driving through there. Would you not come back and say, gee, Hartland is still important enough, we want to cover it as best we can or would you just give up?

MR. WELLS: I'm not sure of the answer to that because we would be giving up a significant amount of coverage and not -- you know, not just on Route 20, but even the secondary roads, which as you said -- I mean they may not carry a lot of traffic --

MR. TAIT: Are these secondary --

MR. WELLS: -- but there's a significant amount of --

MR. TAIT: Are these secondary roads in the state forest?

MR. WELLS: Not --

MR. TAIT: Are they gated?

MR. WELLS: Not all of them, no.

MR. TAIT: Could you identify the ones that are in the state forest that are gated and the ones that are not in the state forest and not gated? I'm trying to figure out what you're trying to cover, where it be cars and people. I grant it people do go from East Hartland to West Hartland down to Riverton by Route 20. Sometimes they wish they didn't have to do that, but they do. The question is they're in transit and that's not a heavily -- even though it's a state route, 20. Route 179 seems to be a more heavily used route, which if you wanted to get customers -- I agree there's gaps. It might be a longer gap. I'm trying to figure out what's your alternative."
(Tr., 03/01/11, 11:25 a.m., pp. 34-36).

"MR. SHERWOOD: The question -- question six specifically refers to areas that are open to public vehicles. Would you agree that Hartland Hollow Road, which is the second road that you've listed, and Millstone Road, which is the fourth road that you've listed are gated? As is Hurricane Brook Road, which is on the second page, seven roads down?

MR. GOULET: I can't -- I can't attest to that, no. There's -- you have to understand that we're using software, mapping software, that is current. But the mapping software doesn't tell us if a road is gated or not gated, it just tells us that there's a road there.

MR. SHERWOOD: So you don't know whether the roads that you've listed in A-6 are open to public access or not, is that correct?

MR. GOULET: That's correct."

(Tr., 05/16/11, 1:05 p.m., pp. 57-58).

"The following secondary roads are open to the public:

- Pell Road. Pell Road becomes a gravel road beyond house no.39 and there are no houses beyond that point.
- Milo Coe Road. Milo Coe Road has two houses.
- Hartland Hollow Road, South Lane and Hurricane Brook Road are all gated, and closed to public vehicles."

III. B Party Thomas H. Sirman Exhibits, 12 , Supplemental Information, May 9, 2011, A-6.

"MR. MERCIER: Are you -- are you familiar with that road at all, what's up there or anything of that nature?

MR. WELLS: I've driven up there.

MR. MERCIER: Would you agree it's all state forest up there off Morrison Hill Road?

MR. WELLS: It --

A VOICE: Route 20 --

MR. WELLS: Yeah, the general -- well when I said that gap, I meant Route 20 along -- near Morrison Road --"

(Tr., 01/13/11, 3:15 p.m., p. 87).

11. The proposed tower may have a significant adverse impact on migrating birds.

"According to our information, there are records for State Endangered *Haliaeetus leucocephalus* (bald eagle) and State Special Concern *Aegolius acadicus* (saw-whet owl) from the vicinity of this project." II. B. Applicant Exhibits, 4.a, Supplemental Response to Interrogatory 7; Letter from DEP dated November 16, 2009.

"The CEQ recommends detailed analysis of the proposed tower's effect on wildlife. The proposed site is within an area identified by Connecticut's comprehensive Wildlife Conservation Strategy (page 1-14) as Key Wildlife Habitat. Furthermore, the Barkhamsted Reservoir area is known to attract both birds and birders. As most migrants travel the corridor at night, the potential for impacts would potentially increase with elevation. With the proposed tower being exceptionally tall and within a migration corridor, its potential impact on wildlife should receive exceptional scrutiny." I. E. State Agency Comments, 3. State of Connecticut Council on Environmental Quality, February 22, 2011.

"MS. KRAULAND: Thank you, Chairman Caruso. Most of my questions were actually already asked by most of the attorneys. I just have a couple of follow-up questions. The first one would be to Dr. Standley. You were talking about migration of songbirds and the height that they migrate at. Obviously the bird of the biggest concern in this area is the Northern Saw-Whet Owl. I was just wondering if you have the height at which the Northern Saw-Whet Owl flies during migration?

DR. STANDLEY: I've actually never -- I don't -- I don't know that that's every been documented. I don't know that.

MS. KRAULAND: Okay. Is there a way that we could actually find that out or --

DR. STANDLEY: I don't -- I'm fairly familiar with the literature on Saw-Whet Owls. I don't -- I don't know of any documentation that specifically looks at migration height for Saw-Whet Owls.

MR. TAIT: Would it be anything differently than from other birds?

