STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL

IN RE:

CONNECTICUT SITING COUNCIL PETITION FOR A DECLARATORY RULING THAT §16-50k DOES NOT APPLY TO ELIGIBLE FACILITIES REQUESTS SUBMITTED PURSUANT TO FEDERAL LAW AND FCC REGULATIONS	PETITION NO. 1133 February 10, 2015

NEW CINGULAR WIRELESS PCS, LLC ("AT&T")
COMMENTS ON SITING COUNCIL INITIATED PETITION NO. 1133

New Cingular Wireless, PCS, LLC ("AT&T") by its attorneys, Jay Perez, Esq. and Diane Iglesias, Esq., AT&T Legal Department, and Christopher Fisher, Esq., Cuddy & Feder LLP respectfully submit these comments in response to the Siting Council's request for comment on its self-initiated proceeding for a declaratory ruling as set forth in Petition No. 1133. AT&T is supportive of the Council's proceeding which would confirm federal requirements associated with state and local governmental permit processing for "eligible facility modifications" as defined by Congress and the Federal Communications Commission ("FCC"). As more fully set forth herein, AT&T has a few recommendations to the Siting Council which would bring the proposal into greater conformity with the FCC's regulations as recently published and also provide for paperwork reduction benefits for both the agency and AT&T in the filing and approval of eligible facility requests ("EFR"). AT&T's recommendations include full delegation of authority by the Siting Council to its Staff for review and approval of EFRs, a further streamlined process similar to acknowledgement of exempt modifications, and adoption of a uniform CSC form for all EFR applications and Staff approvals.

I. 2012 Congressional Action - Eligible Facility Modifications State and Local Permit Approvals Required

The Middle Class Tax Relief and Job Creation Act became law on February 22, 2012 (the "Act"). With respect to wireless communications, the Act authorized a national public safety broadband communications network ("FirstNet"), expedited availability of new wireless spectrum for commercial broadband services, streamlined siting of commercial wireless facilities on federal properties, and legislated requirements for state and local permit approvals for certain modifications of wireless facilities. *See* Title VI of the Act generally referred to as the Public Safety and Spectrum Act ("Spectrum Act"). The Spectrum Act furthers federal policy to expedite development of both emergency and commercial broadband wireless networks to meet public need and consumer demand for high speed reliable wireless services.

Section 6409(a) of the Spectrum Act created a new federal requirement that state and local land use and zoning agencies approve permits for certain types of modifications to existing wireless facilities. Section 6409(a) specifically provides that:

> [A] State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.

47 U.S.C. § 1455(a). Section 6409(a) further defined an "eligible facilities request" as one involving "(A) collocation of new transmission equipment; (B) removal of transmission equipment; or (C) replacement of transmission equipment." *Id.* Notably, Congress expressly adopted Section 6409(a) as a standalone provision separate from and in addition to Section 704 of the Telecommunications Act of 1996. *See* 47 U.S.C. § 332(c)(7).

II. FCC Order & Regulations – Uniform Application of 6409(a)

Shortly after Congress' adoption of the Spectrum Act, the FCC initiated various rule making and regulatory proceedings to, among other things, interpret Section 6409(a) and adopt a uniform set of rules for state and local approval of eligible facility requests by wireless carriers. In a 2014 report and order that is over 150 pages long, the FCC eliminated some of its own and other state and local "unnecessary reviews, thus reducing the costs and delays associated with facility siting and construction of eligible facility modifications." FCC Infrastructure Report & Order, Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, (WC 11-59; WT 13-238, 13-32) ¶ 1 (Oct. 17, 2014) (the "Order"). The FCC's Order was just recently published in the Federal Register and the vast majority of the associated regulations will become effective within 90 days, in April 2015. 80 Fed. Reg. 1238 (Jan. 8, 2015) (to be codified at 47 C.F.R. pts. 1 and 17).

