



STATE OF CONNECTICUT

PUBLIC UTILITIES REGULATORY AUTHORITY
TEN FRANKLIN SQUARE
NEW BRITAIN, CT 06051

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

May 9, 2018

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DECISION

TABLE OF CONTENTS

I.	INTRODUCTION	1
A.	SUMMARY	1
B.	BACKGROUND OF THE PROCEEDING	1
C.	CONDUCT OF THE PROCEEDING	2
D.	PARTIES, INTERVENORS AND PARTICIPANTS	2
E.	PUBLIC COMMENT	3
II.	NOTICE	4
III.	POSITIONS OF PARTIES, INTERVENORS AND PARTICIPANTS	5
A.	CENTURYLINK	5
B.	COMMUNICATIONS WORKERS OF AMERICA	6
C.	CONNECTICUT CONFERENCE OF MUNICIPALITIES	8
D.	CONNECTICUT COUNCIL OF SMALL TOWNS	10
E.	CTIA-THE WIRELESS ASSOCIATION	10
F.	DEPARTMENT OF TRANSPORTATION.....	12
G.	OFFICE OF CONSUMER COUNSEL.....	12
H.	THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY D/B/A FRONTIER COMMUNICATIONS OF CONNECTICUT	15
I.	NEW ENGLAND CABLE AND TELECOMMUNICATIONS ASSOCIATION	17
J.	TOWNS AND MUNICIPALITIES	19
K.	THE UNITED ILLUMINATING COMPANY	20
IV.	AUTHORITY ANALYSIS.....	21
V.	CONCLUSION.....	25

DECISION

I. INTRODUCTION

A. SUMMARY

In this Decision, the Public Utilities Regulatory Authority issues a declaratory ruling that use of the free gain on utility poles or in each underground communications duct system reserved to municipal entities pursuant to §16-233 of the General Statutes of Connecticut is limited to a municipality's own use, and does not permit the public or other third-parties to physically connect to a municipal broadband network erected in the municipal gain, nor does it permit a municipality to assign to a third party the right to locate facilities in the municipal gain. Consistent with this determination, the Authority also finds that the General Statutes of Connecticut §16-233 does not permit a municipality to use the gain to provide broadband services to its residents or businesses.

B. BACKGROUND OF THE PROCEEDING

This Decision turns on the interpretation of the General Statutes of Connecticut (Conn. Gen. Stat.) §16-233, which provides:

Sec. 16-233. Use of gain by town, city, borough, fire district or Department of Transportation. 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.

By petition dated September 28, 2017 (Petition), the Communications Workers of America (CWA), CTIA-The Wireless Association (CTIA), The Southern New England Telephone Company d/b/a Frontier Communications of Connecticut (Frontier) and the New England Cable and Telecommunications Association (NECTA) (collectively, the Joint Petitioners) requested that the Public Utilities Regulatory Authority (Authority or PURA) issue a declaratory ruling identical to the draft determination issued in the Authority's proposed final Decision dated June 1, 2017 in Docket No. 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.¹

¹ A final Decision was never issued in Docket No. 17-02-40. After the proposed final Decision was issued, the Office of Consumer Counsel filed a Motion to Withdraw its Petition for Declaratory Ruling, which petition had prompted PURA's initiation of the docket. The statutory time period for issuing a declaratory ruling pursuant to Conn. Gen. Stat. §4-176(i) expired without the issuance of a Decision by the Authority.

Specifically, the Joint Petitioners requested that the Authority issue a declaratory ruling confirming 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.

Petition, p. 1.

On October 5, 2017, the Connecticut Conference of Municipalities (CCM) moved the Authority to grant the CCM party status and to deny the Petition and close this docket without further proceedings on the ground that the Joint Petitioners lacked standing to bring the Petition (Motion No. 1). By letter dated November 20, 2017, the Authority partially denied Motion No. 1 to the extent that it sought denial of the Petition. In its response, the Authority also indicated that it would seek additional documentation from all interested parties regarding the legal and practical implications related to whether Conn. Gen. Stat. §16-233 (the Municipal Gain Statute) permits a municipality to use the one gain to provide broadband services to its citizens and businesses either directly or through contracts with third party providers. November 20, 2017 Response to Motion No. 1, pp. 3 and 4.

C. CONDUCT OF THE PROCEEDING

By Notice of Request for Written Comments (Notice) dated December 15, 2017, the Authority requested written comments from parties and interested persons participating in this docket. By letter dated December 1, 2017, the CCM requested an extension of time until February 16, 2018, to submit its written comments (Motion No. 2). While the Authority allowed additional time for the CCM and other parties to submit their written comments, it did not believe that an extension of time until February 16, 2018, was warranted. Consequently, the Authority extended the date by which written comments were due to December 29, 2017. Additionally, to further assist in the development of the administrative record, the parties were permitted to file reply comments with the Authority no later than February 1, 2018. Authority December 13, 2017 Response to Motion No. 2, p. 2.

The Authority issued its proposed final Decision in this matter on March 6, 2018. All parties, intervenors and interested persons were afforded an opportunity to submit written exceptions. The Authority heard oral argument concerning this proposed final Decision on March 16, 2018.

D. PARTIES, INTERVENORS AND PARTICIPANTS

A listing of the parties, intervenors and participants is appended hereto as Attachment 1.

E. PUBLIC COMMENT

The Authority is in receipt of written comments opposing the Petition submitted by State Representative Tim Ackert, Eighth Assembly District. According to Representative Ackert, the amendments to the Municipal Gain Statute adopted in Public Acts 94-188, An Act Revising Certain Transportation Laws and 13-247, An Act Implementing Provisions of the State Budget for the Biennium Ending June 30, 2015 Concerning General Government clarified and modernized the uses permitted by Conn. Gen. Stat. §16-233. Representative Ackert asserted that the statute explicitly provides for the use of the gain “for any purpose” by all municipalities. Accordingly, Representative Ackert requested that the PURA not issue a declaratory ruling favoring the Joint Petitioners’ request since state law already provides guidance with respect to the use of utility poles and underground infrastructure. Ackert Comments, p. 1.

The Authority also received comments from Representative Josh Elliott, Eighth District stating his support for the CCM, individual towns, the Office of Consumer Counsel (OCC), and others that opposed the Joint Petitioners’ Petition. In his comments, Representative Elliott requested that the Authority find that Conn. Gen. Stat. §16-233 allows the use of the governmental gain for the sale of broadband services to residents and businesses, including authority for any assignment or delegation of the governmental gain. Representative Elliott also argued that the Municipal Gain Statute confers rights on entities other than municipal entities, and the Department of Transportation (DOT) and that the legislature intended to authorize these governmental bodies to assign those rights to other parties, including non-governmental entities. Elliott Comments, pp. 1 and 2.

Senator Beth Bye, Fifth District also submitted comments in support of the individual towns, the CCM, the Council of Small Towns, GMIS (state association of chief information officers), the OCC and others that opposed the Joint Petitioners’ Petition. Senator Bye opined that the Municipal Gain Statute unambiguously allows a municipality to use the municipal gain “for any purpose,” and requires the utility pole owners to reserve a space on each pole or conduit for municipal use. According to Senator Bye, this was the intended result of the changes to Conn. Gen. Stat. §16-233 made in Public Act 13-247² and the statutory language is direct and clear on this point. Senator Bye stated that, in crafting the relevant language of Public Act 13-247, she worked to make sure it would allow the towns to pursue economic development efforts using broadband as a tool. Bye Comments, p. 1.