DR. STANDLEY: Probably not, although I don't -- as I said, there's very little literature on owls per se. Saw-Whets have only recently been studied through trapping and satellite band studies, so they looked at movement patterns. I don't know of any records about migration height.

MS. KRAULAND: Okay, thank you."
(Tr., 03/01/11, 11:25 a.m., pp. 226-227).

"MR. SHERWOOD: Thank you. Dr. Standley, on the question of the height that the Sawet Owl migrates and in particular bird mortality associated with towers in general did you or anyone else on the team consult with Dr. Leanders (phonetic) about that?

DR. STANDLEY: I did not.

MR. SHERWOOD: Dr. Leanders presumably is an expert, at least on the Sawet Owl, having produced three reports for you?

MR. GUSTAFSON: That's correct.

MR. SHERWOOD: And nobody asked him about bird mortality or whether -- or what height he thought the Sawet Owl migrated?

MR. GUSTAFSON: No.

MR. SHERWOOD: Thank you Mr. Chairman. I have no further questions."
(Tr., 05/16/11, 1:05 p.m., p. 59).

"Because . . . the proposed facility lies within a major migratory flyway, and an area of significant bird concentrations, and also because the science literature shows that low (i.e., less than 200 feet in height) unlit telecommunications towers can cause significant bird mortality, particularly at night during foggy and rainy conditions (Manville 2005, Wylie 1977), we conclude that the proposed tower at 95 Balance Rock Road will in all likelihood have a long-term significant adverse impact upon avian populations, throughout a given year, but particularly during the Spring and Fall avian migratory periods." III. B Party Thomas H. Sirman Exhibits, 9 , Pre-filed testimony of George Logan, January 4, 2011.

"MR. SHERWOOD: Now Mr. Lenders (phonetic) of the Connecticut Audubon Society, he prepared two studies, both of the Saw-Whet -- the presence or absence of the Saw-Whet Owl on the site, is that correct?

DR. STANDLEY: That's correct.

MR. SHERWOOD: Did you or anyone else on your team consult Mr. Lenders about the issue of the impact that the tower might have on migrating birds?

DR. STANDLEY: I'll have to refer that to Mr. Gustafson. I did not have any contact with him.

MR. GUSTAFSON: I did have some limited correspondence with him. And essentially he consulted with his supervisor at Connecticut Audubon and declined because of a general overall lack of data with respect to impacts for low height tower facilities.

MR. SHERWOOD: So it would be fair to say that he -- that he could not provide any reliable information with respect to that?

MR. GUSTAFSON: He essentially refused to get involved because there is a general lack of scientific data on the effects of low or short tower facilities of this type.

MR. SHERWOOD: Thank you.”
(Tr., 03/01/11, 11:25 a.m., pp. 173-174).

12. The proposed tower may have a significant adverse impact on the water quality of Barkhamsted Reservoir.

“Using the US Army Corps of Engineers New England District *Wetland Functions and Values, A Descriptive Approach*, the following functions and values were found to be provided by the Property wetlands either at a principal or secondary level: groundwater discharge, floodflow alteration, sediment/shoreline stabilization, wildlife habitat, sediment/toxicant retention, nutrient removal/retention/transformation and production export. The functions and values supported by the Property’s wetlands are typical for forested headwater wetland systems. Headwater wetland systems are considered particularly important in water quality management as they are the first step in treating water moving from uplands to stream systems.” II. B. Applicant Exhibits, 15, Prefiled Testimony of Dean E. Gustafson, January 27, 2011.

“The access roadway should be carefully constructed and maintained to protect water resources. The party(s) responsible for long term maintenance of this roadway should be clearly specified. Consideration should be given to improving the outflow of the existing drainage structure that crosses under the access roadway.” I. E. State Agency Comments, 2. Metropolitan District Commission Comments, January 4, 2011.

13. The on-site inland wetlands and watercourses and associated flora and fauna were not inspected or evaluated during the spring growing season.

“The original wetlands delineation performed by VHB occurred on August 25, 2010, during the growing season and the updated wetland inspection occurred on December 9, 2010. The wetland delineation performed by Kelifelder occurred on October 19, 2009. The wetland areas have not been inspected during the spring season.” II. B. Applicant Exhibits, 4, Responses to Sirman Interrogatories, January 6, 2011, A 11.

“According to the available reports, and secondary source data, the site’s wetlands are “headwater” or hillside seepage wetlands, which are most often considered sensitive wetlands. These must be inventoried in the spring to properly assess their biodiversity and function.”

Since inventories were not conducted during the proper time of season, spring ephemerals (i.e. herbaceous species that are typically present and best inventoried only during the spring season) are not listed. Neither is there any indication in the reports of any biota associated with the intermittent stream which was identified as being present on the site during times of higher flows (i.e. Spring) nor is any amphibian activity recorded during their breeding season (i.e. Spring).”