a. Eligible Facilities & Substantial Modifications Further Defined by FCC

As set forth in the Order, the FCC adopted numerous provisions that further define Section 6409(a)'s terms and created a comprehensive national standard for review of eligible facility requests by state and local permit agencies. Notably, the FCC held that Section 6409(a) applies to all towers or other sites which are used for transmission equipment in "connection with any Commission-authorized wireless communications service." 80 Fed. Reg. at 1249, ¶ 64. As a result, Section 6409(a) is applicable to any tower site, rooftop, right-of-way pole, water tank or other existing structure principally built for or used in the provision of any FCC wireless communications services (*i.e.,* existing public safety, broadcast, and WiFi locations are

included in addition to personal wireless services). *Id.* at 1250. The Order further clarifies that covered "transmission equipment" includes antennas, cabling, necessary utility services, equipment, backup power generators and any other ancillary equipment that facilitates transmission of FCC authorized wireless services. *Id.*

The FCC's Order also defines in significant detail other key provisions of Section 6409(a) of the Spectrum Act. "Collocation" is broadly defined to include siting of a wireless facility on any existing tower whether or not the tower currently supports wireless transmission equipment. *Id.* at 1252. Additionally, an eligible "modification" of an existing wireless facility site includes "hardening through structural enhancement" if necessary for a covered collocation (but does not include the replacement of the underlying structure). *Id.; see also* § 1.40001(b)(2) of the FCC published regulations. Eligible collocations and modifications of other non-tower sites (*e.g.,* rooftops, water tanks, etc.) include only those locations where there is an existing wireless transmission facility already located on the structure. 80 Fed. Reg. at 1252, ¶ 85.

Importantly, the FCC Order sets objective and verifiable standards over what constitutes a "substantial change in the physical dimensions" of an existing tower or base station site. The FCC created two categories for height and width changes: 1) towers outside the public-right-of-way; and 2) base station sites and towers within the public-right-of-way. *Id.* at 1252-53, ¶ 87. For towers outside of a public right-of-way, there is no substantial change if:

- The height of the tower increases by no more than 20' or 10%, whichever is greater; and

- The modification protrudes from the edge of the tower no more than 20', or more than the width of the tower structure at the level of the appurtenance, whichever is greater.

80 Fed. Reg. at 1252-53, ¶ 87; *see also* § 1.40001(b)(7) of FCC published regulations. For towers in public rights-of-way and for all base stations, there is no substantial change if:

- The height increase is no more than 10% or 10 feet, whichever is greater; or
- The modification protrudes from the edge of the structure no more than six feet.

80 Fed. Reg. at 1253-54, ¶ 92. Additionally, to be eligible, a modification cannot involve either the installation of more than the standard number of new equipment cabinets for the technology involved, but not to exceed four, or excavation or deployment outside of the current tower site boundaries. *Id.*; *see also* § 1.40001(b)(7) of the FCC published regulations. Notably, any "changes" are measured in time from "the originally approved appurtenances and any modifications that were approved prior to the passage of the Spectrum Act" (*i.e.,* February 2012) and include one tower height extension. 80 Fed. Reg. at 1253, ¶ 87.

In balancing the effect of Section 6409(a) on areas of overlap with traditional state and local permitting jurisdiction, the FCC adopted further conditions with respect to application of the Spectrum Act. Specifically, to be eligible, the modification may not "defeat the existing concealment elements of the tower or base station" and must comply with general conditions of the prior approval for the tower site or base station (unless the non-compliance is due to an increase in height, increase in width, addition of cabinets, or new excavation that does not exceed the corresponding "substantial

change" thresholds). *Id.* Additionally, agencies responsible for building and other health and safety codes (other than MPE compliance) retain their authority to require permits for eligible facilities to the extent required. *Id.* Finally, the FCC held that Section 6409(a) of the Spectrum Act only applies to state or local government agencies "acting in their role as land use regulators and does not apply to such entities acting in their proprietary capacities." *Id.* at 1259, ¶ 126.

b. Required Process, Submissions and Timing for State and Local Approval of Eligible Facility Requests

