

STATE OF CONNECTICUT  
CONNECTICUT SITING COUNCIL

IN RE:

APPLICATION OF NEW CINGULAR  
WIRELESS PCS, LLC (AT&T) FOR A  
CERTIFICATE OF ENVIRONMENTAL  
COMPATIBILITY AND PUBLIC NEED FOR  
THE CONSTRUCTION, MAINTENANCE AND  
OPERATION OF A TELECOMMUNICATIONS  
TOWER FACILITY AT 8 BARNES ROAD IN  
THE TOWN OF CANAAN (FALLS VILLAGE),  
CONNECTICUT. REOPENING OF THIS  
DOCKET PURSUANT TO CONNECTICUT  
GENERAL STATUTES § 4-181a(b) LIMITED  
TO COUNCIL CONSIDERATION OF  
CHANGED CONDITIONS, REVISED TOWER  
SITE LOCATION AND MODIFIED FACILITY

DOCKET NO. 409A

July 25, 2013

NEW CINGULAR WIRELESS PCS, LLC ("AT&T")  
POST HEARING BRIEF

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## PRELIMINARY STATEMENT

New Cingular Wireless PCS, LLC (“AT&T”), by its attorneys, Cuddy & Feder, LLP, respectfully submits this post hearing brief in support of its motion to reopen, reverse and modify the Council’s denial of AT&T’s Application for a Certificate of Environmental Compatibility and Public Need (“Certificate”) in Docket No. 409. AT&T’s administrative motion addresses changed conditions with respect to its proposal to site a new tower facility at property with an address of 8 Barnes Road on Cobble Hill in the Town of Canaan (the “Site”).

There is a recognized public need for a new tower to provide wireless services to residents and travelers along State Routes 63 and 126 and U.S. Route 7, among other areas of Falls Village. In fact, the public need for a new facility in this part of Falls Village was already determined by the Council in its original Findings of Fact and Opinion in Docket 409. Yet the Council denied the 150’ tower in the original proposed location on the Site based on its opinion that there would be adverse visual effects from the tower in an otherwise scenic area of the Country and State. Importantly, the Council found no other significant environmental impacts associated with the tower project at the Site. In fact, the Council itself recognized that concerns about the access road improvements proposed by AT&T at that time were speculative, unlikely to occur and could be mitigated.

Since the time of the Council’s Decision in Docket 409, the need for a tower in this area of the State was reaffirmed by no less than the Federal Communications Commission (“FCC”) on October 27, 2011. In 2012, the FCC identified this exact area of the State as one with no reliable wireless broadband service. The FCC further found that a facility should be built in this exact area of the State in furtherance of U.S. Policy and the critical need to remedy rural America’s inability to access wireless networks. Additionally, there are State of Connecticut

public safety communications concerns in this area of the State as indicated in publicly available information from the State Department of Public Safety. Further, it is known from sworn testimony by Verizon in Docket 360 that it also requires another facility in this area of Falls Village.

Despite ongoing litigation over the original denial in Docket 409, AT&T has explored various alternatives in order to meet the public need for wireless services without financial assistance from the FCC. These efforts by AT&T are in furtherance of the Council's own specific encouragement as set forth in its 2011 Opinion where it implored AT&T to explore "alternative sites and technologies" in trying to meet the public need for service. AT&T and its experts have nevertheless confirmed there simply are no other feasible technologies or options other than a new tower in this part of Falls Village in order to provide reliable wireless services. Indeed, a tower located somewhere on the over 70 acre Site located on Cobble Hill remains the only known viable site for construction of a tower to meet the public's need for service in this area of Falls Village.

In order to address the Council's original Findings of Fact and Opinion from 2011 and as part of a potential settlement of litigation, AT&T studied different tower locations on the same Site which was the subject of Docket 409. In consultation with AT&T's visual experts, radiofrequency engineering experts and professional engineers, AT&T was able to identify a location on the Site which would cost more for AT&T to build and be less effective in providing service as compared with the original location while at the same time substantially reduce overall visibility of the tower structure based on the revised location and a thirty foot reduction in tower height. Additionally, AT&T's professional engineers redesigned the proposed improvements to the existing driveway to reduce widening, reduce cut and fill and incorporate state of the art

drainage features that do not exist at the Site today. These modifications to the original proposal on the Site were incorporated into plans and other materials referred to as a “Modified Facility” and presented to the Council by way of AT&T’s motion pursuant to Section 4-181a(b) of the Connecticut General Statutes.

