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December 29, 2017

Via Electronic Mail and First Class Mail

Jeffrey R. Gaudiosi, Esq.
Executive Secretary
Public Utilities Regulatory Authority
10 Franklin Square
New Britain, CT 06051

Re: Docket No. 17-09-37 – Petition of The Communications Workers of America, CTIA, Frontier Communications of Connecticut, and The New England Cable and Telecommunications Association For A Declaratory Ruling Regarding Permissible Use of The Municipal Gain By Connecticut Municipalities

Dear Mr. Gaudiosi:

I am writing on behalf of CTIA[1] in response to the Public Utilities Regulatory Authority's (the "Authority's") November 28, 2017 Notice of Request for Written Comments (the "Notice") in the above-captioned proceeding.

As indicated in the Notice, Petitioners seek a declaratory ruling identical to the Authority's June 1, 2017 Proposed Final Decision in Docket 17-02-40, Petition of the Office of Consumer Counsel for a Declaratory Ruling that Municipalities May Use the Municipal Gain to Provide or Facilitate the Provision of Broadband Services. A February 22, 2017 petition filed by the Office of Consumer Counsel ("OCC"), including the State Broadband Office within the OCC, requested that the Authority declare that Connecticut General Statutes ("Conn Gen. Stat.") §16-233 (the "Municipal Gain Statute") permits municipalities to share with or assign to third-parties the gain space reserved by statute for use by municipalities. The OCC had originally requested that the Authority consider the issue in 2016 in Docket 16-06-35, Petition of The Office of Consumer Counsel for Investigation into Facilitating the Use of the Municipal Gain for Broadband Internet Services.

[1] CTIA—The Wireless Association® ("CTIA") (www.ctia.org) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st century connected life. The association's members include wireless carriers, device manufacturers, suppliers as well as apps and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry's voluntary best practices, hosts educational events that promote the wireless industry and co-produces the industry's leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.

In its Proposed Final Decision, the Authority affirmed that use of the gain described in Conn. Gen. Stat. §16-233 was limited to those entities enumerated in the statute, specifically *the town, city, borough, fire district or the Department of Transportation* and "not for the use of third parties nor for the assignment of the right for third parties to provide services to others."[2] The Connecticut General Assembly has long recognized the special status and unique requirements of the State's municipalities and the Department of Transportation and accorded each with a special right to access utility poles in the state. Initially, the right was limited to "signal wires," but was later extended to allow for voice services.[3] While Public Act 13-247 amended the Municipal Gain Statute to allow use of the gain "for any purpose," it left the final sentence intact reserving such gain "for use *by* the town, city, borough, fire district or the Department of Transportation."[4]

As the Authority recognized in the Proposed Final Decision in Docket 17-02-40, the use of this space is uniquely restricted to the statutorily-prescribed governmental entities alone. To allow municipalities to use the space allocated in the municipal gain for a competitive purpose would violate federal law, ignore the restricted use set forth by the statute, and contravene state and federal policies mandating equitable treatment for all telecommunications service providers. Municipalities are certainly free to seek a Certificate of Public Convenience and Necessity granted by the Authority should they wish to provide telecommunications services to other parties on an equal footing with other providers.[5] Indeed, Connecticut law is clear: "no person shall provide intrastate telecommunications services… unless the person… is certified to provide intrastate telecommunications services by the Public Utilities Regulatory Authority."[6] Thus, a government entity otherwise entitled to use the municipal gain simply cannot use the special rights allocated to them in the manner advocated by the OCC or various municipalities.

CTIA will not repeat all of the arguments it previously detailed in Docket 17-02-40. Instead, CTIA attaches hereto its comments in that proceeding, and requests that they be incorporated herein as CTIA's comments in response to the Notice. As those comments indicate, an interpretation of the statute such as was sought by the OCC in Docket 17-02-40 would create an anti-competitive regime in violation of both federal law and federal and state policy. Accordingly, CTIA requests that Authority issue a declaratory ruling confirming that Conn. Gen. Stat. §16-233 does not allow municipalities to share with or assign to third parties the right to use municipal gain space on utility poles in order to provide broadband services.

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[2] PURA Docket 17-02-40, Proposed Final Decision at 24.