After Section 6409(a) became law in 2012, an open question for both land use and zoning agencies and wireless carriers was what, if any, type of application could be required for eligible facility modifications given the mandatory approval language included in the Spectrum Act. The FCC Order clarified that while some form of application may be required to review an EFR and confirm compliance with federal standards, Section 6409(a) "leaves no room for a lengthy and discretionary approach to reviewing an application that meets the [federal] statutory criteria; once the application meets these criteria, the law forbids the State or local government from denying it." *Id.* at 1257-58, ¶ 116. Indeed, as part of any required application, "State or local governments may only require applicants to provide documentation that is reasonably related to determining whether the request meets the requirements" of Section 6409(a) as clarified by the FCC. *Id.* at 1267, ¶ 192; *see also* §1.40001(c)(1) of FCC published regulations. While there is some flexibility on the exact documentation that may be required to demonstrate compliance with federal eligible facility standards, "States and localities may not require documentation proving the need for the proposed modification or presenting the business case for it." 80 Fed. Reg. at 1256, ¶ 107.

The FCC Order also incorporates a 60 day time period for State or municipal land use agencies to decide applications, if the agency in fact requires an application for review and approval of an EFR. *Id.* at 1257, ¶ 115. Completeness determinations must also be made within 30 days of the filing, delineate any missing information and expressly state how that information is reasonably related to the requirements of Section 6409(a) (*i.e.,* information requests cannot be outside the scope of 6409(a) including requests for information related to any other health and safety permitting requirements such as building code compliance). *Id.* at 1259, ¶ 131-32. In the event a State or local agency fails to approve or deny an EFR within 60 days (subject to any tolling), the request is deemed granted. *Id.* at 1257, ¶ 115; *see also* FCC published regulation §1.40001(c)(4) which is subject to OMB approval. A default approval is effective once the applicant notifies the reviewing authority in writing that the applicable review period has expired without action by the agency and the EFR deemed granted. 80 Fed. Reg. at 1258, ¶ 115. In the event an EFR is denied, an applicant may seek judicial review and/or file such other applications as customarily required by State and/or municipal land use and zoning agencies. *Id.* at 1258, ¶ 125.

III. State of Connecticut – Siting Council, Municipal Zoning and Other Agency Jurisdiction

In Connecticut, the Public Utility Environmental Standards Act, General Statutes § 16-50i, *et seq.* ("PUESA") provides the Connecticut Siting Council ("CSC") with exclusive jurisdiction over the siting of cellular tower facilities as defined in the statute and CSC regulations (at grade or rooftop towers). Other types of cellular communication facility installations (*e.g.,* rooftop antenna attachments) are generally subject to municipal codes including any relevant zoning regulations as adopted by local

planning & zoning commissions. General Statutes § 8-1 et. seq. Other agencies such as the State Department of Energy and Environmental Protection ("DEEP") have jurisdiction over air permitting requirements generally applicable to public health and safety (*e.g.,* generator air emissions). *See generally* www.ct.gov/deep. Additionally, the Department of Administrative Services, Division of Construction Services and/or municipal building officials have jurisdiction over State Building Code compliance, structural standards and issuance of building permits for construction of any facility, including cellular towers. General Statutes § 29-250, *et. seq.*

IV. Current Siting Council Permit Processes – Exempt Modification Notices, Tower Sharing Approvals, Petitions for Declaratory Rulings, and Certificate Applications

Over a period of 25 years, the Siting Council has implemented and developed permitting processes for wireless facilities within its jurisdiction that correlate with the nature and probable impacts of a proposed tower or modification of any existing tower. There are four permit procedures applicable to new tower facilities or modifications thereto by wireless carriers: PUESA provides a State statutory review process for Certificates of Environmental Compatibility and Public Need ("Certificates"); Section 4-176 of the Uniform Administrative Procedure Act and Article 3, Part 2, of the Council's Regulations permit site by site declaratory rulings for proposed tower facilities or modifications ("Petitions"); Section 16-50aa of PUESA incorporates a State statutory streamlined tower sharing process for collocations ("TS Requests"); and several classes of modification to any carrier's existing wireless transmitting facilities are, by regulation, exempt and simply require a notice and acknowledgment process ("EM Notices") (Regs. Conn. State. Agencies § 16-50j-72).

