

STATE OF CONNECTICUT  
CONNECTICUT SITING COUNCIL

IN RE:

APPLICATION OF NEW CINGULAR WIRELESS PCS,  
LLC (AT&T) FOR A CERTIFICATE OF  
ENVIRONMENTAL COMPATIBILITY AND PUBLIC  
NEED FOR THE CONSTRUCTION, MAINTENANCE  
AND OPERATION OF A TELECOMMUNICATIONS  
TOWER FACILITY IN STAMFORD, CONNECTICUT

DOCKET NO. 447

April 7, 2014

**APPLICANT'S RESPONSE AND OBJECTION TO  
INTERVENOR WHET'S MOTION FOR COMPELLED SITE ACCESS & TESTING**

I. Procedural Background

The Siting Council granted WHET status as an Intervenor in Docket 447 on Thursday April 3, 2014 in response to its request dated March 18, 2014. On Thursday April 3, 2014, counsel for West Hill Environmental Trust ("WHET") telephoned and e-mailed counsel for the Applicant to request physical access to the property of Thomas J. Finn, Jr., a non-party to Docket 447, on consent of AT&T. At the time of the request, counsel for WHET had not indicated any intent to file any motions with the Siting Council. At that time, as counsel for the Applicant, we indicated to Attorney Ainsworth that we would forward his request to our client for consideration and we requested further clarification on the scope of the request. We noted that our client might not consent to having WHET's environmental consultant unfettered unsupervised access to AT&T's leasehold premises and the property of Mr. Finn. Later that same day, and minutes after being admitted as an intervenor in Docket 447, counsel for WHET filed a motion with the Siting Council requesting an order compelling the Applicant, New Cingular Wireless PCS LLC (AT&T), to grant it access to the property owned by Thomas J. Finn, Jr. on which AT&T has proposed a tower facility. As of the time of this response and objection, Monday April 7, 2014, our client, AT&T has not yet granted or denied WHET's request and has contacted the property owner for their consideration. As counsel for AT&T, we are timely responding to WHET's motion in accordance with the Siting Council's procedural requirements to note our objections in point of law.

## II. Summary of Facts Related to WHET's Motion for Compelled Site Access

WHET's motion references the application materials in Docket 447 and that the project is located in close proximity to delineated wetlands as noted in the reports already prepared by the Applicant's independent consultant Mr. Dean Gustafson, of All-Points Technology, Inc. As set forth in detail behind Tab 4 of AT&T's Application and in the reports, the project does not involve permanent direct wetland impacts and has relatively minimal secondary impacts in an area characterized with historic disturbed fill and an already degraded buffer area. As noted in the Application, AT&T has planned mitigation for these secondary impacts in accordance with the recommendations of its consultant Mr. Gustafson. Additionally, AT&T has already requested Mr. Gustafson to conduct a further assessment of the project area for any critical habitat, its hydrology and potential on-site alternative locations for the tower. Of note, at this point in time, and despite a five year search for sites and ongoing consideration of alternatives, there are no known practical or feasible off-site options available to the Applicant to implement.

Upon information and belief, members of WHET recently contacted Mr. Richard Talamelli at the City of Stamford's Environmental Protection Bureau. In response to a telephone call from Mr. Talamelli in mid-March, the Applicant agreed to have Mr. Talamelli visit the tower site location with Mr. Gustafson, the Applicant's environmental consultant. The purpose of the site visit was for observation only in order to facilitate a discussion regarding the tower project and allow Mr. Talamelli to provide Mr. Gustafson some feedback as he develops a further scope of work for habitat, vernal pool, and hydrological assessments at the tower site for the Applicant. Presumably, WHET representatives thereafter spoke with Mr. Talamelli as was referenced in WHET's motion.

We are frankly surprised and concerned that WHET has chosen to take a more adversarial approach in this administrative proceeding from the start and without simply trying to coordinate a telephone call among their and the Applicant's consultants to talk as professionals as they apparently did with Mr. Talamelli. Moreover, counsel for WHET has not provided us with a detailed scope from their consultant to review as part of its request for physical site access and inspections making it difficult to assess in consultation with our client and Mr. Gustafson. Rather, counsel has simply demanded access in a motion to the Siting Council for a "non-destructive" physical inspection of the site by its consultant which would presumably include

sampling, collection of physical evidence and other intrusive means of analysis by WHET's consultants.