Senator Bye also argued that because the telecommunications companies and cable companies are already occupying spaces on the poles to provide broadband services, it was reasonable, under the plain meaning rule of Conn. Gen. Stat. §1-2z, for the municipalities to seek to use their own pole space for that exact same purpose. By

² Public Act 13-247 §62 modified the following language from Conn. Gen. Stat. §16-233: “[e]ach town, city, borough, fire district, or the Department of Transportation shall have the right to occupy and use for municipal and state signal wires.” That provision now reads, in relevant part, “[e]ach town, city, borough, fire district, or the Department of Transportation shall have the right to occupy and use for any purpose.”

application of the plain meaning rule, according to Senator Bye, there was no need for the PURA to look beyond the Municipal Gain Statute to determine that each municipality has an unambiguous right to ensure that its citizens have affordable access to broadband through the municipal gain. Senator Bye stated that this was also consistent with the policies of this state as enunciated by the PURA's Decisions and through legislative action to enable the provision of world-class communication systems in the form of high-speed broadband to every citizen. *Id.*, p. 2.

Senator Bye also asserted that the Municipal Gain Statute conferred rights on entities other than municipal entities and the DOT because the legislature intended to authorize these governmental bodies to assign those rights to other parties, including non-governmental entities. Senator Bye therefore requested that the Authority find Conn. Gen. Stat. §16-233 allows the use of the governmental gain for the sale of broadband services to residents and businesses, including any assignment or delegation of the governmental gain. *Id.*, p. 3.

Martin F. Seifert also filed with the Authority written comments dated December 29, 2017, on behalf of Greentec Design LLC (Greentec). Greentec argued that the Authority is not the appropriate forum to adjudicate the questions presented by the Joint Petitioners. Greentec does not believe that the PURA has the statutory authority to determine, authorize or limit the use of the municipal gain under Conn. Gen. Stat. §16-233. Accordingly, Greentec requested that the Authority decline to issue the declaratory ruling or rule that it does not have the statutory authority to issue the requested ruling. Greentec Comments, p. 1.

II. NOTICE

In order to facilitate the processing of the Petition, the Authority requested that the parties, intervenors and participants to this proceeding update their written comments filed in response to the PURA's March 20, 2017 *Notice of Proceeding and Request for Written Comments*, issued in Docket No. 17-02-40 as they pertain to issues 1 through 4 identified below. The Authority also indicated its intent to accept written comments from those parties, intervenors and participants to this proceeding who were addressing these issues for the first time. Specifically, the Authority requested written comments addressing:

1. The meaning and applicability of Conn. Gen. Stat §16-233, which provides:

Sec. 16-233. Use of gain by town, city, borough, fire district or Department of Transportation. 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 OCC's specific request that the PURA determine how the application of Conn. Gen. Stat §16-233 applies to municipalities interested in using the public use gain "for purposes of facilitating the provision of broadband services to residents and businesses therein, including through commercial arrangements with third parties."
3. The governmental usage of utility owned poles or utility owned underground duct systems for public usages "...without payment therefor..." (Conn. Gen. Stat §16-233).
4. Any other issues the Authority should consider in processing the Joint Petitioner's request.

In light of the Authority's November 20, 2017 ruling denying Motion No. 1 in part, the PURA also sought written comments from the parties, intervenors and participants regarding:

5. Whether Conn. Gen. Stat. §16-233 permits municipalities providing to its citizens and businesses broadband services either directly or through contracts with third party providers.

III. POSITIONS OF PARTIES, INTERVENORS AND PARTICIPANTS

In response to the Notice, the Authority received written comments from various parties, intervenors, and participants as summarized below.

A. CENTURYLINK

Level 3 Communications, LLC; Broadwing Communications, LCC; Global Crossing Telecommunications, Inc.; Global Crossing Local Services, Inc.; Level 3 Telecom Data Services, LLC and WiITel Communications, LLC (collectively, CenturyLink) argued that the private use of the municipal gain is contrary to federal statutes and policies designed to encourage broadband deployment and investment. CenturyLink Comments, pp. 3 and 4.

CenturyLink asserted that among the considerable risks entailed with municipal provision of broadband, municipal entry can have a chilling effect on competition. CenturyLink argued that by allowing municipalities to convey benefits to themselves, the Authority could render private investment uneconomic by creating a skewed competitive playing field. *Id.*

CenturyLink also argued that the OCC's proposal in Docket No. 17-02-40, now supported by the CCM, conflicts with the fundamental policies of the Federal Telecommunications Act of 1996 (Federal Telcom Act), which emphasize the right of market competitors to non-discriminatory use of the public rights-of-way and utility poles. According to CenturyLink, Section 253(a) of the Federal Telcom Act further limits the authority of states and local governments by prohibiting them from adopting laws or requirements that have the effect of limiting the "ability of any entity to provide any

interstate or intrastate service." CenturyLink asserted that the Authority, too, has consistently applied its statutory mandates under Conn. Gen. Stat. §16-247a to promote a level playing field among providers and foster competition. Id., p. 4.

According to CenturyLink, the OCC's position would provide a competitive advantage to the municipality offering broadband or telecommunications services by enabling the municipality to deploy facilities upon demand in a preferred location without paying pole rental fees and at discounted make-ready costs. CenturyLink cautioned that this competitive advantage would become more pronounced if the Authority were to interpret the Municipal Gain Statute to allow municipalities to assign their municipal rights to private providers. CenturyLink claimed that the OCC's Docket No. 17-02-40 petition conceded that such an approach would be a "major advantage for a municipality looking to investors and new market entrants to enhance their access to broadband assets." Id.

Additionally, CenturyLink maintained that Conn. Gen. Stat. §16-233 limits the use of the municipal gain to a municipality's own use. CenturyLink asserted that Docket No. 17-02-40 is replete with compelling arguments against the municipalities' use of the municipal gain as contemplated by the OCC in its Docket No. 17-02-40 petition, and that those arguments are equally applicable in this proceeding. Consequently, CenturyLink urged the Authority to reject any proposed interpretation of Conn. Gen. Stat. §16-233 that would permit municipalities to use commercial arrangements to assign the municipal gain to third parties offering broadband services to the general public. Id., pp. 5-7.

Lastly, CenturyLink pointed to a January 12, 2018 order issued by the Maine Public Utilities Commission (PUC), which CenturyLink characterized as declining to "provide municipalities with unfettered free-of-charge access to join-use utility poles for any competitive services." CenturyLink also highlighted that the Maine order also rejected the *quid pro quo* argument that access to poles by municipalities is the product of a silent bargain because use of the public rights-of-way are a mandate of state law in Maine and cannot be characterized as "doing someone a favor." Finally, CenturyLink claimed that the Maine order rejected the municipalities' argument that all actions by a municipality are, by definition, non-commercial and accordingly, the PUC declined in a competitive environment to grant municipalities an advantage over other market entrants. Instead, the PUC found that municipal deployments should be limited to police power functions. CenturyLink Reply Comments, p. 2.

B. COMMUNICATIONS WORKERS OF AMERICA

Regarding PURA Issues 1-4, the CWA stood by the comments it filed in Docket No. 17-02-40. Comments of CWA, pp. 1 and 2. In that docket, the CWA argued that the OCC's petition raised important issues of legal interpretation with respect to Conn. Gen. Stat. §16-233, the resolution of which may ultimately affect the activities on utility poles and conduits where the CWA members work, and may affect the infrastructure and the financial competitive well-being of the pole and conduit owners, including the employer of the CWA members. Written Comments of CWA in Docket No. 17-02-40, p. 1.

