

STATE OF CONNECTICUT  
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

**POST HEARING BRIEF OF THE INLAND WETLANDS/CONSERVATION  
COMMISSION OF THE TOWN OF CANAAN (FALLS VILLAGE)**

**Preliminary Statement**

**Ex Parte Discussion #1**

On February 15, 2013, while New Cingular Wireless PCS, LLC ("AT&T")'s federal appeal from the decision of the U.S. District Court's affirming the Siting Council's denial of the AT&T application under CSC Docket 409 for a certificate of environmental compatibility and public need for a telecommunications facility at 8 Barnes Road in Falls Village (Town of Canaan), Connecticut was pending, the two parties to ATT's Second Circuit Appeal (Docket 12-4709) stipulated to withdraw the appeal until June 14, 2013.

On that same date, February 15, 2013, AT&T moved to reopen Docket 409 on grounds of "changed conditions" under Conn. Gen. Stat. Sec. 4-181a and concurrently moved the CSC to reverse the CSC's prior denial of ATT's application for a certificate under Docket 409, in favor of a new peak site AT&T described as a "settlement site," at a new location on Cobble Hill. Under the so-called "settlement," secretly worked out between AT&T and the CSC, the latter would withdraw its tower denial under Docket 409 -- a contested case involving the fundamental rights

and liberty interests of others, and implicating prior formal disposition under state and federal law.

Simultaneously, on February 15, 2013, the Siting Council announced:

Parties and intervenors are requested to submit comments or statements of position in writing to the Council with respect to whether the Motion to Re-open should be granted or denied on or before the close of business on March 1, 2013.

([http://www.ct.gov/csc/lib/csc/pendingproceeds/docket\\_409/do409motiontoreopen.pdf](http://www.ct.gov/csc/lib/csc/pendingproceeds/docket_409/do409motiontoreopen.pdf))  
(Last viewed 7/18/13) (Emphasis added.)

IW/CC, a party to Docket 409, timely filed its opposition to the Motion to Reopen on February 27, 2013, pointing out the violations of state and federal law, and the defiance of federal court jurisdiction. However, its opposition was disregarded.

Meeting minutes of the Council state in pertinent part:

\* \* \* Reopening of this docket pursuant to Connecticut General Statutes 4-181a(b) [is] limited to Council consideration of changed conditions, revised tower site location and modified facility.

Mr. Ashton moved to approve the schedule for processing the docket as per staff recommendations, the appointment of Carriann Mulcahy as custodian of the docket, the deposition of the transcript in the Town of Canaan, a public field review and hearing in Canaan on Tuesday April 30, 2013; seconded by Mr. Tait. The motion passed unanimously.

(CSC Minutes of March 21, 2013)  
(<http://www.ct.gov/csc/lib/csc/minutes/2013/032113.pdf>) (Emphasis added.)

Without inquiring into the existence of "changed conditions" as a threshold to re-opening as required by state law, and disregarding the opposition of the Inland Wetlands/Conservation Commission of Falls Village (Opposition of IW/CC filed before the CSC on February 27, 2013), the Siting Council proceeded to reopen the docket under "409A" to consider AT&T's "revised tower site location and modified facility" (*Ibid.*) violating state and federal law and defying federal court jurisdiction. Instead of finding any "changed conditions" as a condition precedent

to reopening, the Council has fielded specifications for a new site on Cobble Hill originally rejected by the CSC on Docket 409 on environmental and visibility grounds on August 25, 2011.

The "revised tower site location and modified facility" is in fact a wholly new application, by-passing all state and federal requirements -- the result of AT&T's successful forum-shopping in defiance of the Second Circuit's jurisdiction. The result is to give AT&T a second bite at the apple in defiance of *res judicata* and federal court jurisdiction.

### **Ex Parte Discussion #2**

On June 3, 2013, while the current illegal evidentiary hearing on Docket 409A was still pending, but before the 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).

Despite discussion of the calendar for the "continued evidentiary hearing for Docket No. 409A," in the CSC Minutes of May 16, 2013 (<http://www.ct.gov/csc/lib/csc/minutes/2013/051613-final.pdf>) (Last viewed 7/18/13), there is no mention of this stipulation or approval of action to be taken on the original stipulation or authorization there for in the Minutes of the CSC for May, 2013 (<http://www.ct.gov/csc/lib/csc/minutes/2013/053013.pdf>) (Last viewed 7/18/13). The negotiations and agreement to the "superseding stipulation" occurred behind the scenes without any public notice to the parties to either Docket 409 or Docket 409A.

This second stipulation in a federal Appeals Court proposed to postpone the reactivation of AT&T's appeal until October 25, 2013 -- clearly intended to obtain sufficient time for the CSC

to continue with the illegal proceeding under Docket 409A to consider the "settlement site" proposed in the AT&T Motion to Reopen.

The "superseding stipulation continuing withdrawal of appeal" is in lieu of A) dismissal of the appeal; or B) reactivation of the appeal without prejudice. (See Superseding Stipulation Continuing Withdrawal of Appeal from Active Consideration, Without Prejudice, With Leave to Reactivate, Doc 52, 2d Cir. Docket 12-4709, 6/3/13 and Court's Order of 6/12/13 attached hereto as Appendix A)

The current stipulation, holds a pending federal appeal in abeyance apparently pending CSC disposition of the "settlement site," in total disregard of federally protected rights of others, including, abutting property owners, parties and intervenors to Docket 409, the Town of Canaan (Falls Village), its residents and officials.

### **IW/CC Protest**

In light of the multitude of violations of law, the IW/CC participated in Docket 409A under protest (Trans. May 21, 2013 at p. 110, line 6), kept in the dark, as were all other parties and intervenors to Docket 409 and 409A of AT&T's attempt to forum shop for its most favorable hearing and most favorable result.

Docket 409A should be closed and AT&T directed to reimburse all parties and intervenors for costs.

IW/CC proceeds under protest and files this post hearing brief in Docket 409A to seek closing of this docket on the motion to reopen since there are no changed conditions on which the original Docket could be reopened (See IW/CC Opposition to Motion to Reopen, Filed February 27, 2013), and because the decision in Docket 409 has been upheld by the federal District Court and the matter is *res judicata*.

IW/CC also seeks closing of Docket 409A in accordance with state and federal law, due process guarantees, and in deference to the jurisdiction of the federal courts.

This brief contains the following points:

POINT I: Docket 409 Was the Basis for a Public Hearing Under Conn. Gen. Stat. §16-50m. *Ex Parte* Dealings Between the Applicant and the Agency to Change the Result are Unlawful and any Resulting Private "Settlement" Without Public Notice and Participation Cannot Lawfully be Enforced.

POINT II: The Issue of Finding Changed Conditions Relates Only to the DOT Figures and the FCC Policy Statement in AT&T's Motion to Reopen. These Conditions Were Readily Available at the Time of the Original Hearing, and Have Not Changed. Therefore Docket 409A is *Ultra Vires*, Not Based on Changed Conditions, and Any Result is Unenforceable.

POINT III: Applicant AT&T Has Had a Full and Fair Hearing on the Docket 409 Application and the CSC Decision Has Been Upheld by the U.S. District Court and May Not Be Changed by the CSC Under the Doctrine of *Res Judicata* and Issue Preclusion.

POINT IV: AT&T Failed to Provide Full Information on Environmental Impact Known to it and its Consultants Prior to the Filing of the Original Docket 409 Application, Including Particularly the Presence of Habitat of a State Endangered Species, Further Supporting the CSC Denial on Environmental Grounds and Rejection of Any Settlement.

POINT V: AT&T Has Shown Itself to be Untrustworthy in its Disclosures and Compliance. Its Present Effort to Work Out an Undisclosed Settlement With the CSC Without Public Participation is a Flagrant Violation of the Public Interest, Including That Represented by the IW/CC. The Motion to Reopen Should be Denied and The Proceedings Closed and AT&T Directed to Pay Costs.

POINT VI: AT&T Failed to Demonstrate any Change in Conditions Material to the Visual, Environmental and Technical Bases Cited by the Siting Council for Denial on Docket 409; In Many Cases, The Bases Lead to Greater Hazards, Greater Intrusion and Worse Outcomes Under the Specifications for the "Settlement Site" of Docket 409A, Warranting Rejection on the Merits.

APPENDICES

## ARGUMENT

**POINT I: DOCKET 409 WAS THE BASIS FOR A PUBLIC HEARING UNDER CONN. GEN. STAT. 16-50m. EX PARTE DEALINGS BETWEEN THE APPLICANT AND THE AGENCY TO CHANGE THE RESULT ARE UNLAWFUL AND ANY RESULTING PRIVATE "SETTLEMENT" WITHOUT PUBLIC NOTICE AND PARTICIPATION CANNOT LAWFULLY BE ENFORCED.**

Docket 409 was the basis for a public hearing under Conn. Gen. Stat. 16-50m. Conn.

Gen. Stat. 16-50m. provides in pertinent part:

**Sec. 16-50m. Public hearing. Notice.** (a) The council shall promptly fix a commencement date and location for a public hearing on an application for a certificate complying with section 16-50l \* \* \* At least one session of such hearing shall be held at a location selected by the council in the county in which the facility or any part thereof is to be located after six-thirty p.m. for the convenience of the general public. After holding at least one hearing session in the county in which the facility or any part thereof is to be located, the council may, in its discretion, hold additional hearing sessions at other locations. \* \* \*

(c) The council shall cause notices of the date and location of each hearing to be mailed, within one week of the fixing of the date and location, to the applicant and each person entitled under section 16-50l to receive a copy of the application or resolution. The general notice to the public shall be published in not less than ten point, boldface type.

These statutory requirements of public notice and public hearing supplement the notice to the public incumbent on the applicant under Conn. Gen. Stat. 16-50l, including:

**Sec. 16-50l. Application for certificate. Notice. Application or resolution for amendment of certificate.** (a)(1) To initiate a certification proceeding, an applicant for a certificate shall file with the council an application, \* \* \*

(b) Each application shall be accompanied by proof of service of a copy of such application on: (1) Each municipality in which any portion of such facility is to be located, \* \* \* and any adjoining municipality having a boundary not more than two thousand five hundred feet from such facility, which copy shall be served on the chief executive officer of each such municipality and shall include notice of the date on or about which the application is to be filed, and the zoning commissions, planning commissions, planning and zoning commissions, conservation commissions and inland wetlands agencies of each such municipality, and the regional planning agencies which encompass each such municipality; (2) the Attorney General; (3) each member of the legislature in whose assembly or senate district the facility or any alternative location listed in the application is to be located; (4) any agency, department or instrumentality of the federal government that has jurisdiction, whether concurrent with the state or otherwise, over any matter that would be affected by such facility; (5) each state

department, agency and commission named in subsection (h) of section 16-50j; and (6) such other state and municipal bodies as the council may by regulation designate. A notice of such application shall be given to the general public, in municipalities entitled to receive notice under subdivision (1) of this subsection, by the publication of a summary of such application and the date on or about which it will be filed. Such notice shall be published under the regulations to be promulgated by the council, in such form and in such newspapers as will serve substantially to inform the public of such application and to afford interested persons sufficient time to prepare for and to be heard at the hearing prescribed in section 16-50m. Such notice shall be published in not less than ten-point type. A notice of such an application for a certificate for a facility described in subdivision (3), (4), (5) or (6) of subsection (a) of section 16-50i shall also be sent, by certified or registered mail, to each person appearing of record as an owner of property which abuts the proposed primary or alternative sites on which the facility would be located. Such notice shall be sent at the same time that notice of such application is given to the general public. \* \* \*

(Conn. Gen. Stat. Sec. 16-50*l*. excerpted.) (Emphasis added.)

None of these notice requirements was met after the initial application on Docket 409.

In defiance of these public notice and public proceeding requirements, the applicant has engaged in *ex parte* dealings with the Siting Council in an effort to change the result of Docket 409. Such dealings are unlawful and any resulting private "settlement" without public notice and participation cannot lawfully be enforced.

### **Defiance of Public Notice Requirements**

Without making a single finding of changed conditions and without the appropriate public notices in accordance with the statutes under which the CSC operates, the CSC proceeded to an evidentiary hearing at the behest of AT&T, against the warning of the CEQ (Letter dated April 25, 3013) that "actual conditions on and around Cobble Hill...have not changed" (*Ibid.* at p. 1) and the IW/CC (Pre Hearing Brief of April 18, 2013) and in disregard of IW/CC's opposition (IW/CC Opposition to Motion to Reopen, Filed February 27, 2013). IW/CC participated under protest (May 21, 2013 Trans. at page 110 line 6). Such a proceeding was premature and in violation of U.A.P.A. §4-181a under which AT&T moved to re-open (AT&T's Motion to the

Siting Council to Reverse its Final Decision in Docket 409 and Issue a Certificate for a Modified Tower Facility, February 15, 2013 at page 1).