We respectfully submit that the FCC’s factual findings on the need for service in this exact part of the State and adoption of U.S. policy to foster deployment of rural wireless services as articulated in 2012 are in fact changed conditions related to this Docket. All that is required as a matter of state law is some showing of “changed conditions”, an undefined term as set forth in Section 4-181a(b) of UAPA. In its own opinions, the Council has defined “changed conditions” as “new information or facts that were not available at the time of the final decision.” On this motion, AT&T respectfully submits that the Council simply could not find as a matter of law that this new evidence from the FCC is anything other than a changed condition directly related to Docket 409. Further that U.S. Policy as advanced by the FCC directly relates to the need for a new tower to provide rural services in Falls Village and warrants a second look at the Site in Docket 409 as part of Docket 409A. Indeed, in undertaking the balancing test required under Section 16-50p of PUESA and weighing the need for a tower with environmental effects in this part of the State, we submit that the Council must give great weight to the FCC’s factual findings and U.S. policy regarding rural wireless services and recent amendments to PUESA which absolutely tips the scales in favor of approving a new tower at the Site. As such AT&T respectfully requests that the Council’s decision in Docket 409 be reversed and either the Modified Facility issued a Certificate as requested by AT&T or, on its own motion, the Siting Council approve the original location proposed in Docket 409, either at the same height as

originally proposed by AT&T (150' above grade level (AGL)) or at a lower height (130' AGL) approved to provide reliable service to the public.

### **STATEMENT OF FACTS**

#### I. Procedural History

On October 19, 2010, after an approximately year-long municipal consultation period, AT&T applied for a Certificate of Environmental Compatibility and Public Need to construct a 150' tall tower and related wireless communications equipment, driveway, utilities and other facility site components ("Facility") at 8 Barnes Road (the "Site") to provide needed wireless services in Falls Village. AT&T's Application was assigned Docket No. 409. [Docket 409, AT&T's Exhibit 1]. Parties and intervenors admitted to the Docket 409 proceedings were Patty and Guy Rovezzi, the Falls Village Inland Wetlands/Conservation Commission (IW/CC) and the Falls Village Planning & Zoning Commission. Public hearings in Docket 409 were held on February 17, 2011 and June 16, 2011. The public hearing was closed on June 16, 2011.

On August 25, 2011, the Siting Council issued a Decision & Order ("D&O") denying AT&T's application for a Certificate in Docket 409. [Docket 409 Decision and Order August 25, 2011]. AT&T timely filed suit in the United States District Court for the District of Connecticut ("District Court") challenging the Siting Council's denial of AT&T's application. On October 25, 2012, the District Court granted summary judgment in favor of the Siting Council, a decision which AT&T has appealed to the United States Court of Appeals for the Second Circuit ("Pending Appeal").

On February 15, 2013, AT&T submitted a motion to the Siting Council pursuant to Section 4-181a(b) of the Connecticut General Statutes to reverse and modify its decision in Docket No. 409 based on changed conditions, including new federal policies and facts

specifically related to wireless service in this part of Falls Village and a modified tower facility (“Modified Tower Facility”) at another location on the Site. [Docket 409A, AT&T’s Ex. 1]. The Modified Tower Facility was proposed in the spirit of potential compromise and is designed to reduce visibility with a reduction in height to 120’ tall at the modified location. [Id.]

On March 7, 2013, the Siting Council reopened Docket 409 limited to Siting Council consideration of changed conditions and the Modified Tower Facility. The re-opened docket was assigned Docket No. 409A. Parties and intervenors admitted to the Docket 409A proceedings included the Docket 409 parties and intervenors as well as Marc Rosen and Susan Pinsky.

A public hearing on Docket 409A was scheduled by the Siting Council for April 30, 2013. On March 28, 2013, AT&T provided a copy of the Siting Council’s public notice of the April 30, 2013 hearing via first class mail, return receipt requested to all abutting property owners and those agencies and entities that would be notified of an applicant’s intent to file an application with the Siting Council. [Docket 409A, AT&T’s Ex. 3, Tab 1]. AT&T submitted responses to Siting Council pre-hearing interrogatories on April 15, 2013 and AT&T submitted pre-filed testimony on April 22, 2013. Responses to the IW/CC interrogatories were submitted by AT&T on April 23, 2013.

On April 30, 2013, AT&T raised a red weather balloon to the height of 120’ above grade level at the location of the Modified Tower Facility and a black weather balloon to the height of 150’ above grade level at the original location on the Site considered in Docket 409 (the “Denied Tower Facility”). The Siting Council conducted a field review of the Site and the Modified Tower Facility and Denied Tower Facility. Both balloons remained elevated throughout the day until approximately 4:45 p.m., when red weather balloon at Modified Tower Facility came down

and was replaced approximately 30 minutes later. [6/11/13 Hr. Tr. pg. 33-34]. After the red weather balloon at the Modified Tower Facility was replaced, both balloons remained elevated until approximately 7:00 p.m. [Id.].

At the hearing, the Siting Council heard comprehensive testimony from AT&T's panel of witnesses regarding the need for and the design of the Modified Tower Facility. The hearing was adjourned to May 21, 2013. On May 14, 2013 and May 16, 2013 AT&T responded to a second set of Siting Council interrogatories. At the May 21, 2013 hearing, cross examination of AT&T, the parties and intervenors was conducted. The hearing was adjourned to June 11, 2013 to accommodate the Rosen and Pinsky party. At the June 11, 2013 hearing, the Siting Council heard additional testimony regarding the need for the proposed facility and any environmental effects associated with the Modified Tower Facility. The public hearing was closed on June 11, 2013 after all parties and intervenors were given a full and fair opportunity to present their direct cases and AT&T rebutted same.