The CWA disagreed with the OCC regarding the plain meaning of the Municipal Gain Statute. According to the CWA, the plain meaning of the Municipal Gain Statute, when viewed as a whole, demonstrates that allowed municipal activity within the gain is limited solely to carrying out municipal governmental activities by the municipality itself and does not encompass assigning any rights the municipality may have to third parties. Id., p. 3.

The CWA also argued that it is doubtful that the legislature would allow a municipality to make use of poles and conduits on private property unless it was clear that the use was necessary to serve a governmental purpose. The CWA asserted that when the legislature amended the Municipal Gain Statute in 2013, it preserved the language granting municipal gain rights in all areas, thereby signaling a continuation of the original statutory structure, which limited the use of the municipal gain to municipal governmental purposes only. Id., pp. 3 and 4.

The CWA further argued that the Municipal Gain Statute does not envision nor allow the municipality to assign its rights to a third-party private company because Conn. Gen. Stat. §16-233 entitles a municipality to “occupy and use” the municipal gain space, not “occupy or use” that space. The CWA also asserted that the addition of the words “for any purpose” to the Municipal Gain Statute in 2013 did not change the statute’s contemplation that the municipality’s facilities would “occupy” the municipal gain space on the pole. The CWA stated that even if one were to focus solely on the term “use,” it is the municipality itself which must “use” the gain. Therefore, the CWA recommended that the Authority clarify that a municipality is not authorized by Conn. Gen. Stat. §16-233 to assign its right to use the municipal gain space. Id., p. 4.

Regarding legislative intent, the CWA maintained that the intent of the legislature was to no more than confirm the Authority’s January 19, 2000 Decision 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 (Manchester Decision), which found that a municipality is permitted to use the gain to provide a private telecommunications network for its own use. The CWA claimed that the Manchester Decision clarified that the word “signal” in Conn. Gen. Stat. §16-233 meant not just fire and safety signals, but also the signals of the private network being contemplated by the Town of Manchester (Manchester). The CWA asserted that it was in this legal context and with this intent that the legislature amended Conn. Gen. Stat. §16-233 through Public Act 13-247. Id.

The CWA more specifically argued that Public Act 13-247 removed the language in Conn. Gen. Stat. §16-233 authorizing use of the gain for “signal wires” and replaced it with the “any purpose language.” The CWA suggested that this change was intended to reduce lingering ambiguity or lack of clarity in the word “signal,” not to effect a broad addition of new and untested possibilities. According to the CWA, the legislative intent can be construed no further than to stay within the scope of the Manchester Decision and the statutory ratification of that Decision. The CWA also argued that this limited intent is confirmed by the fact that the 2013 amendment was included in a budget bill. Id., pp. 5 and 6.

Accordingly, the CWA requested that the Authority issue a ruling finding that a municipality may occupy and use the municipal gain space solely for itself and solely for municipal purposes that are in the nature of internal governmental functions. *Id.*, p. 6.

Regarding Issue Number 5, the CWA claimed that there was nothing in the Municipal Gain Statute explicitly or implicitly permitting municipalities to provide broadband services to their citizens and businesses, whether directly or through a third party provider. The CWA asserted that Conn. Gen. Stat. §16-233 does not permit a municipality to provide broadband services. Accordingly, the CWA requested that the Authority issue a final Decision granting the declaratory ruling as requested in the Petition. CWA Comments, pp. 1 and 2.

C. CONNECTICUT CONFERENCE OF MUNICIPALITIES

The CCM argued that the PURA lacks statutory authority over a municipality's permissible use of the gain. The CCM asserted that the Authority's jurisdiction is limited by the terms of Conn. Gen. Stat. §16-233's language to the location or relocation of any such gain. The CCM also asserted that by amending Conn. Gen. Stat. §16-233 in Public Act §13-247 to encompass any use of the gain, and not making conforming revisions to the language subjecting the location of the gain to Authority oversight, the Connecticut General Assembly made clear that the Authority is limited to addressing the physical location or relocation of the gain that would be available to the governmental entities. The CCM also argued that this interpretation of the Municipal Gain Statute is consistent with Conn. Gen. Stat. §1-2z and virtually all other tenets of statutory construction. The CCM argued that the express provision of Authority oversight regarding the location or relocation of the gain and the absence of language addressing PURA's authority over the terms of permissible use of the gain unequivocally demonstrates that the Authority has no statutory basis to address the permissible use of the gain.³ CCM Comments, pp. 2 and 3.

The CCM raised two additional arguments regarding the Authority's jurisdiction. First, the CCM asserted that the issue of whether a municipality entitled to use the gain under Conn. Gen. Stat. §16-233 may partner with a non-governmental entity with respect to that use would be governed by Title 7, which pertains to the powers of municipalities, and is not within the purview of the Authority. *Id.*, pp. 2 and 3; CCM Reply Comments, pp. 3-6. Second, the CCM argued that the FCC's recent Restoring Internet Freedom order eliminates any jurisdictional authority over broadband services and that the PURA must decline to issue any declaratory ruling concerning municipal broadband use.⁴ According to the CCM, the FCC's Restoring Internet Freedom order

³ In reply comments, Frontier asserted that the Authority has explicit jurisdiction and that the CCM's arguments ignored the PURA's span of authority to regulate pole attachments, use of the public rights-of-way and the use, operation and services provided on the state's utility infrastructure. Frontier Reply Comments, p. 14. CTIA and NECTA likewise disagreed with the CCM's position. CTIA and NECTA argued that Connecticut and relevant federal statutes support the PURA's authority to manage matters related to electrical pole attachments, including the use of the gain space. CTIA and NECTA also argued that the PURA's jurisdiction over the utility poles does not hinge on the classification of services provided via a pole attachment. CTIA and NECTA Reply Comments, pp. 2-6.

⁴ Frontier noted that the relief sought in the Petition would not in any manner be impacted by the FCC's recent Restoring Internet Freedom Order. According to Frontier, the Petition presented a

changed the federal legal status of broadband from a Title II service to a Title I service not within the Authority's jurisdiction, and therefore the PURA has no reason to render the declaratory ruling requested by the Joint Petitioners in this proceeding.⁵ *Id.*, pp. 3 and 4.

The CCM noted that the PURA's predecessor agency, the Department of Public Utility Control (DPUC), addressed this issue in Docket No. 04-02-15, Decision dated August 18, 2004, Application of The Southern New England Telephone Company for a Declaratory Ruling Regarding the Town of Manchester's Use of Its Private Telecommunications Network (Manchester II) wherein it denied The Southern New England Telephone Company's request for a declaratory ruling because the PURA did not have jurisdiction over Internet traffic. The CCM argued that the PURA should rely on its determination in Manchester II and find it does not have jurisdiction here as well. CCM Comments, p. 4.

The CCM questioned other parties' allegations that Conn. Gen. Stat. §16-233 would provide municipalities with discriminatory benefits to the detriment of large multi-state or international communications companies in violation of federal law. The CCM also argued that regardless of those allegations, the FCC's Restoring Internet Freedom order has mooted the federal law issues relied on in the PURA's Proposed Draft Decision in Docket No. 17-02-40. *Id.*, pp 3-5; CCM Reply Comments, pp. 6 and 7.