No application was ever rendered by AT&T in compliance with FCC regulations and State law (CGS 16-50l); no consultations with state agencies and commissions were made in violation of CGS 16-50j, which provides, in pertinent part:

**Sec. 16-50j. Connecticut Siting Council. Membership. Regulations. Consultation with state agencies.** (a) There is established a "Connecticut Siting Council", hereinafter referred to as the "council", which shall be within the Department of Public Utility Control. \* \* \*

(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. \* \* \* Copies of such comments shall be made available to all parties prior to the commencement of the hearing.

None of this has been done here.

No determinations of effects of visibility under the Nationwide Programmatic Agreement ([http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-04-222A3.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-222A3.pdf)) (Last viewed 7/22/13), no certification of compliance with USFWS Interim Guidelines (<http://www.fws.gov/migratorybirds/CurrentBirdIssues/Hazards/towers/comtow.html>) (Last viewed 7/22/13) no determinations from the CT DEP on the NDDDB (see "Requests for Natural Diversity Data Base State Listed Species Reviews, ([http://www.ct.gov/deep/cwp/view.asp?a=2702&q=323466&deepNav\\_GID=1628](http://www.ct.gov/deep/cwp/view.asp?a=2702&q=323466&deepNav_GID=1628)) (Last viewed 7/22/13) or requests made to the DEEP; no on-the-ground field inventory was made; and consistent with the federally defective application on Docket 409, AT&T wholly failed to disclose, or the CSC to consider, the indirect effects of the "project action area" proposed under the illegal Docket 409A as required by federal law (ESA) and USFWS guidance under the ESA.



Meanwhile, AT&T's own witnesses acknowledged these defects:

Mr. Libertine acknowledged that the Cobble Hill location is rattlesnake habitat -- an acknowledgement requiring direct consultation with the state DEEP. (See Endangered Species Consultation, "Consultations With Federal Agencies (Section 7)

<http://www.fws.gov/newengland/endangeredspec-consultation.htm>) (see also "Requests for Natural Diversity Data Base State Listed Species Reviews,

[http://www.ct.gov/deep/cwp/view.asp?a=2702&q=323466&deepNav\\_GID=1628](http://www.ct.gov/deep/cwp/view.asp?a=2702&q=323466&deepNav_GID=1628)) (Last viewed 7/22/13)

The state DEP letter of no effect obtained by AT&T under Docket 409 (Docket 409 Application at Tab 8, page 1) and used to contort requirements through semantics ("no known extant populations" as opposed to "no extant populations"), was revived, recycled and reused to apply to the different site on the same hill, also a plain violation of federal and state environmental laws and local IW/CC jurisdiction.

Instead of public notice and public hearing, Docket 409A rests upon secret dealings and discussions held *ex parte*.

The Council has proceeded to violate the law in opening this docket and proceeding to a substantive hearing, and it has done so on the basis of prohibited *ex parte* communications with Docket 409 applicant AT&T in violation of the public interest. The results of any such prohibited communications will be fruit of the poisonous tree, and will be tainted, illegal and unenforceable.

**POINT II: THE ISSUE OF FINDING CHANGED CONDITIONS RELATES ONLY TO THE DOT FIGURES AND THE FCC POLICY STATEMENT IN AT&T'S MOTION TO REOPEN. THESE CONDITIONS WERE READILY AVAILABLE AT THE TIME OF THE ORIGINAL HEARING, AND HAVE NOT CHANGED. THEREFORE DOCKET 409A IS *ULTRA VIRES*, NOT BASED ON CHANGED CONDITIONS, AND ANY RESULT IS UNENFORCEABLE**

### No Changed Conditions Sufficient to Reopen Docket 409

If the federal appeal were not already pending and the Council still had jurisdiction, under the rule of *Town of Fairfield v. Connecticut Siting Council*, the Council may only render a determination on a motion to reopen under CGS §4-181a(b) "to assist the council in ascertaining whether there was sufficient reason to entertain reconsideration of its prior decision," *Town of Fairfield v. Connecticut Siting Council*, 238 Conn. 362 at 370. Such determination is only preliminary.

We now turn to the question of whether the hearing conducted by the council was held for the purpose of rendering a preliminary determination of whether to open its prior final decision, \* \* \*

Our review of the record reveals that the July 13, 1993 hearing was limited solely to the question of whether the plaintiffs had made a sufficient allegation of changed circumstances to warrant a further hearing by the council on the merits of the plaintiff's motions to open its prior final decision. In his opening statement at the hearing, the council chairman informed all those who were present that "[a]t this hearing, the Council will receive testimony on the technical and legal reasons to reopen this proceeding.' ...The council, in its memorandum of decision, described the hearing as one in which "the Connecticut Siting Council ...considered motions and requests to reopen, stop work, reconsider, revoke or amend the Certificate," and concluded that "[w]e know of no new information or facts that were not available at the time that would compel us to reopen this case...[W]e must find a showing of changed conditions or a compelling reason to reopen this proceeding...[W]e find no such changed conditions or compelling reasons."

(*Fairfield v. Connecticut Siting Council*, 238 Conn. 362, 372 (1996)) (Emphasis added.)

Here, however, the AT&T motion did not raise "changed conditions" not available at the time of its original application under Docket 409 as provided for in the statute, but rather, presented an entirely new "settlement site" -- constituting a new application and masquerading as a modified site, with new specifications on the same Cobble Hill. (AT&T Motion to Reopen, Ex 1, p. 9 and Ex 4) (The Council may take administrative notice that AT&T has slipped its modification onto a distinct tax map parcel. The Docket 409 proposal was on Canaan Tax Map

#60; the Docket 409A proposal is on Canaan Tax Map #22. The property bounds of the second site implicate mandatory notice requirements under state law.)

The merits of a modified site are not heard on a motion to reopen to constitute "changed conditions," which AT&T asserts are: a DOT traffic count previously available but not adduced by AT&T in its original application; and the FCC's "USF/ICC Transformation Order, FCC 11-161" also available to AT&T at the time of its original application -- since ATT directly participated in the FCC docket 11-161 as a commenter.

The FCC Policy does not represent a "changed condition" also because the "settlement site" does not meet the alleged need under FCC 11-161 any more than the denied 409 site, proposed by AT&T to provide service to this rural area.

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. Neither the DOT traffic counts nor the FCC Policy alter this. AT&T's proffered evidence on "changed conditions" is therefore not materially relevant (see IW/CC Opposition to Motion to Reopen, 2/27/13).

The FCC Policy hasn't changed any condition, furthermore, these alleged gaps could be met without the Cobble Hill "settlement site" (see testimony of RF engineer Walter Cooper, May 21, 2013).

The Federal District Court concluded that the gaps do not justify such an environmental and rural intrusion as proposed by the 409 site. The "settlement site" is as intrusive, if not more so (as the record evidence of environmental impact and visibility show) making AT&T's proposal under the FCC's USF policy — to serve 16 people in 6 census blocks and considerable unpopulated forest and swamp land -- ridiculous.

The evidence of "changed conditions" ends there. Upon these two proffered exhibits, the CSC was to have rendered its decision on the motion to reopen. It did not.

Instead, it has entertained a full evidentiary hearing on the new proposal, an access road now extending an additional 1,800 feet (totaling approximately 4,800 feet).

**The Council's and AT&T's "Revis[ion of] Tower Location and Modiffication of] the Facility" Proposed In the Motion To Reopen and Adopted in the Purpose of Docket 409A Fall Beyond "Changed Conditions" Consideration Under the Rule of *Fairfield v. Connecticut Siting Council***

The Council's website laid out the limited condition upon which a docket would reopen relating to the proposal by AT&T:

**DOCKET NO. 409A** - New Cingular Wireless PCS, LLC application for a Certificate of Environmental Compatibility and Public Need for the construction, maintenance and operation of a telecommunications facility located at 8 Barnes Road, 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.

(Official Siting Council Website, "Pending Proceedings" page, <http://www.ct.gov/csc/cwp/view.asp?a=895&q=318776>) (Last viewed 7/16/13)

Although the Council issued the following invitation,

Parties and intervenors are requested to submit comments or statements of position in writing to the Council with respect to whether the Motion to Re-open should be granted or denied on or before the close of business on March 1, 2013,

("Council memo regarding Motion to Reopen" of February 15, 2013) ([http://www.ct.gov/csc/lib/csc/pendingproceeds/docket\\_409/do409motiointoreopen.pdf](http://www.ct.gov/csc/lib/csc/pendingproceeds/docket_409/do409motiointoreopen.pdf)) (Last viewed 7/16/13)

legal and constitutional arguments by the IW/CC were disregarded and the Council proceeded to hear entirely new evidence constituting an entirely new application at a new location on Cobble Hill proposed under Docket 409.

At the outset of the June 11, 2013 continuation of the April 30 and May 20, 2013 hearings, according to Chairman Stein, the hearing "is held....upon a motion to reopen the final

decision on application from New Cingular Wireless, PCS, LLC for a certificate....for a telecommunication facility...at 8 Barnes Road in Canaan..." The opening remarks continued:

This motion to reopen was filed with the Council and the parties and intervenors of the original proceedings on February 15, 2013. During a public meeting the Council held on March 7th, 2013, this Council reopened the docket pursuant to Connecticut General Statutes 4-181(a) Subsection b, and specifically limited this hearing to Council consideration of change [in]... conditions to revise tower location and modify the facility.

(Trans. June 11, 2013, p. 3, lines 2-10)

But the Connecticut Supreme Court rule for reopening or reconsideration requires

new information or facts \* \* \* not available at the time that would compel us to reopen this case...[W]e must find a showing of changed conditions or a compelling reason to reopen this proceeding...[W]e find no such changed conditions or compelling reasons.

*Fairfield v. Connecticut Siting Council*, 238 Conn. 362, 372 (1996)

### **No Finding of Changed Conditions**

These grounds for reopening a decision by the Council contort the provisions of C.G.S. §4-181(a) Subsection b, and the IW/CC objected at the time<sup>1</sup> and incorporates by reference its legal arguments here. To summarize:

- 1. No Change in Relevant Conditions.** The Connecticut Siting Council ("CSC") denial was based on critical environmental conditions, which have not changed in any material way since the time of AT&T's original application. Conn. Gen. Stat. Sec. 4-181a therefore does not apply and the motion must be denied as contrary to state law.
- 2. Law of the Case.** The CSC denial of the AT&T tower application was affirmed by the United States District Court based on those same environmental conditions along with the applicant's failure to meet the mandatory "least intrusive" *Sprint Spectrum v. Willoth* standard for towers. The United States District Court ruling is now the law of the case and can only be modified by a timely application to the District Court, on a proper showing, or by proceeding with the appeal before the Second Circuit. The CSC itself

---

<sup>1</sup> See Opposition of Falls Village Inland Wetlands and Conservation Commission ("IW/CC") to AT&T's Motion to Reverse the Siting Council's Final Decision in Docket No. 409 and to Issue a Certificate Approving a Modified Tower Facility, dated February 27, 2013 -- although public record, IW/CC's Opposition document does not appear in the CSC docket, although the AT&T motion with all exhibits appears in three places -- twice on the Docket 409 web page and once on the Docket 409A web page.

cannot reverse or override the United States District Court -- the power to do that rests solely with the Second Circuit Court of Appeals.

**3. Inadequate Service of Motion to Interested Parties.** The AT&T motion to reopen and reverse affects vital rights of several abutting property owners (both of the originally proposed tower and of the so-called "modified" version) and others, including town and state entities. No such service of the motion has been certified, and this proceeding is therefore unconstitutional under the Fifth and Fourteenth Amendments.

**4. Additional Considerations**

AT&T fails to cite the full test of *Sprint Spectrum, L.P. v. Willoth* including the "least intrusive means" standard. The binding federal test, now law of the case is wholly omitted from AT&T's motion. AT&T has failed and continues to fail to comply with the Clean Water Act.

This Council has interpreted the invoked section 4-181a(b) as "specifically limited to consideration of changed conditions and," e.g. "the attachment of conditions to MGT's Certificate consistent with the findings and recommendations contained in the Final Report issued by the Kleen Energy Plant Investigation Review Panel Final Report issued on June 3, 2010." (See CSC Opinion, Docket No 190A, March 3, 2011) What is intended are conditions material to Siting Council certification criteria, facts relating to the site, or law. None of these is present here.

