

STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL

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CONNECTICUT
SITING COUNCIL

In Re:

APPLICATION OF NEW CINGULAR WIRELESS PSC, LLC (AT&T) DOCKET: 409A
FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY
AND PUBLIC NEED FOR THE CONSTRUCTION, MAINTENANCE,
AND OPERATION OF A TELECOMMUNICATIONS FACILITY
AT 8 BARNES ROAD IN THE TOWN OF CANAAN (FALLS VILLAGE) July 24, 2013

ORIGINAL

**PROPOSED FINDINGS OF FACT OF THE INLAND WETLANDS AND
CONSERVATION COMMISSION OF THE TOWN OF CANAAN
(FALLS VILLAGE), CONNECTICUT**

Just over two years ago on July 16, 2011, the Inland Wetlands/Conservation Commission of the Town of Canaan (Falls Village) ("IW/CC") submitted its proposed findings of fact in good faith, based on the evidence presented during the hearing on Docket 409 in opposition to New Cingular's application to construct and operate a telecommunications tower facility at 8 Barnes Road in the Town of Canaan (Falls Village), Connecticut.

In the intervening period, the applicant filed an expedited appeal under 47 U.S.C. §332(c)(7)(B)(v), and the Siting Council's denial of the application was upheld by the U.S. District Court for the District of Connecticut under the rule of *Sprint Spectrum, L.P. v. Willoth* (*Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630 (2d Cir. 1999)):

Thus, under the *Willoth* standard, a plaintiff prevails on a Section 332(c)(7)(B)(i)(II) claim for effective prohibition if it shows both that a "significant gap" exists in wireless coverage and that its proposed facility is "the least intrusive means" to close that gap.

(*AT&T v. Connecticut Siting Council*, 3:11-cv-01502 (WWE) Doc 55 Decision at p. 7)

The Siting Council decision and previous findings of fact are now law of the case, upheld by the federal District Court, including no finding of a "significant gap" and no finding that the proposed site was the "least intrusive means" to close that gap.

Although IW/CC participated under protest, in light of the hearing on Docket 409A and AT&T's attempt to side-step statutory requirements for an application for a new site under Conn. Gen. Stat. §16-50l and attempt to reverse a federal district court ruling in contempt of that court's ruling, facts emerged under Docket 409A that supplement and support the bases of the CSC's denial under Docket 409.

The IW/CC incorporates by reference the 107 proposed findings previously proffered under Docket 409, and supplements with the following proposed findings of fact:

108. There are no "changed conditions" in the material offered by AT&T on its Motion to Reopen, filed on February 15, 2013.

109. The 2009 ADT Machine Count Connecticut Department of Transportation traffic statistics for Canaan offered as Exhibit 2 in AT&T's Motion to Reopen "accepted as of Dec. 31, 2008" were available on October 18, 2010 when AT&T filed its application under Docket 409.

110. The "gaps" referred to in the CSC Decision and Findings of Fact on Docket 409 and confirmed by the U.S. District Court (Docket 3:11-cv-1502 (WWE), Eginton, J., Doc 55, 10/25/12), existed under Docket 409 and exist now under Docket 409A.

111. The substance of FCC 11-161 Report and Order and Further Notice of Proposed Rulemaking and a map purportedly relating FCC policy offered as Exhibit 3 in AT&T's Motion to Reopen is a statement of non-binding policy, and the stated policy was available to AT&T as a registered commenter on October 18, 2010 when AT&T filed its application under Docket 409.

112. The census blocks data in AT&T's exhibit 3 to AT&T's motion to reopen was information available to AT&T on October 18, 2010 when AT&T filed its application under Docket 409.

113. The census blocks identified as "that the use of universal service funds ("USF") was warranted to assist the private sector in development of infrastructure" include stretches of preserved open space and wetlands.

114. The "revised tower site location and modified facility" is a wholly new application.

115. The Docket 409 proposal was on Canaan Tax Map #60; the Docket 409A proposal is on Canaan Tax Map #22.

116. AT&T filed its motion to reopen Docket 409 on February 15, 2013.

117. On February 15, 2013, the two parties to *AT&T v. Connecticut Siting Council* (Docket 12-4709) stipulated to withdraw the appeal until June 14, 2013.

118. On June 3, 2013, before expiration of the first June 14, 2013 date stipulated by the CSC and AT&T (2d Cir. Docket 12-4709, Doc 39, 2/15/13) upon which date AT&T's federal appeal would be reactivated by stipulation, the parties to the appeal filed a "Superseding Stipulation Continuing Withdrawal of Appeal from Active Consideration, Without Prejudice, With Leave to Reactivate" (2d Cir. Docket 12-4709, Doc 52, 6/3/13).

