



**Connecticut Department of  
Energy & Environmental Protection  
Bureau of Energy and Technology**

## Confirmation Receipt

<b>Docket Number:</b>	Not Assigned Yet!
<b>On Behalf Of What Entity:</b>	CWA, CTIA, NECTA and Frontier
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September 28, 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-\_\_  
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:

Enclosed please find the 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 (the "Petition").

As reflected in the Petition, the issue presented is identical to that considered by the Public Utilities Regulatory Authority ("PURA" or the "Authority") in Docket No: 17-02-40, *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*. Unfortunately, although the Authority issued a Proposed Final Decision in that matter, it did not issue a final decision due to an assertion by the OCC that such was moot by virtue of the time allowed for such pursuant the statute governing requests for declaratory rulings. The instant Petition requests that the Authority render that final decision.

Please feel free to contact the undersigned should you have any questions.

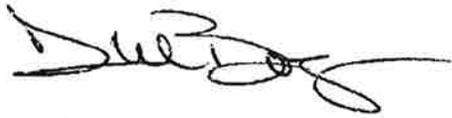
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Jeffrey R. Gaudiosi, Esq.  
September 28, 2017  
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I certify that a copy of this submission has been sent to all participants of record in PURA Docket No: 17-02-40 via First Class Mail, postage prepaid or via electronic mail, and has also been filed with the Authority as an electronic web filing and is complete.

Very truly yours,

A handwritten signature in black ink, appearing to read "D. Bogan", with a long horizontal flourish extending to the right.

David W. Bogan

Enclosure

cc: Service List, Docket No: 17-02-40

STATE OF CONNECTICUT

PUBLIC UTILITIES REGULATORY AUTHORITY

PETITION OF THE COMMUNICATIONS : Docket No. 17-09-\_\_\_  
WORKERS OF AMERICA, CTIA, FRONTIER :  
COMMUNICATIONS OF CONNECTICUT, :  
AND THE NEW ENGLAND CABLE AND :  
TELECOMMUNICATIONS ASSOCIATION : September 28, 2017  
FOR A DECLARATORY RULING :  
REGARDING PERMISSIBLE USE OF THE :  
MUNICIPAL GAIN BY CONNECTICUT :  
MUNICIPALITIES :

**PETITION FOR DECLARATORY RULING**

Pursuant to Connecticut General Statutes §4-176, the Communications Workers of America (“CWA”), CTIA<sup>1</sup>, The Southern New England Telephone Company d/b/a Frontier Communications Of Connecticut, and the New England Cable and Telecommunications Association (“NECTA”)<sup>2</sup> (collectively, the “Petitioners”) hereby request that the Public Utilities Regulatory Authority (“PURA” or the “Authority”) issue a declaratory ruling to confirm the following determination:

The one gain permitted for use by municipal entities pursuant to Connecticut General Statutes §16-233 is limited to a municipality’s own use and does not authorize a municipality to use the gain to provide broadband services to its residents and businesses, including through commercial arrangements with third parties.

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<sup>1</sup> CTIA–The Wireless Association® (“CTIA”) ([www.ctia.org](http://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.

<sup>2</sup> NECTA is a non-profit corporation and trade association that represents the interests of most community antenna television (“cable”) operators in the New England states, and all cable operators and their competitive local exchange company affiliates in Connecticut, except for Frontier Communications Corporation and Thames Valley Cable including affiliates of Altice, Atlantic Broadband, Charter, Comcast, and Cox (collectively, the “NECTA Members”).

In this filing, the Petitioners seek a declaratory ruling identical to the determination in the Authority's Proposed Final Decision dated June 1, 2017 in Docket No. 17-02-40. The issue was fully adjudicated in Docket No. 17-02-40 but to date a declaratory ruling has not been issued. The Petitioners respectfully request a declaratory ruling herein to provide closure on the issue as previously addressed by PURA in Docket No. 17-02-40.

**I. Background**

Section 16-233 of the Connecticut General Statutes ("Conn. Gen. Stat.") 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.

On June 21, 2016, the Office of Consumer Counsel ("OCC") filed a petition with the Authority requesting that it "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 Connecticut General Statutes §16-233 . . . ." <sup>3</sup> PURA docketed the petition as Docket No. 16-06-35. The OCC alleged 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..." <sup>4</sup> but ignored in its petition the threshold legal question of whether such approval of the proposal is authorized by Conn. Gen. Stat. §16-233. The Authority convened a technical session in the docket on January 19, 2017, at which OCC agreed to file a

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<sup>3</sup> Docket No. 16-06-35, OCC Petition at 1.