The legislative history of Section 6409(a) of the Spectrum Act and the FCC Order indicates that this federal law was adopted to address situations where state or municipal agencies caused delays, unreasonable expense and other barriers to the effective deployment of certain facilities needed for reliable high-speed wireless services. Notably, the Council's current processes for EM Notices and TS Requests have been cited as examples of an effective regulatory approach for Connecticut that balances industry and public interests. Indeed, in the three years since Section 6490(a) became law, the Siting Council has processed numerous applications for eligible facility requests as TS Requests or EM Notices and occasionally by Petition, none of which are known to have been unreasonably delayed or denied.

The Siting Council's three processes relevant to EFRs are well known to the industry, municipalities and public and have been effective for review and approval of EFRs as measured by the time, cost, and paperwork to both the agency and wireless carriers. In practice, AT&T's experience has been that the Siting Council's current processes and procedures work relatively well for both the agency and regulated industry, particularly for EFRs. As such, the Council could choose as part of any declaratory ruling it may issue in Petition 1133 to leave its current processes and procedures in place and simply rule that modified submission and timing requirements are applicable to EFRs so as to comply with Section 6409(a) and the FCC's Order and regulations. In this regard, in comparing Section 6409(a) and the FCC's Order to current Siting Council regulations and procedures, an EFR as outlined by the FCC is procedurally most comparable to the Siting Council's notice of exempt modification filing and acknowledgment process.

V. Siting Council Self-Initiated Declaratory Ruling - Petition 1133

It is appropriate for the Council to consider Section 6409(a) of the Spectrum Act's requirements and ensure that the agency's permit processes as applied to EFRs comply with federal law and the FCC Order and regulations. We understand that the Council elected to consider the legal import of Section 6409(a) of the Spectrum Act and the FCC Order in this self-initiated petition for a declaratory ruling to interpret Section 16-50k of the Connecticut General Statutes. As framed by the Siting Council itself at its January 8, 2015 meeting, there does not appear to be any question that, if ruled upon, the Council intends to interpret that PUESA's Certificate requirements are not legally applicable to EFRs given Section 6409(a) of the Spectrum Act and the FCC's Order. The Council's January 9, 2015 memorandum essentially confirms that PUESA must be interpreted in such a manner given that Congress has preempted review and approval of EFRs by state and municipal land use agencies in any manner other than the nationally uniform procedural and substantive requirements specified in Section 6049(a) of the Spectrum Act and the FCC's Order and regulations. Accordingly, AT&T is supportive of this proceeding to the extent the Siting Council intends to issue such a declaratory ruling in Petition 1133.

VI. Siting Council Proposed Process for Eligible Facility Requests

The vast majority of EFRs that are filed by wireless carriers with the Siting Council involve EM Notices or TS Requests. Under current Siting Council regulations and procedures, these filings are typically reviewed and approved by Staff within thirty days of filing and do not require mailed notices. Only in rare circumstances would a Petition be required for an EFR, and this generally occurs only in a situation where a

tower extension is proposed. The Council's latest Annual Report to the Governor for the fiscal year 2013/14 notes that the agency acknowledged 599 Exempt Modifications, 50 Tower Sharing Requests and approved 35 Petitions (the latter category of Petitions includes utility substations, energy facilities, and some new wireless facilities). As such, in both experience and as a future prediction of administrative workload, EFRs filed with the Siting Council overwhelmingly represent simple upgrades to existing wireless carrier sites and collocations on existing towers.