At this point in time, the Applicant has some legitimate concerns with granting access to the site to WHET for such purposes. WHET's membership has not yet been disclosed and the entity is by all accounts a group of homeowners formed by their counsel after a March 3, 2014 community meeting hosted by AT&T and for the sole purpose of opposing the proposed tower at 560 West Hill Road based on their interests as homeowners. In this regard, WHET does not appear to be a group principally formed to protect natural and environmental resources in this area of the City despite the group's statement in support of its request to intervene and procedural reliance on Section 22a-19 of the Connecticut General Statutes. It further appears that WHET has no real corporate capacity, insurance or other means to adequately address AT&T's concerns regarding site access by its members or representatives. As such, AT&T is rightfully considering WHET's request in context with its limited knowledge of the entity and the lack of any assurances whatsoever in the request it made through counsel or the motion it filed with the Siting Council. Regardless, for the reasons set forth below, we note on behalf of the Applicant that a motion to compel site access for an intervenor's own physical inspections and testing is not a legal option within the agency's administrative authority to grant and as such are objecting on their behalf.

### III. Applicant's Objection to WHET's Motion

WHET's motion is devoid of any relevant or genuine citation to a law or regulation that realistically supports its theory that the Council can compel applicants to grant intervenors access to proposed facility sites for any and all kinds of inspections, testing or other forms of entry. With complete disregard for Constitutional guarantees of property owners, including the rights of AT&T, WHET nevertheless demands such access be compelled by the Siting Council as a governmental agency reviewing this application. We have found no legal support for WHET's proposition that the Siting Council, as an administrative agency, has statutory or regulatory authority, to compel an applicant to grant an intervenor physical access to a facility site which is the subject of a contested case under PUESA. In fact, once a request to intervene is granted by a reviewing authority, even a request under CEPA, the law provides no more than a guaranty to the

intervenor that it may participate in the administrative proceeding. General Statutes § 22a-20; *See also* Regs. Conn. State Agencies § 16-50j-15a.

In contested cases involving the Siting Council, UAPA, PUESA and the Council's own regulations govern the rights of the applicant, any parties, or intervenors and the authority of the Siting Council as it relates to the administration of a contested case. As it relates to discovery, we refer the Siting Council to UAPA and Section 4-177b which provides that:

In a contested case, the presiding officer may administer oaths, take testimony under oath relative to the case, subpoena witnesses and require the production of records, physical evidence, papers and documents to any hearing held in the case. If any person disobeys the subpoena or, having appeared, refuses to answer any question put to him or to produce any records, physical evidence, papers and documents requested by the presiding officer, the agency may apply to the superior court for the judicial district of Hartford or for the judicial district in which the person resides, or to any judge of that court if it is not in session, setting forth the disobedience to the subpoena or refusal to answer or produce, and the court or judge shall cite the person to appear before the court or judge to show cause why the records, physical evidence, papers and documents should not be produced or why a question put to him should not be answered. Nothing in this section shall be construed to limit the authority of the agency or any party as otherwise allowed by law.

Section 4-177c (a) further provides that:

In a contested case, each party and the agency conducting the proceeding shall be afforded the opportunity (1) to inspect and copy relevant and material records, papers and documents not in the possession of the party or such agency, except as otherwise provided by federal law or any other provision of the general statutes, and (2) at a hearing, to respond, to cross-examine other parties, intervenors, and witnesses, and to present evidence and argument on all issues involved.

Neither § 4-177b nor § 4-177c (a) provides any express or even implied authority for the Siting Council to compel AT&T (a party in a contested case) to allow WHET (an intervenor) physical access to its lease area and the property for inspections and testing of any kind. In fact, the Council itself is not even statutorily required to conduct site visits under PUESA, but does so routinely on consent of applicants as a site inspection to observe the locus of a proposed facility. See generally, Grimes v. Conservation Com'n of Town of Litchfield, 703 A.2d 101, 243 Conn.

266 (1997)(noting site inspection simply requires notice under FOIA). Rather UAPA merely supports the agency's authority to compel witnesses to testify and the production of records, any physical evidence or other papers and documents.

As such, WHET's motion seemingly "relies" on Section 16-50p(3)(B) of the Public Utility Environmental Standards Act ("PUESA"), the Council's enabling legislation. Nevertheless, this section of PUESA simply lists one of the statutory criteria by which the Council must evaluate facilities, cellular or otherwise, with regard to the nature of impacts on the environment, any significantly adverse effects or conflicts with state policies concerning the environment. It is undisputed that wetlands and potential impacts to wildlife are one of the relevant environmental factors the Council must consider in balancing the need for energy or communications infrastructure for service to be provided to the public in the State of Connecticut in accordance with PUESA's requirements. However, that such factors are relevant in any docket, including this one, does not grant the Siting Council "organic" power to compel access to proposed tower sites for intervenors that have chosen to participate in and oppose a facility. The State Legislature has simply not conferred that authority on administrative agencies and any such effort implicates Fourth Amendment Constitutional guarantees to parties with real property interests, such as applicants and underlying property owners.