## II. Need for Services in this Area of Falls Village

### a. AT&T's Need

AT&T's need for service in this area of Falls Village was confirmed by the Siting Council in its October 2010 Findings of Fact and Opinion in Docket 409, in which the Siting Council determined that there is a public need for a new facility in this area of Falls Village. [Docket 409, Finding of Fact No. 26 through 26 August 25, 2011; Docket 409 Opinion August 25, 2011]. AT&T's need for a facility in this area of Falls Village is not in dispute by any party or intervenor. [5/21/13 Hr. Tr. pg. 29-30].

b. FCC Finding of Need

The need for reliable wireless services in this area of Falls Village is also confirmed by the Federal Communication Commission (“FCC”) through its program to facilitate infrastructure development in underserved and rural areas lacking mobile broadband coverage. [Docket 409A, AT&T’s Ex. 1]. The FCC’s coverage maps, which were based on 2012 third party drive testing of all wireless carrier networks, specifically identify this area of Falls Village as having gaps in wireless service. The FCC identified specific census blocks and roads in this area of Falls Village as requiring infrastructure for service to be provided to the public. [USF/ICC Transformation Order, FCC 11-161 at ¶¶ 8, 28 and Docket 409A, AT&T’s Ex. 1].

c. Public Safety & Other Carrier Need

On a State and local level, coverage maps of the State Department of Public Safety Network (“DPS”) also identify this area of Falls Village as lacking coverage. The DPS system coverage maps show that the DPS system experiences gaps in the ability of handheld units to communicate on the DPS network on Routes 7 and 63 in the vicinity of AT&T’s proposed facility. [Docket 409A, Administrative Notice; Docket 409A, AT&T’s Ex. 7]. Additionally, Verizon’s sworn testimony in Docket 360 and its coverage maps specifically indicated a need for a facility in this area of Falls Village in addition to the tower approved in that Docket.

d. AT&T’s Comprehensive Search for Sites and Review of Alternatives

The Docket 409 and 409A records demonstrates that no existing sites or facilities could be used by AT&T to remedy the documented gap in reliable service in this area of Falls Village. [Docket 409, AT&T’s Ex. 1, pg. 11-12, Tab 2]. The Docket 409 record also establishes that the none of the sites investigated by AT&T, including sites suggested by the IW/CC during the Docket 409 municipal consultation were feasible sites for providing needed service. [Id.]



Moreover, in the Docket 409 proceeding, AT&T established that there are no viable multiple site configurations for providing needed service. [Docket 409, AT&T's Ex.9; AT&T's Ex. 8, Response No. 2, Docket 409, 6/16/11 Hr. Tr. pg. 50]. In the Docket 409A proceeding, AT&T even demonstrated via empirical evidence that a tower facility at a Town-owned location, studied by the IW/CC and its consultant, would not provide service to the area where service is needed. [Docket 409A, AT&T's Ex. 6, Response No 14 and Tab 5; 6/11/13 Hr. Tr. pg. 41-43]. In addition, the Docket 409A record reveals that the Town would not even make this IW/CC studied location available resulting in a wholly illusory exercise for all involved. [Docket 409A, IW/CC Ex. 11, Response No. 5, Docket 409A, 5/21/13 Hr. Tr. pg. 45-50].

### III. Modified Tower Facility

The Modified Tower Facility for consideration in Docket 409A was proposed by AT&T in the spirit of potential compromise and without prejudice to AT&T's Pending Appeal. [Docket 409A, AT&T's Ex. 1]. The Modified Tower Facility is designed to reduce visibility through relocation on the Site, east of the Denied Tower Facility and through a 30-foot reduction in tower height to 120' AGL. [Id.]. The Modified Tower Facility location is approximately 1600' east of the existing hunting cabin at the Site. [Docket 409A, AT&T's Ex. 1, AT&T's Ex. 3, Tab 2]. The Modified Tower Facility requires a longer access drive than the Denied Tower Facility, though much if it follows an existing logging trail previously disturbed. [Id.]. The Modified Tower Facility access drive will include drainage features to safely convey storm water flows and protect outfall locations from erosion. [Docket 409A, AT&T's Ex. 3, Tab 3, AT&T's Ex. 6, Tabs 2 & 3]. The proposed improvements to the access drive will reduce the existing rate of runoff. [Docket 409A, 4/30/13 Hr. Tr. pg. 48].

While the Modified Tower Facility will allow AT&T to provide service to a significant segment of the public, the coverage area provided by the Modified Tower Facility is much less than the coverage from the Certificate Tower Facility. [Docket 409A, AT&T's Ex. 3, Response No. 19, Docket 409A, 4/30/13 Hr. Tr. , pg. 39-42]. Areas of year-round visibility of the Modified Tower Facility are substantially less than areas of year-round visibility of the Denied Tower Facility. [Docket 409A, AT&T's Ex. 3, Tab 4]. There will be less residential properties with views of the Modified Tower Facility than the Denied Tower Facility. [Id.]. The Modified Tower Facility will not be visible from any historic properties. [Id.].