**POINT III: APPLICANT AT&T HAS HAD A FULL AND FAIR HEARING ON THE DOCKET 409 APPLICATION AND THE CSC DECISION HAS BEEN UPHELD BY THE U.S. DISTRICT COURT AND MAY NOT BE CHANGED BY THE CSC UNDER THE DOCTRINE OF RES JUDICATA AND ISSUE PRECLUSION**

AT&T's proposed "settlement site" is on Cobble Hill -- with the same environmental conditions of that location and identical surrounding conditions including visibility (albeit now even more prominently visible and intrusive) and critical habitats and protected wetlands -- including all the conditions cited by the CSC in its final decision on Docket 409. The CSC decision was final, and has now been reviewed and upheld by a federal court -- expedited

judicial review sought by AT&T under 47 U.S.C. §332(c)(7)(B)(v). (U.S. District Court, District of Connecticut, *AT&T v. The Connecticut Siting Council*, 3:11-cv-01502 (WWE))

There are no changed conditions sufficient for reopening of Docket 409 under CGS §4-181b. *Res Judicata* prevents further proceedings on the same facts -- this includes facts that might have been presented, but that were not presented:

[A] judgment upon the merits in one suit is *res judicata* in another where the parties and subject-matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end.

*Grubb v. Public Utils. Comm'n of Ohio*, 281 U.S. 470, 479, 50 S.Ct. 374, 378, 74 L.Ed. 972 (1930); *see also Commissioner v. Sunnen*, 333 U.S. 591, 597, 68 S.Ct. 715, 719, 92 L.Ed. 898 (1948) (“the parties to the suit and their privies are thereafter bound ‘not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose’”) (quoting *Cromwell v. County of Sac*, 94 U.S. 351, 352, 24 L.Ed. 195 (1877)); *Harborside Refrigerated Servs., Inc. v. Vogel*, 959 F.2d 368, 372 (2d Cir.1992); *Saud v. Bank of New York*, 929 F.2d 916, 919-20 (2d Cir.1991). Thus, *res judicata* or claim preclusion “prevents a party from litigating any issue or defense that could have been raised or decided in a previous suit, even if the issue or defense was not actually raised or decided.” *Clarke v. Frank*, 960 F.2d 1146, 1150 (2d Cir.1992); *see also Greenberg v. Board of Governors of Fed. Reserve Sys.*, 968 F.2d 164, 168 (2d Cir.1992); *compare Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 n. 1, 104 S.Ct. 892, 894 n. 1, 79 L.Ed.2d 56 (1984) (collateral estoppel or “[i]ssue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided.”). “Whether or not the first judgment will have preclusive effect depends in part on whether the same transaction or connected series of transactions is at issue, whether the same evidence is needed to support both claims, and whether the facts essential to the second were present in the first.” *NLRB v. United Technologies*, 706 F.2d 1254, 1260 (2d Cir.1983).

\* \* \*It is this identity of facts surrounding the occurrence which constitutes the cause of action, not the legal theory upon which Woods chose to frame her complaint. *See Berlitz Sch. of Languages of Am., Inc. v. Everest House*, 619 F.2d 211, 215 (2d Cir.1980) (“[W]hatever legal theory is advanced, when the factual predicate upon which claims are based are substantially identical, the claims are deemed to be duplicative for purposes of *res judicata*.”); *Expert Electric, Inc. v. Levine*, 554 F.2d 1227, 1234 (2d Cir.), *cert. denied*, 434 U.S. 903, 98 S.Ct. 300, 54 L.Ed.2d 190 (1977); *see also* Restatement (Second) of Judgments § 24(b) & Comments[.] \* \* \*

*Woods v. Dunlop Tire Corp.*, 972 F.2d 36, 38-39 (2d Cir. 1992)

This is settled law of this Circuit. AT&T's ploy is entirely barred by *res judicata*.

**POINT IV: AT&T FAILED TO PROVIDE ESSENTIAL INFORMATION ON ENVIRONMENTAL IMPACT, INCLUDING PARTICULARLY THE PRESENCE OF HABITAT OF A STATE ENDANGERED SPECIES, FURTHER SUPPORTING THE CSC DENIAL ON ENVIRONMENTAL GROUNDS AND REJECTION OF ANY SETTLEMENT**

**Material Omission of Fauna Survey on Both Dockets 409 and 409A**

The applicant failed to conduct an inventory of flora and fauna that would be affected by the access way -- either for the original site on Docket 409 or for the expanded accessway for "modified," "settlement site." under Docket 409. Upon issuance of the Town of Canaan IW/CC's Interrogatory No. 38:

Q. 38: Has an inventory of flora and fauna in the vicinity of the additional access drive and new tower site been conducted? Please provide full inventory and name and contact information for those who performed it.

The applicant produced a 'Flora Survey Report' on April 21, 2013, two days before the results of said report were included as a response to Town of Canaan's IW/CC Interrogatory #38.

**Flora Survey on Docket 409A Fails to Meet Due Diligence Requirements**

The interrogatory response was incomplete, as the "Flora Survey Report" -- apparently produced in response to the IW/CC's interrogatory -- covered only "Flora."

Moreover, the "Flora Survey" did not constitute a comprehensive professional inventory sufficient to respond to the IW/CC Interrogatory or to fulfill requirements of state and federal environmental laws, but rather it consisted of a casual description of a walk through the woods.

**Acknowledgement of Material Omissions from Flora Survey**

The description failed to address species that would not be present at the time of year in which the "survey" was made.



Hearing testimony acknowledged that certain herbaceous species would not appear at the time of the survey (AT&T's Response to IW/CC Interrogatory No. \_\_\_\_\_, April 23, 2013, Tab 4).

The 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.

In light of the spelling errors of the scientific names of several of the noted species (eg. "Quercus prinus," not "Quercus primus"; "Carya glabra," not "Caryn glabra"; "Vaccinium pallidum," not "Vaccinidium pallidmr"), the listing of only eleven plant species, the narrow scope of the timing of the survey, and the last minute conducting of the survey (a mere two days before the response to the IW/CC Interrogatory), all point to the perfunctory and insufficient nature of the survey.

#### **Legal and State Policy Importance of Proper, Comprehensive Field Surveys of Flora and Fauna**

State law, including mandates under which the CSC and the IW/CC operate, require completion of thorough, comprehensive, reliable flora and fauna surveys -- none of which have been conducted for either Docket 409 nor 409A. On this ground alone, the motion to reopen must be rejected and any modified site rejected. The State Endangered Species Act requires the use of the best scientific data available, and contemplates no such material omissions:

**Sec. 26-310. Actions by state agencies which affect endangered or threatened species or species of special concern or essential habitats of such species.** (a) Each state agency, in consultation with the commissioner, shall conserve endangered and threatened species and their essential habitats, and shall ensure that any action authorized, funded or performed by such agency does not threaten the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat designated as essential to such species, unless such agency has been granted an exemption as provided in subsection (c) of this section. In fulfilling the requirements of this section, each agency shall use the best scientific data available. \* \* \*

(Conn. Gen. Stat. Sec. 26-310. Excerpted.)(Emphasis added.)

### **No Legitimate Species Protection Plan**

In its direct case on Docket 409A, ATT attorney Chicchio asked Dean Gustafson, professional soil scientist, All Points Tech, Corp. PC, during the June 11, 2013 hearing to provide detail regarding the "Multi Species Protection Plan for construction..." (Trans. 6/11/13, p. 72, l. 12)

Gustafson's response was non-specific. Without a reliable field survey of flora and fauna, a legitimate "species protection plan" cannot be implemented. One first needs to know what species are present that need protection in the "project action area" (as designated under US FWS regulations, see IW/CC Ex IW 56 (Vol. 2 of 2)). The foundation for a Protection Plan requires a comprehensive inventory of both flora and fauna.

An example of the defective Species Protection Plan offered by AT&T is the proposal of "silt fencing." "Silt fencing" works in theory as a barrier to exclude mobile species from entering the construction area -- assuming no species present can burrow under, chew through or climb over the barrier. Unless silt fencing is thoroughly monitored on a regular basis, especially during and after storm events, its effectiveness is negated, as silt overload can fencing collapse.

It is unrealistic to think all employees associated with the construction phase of the accessway and facility could or would be apprised of the specific species protection measures needed for the site. The more so because it is clear from the proposal under Docket 409A lacks a comprehensive survey.

### **ATT Acknowledges Habitat of State Endangered Timber Rattlesnake**

Workers on D-9 Caterpillar bulldozer could hardly exert due caution to avoid running over a salamander or snake. The Council is requested to take administrative and statutory notice of text from the CT DEEP website on amphibians and reptiles at Appendix B (marked)). These

hazards are exactly those identified by the state of Connecticut legislature and DEP that must be prevented to preserve protected species. Note that it was ATT's own witness (April 30, 2013 Trans., Libertine at page 60, lines 21-22) who acknowledged that the site is Timber Rattlesnake habitat. As such, the site is entirely inappropriate for the kind of development proposed under Docket 409 or 409A and "any activity that significantly alters, pollutes, impairs, degrades, damages, destroys or otherwise reduces the ability of the habitat to sustain populations of endangered or threatened species" must be protected under state law. (Conn. Gen. Stat. Sec. 26-304. Definitions.)

With the applicant's acknowledgment of the presence of Timber Rattlesnake habitat, the CSC is bound by state law to "conserve endangered and threatened species and their essential habitats, and shall ensure that any action authorized, funded or performed by such agency does not threaten the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat designated as essential to such species." (CGS §26-310(b)) It is now acknowledged by the applicant that such habitat is present, and the endangered species known to exist near the site (affidavit and testimony of Mary Lu Sinclair, Ex IW 38, Hearing Exhibits of IW/CC, Town of Canaan, Vol. 1 of 2).

### **Special Knowledge of State Reptiles and Amphibians and Their Habitats**

It is important to note that one member of the Connecticut Council on Environmental Quality, Michael W. Klemens, is a nationally-renowned herpetologist and author of the state of Connecticut's official Checklist of Amphibians & Reptiles in Connecticut. (See Appendices B and C hereto.) Despite the applicant's failure to consult or cite CT DEEP materials on the protected amphibians and reptiles on and around Cobble Hill, we are all beneficiaries of Dr.

Klemens's research -- through the publication on the Connecticut Department of Energy & Environmental Protection's website of Dr. Klemens's pioneering checklist. The Introduction to the official Checklist of Amphibians & Reptiles in Connecticut contains the following *caveat* regarding "Extirpation":

As we enter the twenty-first century several species of Connecticut's herpetofauna are in imminent danger of disappearing forever from the state. \* \* \* Although amphibians and reptiles are found throughout Connecticut, many species are localized and restricted to specific habitat types. Unfortunately, when these habitats are destroyed the amphibians and reptiles found there disappear too. With few exceptions, amphibians and reptiles have poor dispersal abilities. This means that when their habitat is lost, they are unable to find a suitable habitat to which to relocate. Even if suitable habitat is located nearby, migration to that habitat is very difficult in a landscape that is increasingly criss-crossed with roads.

("Amphibians & Reptiles in Connecticut: A Checklist with Notes on Conservation Status, Identification, and Distribution (Adapted from the book by Michael W. Klemens) ([http://www.ct.gov/deep/cwp/view.asp?a=2723&q=325812&deepNav\\_GID=1655](http://www.ct.gov/deep/cwp/view.asp?a=2723&q=325812&deepNav_GID=1655)) (Last viewed 7/16/13)

Appendix C contains excerpts from Dr. Klemens' material from the website of the Connecticut DEEP, that describe three species whose habitat may be found on Cobble Hill. Two are mentioned in the CEQ letter of May 20, 2013. The third, the Timber Rattlesnake is a state endangered species whose habitat Mr. Libertine acknowledged was present at the project site proposed under Docket 409A. The Council is requested to take administrative and statutory notice of the DEEP material in Appendices B and C regarding these species of special concern, threatened and endangered species of the State of Connecticut.

**POINT V: AT&T HAS SHOWN ITSELF TO BE UNTRUSTWORTHY IN ITS DISCLOSURES AND COMPLIANCE. ITS PRESENT EFFORT TO WORK OUT A "DEAL" WITH THE CSC WITHOUT PUBLIC PARTICIPATION IS A FLAGRANT VIOLATION OF THE PUBLIC INTEREST, INCLUDING THAT REPRESENTED BY THE IW/CC. THE MOTION TO REOPEN SHOULD BE DENIED AND THE PROCEEDINGS CLOSED AND AT&T DIRECTED TO PAY COSTS**

The mischaracterizations and material omissions of fact, especially those pertaining to this special environment on Cobble Hill, demonstrate the applicant's untrustworthiness and lack of due diligence.