III. B Party Thomas H. Sirman Exhibits, 9 , Pre-filed testimony of George Logan, January 4, 2011.

“The Hartland Inland Wetlands Commission has serious concerns with the development of any Tower Sites on the Hunt Club property. In conclusion, a more comprehensive wetlands study of the parcel, particularly in the spring season as recommended by REMA Ecological Services, should precede

any final determination by the Siting Council.” IV.B Town of Hartland Exhibits, 4, Pre-filed Testimony of William H. Emerick, Chairman of Inland Wetlands Commission, January 11, 2011 (Emerick Letter, January 6, 2011).

14. The applicant failed to provide adequate information to allow the council to evaluate the impact of the proposed tower on the inland wetlands and watercourses at 95 Balance Rock Road and adjacent lands.

“We find that this proposal lacks sufficient detail and documentation to evaluate potential short-term and long-term direct and indirect impacts upon regulated resources, that is, wetlands and watercourses, as well as to other ecological resources both on-site and off-site.” IV.B Town of Hartland Exhibits, 4, Pre-filed Testimony of William H. Emerick, Chairman of Inland Wetlands Commission, January 11, 2011 (Logan Letter, December 2, 2010).¹

“The applicant submitted two wetlands delineation reports: (1) A Wetland & Watercourse Delineation Report by Kleinfelder, dated December 3rd, 2009; and (2) A Wetlands Delineation Report by Vanasse Hangen Brustlin, Inc. (VHB), dated September 7th, 2010.

These two “wetlands” reports are quite limited in scope, being primarily delineations of on-site wetlands and watercourses. Reasonably complete field inventories and resource characterization are lacking, and what was done took place outside of normal conditions for proper inventories. The VHB site visit was on August 25th, 2010 at the tail end of a drought period. According to the NOAA National Climatic Data Center, in 2010 Connecticut experienced severe drought in April, moderate to severe drought in May, moderate drought in June, and was abnormally dry July through September. The Kleinfelder site visit took place on October 19th, 2009, which is outside of the growing season for this part of Connecticut. According to the Connecticut Department of Environmental Protection, October 6th is the average first-frost date for the Northwest Hills, which includes the property at 95 Balance Rock Road, which has elevations above 1,100 feet. Many water-dependent species would not be evident in these conditions.

Additionally, an intermittent watercourse was identified in Wetland A (eastern wetland on the site), yet it was not surveyed and does not even appear on the site plan submitted with the application. The same is true for an identified depressional area in Wetland B (western wetland on the site). Moreover, topography is mostly or completely lacking within the site’s wetlands and watercourses, which could be impacted from the proposal.” III. B Party Thomas H. Sirman Exhibits, 9 , Pre-filed testimony of George Logan, January 4, 2011.

15. The proposed 12’ wide gravel access drive for proposed tower site “C” traverses a wide band of wetlands previously disturbed by the owner of 95 Balance Rock Road.

¹ “The Hartlands Inland Wetlands Commission agrees with the position and stipulations of the December 2, 2010 letter by REMA Ecological Services, LLC, George Logan, Registered Soil Scientist. (Copy attached).” IV.B Town of Hartland Exhibits, 4, Pre-filed Testimony of William H. Emerick, Chairman of Inland Wetlands Commission, January 11, 2011 (Emerick Letter, January 6, 2011).

Site Access Map, II. B. Applicant Exhibits, 22, Responses to CSC's Request for Additional Information, May 9, 2011, Attachment 3.

16. The proposed tower site at 95 Balance Rock Road was the site of illegal wetlands activity.

"[T]he property owner, Ring Mountain Hunt Club, has conducted un-permitted clearing and grubbing activities within regulated wetlands, as recently as the early to mid-1990s. This area, that was previously a full-canopied forested wetland, is currently maintained as a mowed meadow." IV.B Town of Hartland Exhibits, 4, Pre-filed Testimony of William H. Emerick, Chairman of Inland Wetlands Commission, January 11, 2011 (Logan Letter, January 5, 2011).

"[T]he property owner, Ring Mountain Hunt Club, is engaged in an ongoing deposition of a toxic heavy metal, that is, lead (in lead shot) within a regulated wetland area. The property owner has not pursued any permits before the Commission for the resulting significant adverse physical impacts upon the wetlands and the habitat they provide to the local wildlife assemblage." IV.B Town of Hartland Exhibits, 4, Pre-filed Testimony of William H. Emerick, Chairman of Inland Wetlands Commission, January 11, 2011 (Logan Letter, January 5, 2011).