119. AT&T's February 15, 2013 motion to reopen Docket 409 stated (at p. 4):

"Without prejudice to AT&T's pending appeal asserting that the Siting Council's 2011 decision is contrary to 47 U.S.C. §332, and in the spirit of potential compromise, AT&T is prepared to propose a modified tower facility at another location at the 8 Barnes Road property in Falls Village..."

120. No notice requirements under Docket 409A have been met in accordance with Conn. Gen. Stat. §16-50l.

121. No application has been received in Docket 409A.

122. No consultation with state agencies has been accomplished under Docket 409A in compliance with Conn. Gen. Stat. —16-50j.

123. No determinations of effects of visibility or compliance under the Nationwide Programmatic Agreement has been offered under Docket 409A.

124. No compliance with the State Historic Preservation Office as mandated for a different site has been attempted or accomplished.

125. No certification of compliance with USFWS Interim Guidelines has been provided under Docket 409A.

126. No determinations from the CT DEP on the NDDB have been provided under Docket 409A.

127. No on-the-ground fauna field inventory was made under either Docket 409 or 409A.

128. A deficient and insufficient superficial flora field inventory was made under Docket 409A. No such field inventory was made under Docket 409.

129. AT&T failed to disclose the indirect effects of the "project action area" under Docket 409A and 409 as required by federal law (ESA) and USFWS guidance under the ESA.

130. Mr. Libertine acknowledged that the Cobble Hill location is rattlesnake habitat. (April 30, 2013 Trans., Libertine at page 60, lines 21-22)

131. The state DEP letter of no effect obtained by AT&T under Docket 409 (Docket 409 Application at Tab 8, page 1) was used to suggest that there were "no extant populations" when the letter states that there are "no known extant populations," two very different things. The letter has been revived, recycled and reused to apply to the different site on Cobble Hill.

132. Hearing testimony acknowledged that certain herbaceous species would not appear at the time of the survey (AT&T's Response to IW/CC Interrogatory, April 23, 2013, Tab 4).

133. AT&T's flora survey identified three separate species of lowbush blueberry, a dubious identification, as the "survey" was made in April, 2013 when said species would not exhibit diagnostic features.

134. A legitimate "species protection plan" requires a reliable field survey of flora and fauna in order to determine what species are present that need protection.

135. Despite altered plans for the extended accessway under Docket 409A limiting all activity to within the 30-foot deeded right of way; no drainage plans were ever submitted to reflect this change.

136. No compliance with the State Historic Preservation Office as mandated for a different site has been attempted or accomplished.

137. AT&T presented no alternative technologies in response to the CSC Findings of Fact under Docket 409.

138. The 2013 Town of Canaan Plan of Conservation & Development is an up-date of the 2002 Plan and a simplification of the information. The 2013 Plan shows all open space together, not distinguishing between Dedicated Open Space and Managed Open Space. Attorney Fisher failed to make that distinction when he suggested that the property in question was not available as it was dedicated open space. This was simply untrue.

139. The proposed sites under both Docket 409 and 409A are on Cobble Hill, "located in the Town of Canaan's Steep Slopes Overlay Zone, a zoning designation that provides further protections to steep slopes and ridgelines in town." (Docket 409 Opinion p.1, par. 2)

140. Under Docket 409A, the maximum grade would be increased to 35%. (May 21, 2013 Trans. page 154, lines 14-15) in violation of local zoning requirements (Falls Village Zoning Regulations, IW Ex 8: Sec. 4.3, pp. 31-33).

141. The proposed access route has been characterized as impassable for construction trucks due to lack of turning radius space, and the need for hazardous backing down hill (Testimony of Engineer Richard Calkins, PE, Trans May 21, 2013, page 42, lines 2-9 supplementing his prior testimony on Docket 409 at IW 9A and 9B).

142. AT&T provided no evidence that the proposed construction could be executed within the confines of the 30- foot right of way.

143. AT&T failed to provide the design of a drainage system limited to the 30-foot width that can sufficiently direct and contain surface water flow associated with the access drive – especially when the original plans called for substantially more cut and fill to significantly alter the topography, wider swales and numerous level areas outside the swales to enhance water infiltration.

144. AT&T presented no evidence that the Council's Opinion that "Notwithstanding that the site meets AT&T's coverage needs; the Council has seen no evidence that public safety concerns require the proposed facility to be constructed in the proposed location." (Opinion p. 2, Par. 1) has changed.

145. AT&T advanced no evidence that the "unique scenic, natural and cultural features...recognized at the national, state, local and private levels through various cultural and natural designations" (Docket 409 Opinion p. 2, par. 2) of Cobble Hill have changed in any respect.