AT&T has no particular objection to the Siting Council adopting a uniform application procedure to review all EFRs should the Council choose to do so as part of ruling on Petition No. 1133. In reviewing the Siting Council's proposed EFR process and creation of a "sub-petition" process, AT&T does have two principal questions and/or concerns. First, the outlined "sub-petition" process for EFRs would require submission of certain information that is outside the scope of Section 6409(a) eligibility assessments as set forth in the FCC's Order (*e.g.,* MPE reports and structural reports). Second, the outlined "sub-petition" process would add some costs and overall time associated with review of what have to date been routinely processed acknowledgements of exempt modification notices and approvals of tower sharing requests.

AT&T's first concern is more particularly addressed in its recommendation that the Siting Council adopt a uniform EFR form and seek information only as needed to confirm eligibility under Section 6409(a) of the Spectrum Act. With regard to AT&T's second concern, we note that the proposed requirement to prepare and mail notices that are not currently required by State law or Council regulations for EM Notices or TS

Requests will add measurably to wireless carrier costs. Additionally and as a practical matter, such notices will have no nexus to Section 6409(a) (*i.e.,* the Siting Council must approve EFRs so query what comments from the public or other governmental officials would be material to assessing Section 6409(a) eligibility). We support Council notice requirements and an informed public with respect to tower projects, yet believe that notifying the public of EFR modifications that are required to be approved by federal law would only promote confusion as to the purpose of the notice, especially given that hearings, considerations of need and environmental impact and other questions that generally arise in permitting proceedings for new facilities are irrelevant to EFR approvals. The "sub-petition" process would also involve a review period of at least 30 to 60 days as compared to the current time for Staff assessments and approvals for EM Notices and TS Requests that are generally issued in 30 days or less.

While the Council's proposed notice and timing procedures are not per se prohibited by the FCC's Order, they would have the unintended consequence of adding to the time and costs of approving most EFRs and increase the Council and Staff's' own workload as an administrative agency. This is contrary to one of the underlying potential benefits recognized by the FCC in its Order, which is to increase state and municipal administrative efficiency and decrease workloads for EFRs. As such, carriers might simply elect to keep filing EM Notices or TS Requests in lieu of utilizing any new process intended to streamline EFRs. Given the foregoing, to the extent the Siting Council seeks to implement a uniform EFR review process, an initiative AT&T supports, AT&T respectfully requests consideration of various modifications to the "sub-petition" process outlined in Petition 1133.

First, we suggest a uniform EFR form be approved for use by applicants and Siting Council Staff. Attached as Exhibit A is a draft form we have prepared that combines the filing requirements of 6409(a) and the FCC's Order with the eligibility questions state and local land use agencies may review. The draft form also incorporates an approval or denial section for use by Siting Council Staff in rendering decisions on EFRs. The form as drafted ensures that complete filings are made by applicants with relevant information provided, and excludes documents not material to making a determination of eligibility pursuant to Section 6409(a) of the Spectrum Act. We respectfully submit that use of a standardized form will create numerous efficiencies for filers and the agency alike in reviewing and approving EFRs.

Second, for procedure, we respectfully request that the Siting Council replicate in large measure the current process for review and acknowledgment of EM Notices. In particular, we suggest that the Council delegate fully to Staff the authority to approve or deny EFRs. Siting Council Staff are professionals well equipped to review and approve or deny EFRs. Moreover, adding EFR reviews to Council Member's administrative obligations and paperwork files (even with an internal consent review process) would unnecessarily burden Council members with matters that must be approved by the agency as a matter of federal law. We respectfully submit that the Council Member's time, energy and considerable talents be reserved to those matters that are within its jurisdiction and of much greater import to the residents of the State of Connecticut (i.e. power plant siting, transmission lines, new tower facilities in Certificate and Petition proceedings). Finally, while 60 days is legally permitted by the FCC Order, with a streamlined form and process, we submit that Council Staff could readily approve EFRs

within the customary practice of currently acknowledging Notices of Exempt Modifications in a few weeks to less than 30 days, a process which simplifies Staff's own internal paperwork obligations.