AT&T repeatedly and surreptitiously has made significant changes to the original application (Docket 409) and proposals (Docket 409A).

In Docket 409, original plans called for extensive cutting and filling outside the deeded 30-foot right of way. AT&T submitted, as supplemental and unsolicited information (attached to answers to interrogatory responses), altered plans for the accessway, limiting all activity to within the 30-foot deeded right of way; no drainage plans were ever submitted to reflect this change.

Similarly, in Docket 409A, revisions were proposed to the original access drive adjacent to Barnes Road (May 14, 2013, AT&T's Responses to Siting Council Interrogatories, Set II).

These changes were included in AT&T's response to Question 7:

Would reconstruction of the road require 1:1 slopes armored control netting and rip-rap? If so, please identify these areas.

The fact that AT&T consistently felt compelled to make relatively significant changes to plans midway in the process of its "settlement site" application demonstrates both a lack of due diligence in their original planning, and total disregard for following established procedures. But most egregious is how AT&T managed to execute the submission of what by all accounts is a new application without actually filing an application.

#### **Inaudible Audio and Inaccurate Public Hearing Transcript**

The written transcript of the June 11, 2013 hearing was replete with errors, making it difficult for the IW/CC to thoroughly assess and review testimony. The IW/CC anticipated relying extensively on this document as the sound system at the hearing was inadequate to allow

those present to hear the proceedings. Any hearing must meet the minimal requirements for a) hearing room acoustics including amplification sufficient for all in the room to hear; and b) a reliable public record. The record of the June 11, 2013 proceeding is unreliable due to technical and acoustical problems, and this defect taints the entire proceedings.

**Contested Case Implicates Legal Rights Protected by Due Process Guarantees**

The Siting Council Regulations define a contested case, under whose character AT&T here files its motion to reverse is:

a proceeding in the council's disposition of matters delegated to its jurisdiction by law in which the legal rights, duties, or privileges of a party are determined by the council after an opportunity for a hearing in accordance with Section 4-166 (2) of the General Statutes of Connecticut.

Sec. 16-50j-2a(e) (Emphasis added.)

AT&T's effort here is to be reheard without meeting the rigorous "changed conditions" standard, and to repackage a failed effort, while bypassing all obligations of any applicant under Sec. 16-50l, violating due process and the fundamental fairness of principles of *res judicata* and issue preclusion.

The State Supreme Court's rule in *Fairfield v. Connecticut Siting Council*, 238 Conn. 362, 372 (1996) that reconsideration or reopening under §4-181a does not constitute a contested case is not applicable here, where the "modified site" is ATT's proposed changed condition.

**No Attempt to Comply with Mandated Review by SHPO**

There is apparently no reference to attempted compliance with the State Historic Preservation Office as mandated for a different site. No compliance references were offered, as no Application was submitted for this "modified site." Such compliance is mandatory under FCC regulations and the Nationwide Programmatic Agreement (See IW/CC Pre-Hearing Brief, Docket 409). AT&T's effort here is to be reheard without meeting the rigorous "changed

conditions" standard; and to repackage a failed effort, while bypassing all the obligations of any applicant under Sec. 16-501, violating due process and the fundamental fairness of principles of *res judicata* and issue preclusion.

### **AT&T Failure to Address CSC Requests**

The only alternative site provided by AT&T at the suggestion of the CSC has been the modified, so-called settlement site. This "alternative" does not meet the Findings of Fact presented by the CSC in its decision on Docket 409. AT&T presented no alternative technologies in response to the CSC Findings of Fact. While two sites were apparently investigated by AT&T (two positions on Dean property and one on Hodgkinson property (Tab 7 in response to 4/15/13 CSC Interrogatories No.16), neither was satisfactory. Yet the IW/CC was able to establish that there is at least one viable site as good as, or better, than the Cobble Hill site. This failure of AT&T to provide viable alternatives demonstrates its a lack of good faith and due diligence with a predisposition toward Cobble Hill, regardless of alternatives. IW/CC makes no claim to establish alternative sites as this is the burden of the applicant. The IW/CC engaged its own RF engineer to respond to repeated statements by AT&T that IW/CC had not refuted AT&T's assertions regarding RF propagation/coverage (AT&T's Superior Court Complaint against the CSC, Return date November 29, 2011, #111, pg. 22; and #116, pg. 23; #121, #122, #123, pg. 24). Our engineer did provide testimony that did refute the accuracy and competency of AT&T's assertions. AT&T legal counsel provided incomplete information regarding routine monitoring (Transcript, May 21, 2013, pg. 39). Also AT&T challenged, erroneously, the accuracy and validity of Mr. Cooper's findings and propagation maps (Transcript June 11, 2013, pp. 40-41). Our response is included as Appendix D. From the outset of Docket 409, AT&T has failed to carry its burden of proof on alternative sites.

Furthermore, at the May 21<sup>st</sup> Hearing in reference to the Town of Canaan (Falls Village) Plan of Conservation and Development Attorney Fisher misled the CSC with regard to preserved open space. The 2013 Plan of Conservation & Development is an up-date (so-stated) 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 (see letter from Northwest Council of Governments, Jocelyn Ayer, 6/25/13).

**POINT VI: AT&T FAILED TO DEMONSTRATE ANY CHANGE IN CONDITIONS MATERIAL TO THE BASES CITED BY THE SITING COUNCIL FOR DENIAL ON DOCKET 409; IF ANYTHING, SIMILAR CATEGORIES IN AT&T'S PROPOSAL UNDER DOCKET 409A PRESENT GREATER HAZARDS AND MAKE THE PROPOSAL EVEN MORE INTRUSIVE, WARRANTING REJECTION ON THE MERITS**

In its Opinion of August 25, 2012, the CSC lists numerous conditions and concerns upon which it based its denial of a permit under Docket 409. These conditions include:

1. **Steepness of Slopes and Access Route**

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) This hasn’t changed.

“The driveway would reach a maximum grade of 30 percent.” (Docket 409 Opinion p.1, Par. 4) This has changed for the worse. 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). These steep slopes have been identified as impassible by construction trucks lacking turning radius space,



and 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); and by the Town's emergency services: Public Comment, Fire Chief Dave Seney (February 17, 2011 Public Comment Session).

The earlier design under Docket 409 (Application, 10/18/10, Tab 5, CHA Ltr dated 9/22/10) provided guard rails deemed necessary for safety. Under 409A, these were eliminated in order to keep the access route within its required ROW. (AT&T Response to CSC Interrogatory 9, May 14, 2013). However, AT&T provided no evidence that the proposed construction could be executed within the confines of the 30- foot right of way.

AT&T also 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. AT&T's expert engineer witness admitted the current drainage plan was a compromise. (Trans. April 30, 2013, page 49, line 12) A compromise at what cost to the stability of the access drive and to the health of the ecosystems down grade? Such half answers cannot meet the strict requirements of the statutory mandates on the Siting Council to protect this delicate and important environment.

## **2. No Evidence of Public Safety Need**

"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." (O p. 2, Par. 1) AT&T presents no evidence that this has changed.

## **3. Site and Surrounding Countryside is of National, State, and Local Significance**

"Cobble Hill and its surrounds contain 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)

There are no "changed conditions" advanced by AT&T material to these formal, extensive and local, state and national designations.

#### **4. Endangered Species**

"There are records of 72 State-listed endangered, threatened or special concern species occurring within a two-mile radius of the proposed tower site." (O\_\_\_\_\_ p.3, Par. 1) While the CSC recognized the presence of suitable Timber Rattlesnake habitat, it did not see evidence for other listed species, based on AT&T's limited and preliminary survey under Docket 409. This has changed.

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) AT&T has had ample time to accomplish an objective professional field investigation and inventory, but has failed to do so. It has failed to properly consult both NDDDB materials and the CT DEEP. This failure has implications for the applicant's non-compliance with federal and state environmental laws. Worse: the applicant persists in its erroneous adoption of a "direct effects"-only rubric regarding environmental effects, despite the IW/CC's explanation during the Docket 409 proceeding of the federal requirement of consideration of all effects, including indirect effects (secondary effects) of the "Project Action Area." (Ex IW 56, Vol. 2 of 2) This is mandatory regulatory language for mandatory project

area effects considerations. See also statement by Commissioner Susan Kelsey, IW/CC, May 21, 2013, Trans. at page 62, Line 25).

The CEQ's comments are discussed further below.

**5. Cobble Hill is a Prominent Land Feature Surrounded by Lowlands, and a Tower at Its Summit Would be Highly Visible**

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. While the so-called “settlement site” may no longer be directly visible from the South Canaan Meeting House, it would dominate the entire unspoiled rural landscape, which includes the historic buildings in South Canaan, as well as the entirety of the Wangum Valley and hiking trails along the southern Canaan Mountain escarpment (see testimony of Starling Childs, May 21, 2013 trans. page 20 lines 21-23). 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) The violations by ATT in its original application of federal telecommunications regulations relating to the built and natural environment persist here, where no correction or revisiting of these underlying regulations (see all IW/CC filings, including exhibits and testimony in Docket 409, incorporated fully here by reference) has been made by this applicant.

**6. Independent from the Effects of the Site Itself, Construction and Maintenance of the Access Drive Alone Will Cause Temporary and Permanent Environmental Impacts**

“Of additional concern to the Council are the temporary and permanent environmental impacts associated with the construction and maintenance of the proposed access drive.” (Docket 409 Opinion Pg. 3, Par. 5). 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) Under Docket 409A, the proposed route is 1800 feet longer, with steeper maximum grade, and a larger area of overall disturbance.

### **Problems with Runoff Control**

Furthermore, 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 (See Application, Docket 409 at Tab 5, pp. 4-7), which, in the prior incarnation (Docket 409) relied upon swale outfalls and check dams (See Drawing, Tab 5, Fig. 6). As revealed only through Docket 409A Interrogatories, AT&T now proposes using V shaped ditches. These ditches 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.).

### **Increased Area of Disturbance**

With regard to the actual amount of disturbance the accessway would create, Mr. Libertine testified on April 30, 2013 (Pg. 61, Line 16) that “...The fact is it’s a very small footprint of what we would be disturbing that would be a new disturbance. Certainly the road needs upgrading, but the road is essentially there.” The answer is not candid. 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.

### **Increased Forest Fragmentation**

In addition, 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

([http://www.ct.gov/csc/lib/csc/pendingproceeds/docket\\_409/canaan\\_docket\\_409a\\_-\\_ceq\\_comments.pdf](http://www.ct.gov/csc/lib/csc/pendingproceeds/docket_409/canaan_docket_409a_-_ceq_comments.pdf)) and of May 29, 2013

([http://www.ct.gov/csc/lib/csc/pendingproceeds/docket\\_409/409a/canaan\\_docket\\_409a\\_-\\_supplemental\\_ceq\\_comments.pdf](http://www.ct.gov/csc/lib/csc/pendingproceeds/docket_409/409a/canaan_docket_409a_-_supplemental_ceq_comments.pdf)) (Last viewed 7/18/13))

Interrogatory No. 12 of the CSC to AT&T (Set II) details the impact that the road and compound construction would have on forest fragmentation. 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." 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) 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. To justify the intrusion and subsequent loss of portions of a “large core forest” based merely on the size of the remaining acreage trivializes and ignores the actual impact and consequences of the intrusion.

These material errors and omissions provide additional support to the CSC's original denial of the application under Docket 409.

**7. The Access Way and Site are Both Up-Gradient From Robbins Swamp and the Hollenbeck River, Therefore Siltation and Run-Off Are Concerns.**

In its Opinion 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. Cobble Hill is surrounded by protected wetlands and watercourses supporting species of special concern and threatened species (see description of Burbot studied by DEP and USFWS, Pre Hearing Brief, Docket 409).

The "settlement site" proposal under Docket 409A presents the same issues for the wetlands below, greater due to the steep grades and volume of runoff (see testimony of David Gumbart, TheNature Conservancy, Trans. May 21, 2013, page 23).

**8. The Council on Environmental Quality Raises Essential Environmental Considerations**

Since its original letter submitted on Docket 409 (Letter of February 7, 2011) ([http://www.ct.gov/csc/lib/csc/pendingproceeds/docket\\_409/409ceqcomments.pdf](http://www.ct.gov/csc/lib/csc/pendingproceeds/docket_409/409ceqcomments.pdf)) (Last viewed 7/18/13), the Council on Environmental Quality ("CEQ") has taken a leading role in describing the effects of the two proposed tower sites.