Review of the most recent Connecticut Department of Energy & Environmental Protection Natural Diversity Database Maps (CT DEEP NDDDB) for this area of Falls Village, last updated December 2012, indicates that the Modified Tower Facility is not located within any shaded areas on the NDDDB map, or is located outside of any potential species listing area. [Docket 409A, AT&T's Ex. 3, Response No. 5, Tab 5]. As a mitigation measure, AT&T will incorporate a multi-species protection plan for construction and an invasive species control/management plan which does not exist today. [6/11/13 Hr. Tr. pg72-74; Docket 409A, AT&T's Ex. 6, Response No. 12]. There are no known impacts to species and the project will not involve fragmentation.

Upon review of the Modified Tower Facility, the State Historic Preservation Office ("SHPO") issued another no adverse effect on cultural resources determination noting its prior June 21, 2011 no adverse effect determination for the Denied Tower Facility and that the Modified Tower Facility is located farther away from the South Canaan Congregational Church, listed on the National Register of Historic Places. [June 28, 2013 SHPO determination].

## POINT I

### **THE SITING COUNCIL HAS JURISDICTION OVER AT&T's MOTION WHICH PRESENTS NEW INFORMATION AND EVIDENCE NOT AVAILABLE IN 2011**

It is undisputed that pursuant to CGS § 4-181a(b), the Council is authorized to reverse or modify a final decision on a showing of changed conditions. CGS §4-181a(b) provides that:

On a showing of changed conditions, the agency may reverse or modify the final decision, at any time, at the request of any person or on the agency's own motion.

While there is no UAPA statutory definition or caselaw on what constitutes "changed conditions", the Council has explained what qualifies as "changed conditions" for purposes of its jurisdiction and PUESA. In numerous prior decisions on motions under 4-181a, the Council has cited "new information or facts that were not available at [the time of the decision]... or "unknown or unforeseen events..." as "changed conditions". [Docket No. 141, Motion To Reopen, Decision July 30, 1993; see also *Town of Fairfield v. Connecticut Siting Council*, 238 Conn. 361, 366, 679 A.2d 354 (1996) (quoting from the Docket 141 Motion to Reopen Decision).

The Council has found changed conditions, or new information not available at the time of its decision to include: "the merger of AT&T Wireless PCS LLC, the original applicant, and Southwestern Bell Mobile Systems, LLC d/b/a Cingular Wireless, with the original applicant no longer needing the site" (Docket No. 270, Opinion, September 28, 2005); "the Council finds changed conditions in industry practices specifically pertaining to the gas pipe cleaning process used for the construction of the Kleen facility." (Docket 225C, Opinion, October 2, 2010); and alternative sources of cooling water for contingency events (Docket 187, Opinion for Connecticut General Statutes (CGS) § 4-181a(b) Proceeding, April 7, 2009). The Council has also determined policies and unforeseen events adopted after issuance of a decision were

changed conditions warranting modification of its decision: the State's identification of an aquifer protection zone subsequent to the issuance of the certificate constituted a changed condition (Docket 225B, Opinion, July 22, 2009); changed conditions included an increase in natural gas supply, improvements to the electrical transmission grid in Connecticut and construction of generation facilities Docket 187A, Opinion, December 2, 2010). As more fully set forth below in Points II and III, the FCC's factual findings of a public need for service and its policy to facilitate construction of a new tower facility in this exact area of the State and changes in Connecticut state law all constitute "changed conditions" within the meaning of 4-181a(b) and the Council's prior precedent.

## POINT II

### **THE FEDERAL COMMUNICATIONS COMMISSION'S FINDING OF THE NEED FOR A NEW TOWER FACILITY IN THIS EXACT AREA OF FALLS VILLAGE IS A CHANGED CONDITION DIRECTLY RELATED TO SECTION 16-50p AND THE COUNCIL'S BALANCING TEST IN DOCKET 409**

Since the Council's Decision and Order in Docket 409, the Federal Communications Commission (FCC), the agency charged with interpreting and administering the Communications Act, has recognized and confirmed the critical significance of providing wireless service to an acknowledged gap in coverage in rural Falls Village. In furtherance of the FCC's National Broadband Plan, the purpose of which is to make available advanced telecommunications services "to all consumers, including those in low income, rural, insular, and high cost areas at rates that are reasonably comparable to those charged in urban areas" (47 U.S.C. § 254(b)), the FCC announced that it would facilitate the development of rural wireless telecommunications infrastructure with \$300 million from the Universal Service Fund (USF) by a public auction ("Public Auction 901") and issued its final order on this policy on October 27, 2011. To implement this auction of public funds, the FCC utilized third party drive testing of all wireless carrier networks from 2012 and created a national map correlating underserved and rural areas lacking mobile broadband coverage with census blocks and roads that it determined eligible for subsidized deployment of wireless infrastructure. [*USF/ICC Transformation Order*, FCC 11-161 at ¶¶ 8, 28; 47 C.F.R. § 54.1002; Mobility Fund Phase I Eligible Areas, <http://www.fcc.gov/maps/section-706-mobile-deployment-map>]. FCC Chairman Genachowski stated "[a]s our new map demonstrates, millions of Americans still live, work, and travel in areas where advanced mobile networks have not been built out." *FCC News* (Feb. 12, 2012). The critical need for wireless services in rural areas like this area of Falls Village was most recently underscored by participants in a panel discussion that included Senator Mark Pryor