Lastly, the CCM argued that Title 16 of the Connecticut General Statutes does not provide the PURA with any authority to authorize, prohibit or in any way regulate municipal broadband networks. The CCM viewed the Petition as a request to the PURA to establish barriers that would ban or impede competitive broadband networks should a municipality make a determination to establish one on its own or in conjunction with

straightforward question of the applicability of specific circumstances to a Connecticut statute, which the PURA has the express authority to determine. Additionally, the Petition speaks only to whether a municipality may use its free pole space under Conn. Gen. Stat. §16-233 to provide commercial telecommunications services or assign rights to free pole space under the statute to a third party to do so. In the opinion of Frontier, the CCM's FCC argument ignores the fact that the Petition has no impact on a municipality's ability to operate a private network utilizing its rights under Conn. Gen. Stat. §16-233; nor does it impact their ability to become licensed CLECs, pay pole attachment fees and compete on a level playing field with other telecommunication service providers. Lastly, Frontier suggested that the Authority has previously analyzed the relevant state and federal laws, noting that the OCC's proposals for expansive use of the municipal gain would create a discriminatory scheme in contravention of the state and federal policy goals for competitive broadband. Frontier Reply Comments, p. 17. CenturyLink opined that the real issue in this proceeding is the PURA's authority to regulate pole attachment terms and conditions and to oversee the safety of the pole infrastructure and the electric distribution system. CenturyLink Reply Comments, p. 3.

⁵ Frontier disagreed and argued that the CCM and Manchester have made an argument that has no relevance to this docket. Frontier also argued that the Petition does not in any manner address "Internet traffic," "net neutrality" or other factors related to the FCC's action. Further, Frontier asserted that this argument has nothing to do with the permissible use of the free gain space provided to a municipality by Conn. Gen. Stat. §16-233 and should be rejected. Frontier Reply Comments, pp. 4 and 5. The CWA makes a similar argument and stated that the PURA's authority to issue the requested declaratory ruling is not determined by the FCC's decisions regarding the scope of its regulation of broadband. CWA Reply Comments, p. 2. Similarly, CTIA/NECTA commented that based on its jurisdiction over utility poles and the power vested in it by the Uniform Administrative Procedure Act, the PURA has the jurisdiction to rule on a petition for declaratory ruling and to grant the relief requested in the Petition in this proceeding. CTIA/NECTA Reply Comments, p. 13.

another party. The CCM asserted that even if the PURA had the statutory authority to render the ruling requested, it would be contrary to the overall public interest to try to impede or ban competitive broadband networks in Connecticut. Id., p. 5.

Accordingly, the CCM recommended that the PURA reconsider reissuing the proposed final Decision in Docket No. 17-02-40 as requested by the Joint Petitioners. Id., pp. 5 and 6.

D. CONNECTICUT COUNCIL OF SMALL TOWNS

COST also opposed the Joint Petitioners' request that the Authority restrict the municipalities' use of the municipal gain and recommended that the Authority refrain from issuing a determination that the municipal gain may be limited based on its assertion that the Municipal Gain Statute does not authorize the PURA to determine, authorize, or limit the use of the municipal gain. COST contended that Connecticut law authorizes municipalities to use space on utility poles in the municipal rights-of-way, regardless of ownership, because the Municipal Gain Statute authorizes municipalities to use the space "for any purpose, without payment therefor," and attempts to limit this authority were soundly rejected by the legislature in 2017. COST also stated that authorizing municipalities to utilize the municipal gain for any use helps position the towns to enhance the availability of broadband infrastructure to better meet the technological needs of schools, libraries, residents, and businesses. COST Written Comments, pp. 1 and 2.

E. CTIA-THE WIRELESS ASSOCIATION

The CTIA requested its Docket No. 17-02-40 written comments be incorporated herein as its comments filed in response to the Notice. CTIA Written Comments, p. 2. In Docket No. 17-02-40, the CTIA argued that the OCC's interpretation of the Municipal Gain Statute would create an anti-competitive regime in violation of federal law as well as federal and state policy, and recommended that the Authority issue a declaratory ruling that the Municipal Gain Statute does not allow municipalities to assign to or share with third parties the right to use space on utility poles in order to provide broadband services as proposed by the Petition. CTIA Docket No. 17-02-40 Written Comments, pp. 1 and 2.

The CTIA also claimed that the OCC's interpretation of the Municipal Gain Statute would violate the Takings Clause in the Fifth Amendment of the U.S. Constitution (as applied to the states via the Fourteenth Amendment) because it would allow municipal governments to sanction third-party installations in the gain space of utility poles by right and without permission. According to CTIA, 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 a cable, if it is for a public use, and only if the owner is paid just compensation. As applied to a utility pole owner, the CTIA suggested that the proposed blanket third-party access to the municipal gain would not qualify as a public use, nor is compensation being proffered to pole owners as a result of the regime established by the Municipal Gain Statute. CTIA thus asserted that the OCC's interpretation of the

Municipal Gain Statute would result in an impermissible taking that cannot be sanctioned by the Authority. Id., pp. 3 and 4.

The CTIA further argued that the OCC's interpretation of the Municipal Gain Statute is discriminatory and contrary to the fundamental tenet of non-discriminatory access to utility poles that underlies both state and federal policy. The CTIA asserted that the OCC's proposal would establish a discriminatory regime for pole access in contravention of these policies and would negatively impact competition in the telecommunications marketplace. As such, the CTIA recommended that the Authority reject that interpretation. Id., pp. 4 and 5.

The CTIA also asserted that although Connecticut self-regulates pole attachment matters, such regulation is still subject to the federal prohibition on barriers to entry for telecommunications services. Citing to Section 253(a) of the Federal Telcom Act, the CTIA argued that the OCC's interpretation would conflict with the requirement 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." The CTIA noted that while 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 proposal would exempt third-party non-municipal partners from some or all of these costs. CTIA argued that this exemption would convey a substantial benefit not available to all other competitors and limit their competitive ability. To avoid potential conflict with the FCC's rules, the CTIA recommended that the Authority reject that interpretation. Id., pp. 5 and 6.

Additionally, the CTIA argued against adopting the OCC proposal because 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." According to the CTIA, doing so would (1) harm competition by inappropriately affording an unfair advantage to certain market participants, allowing municipalities to pick "winners and losers" for free pole access, and (2) run afoul of Conn. Gen. Stat. §16-247f and the Authority's stated policy goals. Id., pp. 4-7; CTIA/NECTA Reply Comments, pp. 6 and 7.

Lastly, the CTIA asserted that the OCC's interpretation of the Municipal Gain Statute was overly broad with no discernable limitations on any purpose. According to the CTIA, when the 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." The CTIA maintained that 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 it would not constitute use "by" the specified units of government and would render superfluous the final sentence of the statute. Id., pp. 7 and 8.

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, the CTIA suggested that

the Authority 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 it is truly "by" the unit of government. Because the proposed uses would be infinitely variable under the OCC's interpretation, the CTIA asserted that 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 by CTIA. Id., p. 9.

The CTIA noted that the legislature has long recognized the special status and unique requirements of the state's municipalities and the DOT. Thus, the legislature accorded each with a special right to access utility poles in the state. According to the CTIA, however, this right is unique to the governmental entities, and a plain reading of the Municipal Gain Statute in its entirety makes this clear. Thus, the CTIA maintained that the OCC's effort to distort the statute to achieve its stated objective cannot be sanctioned. The CTIA argued that 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 CTIA recommended that the Authority 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 the municipal gain on utility poles in order to provide broadband services as proposed by the OCC's petition. Id., pp. 9 and 10.