[3] *See* DPUC Docket 99-03-25, Application of The Southern New England Telephone Company for a Declaratory Ruling Regarding Municipal Use of Poles and Conduits.

[4] Conn. Gen. Stat. §16-233 (*emphasis added*).

[5] *See*, e.g., DPUC Docket 00-03-12, Application of the City of Groton for a Certificate of Public Convenience and Necessity.

[6] Conn. Gen. Stat. § 16-247c(a).

Thank you for your consideration. Please do not hesitate to contact me should you have any questions with regard to this submission. I certify that a copy of this submission has been sent to all parties, intervenors and/or participants of record via First Class Mail, postage prepaid or via electronic mail, and has also been filed with the Authority as an electronic web filing and is complete.

Very truly yours,

David W. Bogan
DWB

Enclosure

cc: Service List

STATE OF CONNECTICUT

PUBLIC UTILITIES REGULATORY AUTHORITY

RE: PETITION OF THE OFFICE OF CONSUMER COUNSEL FOR A RULING THAT MUNICIPALITIES MAY USE THE MUNICIPAL GAIN TO PROVIDE OR FACILITATE PROVISION OF BROADBAND SERVICES	:	Docket No. 17-02-40
	:	April 13, 2017

WRITTEN COMMENTS OF CTIA-THE WIRELESS ASSOCIATION®

CTIA-The Wireless Association® ("CTIA")[1] hereby provides its Written Comments in response to the Public Utilities Regulatory Authority's ("PURA's" or the "Authority's") March 20, 2017 Notice of Proceeding and Request for Written Comments (the "Notice") in the above-captioned proceeding.

This matter concerns the February 22, 2017 request for declaratory ruling filed by the Office of Consumer Counsel ("OCC"), including the State Broadband Office within the OCC, requesting that the Authority declare that Conn Gen. Stat. §16-233 permits municipalities to share with or assign to third-parties the municipal gain space reserved by statute for use by the municipalities.

As more particularly set forth below, CTIA submits that the OCC's overbroad interpretation of the statute would create an anti-competitive regime in violation of both federal law and federal and state policy. Accordingly, the Authority should issue a declaratory ruling that Conn. Gen. Stat. §16-233 does not allow municipalities to assign to or share with third

[1] CTIA – The Wireless Association® ("CTIA") (www.ctia.org) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st century connected life. The association's members include wireless carriers, device manufacturers, suppliers as well as apps and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry's voluntary best practices, hosts educational events that promote the wireless industry and co-produces the industry's leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.

parties the right to use space on utility poles in order to provide broadband services, as proposed by the OCC's petition.

I. Background

On June 21, 2016, the OCC filed a petition (the "Initial Petition") asking PURA to "open one or more proceedings to develop rules to promote the fair and efficient use of the space or 'gain' reserved on utility poles and underground conduits pursuant to General Statutes §16-233, the "Municipal Gain Statute." The Initial Petition stated that there was a need to develop rules "to remove barriers that limit municipalities' use of the Municipal Gain in order to promote access to broadband (a/k/a high speed Internet) services...."

The Municipal Gain Statute provides:

> Each town, city, borough, fire district or the Department of Transportation shall have the right to occupy and use for any purpose, without payment therefor, one gain upon each public utility pole or in each underground communications duct system installed by a public service company within the limits of any such town, city, borough or district. The location or relocation of any such gain shall be prescribed by the Public Utilities Regulatory Authority. Any such gain shall be reserved for use by the town, city, borough, fire district or the Department of Transportation.[2]

The Authority has previously interpreted the Municipal Gain Statute. In Docket No: 99-03-25, *Application of The Southern New England Telephone Company for a Declaratory Ruling Regarding Municipal Use of Poles and Conduits,*[3] the Authority held that the statute, which at that time authorized municipalities and the Department of Transportation to use the Municipal Gain for "municipal and state signal wires," did not limit the interpretation of "signal wires" to mean only wires used for fire and traffic signaling, but included "an array of telecommunications

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[2] Conn. Gen. Stat. §16-233.