(D-Ark), Chairman of the Senate Commerce, Science, & Transportation Communications, Technology, and the Internet Subcommittee, Mark Lewellen of John Deere and John Windhausen with the Schools, Health Care and Libraries Broadband Coalition, among others, who characterized broadband service as essential to the economic development, education and public safety of rural America. See <http://www.pcia.com/pcia-press-releases/586-pcia-to-discuss-rural-wireless-broadband-deployment-on-capitol-hill>.

Only a handful of areas in Connecticut were eligible for Auction 901 and, unsurprisingly, most were in Litchfield County, where the terrain, a general lack of reliable service, the rural nature of the county, a narrow margin of return on investment, and substantial barriers to entry have at times forestalled the deployment of wireless services contrary to federal policy favoring ubiquitous coverage. Specifically, in May 2012, Auction 901 identified six census blocks and several roads in direct proximity to the north and south of the Site AT&T has proposed for a tower. [*Mobility Fund Phase I Auction Scheduled for September 27, 2012, Notice and Filing Requirements and other Procedures for Auction 901*, AU Docket No. 12-25, DA 12-641 (May 2, 2012)]. Those identified FCC areas further document the gaps in service in Falls Village and would be substantially covered by AT&T's facility and no other single site location. [Docket 409A, AT&T's Ex. 1]. As such, the FCC deemed these areas, which were identified in May 2012, to include residents and over three miles of roads including parts of U.S. Route 7 (and the approximately 2,900 drivers that travel these roads daily) eligible for funding as part of a national program. [Id.].

Auction 901 took place on September 27, 2012. There were no bidders for any of the areas eligible in Connecticut, for reasons wholly unrelated to the gaps in service in Connecticut and the Siting Council's considerations under Section 16-50p of the Connecticut General

Statutes. Nonetheless, the gravity of the FCC's own findings of a public need for service and its decision to potentially subsidize construction of a new tower facility in this exact area of the State cannot be emphasized enough. The FCC's own findings, policies and law all specifically identified areas north and south of AT&T's proposed Site location as in need of wireless services for the public.

The FCC's factual findings and policy are exactly the kind of changed conditions that must be considered by the Council for purposes of Section 4-181a(b) of the Connecticut General Statutes. The FCC's critical findings were simply not available to present as evidence at the time of the decision in Docket 409, yet are directly on point and related to the CGS 16-50p criteria the Council must undertake, namely the balancing of a public need for a new tower in this area of Falls Village with environmental impacts. As such, changed conditions exist such the Council must reconsider its decision in Docket 409. We respectfully submit that the FCC's findings and policies provides even greater and compelling evidentiary weight with respect to the balancing test the Council must employ under Section 16-50p of the PUESA and tip the scales decidedly in favor of issuing a Certificate for a new tower facility to serve this exact area of Connecticut.

### POINT III

#### THE STATE LEGISLATURE'S 2013 AMENDMENTS TO PUESA ARE CHANGED CONDITIONS DIRECTLY RELATED TO SECTION 16-50p AND THE COUNCIL'S BALANCING TEST

Connecticut recently amended the Siting Council's enabling legislation to affirmatively and presumptively recognize the broad public need for tower facilities like AT&T's proposed facility to provide reliable wireless services to residents of the state. CGS Section 16-50p(b), as amended by No. 13-289 of the 2013 Public Acts which became law earlier this month, now provides in pertinent part:

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

(Emphasis added.). The legislature thus reaffirmed for the Council that it's inquiry is limited to whether a specific tower is needed, not the need for the FCC licensed services that carriers would in fact provide from a tower. Importantly, this change in state law is also a "changed condition" for purposes of AT&T's 4-181a(b) motion in that the legislature has once again recognized the critical role that wireless services play in the public health, safety and welfare of the State's residents and encouraged the Siting Council to look at the need for towers in that context.



## POINT IV

### **THE CHANGED CONDITIONS WARRANT REVERSAL OF THE DENIAL IN DOCKET 409 AND ISSUANCE OF A CERTIFICATE FOR THE MODIFIED TOWER FACILITY**

In consideration of the Council's Decision and Order in Docket 409, AT&T proposed a Modified Tower Facility at another location at the Site, which proposal reduces visibility from the areas north and west of Cobble Hill, toward the center of Falls Village. This proposal represents a compromise of AT&T's coverage objectives with respect to the identified gap in its services in Falls Village, and would allow AT&T to provide service to a significant segment of the public, but not to the same extent as its original proposal.