F. DEPARTMENT OF TRANSPORTATION

In written comments submitted in Docket No. 17-02-40 and again in this proceeding, the DOT supported the PURA's proposed final Decision in Docket No. 17-02-40 because it retained the municipal gain for public safety uses and reiterated the legislature's intent with Conn. Gen. Stat. §16-233 when it provided in its analysis that "any such gain shall be reserved for use by the town, city, borough, fire district or the Department of Transportation." The DOT stated that in the future, it intends to use the municipal gain for the installation of fiber optic cable to enhance the reliability of the State's Computerized Traffic Signal Systems. The DOT also stated that should the Authority reconsider and permit municipalities to use the municipal gain to provide broadband services, it would be incumbent on the PURA to condition such use to reserve a gain on utility poles to accommodate future DOT public safety needs. Nevertheless, the DOT indicated its agreement with the proposed final Decision in Docket No. 17-02-40 and urged the PURA to finalize that Decision as proposed. DOT Comments, pp. 2 and 3.

G. OFFICE OF CONSUMER COUNSEL

The OCC maintained that the Authority should use the "plain meaning rule" established by Conn. Gen. Stat. §1-2z to determine the meaning of the Municipal Gain Statute and the "for any purpose" language which was added by Public Act 13-247. According to the OCC, Conn. Gen. Stat. §1-2z provides that the plain meaning of the text of a statute and its relationship to other statutes will govern the interpretation so long as there is no ambiguity and a direct reading does not lead to absurd or unworkable results. OCC Comments, pp. 1 and 2.

The OCC asserted that there is no need for the Authority to look beyond the text of Conn. Gen. Stat. §16-233 to reach the determination that each municipality has an unambiguous right to ensure that its citizens have ample, fair, and affordable access to broadband through the municipal gain. In the present context, the OCC argued that since the telecommunications companies and cable companies are already using their spaces on utility poles to provide broadband services to the mass market, it is perfectly reasonable under the plain meaning rule of Conn. Gen. Stat. §1-2z, for the municipalities to use the municipal gain for the exact same purpose. The OCC therefore maintained that the “for any purpose” language would allow a municipality to string communications wires on poles for any legal purpose, since that use is already ubiquitous. Id., pp. 2 and 3.

To the extent that the Authority does not apply the plain meaning rule, but instead seeks to apply other interpretive tools based on a perceived ambiguity, the OCC argued that Conn. Gen. Stat. §16-233 should be interpreted as allowing municipalities to use the municipal gain for a broadband purpose. Under this interpretive approach, according to the OCC, one key to understanding the present version of Conn. Gen. Stat. §16-233, which includes the “for any purpose” language, is to understand what the prior version of Conn. Gen. Stat. §16-233 said, and how that prior version was understood by the former DPUC. Id., p. 3.

The OCC stated that the language in the Municipal Gain Statute in 2000 was interpreted by the DPUC in its Decision in Docket No. 99-03-25. In that Decision, the OCC argued, the DPUC ruled that the term “municipal and state signal wires” should not be interpreted restrictively, but rather “can be interpreted to reasonably encompass the array of telecommunications services.” The OCC maintained that the legislature should be presumed to have been aware of the Manchester Decision at the time it revised Conn. Gen. Stat. §16-233 in Public Act 13-247 to add the “for any purpose” language. Id. at 4 and 5.

The OCC further argued that the central flaw in the Docket No. 17-02-40 proposed final Decision was that the Authority ignored the Manchester Decision in its analysis. According to the OCC, the Authority cannot presume that the 2013 revision of Conn. Gen. Stat. §16-233 to replace “signal wires” with “any purpose” was intended to give municipalities the ability to provide only private telecommunications services for internal communications. According to OCC, the ability of municipalities to place fiber optic cables for internal communications was settled law for over a decade, through the Manchester Decision, before Public Act 13-247 was passed. The OCC asserted that there would thus be no reason for the legislature to ratify the holding in the Manchester Decision that “signal wires” allowed installation of a municipal communications network for internal purposes because no one was challenging that holding. The OCC contended that an interpretation that “for any purpose” refers only to internal municipal communications would therefore render the 2013 statutory revision a superfluous act that was devoid of meaning, contrary to the basic tenet of statutory construction that the legislature does not intend to enact meaningless provisions. Id., pp. 5 and 7

The OCC therefore asserted that the legislature must be presumed to have had a purpose when it declared in 2013 that municipalities could use the municipal gain “for any purpose,” and that purpose must have been to take the law from where it already

was (allowing municipalities to use the gain to provide broadband services to municipal buildings, per the Manchester Decision), to a new place. By using the broad language of “for any purpose,” the OCC argued that the legislature was authorizing municipalities to at least engage in any activities in the municipal gain that are ordinarily taken on utility poles.⁶ *Id.*, pp. 7 and 8.

The OCC also asserted that ensuring that citizens and businesses have access to broadband service is a legitimate goal of government. According to the OCC, ensuring robust broadband access is a legitimate municipal purpose that qualifies under the Conn. Gen. Stat. §16-233 reference to “any purpose.” To that end, the OCC maintained that Public Act 13-247 ratified the municipal effort to use the municipal gain for broadband purposes when substituted the unlimited language of “for any purpose” in place of “municipal and state signal wires.” *Id.*, 8 and 9.

The OCC also claimed that municipalities have ample authority to make commercial arrangements as necessary to meet the needs of constituents under several provisions of Title 7 of the Connecticut General Statutes. According to the OCC, Conn. Gen. Stat. §7-148(c)(1) expressly states that municipalities may contract and be contracted with. Conn. Gen. Stat. §7-148(c)(3) allows municipalities to sell and lease property for any public use or purpose, including “education” and the “erection of structures.” The OCC also pointed to Conn. Gen. Stat. §7-187 *et seq.*, the Home Rule Act, and other statutes to support municipalities’ broad powers. According to the OCC, a municipality’s ability to contract and lease with third parties for the provision of broadband services is a straightforward use of these broad powers. The OCC further noted that in the Manchester Decision, the Authority required Manchester to use an outside contractor rather than a municipal employee to install and maintain the town’s fiber optic system, at least until the town affirmatively demonstrated that employees can manage the job. The OCC asserted that the Authority has thus long recognized and supported that municipalities have the right to enter into contracts to develop communications infrastructure in the municipal gain. Accordingly, the OCC recommended that the Authority honor the rights of municipalities to enter into contracts with third parties, including their efforts to realize their broadband goals in the municipal gain. *Id.*, pp. 8-10.

The OCC also disagreed with arguments that the “without payment therefor” language of the Municipal Gain Statute, permitting a municipality to use space on the pole for free, has the potential to create an anticompetitive “unlevel playing field” and would violate state and federal laws related to competition and discrimination. According to the OCC, this argument misses the point of what the municipal gain is and how it arose. The OCC asserted that the municipal gain is essentially one-half of a

⁶ The CWA disagreed with the OCC’s argument. According to the CWA, the OCC referenced two Superior Court decisions describing the DPUC’s ruling in the Manchester Decision. The CWA noted that neither of these decisions addressed the merits of the Manchester Decision regarding the scope of the term “signal.” Additionally, the CWA argued that while it is true that the legislature is presumed to be cognizant of the Superior Court decisions, it must also be presumed that it was cognizant that these two decisions did not confirm nor clarify the DPUC’s Decision. By repealing and replacing the term “signal” and thereby essentially confirming the Manchester Decision, CWA argued the 2013 amendment was not superfluous, but rather supplanted the absence of a definitive judicial determination of the issue. CWA Reply Comments, pp. 2 and 3.

historic *quid pro quo* bargain in which the utilities obtained the right to place poles on the town's public highways but, to achieve compensatory balance between public and private rights, the legislature expressly reserved the municipal gain on such poles for the use of the municipalities. The OCC stated that unlike other states, Connecticut municipalities do not charge the utilities for placement of poles and, likewise, the utilities cannot charge the municipalities for use of the municipal gain. The OCC also observed that Frontier and the municipalities seeking to use the municipal gain are similarly situated. In particular, just as Frontier provides broadband services using its space on the pole without charging itself a pole attachment fee, a municipality may provide broadband services using the municipal gain, without charging itself a pole attachment fee and without paying a pole attachment fee to a utility. According to the OCC, it is no more an example of unfair competition for a municipality to engage in providing broadband without paying pole attachment fees than it is for Frontier to do so.⁷ *Id.*, pp. 11 and 12.