[3] Docket No: 99-03-25, Application of The Southern New England Telephone Company for a Declaratory Ruling Regarding Municipal Use of Poles and Conduits (January 19, 2000) (the "Manchester Decision"). The matter was considered by the Authority's predecessor, the Department of Public Utility Control ("DPUC").

services [...] to carry out municipal functions".[4] The Manchester Decision also identified the location on utility poles reserved for the "Municipal Gain."[5] In 2013, the statute was amended again to remove the "signal wire" language, instead indicating that such use could be "for any purpose."[6]

On February 22, 2017, the OCC filed the above-referenced revised Petition for Declaratory Ruling (the "Revised Petition") asking that PURA determine how the Municipal Gain Statute applies to municipalities "interested in using the Municipal Gain for purposes of facilitating the provision of broadband services to residents and businesses therein, *including through commercial arrangements with third parties.*"[7]

II. Discussion

A. The OCC's Interpretation of the Municipal Gain Statute Would Constitute an Impermissible Taking Under Federal Law

The OCC's interpretation of the Municipal Gain Statute would give rise to a violation of the Takings Clause in the Fifth Amendment of the U.S. Constitution (as applied to the states via the Fourteenth Amendment). The Authority must therefore reject that interpretation.

Under the OCC's proposed regime, municipal governments would be allowed to sanction third-party installations in the gain space of utility poles by right, and without permission. This would constitute a permanent physical occupation of private property, and as the Supreme Court has held, the government (including state governments) may only mandate that a property owner permit the permanent physical occupation of its property – explicitly including the installation of

[4] *Id.*, at 6.
[5] *Id.*, at 8.
[6] Conn. Gen. Stat. §16-233, as amended by Public Act 13-247.
[7] Revised Petition at 1 (emphasis added).

a cable – if it is for a public use, and only if the owner is paid just compensation. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982).[8]

As applied to a pole owner, then, the OCC's interpretation of the Municipal Gain statute would fail both prongs of this test. As will be further discussed below, the OCC's interpretation of public use is overbroad, and the blanket third-party access the OCC proposes municipalities could allow in the gain space would not qualify. Further, there is clearly no "just compensation" – or any compensation – being proffered to pole owners as a result of the regime established by the Municipal Gain Statute. [9] The OCC's interpretation of the Municipal Gain Statute would therefore create a regime in violation of federal law, and so the Authority cannot sanction the OCC's interpretation.

B. The OCC's Interpretation of the Municipal Gain Statute is Discriminatory, Contrary to Federal and State Policy and Law

A fundamental tenet of state and federal policy regarding pole access is that such access be non-discriminatory. The OCC's interpretation of the Municipal Gain Statute would violate that tenet, establishing a discriminatory regime for pole access which would have a negative impact on competition in the telecommunications marketplace. As such, the Authority must reject the OCC's interpretation.

The federal Communications Act "provide[s] a cable television system or any telecommunications carrier with nondiscriminatory access to any pole...."[10] In 2011, the Federal Communications Commission ("FCC") comprehensively revised its pole attachment rules,

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[8] *See also* Cable Holdings of Ga. v. McNeil Real Estate Fund VI, Ltd., 953 F.2d 600 (11th Cir. 1992), citing to *Loretto*, in which the Court noted that an interpretation of the Cable Communications Policy Act of 1994 which allowed a government-franchised cable company the right to compel access to private property for installation would create "serious questions regarding the potential unconstitutional taking of McNeil's private property." To avoid the constitutional question, the Court adopted a narrower interpretation of the statute permitting access only to property that the owner had formally dedicated to such use.

[9] Based on the holding in *Loretto*, CTIA notes that it is quite possible that even the narrowest interpretation of the Municipal Gain Statute would constitute an impermissible taking for this reason.

[10] 47 U.S.C. §224(f)(1).

noting that the Telecommunications Act of 1996 "granted cable systems and telecommunications carriers an affirmative right of nondiscriminatory access to any pole."[11] The FCC determined that these revisions were necessary to "accelerate broadband buildout, promote competition and increase the availability of robust, affordable telecommunications and advanced services to consumers throughout the nation."[12]

Although Connecticut self-regulates pole attachment matters,[13] such regulation is still subject to federal law prohibiting barriers to entry for telecommunications services. Section 253(a) of the Communications Act states that "no State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[14] Although courts have differed on the exact effect regulation must have to be unlawful, the FCC has held that such barriers need not be absolute. Rather, they have interpreted Section 253(a) to prohibit any law, regulation, or practice that "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[15] The OCC's interpretation therefore implicates potential conflict with Section 253. Other competing providers of telecommunications services are required to incur costs, in the form of pole rental and make-ready fees, in order to access space on utility poles. The OCC would exempt third-party non-municipal partners from some or all of these costs, conveying a substantial benefit not available to all other competitors, and limiting the competitive ability of those providers. Additionally, municipal gain space is limited on utility poles, and the OCC's interpretation of the Municipal