AT&T's original proposal in Docket 409 was to site a new tower facility at either 150' AGL or 130' AGL on the western shoulder of Cobble Hill. The location of AT&T's Modified Tower Facility remains on the same Site, approximately 1600' northeast of the existing hunting cabin on the property. AT&T's Modified Tower Facility would require the extension and improvement of the existing access/logging road and substantial additional cost to AT&T. AT&T proposed to compromise further, reducing the height of the tower structure to from 150' (AGL), as proposed, to 120' AGL. [Docket 409A, AT&T's 1; AT&T's Ex. 3, Tab 2].

Importantly, it should be noted in the proceedings on AT&T's Motion, other parties and intervenors failed to offer any competent evidence or factual testimony to rebut AT&T's evidence and testimony on the subject of a public need for a new tower in this part of Falls Village or the factually documented environmental effects of AT&T's Modified Tower Facility or Certificate Facility. Nor did other parties and intervenors offer a potential alternative site that is both viable from a radiofrequency perspective and available from a leasing perspective to the

property at 8 Barnes Road. Rather, the evidence presented was largely lay opinion testimony and the proffer of “evidence” from the IW/CC’s radiofrequency engineer thoroughly examined and rebutted to the point where it lacks any credibility. The evidence in the record before the Siting Council clearly demonstrates both a significant gap in AT&T’s coverage in the Falls Village area, and that there are no alternative sites or any multiple site configurations that are viable and available options for providing reliable service where service is needed.

Pursuant to CGS Section 16-50p, the Siting Council is required to find and determine as part of a Certificate application any probable environmental impact of a facility on the natural environment, ecological balance, public health and safety, scenic, historic and recreational values, forest and parks, air and water purity and fish and wildlife. AT&T respectfully submits that the impacts associated with its proposed Modified Facility are either not significant or that any significant impacts are simply not outweighed by the public need for a tower at the Site.

#### 1. Potential Visual Impacts

The Docket 409 record demonstrates that the environmental impact associated with the Certificate Tower Facility is limited to the visibility of the facility. [Docket 409 Opinion August 25, 2011]. Indeed, in the Docket 409 proceeding, the CSC based its decision on the visibility of the Certificate Tower Facility and found that any other impacts associated with the facility were not significant and could be mitigated. [Id.]. In an effort to address the visibility of the needed facility and in the spirit of settlement, AT&T designed the Modified Tower Facility to reduce visibility by shifting the location of the tower east of the top of Cobble Hill and reducing the height 30’ to 120’ AGL, even though the Modified Tower Facility results in less coverage than the Certificate Facility. As Mr. Wells testified, the coverage from the Modified Tower Facility represents a compromise to providing service to this area. [4/30/11 Hr. Tr. pg. 39-41].

The comprehensive visual analysis of the Modified Tower Facility demonstrates that areas of year-round visibility of the Modified Tower Facility are *substantially* less than areas of year-round visibility of the Certificate Tower Facility. [Docket 409A, AT&T's Ex. 3, Tab 4]. Only portions of 6 residential properties are expected to have year-round views of portions of the Modified Tower Facility. [Id.]. The Modified Tower Facility There will be less residential properties with views of the Modified Tower Facility than the Certificate Tower Facility. [Id.]. The Modified Tower Facility will not be visible from any historic properties. [Id.]. In addition, many views already contain existing utility infrastructure. [Id.]

It is important to note that despite the assertions by parties and intervenors the Site is not located within any officially designated viewshed. [Docket 409A, AT&T's Ex. 3, Tab 4]. Moreover, while year-round views of the Modified Tower Facility are expected from Route 7, a designated scenic road, the expected views are distant, over one mile away and much less prominent than the views of the Certificate Tower Facility. [Id.]. Thus, the Modified Tower Facility will not have a significant visual impact.

Throughout the Docket 409 and Docket 409A proceedings, the IW/CC submitted numerous documents regarding the areas surrounding the site such as Robbins Swamp and other areas of protected open space.[Docket 409, IW/CC Ex. 7, 19-51, Docket 409A, IW/CC Ex. 9, 10]. However, none of this information demonstrates that the Site itself is either protected or particularly unique. [Id.]. Indeed, the IW/CC confirmed that the Town never sought to purchase the Site for open space or other protection. [5/21/13 Hr. Tr. pg. 69]. Moreover, the Town did not consider this area of the Town or the Site negatively impacted by views of other utility infrastructure or commercial development. In addition to the existing CL&P infrastructure to the south of Cobble Hill, a gas station and associated convenience store are located on Route 63 near

its intersection with Route 7, across the street from the South Canaan Meeting House and at the base of Cobble Hill. Given that the Modified Tower Facility will not have a significant adverse visual impact, it is respectfully submitted that any expected views of the Modified Tower Facility do not outweigh the demonstrated public need for the facility.

## 2. Potential Impacts to the Natural Environment

The record in this proceeding, as well as the Docket 409 proceeding, establish that the impacts to the natural environment associated with a proposed facility at the Site are not significant. Indeed, in its decision in Docket 409, the Siting Council recognized that the proposed facility was designed to mitigate any potential impacts to the natural environment. [Docket 409 Opinion August 25, 2011].