<sup>4</sup> *Id.*

new petition for declaratory ruling on the legal question, specifically whether the municipal gain could be used to provide broadband services to the mass market.<sup>5</sup>

On February 22, 2017, the OCC filed its declaratory ruling petition, which the Authority docketed as Docket No. 17-02-40. In its petition, OCC asked the Authority to “explore how the Municipal Gain Statute, General Statutes §16-233, applies to the specified circumstances of a municipality 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.”<sup>6</sup> Specifically, the OCC asked that the Authority issue a declaratory ruling interpreting Conn Gen. Stat. §16-233 in a manner that would allow “municipalities to use the Municipal Gain to promote high-speed broadband for their businesses and citizens, including through contracts, leases, and other arrangements with commercial parties.”<sup>7</sup>

The Petitioners were each granted party status in Docket No. 17-02-40 and argued that the Authority should reject the OCC’s petition because Conn. Gen. Stat. §16-233 does not allow municipalities to use their one gain to provide broadband services to residents or businesses, or to assign or share with third parties the right to use space on utility poles in order to provide broadband services.<sup>8</sup>

On June 1, 2017, the Authority issued a Proposed Final Decision in Docket No. 17-02-40 in which it concluded that “the one gain permitted on utility poles or in each underground communications duct system installed by a public service company for use by municipal entities

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<sup>5</sup> Docket No. 16-06-35, Tr. 1/19/17 at 75-76.

<sup>6</sup> Docket No. 17-02-40, OCC Petition at 1.

<sup>7</sup> Docket No. 17-02-40, OCC Petition at 22.

<sup>8</sup> As more particularly set forth below, the plain meaning of §16-233 does not allow for such use by municipalities and the Petitioners do not believe there is any ambiguity in the statute that would permit such use. However, given that the OCC to date has filed two petitions that argue a different view, the Petitioners have filed the instant request for a ruling by the Authority.

pursuant to the General Statutes of Connecticut §16-233 is limited to a municipality's own use, and cannot be assigned to another party for the provision of broadband or other commercially available products or services to persons or entities other than the local government.”<sup>9</sup> On the same date, the Authority issued a Notice of Written Exceptions and Briefs allowing such to be filed by June 14, 2017, and also providing parties the opportunity for oral arguments if requested. The Authority stated it intended to issue a final decision on July 5, 2017.

On June 6, 2017, the OCC moved the Authority for an extension of time to July 6, 2017, by which to respond to the June 1, 2017 Proposed Final Decision. Then, on June 21, 2017, the OCC filed a motion to withdraw its request for a declaratory ruling, stating its belief that it was its “prerogative” to do so citing a February 23, 2017 ruling in Docket No. 16-04-02, *Application of Celco Partnership d/b/a Verizon Wireless for Approval of a Construction Plan to Install Wireless Facilities within Certain Public Rights-of-Way, Woodmont SC 3 CT* as grounds.<sup>10</sup> As discussed in written objections to the motion and at oral arguments on August 3, 2017, the factual circumstances involved in the Verizon Wireless case render the proceeding distinguishable and the disposition one that should not serve as precedent.<sup>11</sup>

However, on August 23, 2017, while the various docket participants<sup>12</sup> awaited the Authority's decision on the OCC motion, and/or a final decision on the petition, the OCC filed a letter with the Authority wherein it quoted Conn. Gen. Stat. §4-176: “[i]f an agency does not

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<sup>9</sup> Docket No. 17-02-40, Proposed Final Decision at 1.

<sup>10</sup> OCC Motion, June 21, 2017, at 1.

<sup>11</sup> See, NECTA Objection to OCC Motion to Withdraw Petition for Declaratory Ruling, July 21, 2017, at 1.

<sup>12</sup> Notably, on June 21, 2017, the State Department of Transportation (“DOT”) filed a letter in response to the Proposed Final Decision. The DOT stated that it supported the Proposed Final Decision, as it retained the municipal gain “for public safety uses and reiterates the explicit nature of the Connecticut General Assembly’s intent ... that “[a]ny such gain shall be reserved for use by the town, city, borough fire district, or Department of Transportation.” DOT Ltr. to J. Gaudiosi at 1 (Emphasis in original). The DOT also asked the Authority to be “mindful that such expanded use of the ‘limited space allowed in the municipal gain’ as considered by the petition at issue ‘may result in the future use of that space by the DOT.’” *Id.*, quoting UI Reply Comments at 2, Proposed Final Decision at 22.

issue a declaratory ruling within one hundred eighty days after the filing of a petition therefor, or within such longer period as may be agreed by parties, the agency shall be deemed to have decided not to issue such a ruling.”<sup>13</sup> The OCC noted that 182 days had passed since the filing of the petition, and since OCC had “never agreed to an extension of nor waived the 180-day deadline ... PURA is deemed to have decided not to issue a declaratory ruling...”<sup>14</sup> The OCC asserted that the Authority was “bound by the above-cited statutory provision to provide notice of the termination of this Docket without the necessity of further process.”<sup>15</sup> To date, the Authority has not issued a final decision in Docket No. 17-02-40.

## II. Discussion

The Proposed Final Decision, had it been finalized, would have resolved any controversy created by OCC’s filings in Docket No. 16-06-35 and Docket No. 17-02-40. The Authority affirmed that use of the one gain under Conn. Gen. Stat. §16-233 was limited solely to those entities enumerated in the statute, specifically “*by the town, city, borough, fire district or the Department of Transportation.*”<sup>16</sup> The Proposed Final Decision further confirmed the Authority agreed with Petitioners that the governmental entities granted the right to access a gain pursuant to Conn. Gen. Stat. §16-233 may not convey or otherwise extend such right to third party, 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. Unfortunately, the Authority’s effort to finalize that determination was delayed by procedural requests, and now is asserted to be mooted by the application of the statutory time period governing requests for declaratory rulings.