VII. Conclusion

AT&T commends the Siting Council for raising Section 6409(a) of the Spectrum Act and the FCC's Order as a consideration in how it approves EFRs by wireless carriers. To the extent the Council intends to rule on Petition 1133, we respectfully request that it issue a declaratory ruling that eligible facility modifications are exempt from the procedural and substantive requirements associated with Certificates as set forth in PUESA. Furthermore, AT&T respectfully requests that any EFR process adopted by the Siting Council streamline the review and approval of eligible facility modifications similar to the Council's current process and practice of acknowledging notices of exempt modifications in furtherance of its state regulations. Such an approach is most consistent with requirements set forth in the FCC's Order and associated federal regulations and ensures cost and other efficiencies to both filers and the agency itself. Thank you for your consideration of AT&T's comments, concerns and recommendations.

Dated: February 10, 2015

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EXHIBIT A

DRAFT EFR FORM PREPARED BY AT&T

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CONNECTICUT SITING COUNCIL

ELIGIBLE FACILITIES REQUEST FORM

Pursuant to Section 6409 of the *Middle Class Tax Relief and Job Creation Act of 2012*, 47 U.S.C. § 1455, FCC Report & Order 14-153, dated October 17, 2014, FCC regulations at 47 C.F.R. § 1.4001 (draft published at Federal Register Volume 80, Number 5 on January 8, 2015), and the Siting Council's declaratory ruling in Petition No. 1133

Applicant: _____

Address: _____

Contact Person: _____

Phone: _____

E-Mail: _____

Filing Date: _____

Describe the Existing Tower Facility and/or Base Station:

_____

_____

_____

_____

Identify site address, municipality and any relevant and prior Siting Council approvals:

Site Address: _____

Municipality: _____

Prior CSC Approvals:

Certificate #: _____ Petition #: _____

TS #: _____ EM #: _____

Check all that apply:

☐ Modification of existing wireless carrier antennas and/or equipment
☐ Shared use and collocation of additional wireless carrier's antennas and equipment
☐ Tower extension (no more than 10% or 20 feet whichever is greater)
☐ Addition of a generator
☐ Removal or replacement of transmission equipment

☐ Other - describe:

Enclosures:

☐ Drawings identifying the proposed modifications including:

- ☐ Overall site boundaries
- ☐ Existing and proposed tower and/or base station height
- ☐ Antenna platforms and/or mounts including total horizontal distance from tower
- ☐ Number and location of new equipment cabinets, shelter and/or generator
- ☐ Existing concealment for the tower structure or compound

☐ EFR Fee of $_____ (check made payable to the Connecticut Siting Council)

Signed:_____

Representative/Agent for Tower Owner or Wireless Carrier

Dated: _____

cc: Municipal Building Department

TO BE COMPLETED ONLY BY SITING COUNCIL STAFF

_____ This request must be approved as an eligible facilities request for modification of an existing wireless tower and/or base station because:

☐ The proposed tower extension, if any, does not exceed 10% of the existing tower height or 20', whichever is greater

☐ The proposed platform, mounts and antennas do not extend more than twenty feet from the edge of the tower, or more than the width of the tower structure at the level of the appurtenance, whichever is greater

☐ The proposed ground transmission equipment does not exceed one shelter or four new equipment cabinets

☐ There is no excavation outside of the existing site boundaries (tower site lease area, access and utilities)

☐ The modification does not defeat any concealment elements of the support structure and otherwise complies with prior Siting Council conditions of approval for the tower site.

_____ This request DOES NOT meet the requirements of eligible facilities request for modification of an existing wireless tower and/or base station because:

_____

_____

_____

and requires a:

___ Notice of Exempt Modification

___ Tower Sharing Request or

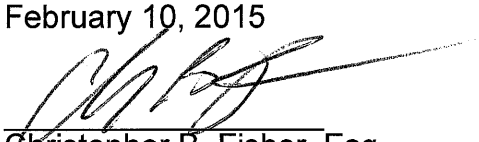
___ Site Specific Petition for a Declaratory Ruling or Amended Certificate

Signed _____ Date _____

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.

February 10, 2015



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Commissioner of the Superior Court