Lastly, the OCC argued that the final sentence of Conn. Gen. Stat. §16-233 is unambiguous, and makes clear that the utility who controls the pole has the legal responsibility to make the gain available to the town, city, or DOT when they are ready.⁸

The OCC contended that the proposed final Decision in Docket No. 17-02-40 incorrectly took this sentence, which it says was intended to make sure that the municipal gain is not just a theoretical space on the pole, and turned it into a limitation on the use of the gain.⁹ *Id.*, pp. 13-15.

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

Frontier argued that no statutory authority exists under the Municipal Gain Statute for a municipality, municipal subdivision or the DOT to assign the municipal gain to or permit its use by a third party, and that this reading is supported by the plain text of Conn. Gen. Stat. §16-233. Frontier also argued that this reading comports with the general rule under Connecticut law that a statutory right is not assignable where the

⁷ Frontier contended that the OCC's argument is not logical and is without merit because it disregards the fact that the poles are owned by Frontier, which has expended the funds necessary to construct, operate and maintain the pole infrastructure. Additionally, Frontier argued that it has a property right in its plant assets on which the municipal gain is located as a point of access. In contrast, Frontier asserted, there would be no municipal gain absent the pole owners' investment. Frontier Reply Comments, p. 12.

⁸ The CWA stated that the OCC's last sentence argument seeks to ignore the obvious. According to the CWA, the wording of the last sentence confirmed and was consistent with what was intended by the entirety of the statute, that it was the municipality itself that would occupy the gain and the municipality itself would use the gain, and in doing so was using it for municipal purposes. CWA Reply Comments, p. 3.

⁹ Frontier claimed that the OCC attempts to interpret the Municipal Gain Statute based not the text, but on its own desired sentence construction. According to Frontier, such an interpretation is not tenable given the actual text of the statute. Frontier Reply Comments, p. 13. CTIA/NECTA stated that the change in language in the Municipal Gain Statute from "municipal signal wires" to "any purpose" was intended to expand municipal rights with respect to their use of the gain. CTIA/NECTA Reply Comments, pp. 10 and 11.

right is conferred on one who belongs to a particular class in the nature of a personal privilege, not intended to be enjoyed by any other.¹⁰ Frontier Comments, pp. 5-8.

Frontier noted that in Docket No. 17-02-40, the OCC attempted to bolster its claim that municipalities can use the municipal gain to provide broadband by pointing to a municipality's general right to "[c]ontract and be contracted with, sue and be sued, and institute, prosecute, maintain and defend any action or proceeding in any court of competent jurisdiction" pursuant to Conn. Gen. Stat. §7-148(c)(1). Frontier contended, however, that this reliance is insufficient and does not meet the legal requirement of "specific statutory authority" to assign a statutory right under the Municipal Gain Statute. Frontier argued that absent such specific statutory authority, the OCC's claim that municipalities can assign or authorize third-party use of the Municipal Gain Statute is incorrect and unsupported.¹¹ Id., pp. 6-8.

Frontier also noted that the Municipal Gain Statute allows a municipality, municipal subdivision or the DOT to use a gain on each pole at no cost and "for any purpose." According to Frontier, in order for the use of the municipal gain to be lawful the purpose must be authorized by and consistent with other statutes. Frontier asserted that the OCC's petition in Docket No. 17-02-40 failed to consider the relationship of the Municipal Gain Statute to other relevant provisions in Title 16 and Title 7 of the General Statutes of Connecticut that demonstrate that the OCC's proposed use of the municipal gain is unlawful. Frontier noted that a municipality cannot construct poles and wires in the public right of way to provide electric distribution service unless it forms a municipal electric utility for this purpose under Title 7 of the General Statutes. According to Frontier, the use of the municipal gain for telecommunications services would thus be allowed only if the municipality is authorized to provide such services.¹² Frontier contended that the OCC missed this point when it noted that the telecommunications companies and cable companies are already using their spaces on utility poles to provide broadband services to the mass market, thus allowing the municipalities to seek to use their own pole space for the exact same purpose. Frontier noted the OCC's argument presented in Docket No. 17-02-40 that municipalities should be allowed to provide broadband, just as other companies do in the communications space. However, Frontier also noted that the OCC failed to recognize that all of these companies have preexisting legal rights to provide such services by virtue of their franchise rights and/or PURA-issued certifications.

¹⁰ The OCC disagreed and commented that this position ignores the broad statutory powers of municipalities to enter into contracts and transactions and business arrangements to achieve their public policy goals. The OCC also stated that the PURA and the former DPUC have long recognized and supported that municipalities have the right to enter into contracts to develop communications infrastructure in the municipal gain. OCC Reply Comments, p. 3.

¹¹ The OCC contended that the last sentence by its plain meaning, and in the context of the rest of the statute, is intended to ensure that a space or gain on each utility pole or conduit is available and reserved for use by a municipality or other entity listed. The OCC also asserted that the focus is on the "reservation of a space," not somehow limiting the use, as Frontier is suggesting. According to the OCC, the use of the gain is dealt with in the first part of the statute, as revised in 2013: "for any purpose." OCC Reply Comments, pp. 2 and 3.

¹² Frontier argued that Connecticut law explicitly prescribes only two narrow circumstances where a municipal entity could provide telecommunications services to the public, which it contended were not applicable to the scenario described in the OCC's petition in Docket No. 17-02-40. Frontier Comments, pp. 11 and 12.

Municipalities do not have these rights. Accordingly, Frontier asserted that the PURA lacks the authority to expand municipal powers as the OCC requested. Id., pp. 8-12.

Frontier also challenged the OCC's arguments regarding the legislative intent behind the amendments to the Municipal Gain Statute in Public Act 13-247. Frontier first argued that the statutory language of the Municipal Gain Statute is plain and unambiguous and there is no need to resort to legislative intent. Frontier next argued that, even if there were a reason to consider legislative intent, there is no relevant legislative history that provides evidence of such intent. Frontier claimed that the OCC has asked the Authority to substitute presumption for evidence and to make an untenable and unsupported leap from the actual text of the statute to the intent it presumes exists. Also, in response to the OCC's argument that it should be presumed that the legislature was aware of the Manchester Decision when it amended the Municipal Gain Statute in Public Act 13-247, Frontier maintained that this argument is based on pure speculation and is invalid.¹³ Id., pp. 12-14.

Frontier further argued that the Home Rule Act does not apply to the OCC's proposal that municipalities may use the gain to provide their residents with broadband because state law occupies the field regarding telecommunications regulation and thus the Home Rule Act does not apply. Id., pp. 14 and 15.

Frontier argued that the OCC's interpretation of the Municipal Gain Statute as providing a municipality with free use of pole space to provide the municipality's residents with broadband would impose a substantial additional burden on pole owners resulting in a taking of property rights without just compensation. Frontier claimed that the OCC's proposal would allow an intensified use of utility poles by municipalities and third parties at no cost to them and with no compensation to pole owners. In effect, Frontier argued, it would be compelled to provide free pole space to competitors, an outcome that Frontier asserted is antithetical to the Connecticut regulatory framework to create a vibrant, competitive market for telecommunication services. Frontier thus argued that the OCC's proposed interpretation of the Municipal Gain Statute should be rejected as unconstitutional. Id., pp. 16 and 17.