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<sup>13</sup> OCC Ltr. to J. Gaudiosi, Esq, August 23, 2017, at 1.

<sup>14</sup> *Id.* at 2.

<sup>15</sup> *Id.*

<sup>16</sup> Conn. Gen. Stat. §16-233 (Emphasis added).

In this filing, the Petitioners now ask the Authority to finalize its determination and issue a declaratory ruling on exactly the same issue of the interpretation of Conn. Gen. Stat. §16-233 as raised by the OCC's petition in Docket 17-02-40.<sup>17</sup> All potentially interested parties had a full opportunity to participate in that very recent docket, including the filing of comments and reply comments. Because the issue is one of statutory interpretation that was fully briefed by all interested parties, there are no changed factual circumstances necessitating a hearing or other substantial process. The Authority can incorporate or take administrative notice of the record in Docket No. 17-02-40, as the record in that docket was fully developed on the very legal question on which Petitioners seek relief.<sup>18</sup>

It is important that the Authority issue the declaratory ruling requested herein as soon as possible to erase any lingering misunderstanding of the statute created by the OCC's earlier petitions, and to avoid a similar future petition or action by a municipality based on interpretation of the statute that the Authority clearly intended to reject. The approach proposed by the Petitioners will resolve the issue in the manner in which the Proposed Final Decision directed. For these reasons, Petitioners request that the Authority incorporate the record and service list from Docket No. 17-02-40 into the instant proceeding and issue a ruling tracking the reasoning and conclusions contained in the Proposed Final Decision.

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<sup>17</sup> This request is being made without acceding to, or waiving any position regarding, the OCC's letter of August 25, 2017 in Docket No. 17-02-40.

<sup>18</sup> If the Authority finds it prudent or necessary to receive further briefing on this petition, such briefing should be narrow in light of the fully developed arguments in the two prior dockets.

### III. Conclusion

The Petitioners have each endeavored to help the State of Connecticut fulfill the promise presented by broadband technology. Competition among providers of services has inured to the benefit of the state's residents. However, the playing field must be level if that is to continue.

The Connecticut General Assembly has long recognized the special status and unique requirements of the State's municipalities and the DOT, and accorded each with a special right to access one gain on utility poles for their own use. In that respect, the right afforded by Conn. Gen. Stat. §16-233 is specific and clear. That right is unique and limited to the particular governmental entities for their own use. Any construction to the contrary would be inconsistent with the plain meaning and would violate various state and federal laws related to telecommunications service, all of which were detailed by the Petitioners in Docket No. 17-02-40.<sup>19</sup>

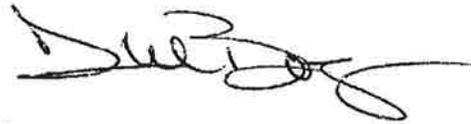
Accordingly, the Authority should issue a declaratory ruling that the one gain permitted for use by municipal entities pursuant to Conn Gen. Stat. §16-233 is limited to a municipality's own use and does not allow a municipality to use the gain on poles or duct space to provide broadband services to its residents or businesses, nor can the gain or duct space be assigned to another party for the provision of broadband services to persons or entities.

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<sup>19</sup> The Proposed Final Decision agreed with the positions of CTIA, Frontier, Verizon and NECTA that the OCC interpretation of Conn. Gen. Stat. §16-233 would violate both federal and state law: "The Authority agrees. First, Conn. Gen. Stat. §16-247a (a) (2) requires the Authority to promote the development of effective competition as the means to provide customers with the widest possible choices of services. If the OCC's proposed interpretation was adopted, significant competitive advantage would inure to the municipality or its assignee for the provision of broadband services to its residents and businesses. In effect this would thwart rather than develop effective competition for broadband services." Proposed Final Decision at 24.

COMMUNICATIONS WORKERS OF AMERICA

CTIA-THE WIRELESS ASSOCIATION®



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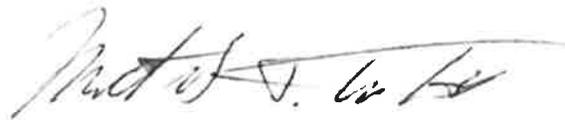
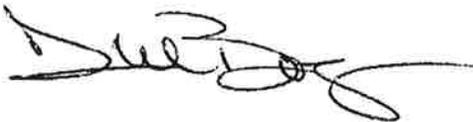
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THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY D/B/A FRONTIER COMMUNICATIONS OF CONNECTICUT



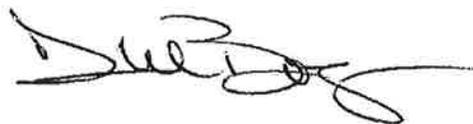
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**CERTIFICATION**

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 28th day of September, 2017. A copy also been filed with the Authority as an electronic web filing and is complete.

A handwritten signature in black ink, appearing to read 'D. Bogan', written over a horizontal line.

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David W. Bogan, Esq.