The Council on Environmental Quality was created in 1971 to do three jobs:

1. Assess the condition of Connecticut's environment and report its findings annually to the Governor, and recommend actions to improve state environmental programs.

2. Advise other state agencies on the environmental impacts of proposed construction projects.

3. Investigate citizens' complaints and allegations of violation of environmental laws.

(<http://www.ct.gov/ceq/cwp/view.asp?a=985&q=248722>) (Last viewed 7/16/13)  
(Emphasis added.)

Additionally the CEQ reviews and advises. (Conn. Gen. Stat. 22a-12)

### **CEQ Comments**

On April 25, 2013 the Council on Environmental Quality responded to a specific solicitation for written comments enunciating the procedural defect in the CSC's plan to proceed:

The CEQ understands that the Siting Council will hear evidence on the question of changed conditions and the substance of the motion simultaneously.

(Letter of the Council on Environmental Quality, April 25, 2013)  
[http://www.ct.gov/csc/lib/csc/pendingproceeds/docket\\_409/canaan\\_docket\\_409a\\_-\\_ceq\\_comments.pdf](http://www.ct.gov/csc/lib/csc/pendingproceeds/docket_409/canaan_docket_409a_-_ceq_comments.pdf) (Last viewed 7/16/13)

and continuing with the warning that the CEQ finds the relevant conditions unchanged. The CEQ's observation matches that of the IW/CC:

The relocation of a proposed tower site on paper might constitute a new application, but the CEQ does not see it as a changed condition when actual conditions on and around Cobble Hill, "a relatively undisturbed area that possesses scenic quality of local, regional, or state-wide significance," have not changed.

(*Ibid.*) (Emphasis added.)

The CEQ found no changed relevant conditions sufficient to re-open the docket, and cited its comments of February 7, 2011, adding and emphasizing the problem of forest fragmentation and destruction of the scenic and biological values of Cobble Hill, which the CEQ called "unique, highly visible and unspoiled," giving it "an iconic status." It described the nearby wetlands surrounding this hill as containing:

[T]en significant natural communities and 72 species that are listed by Connecticut as endangered, threatened or of special concern. The final decision [Docket 409] does not

appear to take into account the extent to which certain wildlife species depend on both the upland habitat of Cobble Hill and the adjoining wetlands. This is an important ecological relationship that should be examined very closely.

Cobble Hill merits extraordinary regulatory protection from visual and ecological disturbances. As the CEQ's original comments note, the citizens of Connecticut have invested considerable sums to keep surrounding lands in an undisturbed state.

*(Ibid.)* (Emphasis added.)

### **Lack of Responsible Consideration of the Environment**

The applicant's disregard of inquiries regarding species affected by the project went unanswered:

Question 12 [of CSC's interrogatories] also asks the applicant to address the CEQ's comment on the need to assess impacts to wildlife species that depend on both the upland habitat and the surrounding wetlands. That request seems to have gone unanswered. The Natural Diversity Data Base (NDDB) should have records of wood turtles and blue-spotted salamanders -- both state-listed species that fit the above description regarding habitat types -- on or near the property proposed for the facility.

Even accurate information from the NDDB is not in itself sufficient. The NDDB should always be consulted for records of rare species but it is not intended to be a substitute for field investigation. NDDB information should be regarded as a supplement to any ecological assessment.

(Letter of the Council on Environmental Quality, May 29, 2013)  
([http://www.ct.gov/csc/lib/csc/pendingproceeds/docket\\_409/409a/canaan\\_docket\\_409a\\_-\\_supplemental\\_ceq\\_comments.pdf](http://www.ct.gov/csc/lib/csc/pendingproceeds/docket_409/409a/canaan_docket_409a_-_supplemental_ceq_comments.pdf)) (Last viewed 7/16/13) (Emphasis added.)

The CEQ's minutes for April 24, 2013 included the following statement:

\* \* \*

#### **Review of State Agency Actions**

**Siting Council Consultation re: telecommunications tower in Canaan (Falls Village), re-opening of docket** – \* \* \* Hall asked what is the “changed condition” if the proposed new tower is going on the same mountain as the old one that had been rejected by the Connecticut Siting Council (CSC). They responded that a Federal Communications Commission (FCC) report had identified a number of underserved rural areas, including parts of Canaan, as priorities for expanded service. Melanie Bachman, attorney for CSC explained from the audience that any person can file a motion to reopen a contested case and argue that there are changed conditions. The CSC holds a hearing to determine if changed conditions actually exist. That hearing is scheduled for April 30, 2013, and the



CSC will hear evidence on both the question of changed conditions and substantive concerns. Klemens said that he lives in the neighboring town and is familiar with the site. He said that from an ecological perspective the proposed new location is worse than the originally proposed site, and described the unique habitats present. He suggested that if ever there was an area of unique regional ecological significance this is it. Wagener added that the state has invested much time and money preserving the areas that surround the site. Acting Chair Brooks said she would like to see the comments amended to emphasize the unique and iconic status of Cobble Hill. Hall and Merrow agreed. Dunbar suggested that the comments address the question of changed conditions first, and include substantive comments in case the CSC finds changed conditions. Brooks asked for a motion to send the comments after modifying them to clarify the Council's message that it is the CSC's prerogative to decide if there has been a change of condition according to administrative law and that the adverse environmental effects are exacerbated by the proposed new location, and that the language about changed conditions should remain in the comments but restructured as indicated. Second by O'Donnell. Approved unanimously.

(<http://www.ct.gov/ceq/cwp/view.asp?a=984&q=523616>) (Last viewed 7/16/13.)  
(emphasis added.)

These are precisely the species and habitats to be affected by both AT&T proposed sites - the first rejected for appropriate environmental and visually intrusive reasons. Cobble Hill has not altered in any material environmental or visual respect. Yet these issues of state-wide importance are real, and have the recognition of the state DEP, and requiring consideration by the CSC.

The State's Policy under the state Endangered Species Act explicitly points to such locations as the one at issue in this Docket for particular care:

**Sec. 26-303. Findings. Policy.** The General Assembly finds that certain species of wildlife and plants have been rendered extinct as a consequence of man's activities and that other species of wildlife and plants are in danger of or threatened with extinction or have been otherwise reduced or may become extinct or reduced because of destruction, modification or severe curtailment of their habitats, exploitation for commercial, scientific, educational, or private use or because of disease, predation or other factors; that such species are of ecological, scientific, educational, historical, economic, recreational and aesthetic value to the people of the state, and that the conservation, protection and enhancement of such species and their habitats are of state-wide concern. Therefore the General Assembly declares it is a policy of the state to conserve, protect, restore and enhance any endangered or threatened species and essential habitat.

(Emphasis added.)

### **AT&T's Challenge to IW/CC's Jurisdiction**

At the May 21, 2013 hearing, AT&T's attorney Fisher questioned IW/CC Commissioners Sinclair and Kelsey extensively (Trans 5/21/13 at Pg 63-65) regarding the Falls Village IW/CC's legal basis for being involved in the Docket 409A tower application/siting process, especially as purportedly there are no [known] apparent wetlands or watercourses on or near the site. This ignores the fact that indirect effects from both the access way and the facility compound will affect not only the upland slopes where they are located but also the wetlands below (see submission by The Nature Conservancy).

The IW/CC is also a Conservation Commission, with duties spelled out in section 7-131a of the General Statutes of the State of Connecticut. Conservation Commissions, while advisory, are entrusted with..... "the development, conservation, supervision and regulation of natural resources, including water resources, within its territorial limits." Cobble Hill is a treasured natural resource of the Town and Canaan and the State of Connecticut and warrants the IW/CC's efforts to protect these resources.

### **The Connecticut Siting Council's Fulfillment of its Mandate**

Any application for a "Certificate of Environmental Compatibility and Public Need," defined in the General Statutes as subject to environmental and scenic criteria, applied under Docket 409 resulting in denial:

**Sec. 16-50p. Certification proceeding decisions: Timing, opinion, factors considered. Telecommunications and community antenna television facilities: Additional factors considered, conditions. Modification of location. Amendment proceeding decisions. Service and notice. "Public need" defined.** (a)(1) In a certification proceeding, the council shall render a decision upon the record either granting or denying the application as filed, or granting it upon such terms, conditions, limitations or modifications of the construction or operation of the facility as the council may deem appropriate.

(2) The council's decision shall be rendered in accordance with the following: \* \* \*

(3) The council shall file, with its order, an opinion stating in full its reasons for the decision. The council shall not grant a certificate, either as proposed or as modified by the council, unless it shall find and determine:

(A) Except as provided in subsection (c) of this section, a public need for the facility and the basis of the need;

(B) The nature of the probable environmental impact of the facility alone and cumulatively with other existing facilities, including a specification of every significant adverse effect, including, but not limited to, electromagnetic fields that, whether alone or cumulatively with other effects, on, and conflict with the policies of the state concerning, the natural environment, ecological balance, public health and safety, scenic, historic and recreational values, forests and parks, air and water purity and fish, aquaculture and wildlife;

(C) Why the adverse effects or conflicts referred to in subparagraph (B) of this subdivision are not sufficient reason to deny the application; \* \* \*

(b) (1) Prior to granting an applicant's certificate for a facility described in subdivision (5) or (6) of section 16-50i, the council shall examine, in addition to its consideration of subdivisions (1) to (5), inclusive, of subsection (a) of this section: (A) The feasibility of requiring an applicant to share an existing facility, \* \* \* (C) 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 state-wide significance. The council may deny an application for a certificate if it determines that (i) shared use under the provisions of subparagraph (A) of this subdivision is feasible, (ii) the applicant would not cooperate relative to the future shared use of the proposed facility, or (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.

(Emphasis added.)

The Council made findings and rendered a decision in Docket 409 based on "conditions" that are immutable characteristics of the landscape and geography at and around Cobble Hill.

AT&T has not presented any material change in these conditions that formed the basis for denial.

The decision must stand as a matter of fact and a matter of law.

## CONCLUSION

For purposes of opposing AT&T's motion to reopen and the substance considered by the CSC under Docket 409A, the IW/CC incorporates by reference all its prior filings, including briefs, opposition documents, exhibits and witness testimony.

For the foregoing reasons, AT&T's motion should be denied on the merits or stricken as improper and untimely.

Parties and intervenors to the original Docket 409 have been required to expend countless hours and resources in order to defend rights and vindicate state and federal laws. Time consumed in filing briefs, exhibits, witness prefiled testimony, attending hearings in Falls Village and in New Britain and associated costs were required for hearings on April 30, May 21 and June 11, 2013.

Since the Docket 409A matter was not adjourned but permitted to proceed, and the application and its *bona fide* bases have been shown to be defective, the applicant should be directed to reimburse all parties for the costs incurred to defend their rights.

Further, the CSC is requested to comply with prohibitions against *ex parte* communications.

For the foregoing reasons, the IW/CC respectfully requests that the Siting Council direct the Applicant to pay all costs connected with defending against this "settlement site" application, and to close these illegal proceedings in accordance with state and federal law.

Respectfully submitted,

  
Ellery W. Sinclair, Chairman  
Inland Wetlands/Conservation Commission  
Town of Canaan (Falls Village)  
201 Under Mountain Road  
Falls Village, CT 06031  
(860) 824-7454  
WML61@comcast.net

July 24, 2013

**STATE OF CONNECTICUT**  
**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

**APPENDICES**

**TO POST HEARING BRIEF OF THE INLAND WETLANDS/CONSERVATION  
COMMISSION OF THE TOWN OF CANAAN (FALLS VILLAGE)**

**Appendix A:** "Superseding Stipulation Continuing Withdrawal of Appeal from Active Consideration, Without Prejudice, With Leave to Reactivate," Doc 52, 2d Cir. Docket 12-4709, 6/3/13; Second Circuit Court's Order, Doc 58, 6/12/13.

**Appendix B:** CT DEEP web pages on Connecticut Amphibians and Reptiles, of which the Council is requested to take administrative and statutory notice (Marked):

- Author and Notes: About the Author (Michael W. Klemens)
- Introduction to the official Checklist of Amphibians & Reptiles in Connecticut (regarding "extirpation")
- Conservation

**Appendix C:** CT DEEP web pages on Connecticut Amphibians and Reptiles, of which the Council is requested to take administrative and statutory notice (Marked). The pages describe three species whose habitat may be found on Cobble Hill. Two are mentioned in the CEQ letter of May 20, 2013, one (Timber Rattlesnake) is a state endangered species whose habitat is acknowledged by AT&T's own witness to be present at the site.