Lastly, Frontier argued that the proposed final Decision in Docket No. 17-02-40 provided a sound basis for the declaratory ruling in this docket. Frontier urged the Authority to reach the same sound conclusion in a final declaratory ruling in this docket. Id., pp. 17 and 18.

I. NEW ENGLAND CABLE AND TELECOMMUNICATIONS ASSOCIATION

NECTA requested that the arguments it raised in Docket No. 17-02-40 be incorporated in this docket as its comments filed in response to the Notice. NECTA Comments, p. 2. In Docket No. 17-02-40, NECTA argued that the Municipal Gain Statute grants municipalities and the DOT special rights with respect to utility poles that

¹³ The OCC responded that this was a legal matter and it is a principle of statutory construction that the legislature is presumed to know the state of the law when it enacts a statute. The OCC stated that there is no speculation involved as it stems from a legal principle of statutory construction. OCC Reply Comments, pp. 4 and 5.

are not available to others; however, those rights are expressly limited. NECTA stated that the OCC's theory that these rights can be extended to private, commercial entities not specifically set forth in the Municipal Gain Statute was erroneous and should be rejected. NECTA Amended Comments in Docket No. 17-02-40, p. 3.

According to NECTA, the OCC reads the statute selectively, ignoring the last sentence that limits the rights granted to governmental entities and the DOT. NECTA stated that when read in its entirety, it is clear that the rights granted to municipalities and the DOT to use the municipal gain "for any purpose" are expressly reserved for use by the particular governmental unit and the DOT. *Id.*, pp. 3 and 4.

NECTA also argued that the OCC's proposal is inherently discriminatory and contrary to state and federal laws and policies related to telecommunications services which have long-required that all rights granted by government authorities to providers be conveyed in an equitable, non-discriminatory manner. According to NECTA, the OCC's scheme would assign these special statutory municipal gain access rights to certain favored third-party, non-municipal entities on terms and conditions not available to all non-municipal entities. *Id.*, p. 4.

NECTA noted that the OCC argued that the "plain meaning rule" supported the OCC's position, but NECTA asserted that the OCC misapplied that rule by failing to give meaning to the entire statute. NECTA asserted that when the entire statute is considered, it is clear that the last sentence of Conn. Gen. Stat. §16-233 limits use of the municipal gain to the very same entities for which the space is reserved in the first sentence. NECTA claimed that when the plain meaning rule is applied correctly, the municipal gain is "reserved for use by the town, city, borough, fire district or the Department of Transportation." NECTA further argued that entities granted the right to access the municipal gain may not convey or otherwise extend that 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. *Id.*, pp. 4 and 5.

NECTA contended that even if the OCC's interpretation of the Municipal Gain Statute was sustainable, the Authority must reject it because it would allow discriminatory access to pole space in contravention of state and federal law. According to NECTA, the essence of state and federal laws and 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. Although 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 already limited space on utility poles, NECTA asserts that the OCC would exempt third-party non-municipal partners from some or all of these costs. *Id.*, pp. 5-7.

NECTA also argued that Section 253 of the Federal Telcom Act provides that state and local governments are authorized to manage use of the public rights-of-way on a nondiscriminatory basis. NECTA opined that the state's policy of equitable, non-discriminatory treatment of telecommunications service providers aligns with this long-standing federal requirement. According to NECTA however, 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." NECTA asserted that doing so would instead stifle competition by inappropriately affording an unfair advantage to certain market participants and would unjustly and unlawfully shift the third party's costs to other attachers, pole owners and their respective customers. *Id.*, pp. 6 and 7.

NECTA noted that Connecticut has certified to the FCC that it: (1) regulates pole attachment rates, terms and conditions; and (2) when regulating such rates, terms and conditions, the state considers the interests of the subscribers of services offered via such attachments, as well as the interests of the consumers of the utility service. NECTA argued that any consideration of the OCC's proposal must include its impact on other attachers' subscribers as well as on utility consumers, including the quantification of the subsidies arising from the OCC proposal whereby existing attachers (such as NECTA members) and their communications subscribers would shoulder costs directly attributable to the activities of the user of the municipal gain. Moreover, NECTA asserted that the OCC's proposal would inject a lack of uniformity in the cost for pole attachments among competitors (i.e., the cost of annual rent for NECTA members and other attachers versus no cost). Thus, according to NECTA, reexamination of the state's existing pole certification to the FCC in the context of the OCC proposal would not support continued Connecticut jurisdiction over pole attachments. *Id.*, pp. 7-9.

Additionally, NECTA argued that Municipal Gain Statute compels pole owners to provide physical pole space to municipalities and, under the OCC's proposal, to unrelated third party communications service providers, without any compensation, which NECTA claims is a per se violation of the Fifth and Fourteenth Amendments. NECTA also claimed that acceptance of the OCC Docket No. 17-02-40 petition would infringe upon the free speech rights of NECTA's members as guaranteed by the federal and Connecticut Constitutions to the extent that the third party providers using the municipal gain are themselves cable operators or provide the functional equivalent of cable service, NECTA maintained that the OCC proposal would plainly constitute unlawful municipal discrimination favoring one speaker over another. *Id.*, pp. 10-12.

NECTA accordingly requested that the 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. *Id.*, p. 2.

J. TOWNS AND MUNICIPALITIES

A number of Connecticut towns and municipalities requested and were granted intervenor status to this proceeding. (See Attachment 1). A number of these towns and municipalities also offered written comments opposing the Joint Petition and supporting the positions raised by the CCM.¹⁴ A majority of those towns, like the CCM, argued that

¹⁴ Manchester also raised in its comments specific activities that it seeks to undertake, including activities implicating the municipal gain. The Authority finds that the specific question of whether the activities raised by the Manchester are permitted under Conn. Gen. Stat. §16-233 or other relevant law is not before the PURA in this docket. Thus, the PURA has not undertaken a review to determine the applicability of this Decision to each of those activities.

the Authority lacks statutory authority over the issues raised by the Joint Petitioners because Conn. Gen. Stat. §16-233 merely authorizes the Authority to prescribe the location or relocation of the physical gain. See, for example, comments submitted by the Town of Marlborough, the Town of Montville, the Town of Plainville, the City of New Britain and the Naugatuck Valley Council of Governments, the Town of Bethany, the Town of Bloomfield and the City of Danbury. Manchester argued that the PURA lacks jurisdiction over the Joint Petition in light of the FCC's recent Restoring Internet Freedom Order. Manchester Comments, pp. 6-11. The towns and municipalities thus requested that the Authority decline to issue the declaratory ruling sought by the Joint Petitioners. See, for example, comments submitted by the Town of Wolcott, the City of Derby and the City of New Haven.

K. THE UNITED ILLUMINATING COMPANY

The United Illuminating Company (UI) argued that the municipal gain should not be used by for-profit companies to provide competitive services to residents. UI asserted that the Authority should be mindful that allowing the municipal gain to be used by for-profit companies would create a situation where UI ratepayers would be forced to subsidize one competitive company's use of poles while other competitive companies would have to pay a fee to provide the same service. UI Comments, pp. 1 and 2.