146. The record of Docket 409A, includes statements by the CT Council on Environmental Quality that habitat of at least two other listed species, the Wood Turtle and the Blue Spotted Salamander, are present at or near the project site and should have been investigated. (CEQ Letter of May 29, 2013)

147. Cobble Hill is a prominent and isolated land feature rising in the midst of surrounding wetlands and visible from all sides. The site proposed under Docket 409 was found to be visually intrusive by the Siting Council (Docket 409 Opinion p. 3 Par. 3). Docket 409A now calls for extending the access road 1800 feet further, to a facility site even closer to the peak of Cobble Hill, where it would be even more visibly intrusive than the 409 site.

148. The visual blot includes the access road, cutting across the breast of Cobble Hill, highly visible especially in winter. (Public comments by Dom Caiati, February 17, 2011 Public Comment Session)

149. Independent from the effects of the site itself, construction and maintenance of the access drive alone will cause temporary and permanent environmental impacts.

150. The initial 3000 feet of access road follows essentially the same route as that proposed in Docket 409. The CSC's expressed concerns about length, shallow depth to bedrock, 1:1 cut and fills, and extensive area of land disturbance have not been mitigated in the least under Docket 409A. (Opinion p.3, Par.5)

151. The proposed access way under Docket 409 is extended 1800 feet to a total length of 4,800' with steeper maximum grade, and a larger area of overall disturbance.

152. The need to fit the access road within the thirty-foot right of way leaves less room for water run-off mitigation deemed so necessary prior to this restriction and revision (Application, Docket 409 at Tab 5, pp. 4-7).

153. Only upon mandatory disclosure through responses to interrogatories, AT&T proposed using V shaped ditches under Docket 409A, ditches that will increase water flow, provide for easy blockage by debris, and ice in winter (see testimony of Starling Childs, May 21, 2013 trans. page 54, lines 18-24 ff.).

154. The approximately 1,800 feet of additional road to be constructed from the cabin to the compound is referred to merely as an “existing path” on the Compound Plan diagram included in Tab 2 of the April 15, 2013, ‘AT&T’s Responses to Siting Council Interrogatories’. Prior to the walk conducted for the Siting Council members on April 30, 2013, sections of this “abandoned 4X4 trail” and “path” were cleared, apparently to facilitate access to the compound site. Contrary to Mr. Libertine’s testimony, a significant portion of the road is not “essentially there” and construction of this additional footage would constitute significant disturbance to an area currently relatively undisturbed.

155. The new 1800 foot access section would cause new and additional fragmentation of the forest block habitat on Cobble Hill, fragmentation recognized in its communications to the CSC by the CT Council on Environmental Quality (CEQ). (See Letters to CSC from CEQ of April 25, 2013)

156. Seventy acres of what is currently part of a “large core forest” was calculated as being impacted and consequently, would no longer be considered part of this “large core forest.” However, because the remaining undisturbed forest is still more than 500 acres, much of the environs of Cobble Hill would still qualify as a “large core forest.”

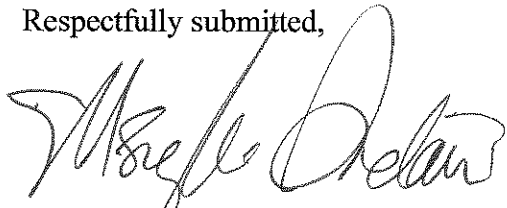
157. The fact that seventy acres would actually be impacted in the process was obscured by AT&T’s claim that there would still be a “large core forest” on Cobble Hill. (AT&T response to CSC Interrogatory Set II, May 14, 2013)

158. The largest of “large core forests” warrant as much, if not more, protection as the smaller “large core forests” because there are fewer and fewer of the largest core forests. (IWCC Opposition to Motion to Reopen, Appendix B)

159. Under Docket 409, the Council found siltation and run-off to be concerns because the access way and site were both up-gradient from Robbins Swamp and the Hollenbeck River. These wetlands and watercourses have not moved.

160. The U.S. District Court, District of Connecticut, Eginton, J. upheld the Siting Council’s denial of a certificate of environmental compatibility and public need. (*AT&T v. Connecticut Siting Council*, 3:11-cv-01502 (WWE) Doc 55 Decision)

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ellery W. Sinclair". The signature is fluid and cursive, with a large initial "E" and "S".

Ellery W. Sinclair, Chairman
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July 24, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this day, an original and fifteen copies of the foregoing was served on the Connecticut Siting Council by Express U.S. Mail, and copy of same was sent postage prepaid to:

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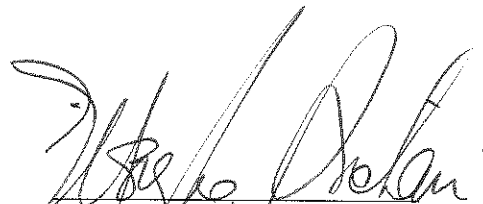
A copy was also delivered by hand to:

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Ellery W. Sinclair

Dated: July 24, 2013