- Blue-spotted Salamander [Pure Diploid Populations] (*Ambystoma laterale*)
- Wood Turtle (*Clemmys insculpta*)
- Timber Rattlesnake [Crotalidae: Pit Vipers] (*Crotalus horridus*)

**Appendix D:** Response to AT&T, re: IW/CC RF Engineer Findings

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

New Cingular Wireless PCS, LLC

v.

Docket No. 12-4709

Connecticut Siting Council, et al.

**SUPERSEDING STIPULATION CONTINUING WITHDRAWAL  
OF APPEAL FROM ACTIVE CONSIDERATION, WITHOUT  
PREJUDICE, WITH LEAVE TO REACTIVATE**

The undersigned counsel for the parties hereby stipulate that the above-captioned appeal will continue to be withdrawn from active consideration, without costs and without attorneys' fees and without prejudice, subject to reactivation of the appeal by appellant's counsel by written notice to the Clerk of this Court or by October 25, 2013, whichever comes first.

If not thus timely reactivated, the appeal shall be subject to dismissal.

Withdrawal of the appeal from active consideration shall not operate as a dismissal of the appeal under F.R.A.P. 42(b).

Dated: June 3, 2013



Co-Attorney for Appellant, New Cingular  
Wireless PCS, LLC  
Nissa J. Imbrock  
Mayer Brown LLP  
71 South Wacker Drive.  
Chicago, Illinois 60606

Dated: June 3, 2013



Attorney for Appellees Connecticut Siting Council,  
et al.  
Robert L. Marconi  
Assistant Attorney General  
10 Franklin Square  
New Britain, Connecticut 06051

APPENDIX A

**CERTIFICATE OF SERVICE**

I, Nissa J. Imbrock, an attorney, hereby certify that on June 3, 2013, I electronically filed the foregoing using the CM/ECF system, which will send notification of the filing to all counsel of record who are registered on the CM/ECF system.

/s/ Nissa J. Imbrock\_\_\_\_\_

**UNITED STATES COURT OF APPEALS  
FOR THE  
SECOND CIRCUIT**

---

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 12<sup>th</sup> day of June, two thousand and thirteen,

---

New Cingular Wireless PCS, LLC, AKA AT&T,  
  
Plaintiffs - Appellants,

**ORDER**  
Docket No. 12-4709

v.

Connecticut Siting Council, Robert Stein, Chairman, in his official capacity, Colin C. Tait, Vice Chairman, in his official capacity, Brian Golembiewski, in his official capacity, Barbara Currier Bell, in her official capacity, Larry P. Levesque, in his official capacity, Daniel P. Lynch, Jr., in his official capacity, James J. Murphy, Jr., in his official capacity, Edward S. Wilensky, in his official capacity, Philip T. Ashton, in his official capacity,

Defendants - Appellees.

---

The parties in the above-referenced case have filed a stipulation withdrawing this appeal pursuant to Local Rule 42.1.

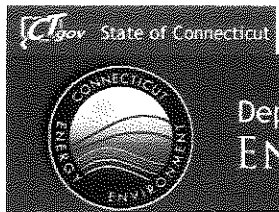
The stipulation is hereby "So Ordered".

For The Court:

Catherine O'Hagan Wolfe,  
Clerk of Court



# Department of ENERGY & ENVIRONMENTAL PROTECTION

Select Language | Translation Disclaimer | Home | About Us | Programs & Services | Publications | Forms | Contact Us

ENERGY | ENVIRONMENTAL QUALITY | NATURAL RESOURCES | OUTDOOR RECREATION | PURA

## Wildlife

### Learn About CT's Wildlife

- Wildlife & Habitat Management**
- Nuisance/Distressed Wildlife**
- Hunting & Trapping**
- Maps & Access Information**
- Wildlife Main Page**
- Main Menu**

- Report an ENVIRONMENTAL Concern/Problem**
- Calendar of Events*
- Laws and Regulations**
- Maps and GIS Data**
- STATE PARKS 100!**
- DOWNLOAD OUR FREE GPS MOBILE APP**
- No Child Left Inside*
- energize CT**
- DEEP Store**
- Sign Up To Receive Updates / Newsletters by E-Mail**
- Connecticut still revolutionary**
- Regulations of CT State Agencies**
- access health**

## Author and Notes

- [Acknowledgements](#)
- [Book Introduction](#)
- [Materials and Methods](#)
- [Literature Cited](#)
- [Wildlife Conservation Society](#)

### About the Author

Michael W. Klemens is a senior conservation zoologist at the Wildlife Conservation Society headquartered at the Bronx Zoo. He was born in Australia and educated in the United States and Europe, receiving his B.S. (Education) and M.S. (Zoology) from the University of Connecticut and his Ph.D. (Ecology) from the University of Kent in the United Kingdom.

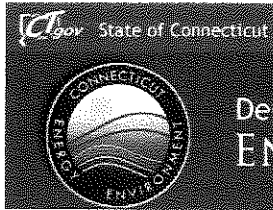
Dr. Klemens has spent over two decades studying amphibians and reptiles in the northeastern United States and in east Africa. He is on the scientific staff of the Department of Herpetology at the American Museum of Natural History and is the author of numerous papers and several books on herpetology and conservation. Dr. Klemens has promoted awareness of amphibians and reptiles through his scientific papers, lectures, popular articles, and television appearances. He has worked tirelessly to conserve amphibians and reptiles in his own backyard and around the world.



[Amphibians and Reptiles in Connecticut](#)

[Printable Version](#)

APPENDIX B



# Department of ENERGY & ENVIRONMENTAL PROTECTION

Select Language

Translation Disclaimer

Home

About Us

Programs & Services

Publications

Forms

Contact Us

ENERGY

ENVIRONMENTAL QUALITY

NATURAL RESOURCES

OUTDOOR RECREATION

PURA

## Wildlife

### Learn About CT's Wildlife

Wildlife & Habitat Management

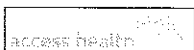
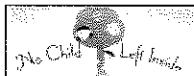
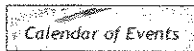
Nuisance/Distressed Wildlife

Hunting & Trapping

Maps & Access Information

Wildlife Main Page

Main Menu



## Introduction

Almost a decade has passed since the publication of the first edition of this checklist (Klemens, 1991). This new, revised edition includes descriptions of all native species, both the common, widespread forms as well as the uncommon species that were featured in the first edition. Distributional information has been updated, and the conservation status of each species is discussed. Although amphibians and reptiles are still among the most poorly known of our native fauna, public interest and appreciation of these animals is on the rise. Popular culture has expanded the definition of "wildlife" to encompass not only mammals and birds, but a host of fascinating creatures including insects, arachnids, amphibians, and reptiles. Although some individuals still hold a deep-seated aversion to reptiles and amphibians, especially snakes, there are many who share a fascination of these attractively patterned and often cryptic denizens of Connecticut's woods, wetlands, and meadows.

Old prejudices, however, die hard. Each year hundreds of harmless snakes are killed in the mistaken belief that they are venomous. Likewise, snapping turtles are too frequently destroyed because of unfounded fears for human safety and exaggerated reports of their depredations on game fish and waterfowl. The greatest threat to Connecticut's amphibians and reptiles is the increasing fragmentation, degradation and loss of their habitats. The state's amphibian and reptile fauna still contains all the species that were native to Connecticut when Europeans settled here over four centuries ago. This is in marked contrast to mammals and birds where species have disappeared from the state through extinction (e.g., passenger pigeon) or extirpation (e.g., timber wolf). Extirpation is extinction that occurs over a portion of a species' range, but does not eliminate the entire species. As we enter the twenty-first century several species of Connecticut's herpetofauna are in imminent danger of disappearing forever from the state. While not threatened with extirpation, over half of the remaining species are in the midst of a long-term, noncyclical decline, while a smaller number of adaptable species (also known as generalists) are actually increasing. Overall, the biodiversity (species richness) of Connecticut's amphibians and reptiles is declining, while the biomass (actual number of individuals) of a small number of adaptable species is on the rise.

Not surprisingly, many amphibians and reptiles are quite secretive. Diurnal species are often superbly camouflaged, whereas other species escape detection by their nocturnal or subterranean lifestyles. In fact, as a group, amphibians and reptiles are far more widespread and abundant than most people realize. There is scarcely a patch of open space within Connecticut that does not house a few hardy, adaptable species. Although amphibians and reptiles are found throughout Connecticut, many species are localized and restricted to specific habitat types. Unfortunately, when these habitats are destroyed the amphibians and reptiles found there disappear too. With few exceptions, amphibians and reptiles have poor dispersal abilities. This means that when their habitat is lost, they are unable to find a suitable habitat to which to relocate. Even if suitable habitat is located nearby, migration to that habitat is very difficult in a landscape that is increasingly criss-crossed with roads.

Amphibians and reptiles serve as excellent barometers of general environmental health. Overall habitat quality is often reflected in the diversity and abundance of species present in any given area. This checklist serves as a brief introduction to Connecticut's amphibians and reptiles. Those wanting to pursue this topic in more detail should consult Klemens, 1993: *The Amphibians and Reptiles of Connecticut and Adjacent Regions*, Bulletin 112, State Geological and Natural History Survey of Connecticut.

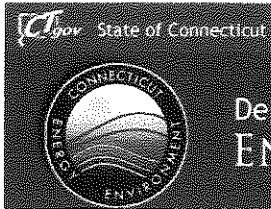
Connecticut's terrestrial and freshwater herpetofauna is composed of forty-five species: twelve salamanders, ten frogs, eight turtles, one lizard, and fourteen snakes. In addition, several species of pelagic marine turtles have been reported from the Connecticut portions of Long Island Sound and are discussed in this text. Of the forty-five freshwater and terrestrial amphibians and reptiles, eighteen species (40%) are commonly found throughout Connecticut. Twenty-seven species (60%) are irregularly distributed, and often absent or very rare in at least one of Dowhan and Craig's (1976) ecoregions. Scientific and common names used in this paper follow Collins (1997).

Babbitt (1937) and Lamson (1935) mentioned nine additional species as potentially occurring within Connecticut. Craig et al. (1980) eliminated the eastern mud turtle from Connecticut's herpetofauna. After intensive field surveys, coupled with a search of museum collections, Klemens (1991, 1993) reported that there was no real evidence to support the natural occurrence of the nine species listed in Table 2. Those wanting to pursue this topic in more detail should consult Klemens, 1993: *The Amphibians and Reptiles of Connecticut and Adjacent Regions*, Bulletin 112, State Geological and Natural History Survey of Connecticut.

Connecticut's terrestrial and freshwater herpetofauna is composed of forty-five species: twelve salamanders, ten frogs, eight turtles, one lizard, and fourteen snakes. In addition, several species of pelagic marine turtles have been reported from the Connecticut portions of Long Island Sound and are discussed in this text. Of the forty-five freshwater and terrestrial amphibians and reptiles, eighteen species (40%) are commonly found throughout Connecticut. Twenty-seven species (60%) are irregularly distributed, and often absent or very rare in at least one of Dowhan and Craig's (1976) ecoregions. Scientific and common names used in this paper follow Collins (1997).

Babbitt (1937) and Lamson (1935) mentioned nine additional species as potentially occurring within Connecticut. Craig et al. (1980) eliminated the eastern mud turtle from Connecticut's herpetofauna. After intensive field surveys, coupled with a search of museum collections, Klemens (1991, 1993) reported that there was no real evidence to support the natural occurrence of the nine species listed in Table 2.

[Amphibians and Reptiles in Connecticut](#)



# Department of ENERGY & ENVIRONMENTAL PROTECTION

Select Language ▼

Translation Disclaimer

Home

About Us

Programs & Services

Publications

Forms

Contact Us

ENERGY

ENVIRONMENTAL QUALITY

NATURAL RESOURCES

OUTDOOR RECREATION

PURA

## Wildlife

### Learn About CT's Wildlife

Wildlife & Habitat Management

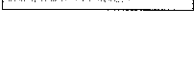
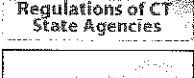
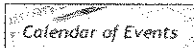
Nuisance/Distressed Wildlife

Hunting & Trapping

Maps & Access Information

Wildlife Main Page

Main Menu



## Conservation

Many of Connecticut's uncommon and rare species are near the northeastern limit of their continuous range. They inhabit small areas of specialized habitat in western Connecticut, or low-lying river valleys, and may never have been widespread within the state. Examples of these include the bog turtle, five-lined skink, and spadefoot toad. Several species, including the spring salamander and northern redbelly snake, are primarily restricted to the hills of northern Connecticut and are much more widely distributed in the upland regions of central and northern New England. Although all species have been subject to collecting pressure, several species are directly threatened by collection, including the bog, wood, spotted, and box turtles, as well as the timber rattlesnake.