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[11] Report and Order and Order on Reconsideration, *In the Matter of Implementation of Section 224 of the Act: A National Broadband Plan for Our Future*, at 6 ¶10.
[12] *Id.*
[13] *See* Letter, Conn. Dept. of Pub. Util. Control, WC Docket No. 10-101 (Apr. 26, 2010).
[14] 47 U.S.C. §253(a).
[15] *See California Payphone Association Petition for Preemption of Ordinance No. 576NS of the City of Huntington Park, California,* Memorandum Opinion and Order, 12 FCC Rcd 14191, 14195, 14206 (1997).

Gain Statute would not impose limits on municipalities' grant of that space to third parties. It is conceivable that beyond the limitations on competition, the OCC's interpretation could create an absolute barrier to entry if other entities cannot attach to that space in a jurisdiction. To avoid potential conflict with the FCC's rules, the Authority should reject the OCC's interpretation.

Further, the State's policy of equitable, non-discriminatory treatment of telecommunications service providers aligns with the long-standing federal policy. Conn. Gen. Stat. §16-247a establishes Connecticut's goals for telecommunications services, and states that "[i]t is, therefore, the goal of the state…to promote the development of effective competition as a means of providing customers with the widest possible choice of services…."[16] Conn. Gen. Stat. §16-247f[17] further requires that the Authority regulate the provision of telecommunications services in the state *in a manner designed to foster competition and protect the public interest.* The Authority (and its predecessor agency, the DPUC) has also expressed its policy goal of "non-discriminatory, equitable access" to rights of way on multiple occasions.[18]

The OCC clearly states that under its proposal, the third parties with whom a municipality enters "public-private partnerships" would be able to access the *free rights*[19] to use a space on every utility pole granted to the municipality. The OCC's expert concedes that this "is a potentially major advantage for municipalities looking to investors and new market entrants to enhance their access to broadband assets."[20]

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[16] Conn. Gen. Stat. §16-247a.
[17] Conn. Gen. Stat. §16-247f (*emphasis added*).
[18] *See* Decision, Docket No. 08-06-19, September 20, 2010, at 10 ("The Department has determined that it will continue to enforce more efficient and effective utility pole attachment agreements and that it intends to provide *non-discriminatory, equitable access* to the public rights of way without compromising the safety of the public and utility workers. The Department will also maintain its policy of *providing a level playing field to all parties* as well as its all out support for the FCC's National Broadband Plan in Connecticut") (*emphasis added*); *also*, Decision, Docket No. 07-02-13, April 30, 2008 at 8 ("[T]here is no doubt that one of the avenues of effective competition is an equitable access to the public rights of way."), 24-25.
[19] Revised Petition at 2 (*emphasis added*).
[20] *Id.* at 8.

This is precisely why PURA cannot sanction the scheme advocated by the OCC. The essence of state and federal policies designed to promote competition for telecommunications services is that the terms and conditions to which providers are subject must be imposed on an equitable and nondiscriminatory basis. Moreover, allowing a third-party partner of a municipality to co-opt the pole attachment rights granted to a municipality would be contrary to the State's legislative goal "to promote the development of competition."[21] In fact, doing so would harm competition by inappropriately affording an unfair advantage to certain market participants, allowing municipalities to pick "winners and losers" for free pole access, and running afoul of both Conn. Gen. Stat. §16-247f and the Authority's stated policy goals. Accordingly, the OCC's interpretation of the statute must be rejected.

C. The OCC's Interpretation of the Municipal Gain Statute is Overbroad, with No Discernable Limitations on "Any Purpose"

Additionally, the OCC's interpretation of the Municipal Gain Statute reads the statute selectively to produce an overbroad result, and would create a regime in which municipalities could grant nearly unfettered access to the reserved gain space.