### a. Wetlands, Watercourses and Floodplains

The record clearly demonstrates that no wetlands are located within the proposed Modified Tower Facility development area or within 200 feet of the proposed development area. [Docket 409A AT&T's Ex. 4, Tab 3]. The record includes a wetlands delineation report prepared by an experienced and professional soil scientist who conducted a comprehensive field review and determined that the closest wetland to the Modified Tower Facility is located off-site approximately 500 feet to the east south-east. [Id.]. Moreover, the Modified Tower Facility is located approximately 5,000 feet from Robbins Swamp and closest point of the access drive is located approximately 800 feet away from Robbins Swamp. [Docket 409, AT&T's Ex. 4]. Thus, the Modified Tower Facility will have no impacts to wetlands or wetland buffer areas.

While the IW/CC and other intervenors claimed impacts to wetlands from the proposed facility, no other party or intervenor presented any evidence of the presence of wetlands on the Site. The assertion by the IW/CC that wetlands exist within the Modified Tower Facility

development area is simply conjecture, as they did not provide any map or other documentation identifying wetlands on or near the Modified Tower Facility. Neither the IW/CC nor any other intervenor conducted any field review of wetlands. [5/21/13 Hr. Tr. pg. 63]. Thus, the evidence in the record demonstrates that no wetlands or watercourses will be impacted by the proposed facility at the Site.

b. Habitat Assessment and Wildlife

AT&T conducted a habitat evaluation which included the Modified Tower Facility area, the access drive area and areas generally within 100 to 200 feet of the development and no rare or endangered species or habitats were identified. [Docket 409A, AT&T's Ex. 4, Tab 4]. In addition, review of the most current CT DEEP NDDB Map indicates that the Modified Tower Facility is located outside of any potential species listing area. [Docket 409A, AT&T's Ex. 3, Tab 5]. DEEP's determination in 2010 that they know of no Federal or State Endangered, Threatened or Special Concern Species occur at the Site is not expected to change based on all the testimony presented including that of the IW/CC. [Id.]. Regardless, AT&T will incorporate a construction protection plan that includes a number of elements to protect any species of concern that might exist or happen to use the Site. [6/11/13 Hr. Tr. pg. 72-74].

The record also demonstrates that the Modified Tower Facility will not cause significant forest fragmentation given that the footprint of the proposed facility and associated clearing will be similar in scale to the existing clearing at the Site and that the proposed facility is unmanned resulting in very little human activity or traffic generation. [Docket 409A, AT&T's Ex. 6, Tab 4; 6/11/13 Hr. Tr. pg. 45-46]. In addition, AT&T will incorporate an invasive species control/management plan which will result in an overall benefit to the forest community on Cobble Hill. [Id.].

The record also demonstrates that no Important Bird Areas, Hawk Watch Sites, Bald Eagle Watch Sites, Important Bird Sites or Migratory Waterfowl areas are mapped within the Site area. [Docket 409A, AT&T's Ex. 6, Tab 1]. Further, the Modified Tower Facility complies with the recommendations of the United States Department of Interior Fish and Wildlife Service for tower siting. [Docket 409A, AT&T's Ex. 4, Tab 6].

Moreover, in its determination in Docket 409, the Siting Council confirmed that the Site is not located within a "Town-designated unique or special habitat area." [Docket 409 Opinion and Findings of Fact August 25, 2011].

While the IW/CC's witnesses provided information from 1988 and 1996 regarding three rare plant species and one rare bird species on the Nature Conservancy property, which boundary is located approximately 700 feet from the Modified Tower Facility; they also testified that the plant species identified would likely not be found at the Modified Tower Facility location. [Docket 409A, IW/CC Ex. 9; 5/21/13 Hr. Tr. pg. 28-30]. The IW/CC witness also testified that he could not confirm that the proposed facility would have any adverse impact to the species on the Nature Conservancy property. [5/21/13 Hr. Tr. pg. 33]. Any other claims of the presence of rare or endangered species at the Site are purely anecdotal and not supported by the evidence in the record regarding the existing habitats at the Site.

Given the lack of evidence of any rare or endangered species at the Site and AT&T's proposed protection measures, the Modified Tower Facility will not have a significant adverse impact to any habitats or wildlife or the ecological balance of this area of Falls Village.

c. Clearing, Grading and Drainage

Access to the Modified Tower Facility includes improvements to an existing access drive with an approximately 2,000-foot extension of the existing access drive over previously

disturbed and logged areas of the Site. [Docket 409A, AT&T's Ex. 3, Tab 2]. Improvements to the existing access drive include drainage features in compliance with ConnDOT requirements to protect the access roads from washout, to safely convey stormwater flows and to protect outfall locations from erosion which are well beyond those required for a driveway. [Docket 409A, AT&T's Ex. 3, Tab 3]. The stormwater drainage measures will result in a decrease in the rate of runoff from current conditions. [4/30/13 Hr. Tr. pg. 48]. In addition, AT&T's facility design will incorporate all appropriate sediment and erosion control measures in accordance with the Connecticut Soil Erosion Control Guidelines as established by the Council of Soil and Water Conservation. [Docket 409A, AT&T's Ex. 3, Tab 3]. Given that no drainage measures currently exist for the proposed access drive, AT&T's proposed improvements to the existing access drive will result in enhanced stormwater and erosion control.