Road mortality seriously affects populations of amphibians and reptiles. Although all species are vulnerable to this factor, long-lived, slow-maturing species with low reproductive outputs, including certain snakes and the majority of turtles, are most seriously affected by the steady attrition of reproductively active adults. The loss of even a few box turtles per decade from a population is not sustainable over the long term (Doroff and Keith, 1990). Many of Connecticut's highways have developed "kill zones" parallel to, and extending hundreds of feet from, the edge of the road. Kill zones are characterized by greatly reduced numbers of reptiles, a direct effect of road mortality exceeding the capacity of populations of long-lived, slow-maturing reptiles to replenish their numbers over time. Amphibians that migrate en masse to breeding sites, including wood frogs and mole salamanders, are vulnerable to large scale mortality if the migration occurs at a time of night when road traffic is high. Development and changing land use patterns often affect specialized, ecologically vulnerable habitats that contain a high proportion of uncommon species. For example, vernal pool breeding species, including the wood frog, Jefferson, marbled and spotted salamanders, are especially vulnerable (Klemens, 1998a). These species are declining statewide because of the loss of large tracts of forested habitat that surround these small wetlands. Although many towns protect the vernal pool wetland breeding habitat, there is minimal protection of the upland habitats that surround these pools. These forested uplands that extend 500 feet or more from the edge of the vernal pool are critical habitat that these animals depend upon most of the year for foraging and hibernation.

An additional challenge to conserving vernal-pool breeding amphibians, as well as many other amphibians and reptiles, is that populations of species rarely occur in isolation from one another. What the casual observer may perceive as series of breeding pools, each with its own resident population of amphibians, actually function as a metapopulation. There is gene flow between these pools, and, in times of ecological catastrophe at one site, such as the loss of a large portion of the breeding population, dispersal from other nearby sites can help replenish the population. I observed one such instance in the spring of 1999 in the Appalachian Mountains of southern Pennsylvania. Here, an early warm spring rain had triggered a mass migration of Jefferson salamanders to their breeding pools. These pools were scattered for about a kilometer along a ridgeline. This warm, rainy night was followed by an extended period of very cold weather. The open pools completely refroze, and several storms then covered the iced over pools with a heavy snow layer. Although Jefferson salamanders can sustain extended periods submerged in cold water, they cannot survive being entombed and subsequently suffocated, unable to obtain oxygen at the surface of the pools. Although every pool examined held dead salamanders, a single spring-fed pool had no mortality. This illustrates how important this single pool was in this particular year, and probably will be for several years afterward, as such a large percentage of breeding adults was lost in the other pools.

Maintaining these landscape-scale ecological connections is one of the biggest challenges that we face in conserving amphibians and reptiles. Spotted turtles use a variety of different wetlands and upland habitats within a landscape mosaic of habitat. Again, in order for this species to sustain itself over the long term, it is insufficient to simply protect the various wetlands that it uses as single entities without recognizing and then protecting the connectivity between these wetlands through the intervening upland habitat. It is also important to understand the impediments that different types of human uses on a landscape can pose to amphibian and reptile movements. For example, many species of amphibians are able to disperse across agricultural fields at night in cool wet weather. If these fields were replaced with a housing subdivision, a common occurrence, and even if some portions of the habitat were reforested, the system of roads, curbs, catch basins, and the activities of the human inhabitants pose a far greater obstacle to the dispersal of amphibians than did the former agricultural landscape. These ecosystem-scale landscape requirements of amphibians and reptiles pose a tremendous challenge to local land-use decision-makers. It requires a much broader look at the overall ecosystem, rather than the site-specific project reviews that are the current norm.

While many of Connecticut's amphibians and reptiles that have complex habitat requirements and life history strategies encompassing multiple habitat types are in decline, a small group of species are on the increase. Species including the bullfrog, snapping turtle, and brown snake are able to survive in human-altered landscapes that are increasing within the state. As wooded swamps and other diverse shallow wetlands are converted into ponds, bullfrogs, snapping turtles, and painted turtles increase, exploiting habitats that once supported wood frogs, spotted turtles, and ribbon snakes. Although many towns stringently protect their wetlands, they often fail to adequately protect the complexity and structure of these wetlands. Wetlands that are structurally complex, with many layers of shrubs and vegetation, support a rich diversity of amphibians and reptiles. When these wetlands are replaced by ponds, which often occurs when land is developed, the complexity of the wetland and its rich biodiversity are lost. A major challenge that land-use decision-makers and conservationists will face in the twenty-first century is to sustain the biodiversity (species richness) of Connecticut's amphibians and reptiles. This will require maintaining habitat complexity and connectivity by examining a much larger landscape scale, often more than 1,000 acres, when evaluating the environmental impacts of a development proposal.

One of the fundamental dilemmas that town planning boards and wetland commissions face is that the majority of





projects that they review fall well below 100 acres in size, whereas many wetland-dependent amphibians and reptiles require a minimum of 1,000 acres that is a mosaic of upland and wetland habitats (Klemens, 1998a; Lassila, 1999). The land-use review mechanisms designed to protect the environment often fall short of that goal by failing to consider impacts at an ecosystem scale. Ironically, because the current environmental and land-use review processes are often conducted at too small a scale, they actually encourage habitat fragmentation (and destruction) of Connecticut's wetland and terrestrial ecosystems. However, this does not have to be the case. A growing number of Connecticut towns have already begun to consider ecosystem-scale in their land-use planning and decision, adding both value and effectiveness to the environmental review process. Such efforts logically lead to focusing more intense development in certain areas, while leaving larger tracts of open space between developed areas. This ecosystem stewardship approach results in a very different pattern of suburban development than has occurred over much of the state. Fragmentation of large tracts of second growth forest into ever smaller, ecologically dysfunctional patches is replaced with more tightly clustered development around existing hamlets and urban centers, with large blocks of open space and lower density development zones retaining ecological connectivity and rural character.



Amphibians and Reptiles in Connecticut

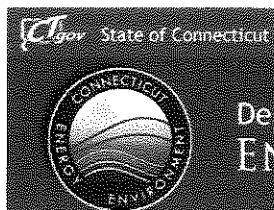
[Printable Version](#)

79 Elm Street, Hartford, CT 06106-5127 / Phone: 860-424-3000

[Home](#) | [CT.gov Home](#) | [Send Feedback](#) | [Login](#) | [Register](#)

[State of Connecticut Disclaimer and Privacy Policy](#), [Additional DEEP Disclaimers](#).  
Copyright © 2002 - 2013 State of Connecticut.





# Department of ENERGY & ENVIRONMENTAL PROTECTION

Select Language Translation Disclaimer Home About Us Programs & Services Publications Forms Contact Us

ENERGY ENVIRONMENTAL QUALITY NATURAL RESOURCES OUTDOOR RECREATION PURA

## Wildlife

### Learn About CT's Wildlife

Wildlife & Habitat Management

Nuisance/Distressed Wildlife

Hunting & Trapping

Maps & Access Information

Wildlife Main Page

Main Menu

Report an ENVIRONMENTAL Concern/Problem

Calendar of Events

Laws and Regulations

Maps and GIS Data

STATE PARKS 100!

DOWNLOAD OUR FREE GPS MOBILE APP

The Child Left Behind

energize CT

DEEP Store

Sign Up To Receive Updates / Newsletters by E-Mail

Connecticut still revolutionary

Regulations of CT State Agencies

access health

## Blue-spotted Salamander

Pure Diploid Populations

(*Ambystoma laterale*)



**IDENTIFICATION:** Slender, narrow head, black coloration with blue flecks, especially on belly, sides, and tail. Tail flattened laterally. Small, adults are usually under 100 mm total length.

Bogart and Klemens (1997) reported on the genetic distinctiveness of the blue spotted salamanders found in eastern Connecticut, southeastern Massachusetts, and on the tip of Long Island at Montauk. Unlike any other blue spotted salamanders in southern New England, these animals have been geographically isolated, and never have had an opportunity to hybridize with Jefferson salamanders or to come into contact with hybrid populations of blue-spotted salamanders. These animals occur in an even sex ratio of males to females. In Connecticut, these salamanders are restricted to several large swamp systems lying in the Quinebaug Valley. These populations of diploid blue-spotted salamanders, found in the towns of Plainfield and Griswold, are a "Threatened Species" in Connecticut and strictly protected on state lands. Collection is prohibited under Section 26-66-13-A of the Connecticut Code. These relictual populations of blue-spotted salamanders are unfortunately not afforded differential conservation or protection status in either New York, where they are restricted to the extreme eastern tip of the South Fork of Long Island, nor in southeastern Massachusetts where they are known from a few sites between Cape Cod and the Rhode Island line. Although these salamanders may have once occurred in northeastern Rhode Island, their habitat has been destroyed by urbanization.

[Salamanders | Amphibians and Reptiles in Connecticut](#)

[Printable Version](#)

APPENDIX C



# Department of ENERGY & ENVIRONMENTAL PROTECTION

Select Language

Translation Disclaimer

Home

About Us

Programs & Services

Publications

Forms

Contact Us

ENERGY

ENVIRONMENTAL QUALITY

NATURAL RESOURCES

OUTDOOR RECREATION

PURA

## Wildlife

### Learn About CT's Wildlife

Wildlife & Habitat Management

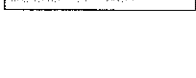
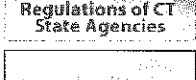
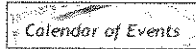
Nuisance/Distressed Wildlife

Hunting & Trapping

Maps & Access Information

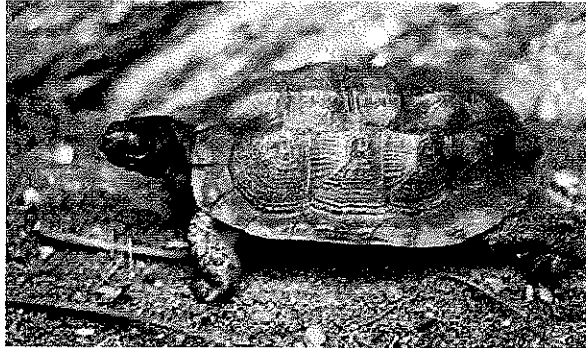
Wildlife Main Page

Main Menu



## Wood Turtle

(*Clemmys insculpta*)

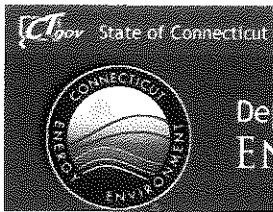


**IDENTIFICATION:** A medium-sized turtle, readily distinguished by its sculptured, rough, moderately-domed carapace, black head, orange-red wash on its under limbs, and a yellow plastron with black squares along the edges. Adults 150-200 mm carapace length.

In contrast to Connecticut's other turtle species, the wood turtle is an animal of the northern forest biome, from the Great Lakes eastward through New England and northeastern Canada. Its southern range limit lies near Washington, DC. In Connecticut, the strongholds of wood turtle distribution are the eastern and western uplands. Although once quite common in the Central Connecticut Lowland, many populations have been reduced or even eliminated by habitat fragmentation. This species was never common in the coastal zone of the state. Wood turtles have extensive landscape-scale habitat requirements, requiring clean rivers and large streams with deeply undercut banks for hibernation, as well as extensive areas of floodplain, forest, and fields for summer foraging. Because of their extensive overland movements, they are very susceptible to road mortality. They take over a decade to reach sexual maturity, and have a low egg output, and limited juvenile survivorship. Loss of adults from breeding populations, whether from increased road mortality or by collection for the wildlife trade, is a major problem affecting the sustainability of wood turtle populations in Connecticut. Possession of any wood turtle is prohibited (Conn. Code Sec. 26-55-3-C) in Connecticut without regard to its origin, and collection within Connecticut is prohibited (Conn. Code Sec. 26-66-14-A). The wood turtle is a "Special Concern" species in Connecticut. International commerce in wood turtles posed such a threat that in 1992 this species was placed under international trade regulatory protection administered by CITES (Convention on International Trade in Endangered Species of Flora and Fauna). The wood turtle is of conservation concern throughout most of its range. Most states and provinces where it occurs afford it special status and/or some form of statutory protection.