"It is likely that some of the fill deposited to stabilize the driveway into the property was placed on wetlands soils. Fill was placed to a depth greater than 2 feet." IV.B Town of Hartland Exhibits, 4, Pre-filed Testimony of William H. Emerick, Chairman of Inland Wetlands Commission, January 11, 2011 (Northwest Conservation District letter, November 8, 2010)..

"After discussion, Chairman William Emerick made a motion to instruct Enforcement Officer Scott Eisenlohr to issue a Cease and Desist Order upon the Ring Mountain Hunt Club with a copy to their legal counsel. Motion seconded by Hank Pruessing. Motion carried. The Cease and Desist Order would cite the following violations: (1) clear cutting without a permit; (2) deposition of lead shot on wetland soils and watercourses and the assumed pollution from the use of the lead shot. After discussion, Chairman Emerick restated his motion to instruct Enforcement Officer Scott Eisenlohr to issue a Show Cause Hearing Notice to the Ring Mountain Hunt Club to be held on February 2, 2011 at the Commission's next regular meeting. Hank Pruessing seconded motion. Motion unanimously carried." IV.B Town of Hartland Exhibits, 4, Pre-filed Testimony of William H. Emerick, Chairman of Inland Wetlands Commission, January 11, 2011 (Hartland Inland Wetlands Commission Minutes – January 5, 2011).

"The CEQ recommends that the CSC consider the implications of approval of the location if it was the site of illegal wetlands filling. The CEQ received documents suggesting portions of this property may have been the site of illegal wetlands activity. Should this activity, if it occurred, have included the access road or other areas essential to the proposed tower, approval to use those areas should be withheld." I. E. State Agency Comments, 3. State of Connecticut Council on Environmental Quality, February 22, 2011.

"No activity will occur within the delineated wetland area, other than any required updating of the existing utility line that crosses a portion of the stream. With these considerations, the proposed project does not appear to directly impact the wetland's hydrologic functional role. In addition, severe impacts to any wildlife habitat provided by the wetland are not likely as this portion of the wetland is already fragmented by the existing road, driveway, structures and grounds associated with the current property surroundings." II. B. Applicant Exhibits, 4, Responses to Sirman Interrogatories, January 6, 2011, Exhibit E, Kleinfelder letter, December 3, 2009, p.2

17. Location of the proposed tower at 95 Balance Rock Road would not comply with the town of Hartland planning and zoning regulations.

"Attached is a summary of the application's incompatibility with our Town zoning regulations which also includes specific objections to the application." IV.B Town of Hartland Exhibits, 3, Pre-filed Testimony of Scott Eisenlohr, Zoning Enforcement Officer, January 13, 2011.

18. Location of the proposed tower at 95 Balance Rock Road would not comply with the town of Hartland plan of conservation and development.

"Q. Is the proposed cellular communication tower consistent with the Town's Plan of Conservation and Development?

A. No. The primary objectives of Hartland's 2007 Plan of Conservation and Development (POCD) includes the preservation and protectuion of the rural character of our community. The placement of the proposed tower in this location is inconsistent with this objective."

IV.B Town of Hartland Exhibits, 2, Pre-filed Testimony of Wade Cole, First Selectman, January 13, 2011.

"Q. Is the proposed cellular communication tower consistent with the Town's Plan of Conservation and Development?

A. No. The Hartland Plan of Conservation and Development (POCD) emphasizes the rural character and environment and residential nature of our residents' properties. The placement of the proposed tower in the proposed location ignores the criteria set forth in Hartland POCD."

IV.B Town of Hartland Exhibits, 4, Pre-filed Testimony of William H. Emerick, Chairman of Inland Wetlands Commission, January 11, 2011.

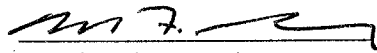
"The Town of Hartland 2007 Plan of Conservation and Development does not specifically identify wireless communications facilities as a land use. Nevertheless, it is respectfully submitted that AT&T's proposed Facility will enhance the Town's goals for ensuring that the Town's public safety needs are satisfied and that the Town's facilities are adequate by providing infrastructure for communications." II. B. Applicant Exhibits, 1. Application for a Certificate of Environmental Compatibility and Public Need filed by New Cingular Wireless PCS, LLC, received October 13, 2010, and attachments and bulk file attachments, p. 15.

"As such, AT&T simply noted in its application that the proposed wireless telecommunications facility would generally enhance a general goal included in the Towns POCD of ensuring that the Town's

public safety needs are satisfied and that the Town's facilities are adequate by providing infrastructure for communications." II. B. Applicant Exhibits, 4, Responses to Sirman Interrogatories, January 6, 2011, A 1.

II. B. Applicant Exhibits, 1.a, 2007 Plan of Conservation and Development, Town of Hartland, November 15, 2007.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of June, 2011, a copy of the foregoing document and attachments was sent, first class U.S. mail, postage prepaid, to:

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