The record in this proceeding also demonstrates that the proposed improvements to the access drive will allow safe vehicle access for maintenance given that the facility is unoccupied and will not present a significant safety risk for emergency purposes. [4/30/13 Hr. Tr. pg. 42-43; 6/11/13 Hr. Tr. pg. 63]. Indeed, the Site is currently accessible via a four wheel drive vehicle over the existing access drive. [Docket 409A Field Review 4/30/13]. Moreover, as explained by AT&T's witnesses, the facility will be remotely monitored so that any required maintenance or repair access, including the refueling of the back-up emergency generator, can be appropriately scheduled. [6/11/13 Hr. Tr. pg. 62-63].

AT&T also demonstrated that construction of the Modified Tower Facility does not present any unusual or unique challenges. [6/11/13 Hr. Tr. pg. 35-36]. AT&T confirmed that no construction issues were encountered with the construction of its tower facility in Woodbridge approved in Docket 388, where the access drive is characterized by slopes similar to the

proposed access drive and switchbacks. [Docket 409A, AT&T's Ex. 6]. Thus, while the Siting Council's consideration under CGS 16-50p does not include construction logistics or operational challenges AT&T may face, AT&T demonstrated that construction of the proposed facility will not result in any significant adverse impacts.

While the parties and intervenors raised concerns regarding the access drive, construction of the proposed facility and stormwater impacts, none provided any empirical evidence that supported the concerns raised. No calculations of claimed runoff or alleged erosion were submitted by others in this proceeding. Concerns regarding the access drive were not supported by any competent or reliable evidence. Thus, while the parties and intervenors possess the right to express their opinions in this proceeding, such unsupported statements should not be given the weight of evidence.

AT&T respectfully submits that it established that the proposed improvements to the existing access drive will have no significant adverse impact to the surrounding area and will result in an improvement to stormwater and erosion control over current conditions.

### 3. Other Environmental Considerations

There are no other relevant environmental factors for consideration by the Siting Council in this proceeding. The Modified Tower Facility will comply with all public health and safety requirements. Additionally, given that the facility is unoccupied, there will be no impacts to traffic, air or water. As such, the Siting Council should find and determine that the Modified Tower Facility will not have any significant environmental effects that outweigh the demonstrated public and safety need for the proposed facility.



## POINT V

### **THE COUNCIL MAY ISSUE A CERTIFICATE FOR THE ORIGINAL TOWER FACILITY ON THE COUNCIL'S OWN MOTION**

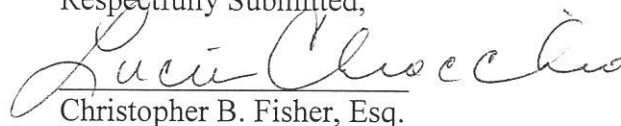
While not requested by AT&T in its motion under 4-181a(b), we note that given the FCC evidence and U.S. Policy related to expansion of rural wireless services, the Council would certainly be well within its authority under 4-181a(b) to reverse its original decision in Docket 409 and approve the original tower location on the Site at the same or a lower height in considering the overwhelming public need for a new tower in this area of Falls Village. The Council can exercise this authority if, for whatever reason the Council had concerns related to the Modified Tower Facility in conducting the balancing test required by Section 16-50p of PUESA.

### **CONCLUSION**

For the reasons set forth herein and on the record in Dockets 409 and 409A, and as an offer of compromise, AT&T respectfully submits it has demonstrated changed conditions that warrant approval of AT&T's modified proposal, or AT&T's original proposal. AT&T has demonstrated that its proposed facility is not only needed to provide wireless service to this area of Falls Village, but that there is no other option that is viable and available to provide not only FCC licensed services, but services the FCC has found lacking and requiring new infrastructure. Upon these changed conditions and AT&T's modified proposal, AT&T respectfully submits that it has demonstrated that its proposed facility at 8 Barnes Road remains the last best opportunity to provide wireless telecommunications services to this area of Falls Village. Therefore, AT&T requests that the Council grant its Motion to reopen its decision on Docket 409 and grant AT&T a Certificate for a facility at the Site. AT&T's proposed facility remains the only available and

viable means to provide service to this area of Falls Village, and it is respectfully submitted that a continued denial of approvals for construction of a tower on this Site will deny residents and travelers along roads in rural Falls Village who were identified by the FCC as being in need of wireless services without any service from any carrier — for the foreseeable future.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this day, a copy of the foregoing was sent electronically and by overnight delivery to the Connecticut Siting Council with copy to:

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Dated: July 25, 2013

  
Lucia Chiochio

cc: Michele Briggs, AT&T  
Christopher B. Fisher, Esq.