[Turtles | Amphibians and Reptiles in Connecticut](#)

[Printable Version](#)



# Department of ENERGY & ENVIRONMENTAL PROTECTION

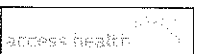
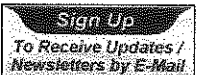
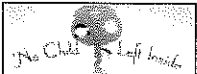
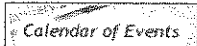
Select Language | Translation Disclaimer | Home | About Us | Programs & Services | Publications | Forms | Contact Us

ENERGY | ENVIRONMENTAL QUALITY | NATURAL RESOURCES | OUTDOOR RECREATION | PURA

## Wildlife

### Learn About CT's Wildlife

- Wildlife & Habitat Management
- Nuisance/Distressed Wildlife
- Hunting & Trapping
- Maps & Access Information
- Wildlife Main Page
- Main Menu



## Timber Rattlesnake

(*Crotalus horridus*)



**IDENTIFICATION:** A large, heavy-bodied snake distinguished by its keeled scales, variable dorsal pattern of dark bands on a black, brown, or yellow background. The venter is light yellow, the head dark, distinctly larger than the neck, with a nostril and heat sensitive pit on each side. The pupil of the eye is vertical. The rattle on the tail tip is distinctive; however, many harmless snakes, when aroused, will vibrate their tails rapidly in dry leaves, making a sound than can be mistaken for a rattlesnake. Adult total length up to 1525 mm.

The rattlesnake's decline in Connecticut since colonial times is well documented (Petersen and Fritsch 1986; Klemens, 1993). It is presently confined to small areas of northwestern and central Connecticut, where the greatest threat to its survival is depredation by humans. Although many dens are in state forests, rattlesnakes are killed both at the dens and when they forage on private property during the summer. Rattlesnakes are a landscape species, requiring large tracts of unfragmented forest. Individuals typically forage a mile or more from their dens during the summer months. Heavy collecting pressure at well known den sites threatens the viability of many rattlesnake populations. The increasing development in areas that surround rattlesnake dens results in significant road mortality, and an increase in incidental kills associated with human encounter. This is a major contributing factor to the decline of this species, especially in the areas of southeastern Hartford County adjoining the Meshomasic State Forest. The timber rattlesnake is an "Endangered Species" in Connecticut and strictly protected on public lands from persecution and collection. Timber rattlesnakes are considered a high conservation concern throughout the northeast where most of the range states have afforded them some form of statutory protection.

[Snakes | Amphibians and Reptiles in Connecticut](#)

[Printable Version](#)

## APPENDIX D

Section 1.1307 does not prohibit monitoring of cell site emissions. AT&T's responses to interrogatories stated that it was unlawful for the Town of Canaan to require post installation monitoring of cell sites. In the transcript of the May 21, 2013 hearing, Mr. Fisher, representing the applicant, cited CFR 47 Section 1.1307 as excluding [cell] tower sites from monitoring requirements. This is not correct, and the CSC should not rely on this statement. Section 1.1307, entitled "Actions that may have a significant environmental effect, for which Environmental Assessments (EAs) must be prepared" refers to environmental assessments at the federal level. It has nothing to do with monitoring and never mentions the word. (Note: A copy of this section can be provided for reference.)

The applicant's assertions about the accuracy of IW/CC's propagation map are not correct. In his June 11, 2013 testimony, Mr. Wells implied that IW/CC's propagation map for Site A5 was inaccurate because terrain profiles showed signals "drilling through...mountains." Terrain profiles can be used to determine if a line-of-sight path exists between two points, but the results can be misleading if not properly interpreted. After correctly noting that profiles are "...not the way to do propagation", Mr. Wells went on to do exactly that, saying "...we did some profiles from the suggested site...you can see that signal had to propagate through dirt and come out with [sic] some rock to get to get to those areas where Mr. Cooper shows coverage." Mr. Wells may well have found a few instances at the fringes of the coverage areas where his terrain profiles indicated that clear line-of-sight did not exist and where it might appear to the untrained eye that the signal was "drilling through ...mountains," but this conclusion is quite erroneous. It ignores the fact that radio signals do not travel in a strictly line-of-sight manner, especially when the terrain is irregular. They can arrive at a location from multiple directions due to reflection, scattering and diffraction. It is well known in radio engineering that diffraction, in particular, causes signals to bend around (not penetrate) obstacles. According to Theodore Rappaport, one of the foremost authorities in the field of radio propagation, "[d]iffraction occurs when the radio path between the transmitter and receiver is obstructed by a surface that has sharp irregularities. The secondary waves resulting from the obstructing surface are present throughout the space and *even behind the obstacle*, giving rise to a *bending of waves around the obstacle, even when a line-of-sight path...does not exist.*"<sup>1</sup> (Emphasis supplied). Prof. Rappaport goes on to say that, "[a]lthough the received signal strength decreases rapidly as the receiver moves deeper into the obstructed (shadowed) region, the diffraction field still exists and often has sufficient strength to produce a useful signal."<sup>2</sup> This pattern of limited and rapidly decreasing coverage around the fringes of obstructions is precisely what one would expect to see and *exactly* what the IW/CC propagation map shows. Thus, Mr. Wells' profiles *support*, rather than refute the accuracy of the IW/CC map. The CSC should not rely on AT&T's assertions that the IW/CC propagation map is inaccurate. In fact, one should question why the applicant's maps fail to show the same diffraction effect.

---

<sup>1</sup> Rappaport, Theodore S., *Wireless Communications Principles and Practices*, 2<sup>nd</sup> Ed., Prentice Hall PTR, 2002, p.113.

<sup>2</sup> *Ibid.* p 126.



The applicant's statements about deterministic propagation models are erroneous. Mr. Wells also stated that "...Mr. Cooper also asserted that his model was a deterministic model...which didn't require any model tuning...I never experienced a model that didn't require tuning." He went on to say that "I don't believe there is such a thing as a deterministic model..." He then equivocated, allowing that such models do exist, "...but field tests prove that that's not an accurate model." This statement would come as a surprise to most experts in the field of propagation modeling. Virtually every standard reference work in radio engineering recognizes and discusses both deterministic (also called analytical) models and empirical (also called statistical) models in great depth. A paper on propagation models by members of the Johns Hopkins University Applied Physics Laboratory identifies 20 recognized commercial propagation modeling tools, including the SiteSafe RFCAD tool used to produce the IW/CC propagation maps and the Atoll Forsk tool presumably used by AT&T. The paper declines to pick a "best" and simply states that all of the tools are "...frequently used by network service providers to predict service coverage."<sup>3</sup> Mr. Well's assertions the IW/CC model ignores "clutter" from trees and ground cover are also erroneous. The model used the government-issued Digital Terrain Model and Land Cover/Land Use ("clutter") data and up to 12 data inputs specific to local conditions. This is common to virtually all propagation modeling, including, AT&T's. The only major difference between the two modeling approaches is that the IW/CC model uses a formula that was derived analytically and which describes the actual physics of radio propagation. It does not require calibration or correction of the formula, only appropriate input data inputs. The AT&T empirical model, because of its statistical nature *must* be corrected with sample propagation measurements. The CSC should consider that neither modeling approach is inherently flawed and both can be sufficiently accurate for planning purposes if correctly applied and interpreted.

The applicant's coverage objectives are inappropriate, misleading and inconsistent with previous practice. The AT&T propagation maps consistently show only two levels of signal strength: -74 dBm (in-building coverage depicted in green) and -75 to -82 dBm (in-vehicle coverage depicted in yellow). Everything else is white. In response to questions from Attorney Chioocchio, on June 11, 2013, Mr. Wells stated that white areas on the AT&T propagation maps indicated "... not reliable coverage in that area, even though you may be able to make calls sometimes." We take issue with both AT&T's emphasis on in-building and in vehicle coverage and its characterization of coverage that does not meet in-vehicle standards as "not reliable." The area in the immediate vicinity of the Settlement Site is heavily wooded and devoid of homes and roads. It is likely that the only users near the site would be hikers, campers or hunters on foot and in the open. Even further out from the site, there is sparse traffic and few buildings. It seems inappropriate to design exclusively for in-building and in-vehicle coverage over a vast "passive" wooded area, while ignoring outdoor or on-street coverage and dismissing any coverage not meeting at least in-vehicle objectives as "unreliable." The Federal Courts seem to agree. A recent decision<sup>4</sup> upheld the Town of Islip, NY's denial of a facility application partially on the basis that the proposed site would mainly serve a "passive" wooded area with few buildings or roads. A copy of this decision is attached for

---

<sup>3</sup> Andrusenko, Julia, Burbank, Jack, and Ward, Jon, "Modeling and Simulation for RF Propagation," Johns Hopkins University Applied Physics Laboratory, December 1, 2009.

<sup>4</sup> T-Mobile Northeast LLC, Plaintiff, V the Town of Islip and The Planning Board of The Town of Islip, Defendants. No. 10-Cv-692 (Ads) (WDW). United States District Court, E.D. New York. September 21, 2012.

reference. We believe the CSC should consider the passive nature of “AT&T’s proposed coverage in its own decision. AT&T’s position is also inconsistent with AT&T practice in similar communities with similar terrain. In a recent application in Williamstown, MA, AT&T stated that a signal strength of -92 dBm would provide “reliable” outdoor coverage.<sup>5</sup> A relevant excerpt of that application is enclosed for reference. We maintain that an appropriate minimum signal strength standard for Falls Village is -92 dBm and note that any customers needing or desiring better in-building or in-vehicle coverage have other alternatives as well. The FCC has recognized the ability of signal boosters to improve coverage in buildings, in vehicles and even outdoors. On February 20, 2013, the FCC released Report and Order 13-21 to “...enhance wireless coverage for consumers, particularly in rural, underserved and difficult-to-serve areas by broadening the use of signal boosters... *Consumer Signal Boosters* are designed to be used “out of the box” by individuals to improve their wireless coverage within a limited area such as a home, car, boat, or recreational vehicle.”<sup>6</sup> The CSC should consider the fact that AT&T’s application ignores the above factors, proposing an overly obtrusive and inappropriate facility that is not tailored to the needs of the community.

The IW/CC and AT&T plots are more similar than may be immediately apparent. The general shapes of the coverage areas on the two maps from Site A5 are quite similar. The presentation is not. The AT&T map only shows coverage above -82 dBm, depicted in green and light yellow, (which is practically invisible when printed on white paper), whereas the IWCC map shows all coverage down to -105 dBm, depicted in four colors. Thus, the difference between an area of yellow (less than -74 dBm) on the AT&T map and green (more than -74 dBm) on the IWCC map could be as little as 1 dBm. The AT&T map is more difficult to interpret and compare because an area of white on the AT&T map could indicate from no signal at all up to -83 dBm (all considered “unreliable” by AT&T), even in areas with obviously clear line-of-sight. On the other hand, white on the IW/CC map indicates less than -105 dBm—essentially no coverage. Compared in this way, they are more similar in content, but appear vastly different due to AT&T’s presentation choices and signal strength objectives. Given Mr. Well’s apparently flawed terrain analysis described above, the CSC could reasonably conclude that the IW/CC map gives a more accurate estimate of service available.

---

<sup>5</sup> Special Permit Application for New Cingular Wireless/Florida Tower Partners/North Atlantic Towers (North Atlantic/AT&T) Wireless Service Facility at 1781 Cold Spring Road, Williamstown, MA dated June 23, 2011.

<sup>6</sup> FCC, Report and Order 13-21, “Use and Design of Signal Boosters,” February 20, 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:

Christopher B Fisher, Esq.  
Lucia Chiochio, Esq.  
Cuddy & Feder LLP  
445 Hamilton Avenue, 14<sup>th</sup> Floor  
White Plains, NY 10601

Michele Briggs  
AT&T  
500 Enterprise Drive  
Rocky Hill, CT 06067-3900

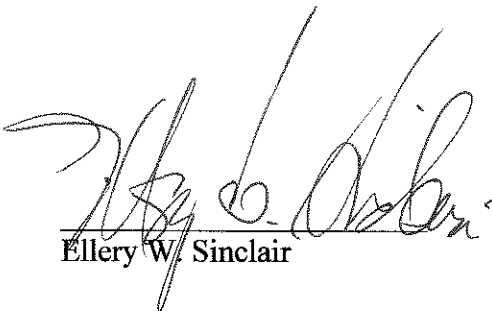
A copy was also delivered by hand to:

Patty and Guy Rovezzi  
36 Barnes Road  
Falls Village, CT 06031

Town of Canaan Planning & Zoning Commission  
Town Hall, Main Street  
Falls Village, CT 06031

Marc Rosen and Susan Pinsky  
6 Barnes Road  
Falls Village, CT 06031

Michael Burke  
12 Barnes Road  
Falls Village, CT 06031



Ellery W. Sinclair

Dated: July 24, 2013