WHET's position to the contrary in its motion that the Siting Council "has the authority to deviate from the procedures set forth in the UAPA" is preposterous. In fact, Sections 16-50(j)(3), 16-50(j)(15)-a, and 16-50j-22-a(c) of the Council's regulations as cited by counsel for WHET for support are wholly irrelevant to the motion made. Those regulations simply provide for the Siting Council's authority to waive *other rules*, to *limit* intervenors' participation in proceedings, and allow for discovery in the form of access to *information*. Nothing in the Council's regulations cited by WHET actually empowers the agency to compel an applicant to grant physical access to a *site* by an intervenor for inspections, studies and other intrusive testing. In fact, the Council's own regulation on discovery as set forth in 16-50j-22-a(c) of its regulations is wholly consistent with UAPA, and simply allows for evidence and information to be produced and examined, not a right of access to a site for physical testing and inspection.

There is no legal authority in CEPA, UAPA, PUESA or the Siting Council's regulations for an order by it as an administrative agency in the context of this proceeding as sought by the Intervenor WHET. The Legislature simply has not granted state agencies the kind of authority in

administrative land use proceedings, WHET seeks it to administer, a power which would be akin to a judicial grant of injunctive relief. WHET's motion must be dismissed as a matter of law.

#### IV. WHET's Discovery Options Pre-Hearing & Offer by the Applicant

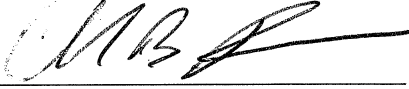
The Applicant's consultant, Mr. Gustafson is in the midst of conducting further assessments of the tower site and property at 560 West Hill Road for purposes of the application filed by AT&T in Docket 447. Having now been admitted as an Intervenor, WHET may choose to submit interrogatories to AT&T to facilitate a further understanding of the facts and to aid its own consultants in preparing reports for submission to the Siting Council. As it relates to WHET's motion and despite no legal obligation to do so, the Applicant is also prepared to consider recommendations WHET's consultant may have on the scope of Mr. Gustafson's upcoming habitat, hydrological and wetlands/vernal pool assessments for inclusion in his report. Thereafter and upon submission of further reports by the Applicant to the Council, WHET may choose to further inquire through cross-examination. In order to consider any recommendations WHET's consultant may make on the scope of Mr. Gustafson's field reviews and analysis, we further authorize WHET's consultant to contact Mr. Gustafson directly or through counsel to provide any such written recommendations by the end of this week, April 11, 2014. WHET's consultant will thereafter be welcome, at its own risk and cost, to observe the site at the time provided for by the Siting Council for a field review on the day of the public hearing in Docket 447. In the interim, the Applicant will not consent to unfettered unsupervised access to the tower site by WHET's consultants for its own testing, collection of samples and other intrusive investigations.

#### V. Conclusion

Neither CEPA, UAPA, PUESA or the Siting Council's regulations provide legal authority for the Siting Council to compel AT&T to allow WHET to access its lease area and the property at 560 West Hill Road in Stamford for any purpose. WHET's motion must be dismissed as a matter of law, and as such should be withdrawn by their attorneys. We further encourage counsel for WHET to coordinate with our office on an alternative means of addressing its interests. Specifically, the Applicant's invitation outside of WHET's motion to have WHET's consultant provide input on the scope of Mr. Gustafson's field work, studies and independent analyses of existing conditions at 560 West Hill Road in the City of Stamford as relevant to the

Application in Docket 447 so that the subsequent report(s), field notes and other data collected in the field by Mr. Gustafson may be peer reviewed. We thank the Siting Council for its consideration in this regard.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day, an original and fifteen copies of the foregoing was sent electronically and by overnight mail to the Connecticut Siting Council with copy to:

West Hill Environmental Trust  
c/o Keith R. Ainsworth, Esq.  
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Dated: April 7, 2014

A handwritten signature in black ink, appearing to read 'DML', is written over a horizontal line. The signature is fluid and cursive.

Daniel M. Laub