The OCC characterizes the grant of authority to use the Municipal Gain as empowering "communities with the statutory asset of free rights to use a space on every utility pole as a public good."[22] They go to great lengths to argue that the "plain meaning rule" results in the conclusion that the rights to access the Municipal Gain may be conveyed to third-parties, asserting that the 2013 revision to the statute to add the words "*for any purpose*" supports its conclusion that municipalities can enter "public-private partnerships" to extend their free rights to the municipal gain to third parties.

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[21] Conn. Gen. Stat. §16-247f.
[22] Revised Petition at 2.

However, while the statute does state that the beneficiaries of the rights afforded under the statute may use the Municipal Gain for any purpose, the last sentence provides that "[a]ny such gain shall be reserved for use *by the town, city, borough, fire district or the Department of Transportation.*"[23] OCC's selective reading of the statute is therefore contrary to Connecticut laws governing statutory construction.

The Connecticut Supreme Court has held that "[i]t is a basic tenet of statutory construction that the legislature [does] not intend to enact meaningless provisions.... [I]n construing statutes, we presume that there is a purpose behind every sentence, clause, or phrase used in an act and that no part of a statute is superfluous.... Because [e]very word and phrase [of a statute] is presumed to have meaning ... [a statute] must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant."[24]

When this basic rule of statutory construction is applied, the broadest interpretation that it sustains is that "each town, city, borough, fire district or the Department of Transportation shall have the right to occupy and use [the Municipal Gain] for any purpose....[However], [a]ny such gain shall be reserved for use by the town, city, borough, fire district or the Department of Transportation." Accordingly, entities granted the right to access the Municipal Gain may not convey or otherwise extend this right to third parties and non-governmental entities, because such would not constitute use "by" the specified units of government and would render superfluous the final sentence of the statute. The OCC's interpretation, by neglecting this language, would create a scenario in which every municipality could allow any party to occupy

[23] Conn. Gen. Stat. §16-233 (*emphasis added*).
[24] Connecticut Podiatric Medical Ass'n v. Health Net of Connecticut, Inc. (302 Conn. 464, 28 A. 3d 958).

the gain space for any reason, which would destroy the intent behind the last sentence's limitation.

Even if the Authority is persuaded that the "for use by" language in the statute is broad enough to encompass use not directly by municipalities, it should still reject the OCC's interpretation in favor of case-by-case review to determine whether the nature of a proposed use complies with the language of the Municipal Gain Statute and is truly "by" the unit of government. Because the proposed uses would be infinitely variable under the OCC's interpretation, a "one-size-fits-all" declaratory ruling is inappropriate to ensure that the intent of the statute is upheld. Further, such a broad interpretation of the statute would only exacerbate the constitutional infirmities identified above.

III. Conclusion

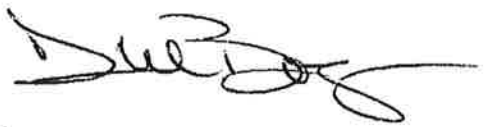
The Connecticut Legislature has long recognized the special status and unique requirements of the State's municipalities and the Department of Transportation. With this in mind, the legislature accorded each with a special right to access utility poles in the state. Initially, the right was limited to "signal wires," but was later extended to allow for voice services, and ultimately "for any purpose."

However, what remains clear is that this right is unique to the governmental entities. A plain reading of the Municipal Gain statute in its entirety makes this clear. The OCC's effort to distort the statute to achieve its stated objective cannot be sanctioned. To do so would violate federal law, ignore the restricted use set forth by the statute, and contravene state and federal policies mandating equitable treatment for all telecommunications service providers.

Accordingly, the Authority should issue a declaratory ruling indicating that Conn. Gen. Stat. §16-233 does not allow municipalities to share with or assign to third parties the right to use

municipal gain space on utility poles in order to provide broadband services, as proposed by the Petition.

CTIA-The Wireless Association®



By_____

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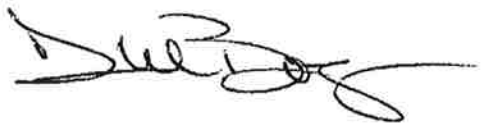
CERTIFICATION

This is to certify that a copy of this submission has been sent to all parties and/or intervenors of record via First Class Mail, postage prepaid or via electronic mail on this 13th day of April, 2017. A copy also been filed with the Authority as an electronic web filing and is complete.



David W. Bogan, Esq.