UI noted that while Conn. Gen. Stat. §16-233 allows a municipality to use the municipal gain "for any purpose," broadband service is not a traditional municipal function, and that municipalities may likely require the expertise of third-parties to provide such service. UI also noted that municipalities are generally not precluded from retaining the services of third-parties to provide services to their constituents. To the extent that they are allowed to enter into commercial arrangements with competitive providers for purposes of providing broadband by way of the municipal gain, however, UI suggested that the Authority treat that use of the municipal gain as a competitive service. UI thus argued that in such a situation, all of the existing non-discriminatory rules related to competitive third-party wire attachments, including attachment fees and the apportionment of costs associated with any required make-ready work should apply. UI opined that allowing competitive broadband providers "free" access to the pole through the municipal gain would create a situation where UI ratepayers would be forced to subsidize one competitive company's use of poles. Id., pp. 3-5.

UI also incorporated into this proceeding the comments it submitted in Docket No. 17-02-40 pertaining to municipalities providing its citizens and businesses broadband service either directly or through contracts with third party providers. Id., p. 7. In addition to many of the same points noted above, UI also noted in those comments that the municipal pole attachment agreements used by the electric distribution companies prohibit a municipality from assigning or granting a license to use the municipal gain to third parties. UI Letter in Lieu of Reply Comments in Docket No. 17-02-40, p. 1. UI also noted that if the PURA were to allow the municipal gain to be accessed by competitive providers to offer broadband services on behalf of municipalities, the Authority should also require such service providers to execute the electric distribution companies' standard competitive attachment agreements. UI Docket No. 17-02-40 Reply Comments, pp. 1 and 2.

IV. AUTHORITY ANALYSIS

In this proceeding, the Authority is asked to determine whether 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 authorize a municipality to use the gain to provide broadband services to its residents and businesses, including through commercial arrangements with third parties.

As an initial matter, the Authority must first resolve the jurisdictional challenge raised by the CCM and several municipalities. Specifically, the CCM, supported by various municipalities, asserted that the Authority lacks jurisdiction over the interpretation of the issue under dispute concerning Conn. Gen. Stat. §16-233, and instead possesses jurisdiction only over the location or relocation of the municipal gain on the utility pole. CCM Comments, pp. 2 and 3. For the reasons outlined below, the Authority finds the CCM and the municipalities' jurisdictional arguments are without merit.

The CCM and the municipalities' argument is incorrectly premised on reading Conn. Gen. Stat. §16-233 in isolation. In *Town of Manchester v. State*, No. CV000501043S, 2001 WL 590033, at *3 (Conn. Super. Ct. May 10, 2001), the Superior Court held that the Authority's jurisdiction pursuant to Conn. Gen. Stat. §16-233 must be read in context with Conn. Gen. Stat. §16-243, which vests the Authority with broad discretion to regulate, *inter alia*, the construction of electric distribution poles, wires and fixtures. Additionally, Conn. Gen. Stat. §16-11 vests the Authority with broad authority over, *inter alia*, public service company plant and equipment. Moreover, as the Connecticut Supreme Court has previously held, the Authority is charged with regulating all activities related to public utilities to the fullest extent in the public interest. *Office of Consumer Counsel v. Dep't of Pub. Util. Control*, No. CV990497238S, 2001 WL 1231684, at *8 (Conn. Super. Ct. Sept. 21, 2001) (citing Conn. Gen. Stat. §16-11; *Greenwich v. Department of Public Utility Control*, 219 Conn. 121, 126 (1991)). The CCM's reading of Conn. Gen. Stat. §16-233 is therefore overly restrictive, and fails to account for the Authority's broad jurisdiction over utility poles and wires.

The CCM also asserted that the Connecticut General Assembly's failure to expressly provide that the Authority has broad jurisdiction to interpret Conn. Gen. Stat. §16-233 at the time the Connecticut General Assembly revised the statute in Public Act 13-247 makes clear that the Authority is limited to addressing the physical location or relocation of the gain that would be available to the governmental entities. The Authority finds that the opposite is true, however. At the time that the legislature amended Conn. Gen. Stat. §16-233, it is presumed to have been aware of the DPUC's Manchester Decision opining on the permissible use of the municipal gain pursuant to that statute, as well as the Superior Court's decision upholding the DPUC's jurisdiction. *State v. Dabkowski*, 199 Conn. 193, 201 (1986) (legislature is presumed to know the state of the law when it enacts a statute). If the legislature disagreed with the Manchester Decision, it could have expressly restricted the jurisdiction of the Authority or its predecessor the DPUC to interpret Conn. Gen. Stat. §16-233 when it amended Conn. Gen. Stat. §16-233 in Public Act 13-247, or at another time in the eighteen years since the Manchester Decision was issued.

Accordingly, the Authority concludes it has jurisdiction pursuant to Conn. Gen. Stat. §§4-176, 16-243 and 16-11 to examine and determine whether a municipality is permitted to offer services to the public by way of the municipal gain established in Conn. Gen. Stat. §16-233.¹⁵

Turning to the substantive issues presented in the Petition, as evidenced by the participation in this docket, including numerous legislators, municipalities, state agencies, utility companies, consumer advocates, and communications companies, the prospect of municipal entities providing broadband services for their residents and businesses through the use of the municipal gain, without payment therefor, affects the interests of many diverse entities across the state. The statutory language the Authority is asked to interpret, Conn. Gen. Stat. §16-233, did not receive a public hearing before the legislature, but was enacted as part of a budget implementer bill. Parties, intervenors, and commenters in this proceeding have advanced various arguments with respect to whether it is necessary or appropriate to allow municipalities to provide competitive services to residents and businesses through the free use of the municipal gain. The Authority's task in this Decision, however, is not to substitute its own judgment for the legislature's on this question of policy, but rather to determine the meaning of the statute enacted, and to consider whether that meaning is compatible with other federal and state laws governing the use of utility poles.

Specifically, the Authority is asked to determine whether the one gain municipal entities are permitted to use for free pursuant to Conn. Gen. Stat. §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. Petition, p. 1. Conn. Gen. Stat. §16-233 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.

¹⁵ The CCM also contended that the recent reclassification of broadband service from a Title II service to an information service places the municipalities' broadband plans outside of its regulatory concerns. CCM Comments, pp. 3-5. The Authority disagrees. The Authority's interpretation of Conn. Gen. Stat. §16-233 does not turn on the type of service being offered, but rather whether a municipality is using the gain for municipal purposes or offering a service to the public. Thus, even if the municipalities sought to install copper wire and offer traditional telephone service to the public through the free municipal gain, the Authority's conclusion would be precisely the same. Consequently, the Authority finds the recent reclassification of broadband to be irrelevant. To the extent that the CCM relies on the DPUC's Decision in Manchester II, that determination is inapposite here. Manchester II involved whether or not Manchester was required to obtain from the Authority a Certificate of Public Convenience and Necessity, and did not address whether the proposed use of the municipal gain to offer Internet service to its business district was permissible under Conn. Gen. Stat. §16-233.

The PURA is presented with two possible and divergent constructions of Conn. Gen. Stat. §16-233. Joint Petitioners and parties supporting the Petition argue that the statute gives a municipality the right to use, free of charge, one gain on a utility pole solely for its internal telecommunications and broadband needs, and does not authorize the municipality to use that gain to offer competitive services to the public or to otherwise assign the gain to a third party. Several parties supporting the Petition, including CTIA, Frontier and NECTA, also argue that interpreting Conn. Gen. Stat. §16-233 as proposed by the CCM, the OCC and various commenters¹⁶ would implicate constitutional concerns, and would be contrary to both federal and state laws. The OCC, the CCM, intervenors, and commenters opposing the Petition argue that the statute authorizes a municipality to use the municipal gain on a utility pole for any purpose, including to provide broadband service to the public, whether directly or through commercial arrangements with third parties.

The Authority is persuaded that both interpretations of Conn. Gen. Stat. §16-233 are plausible. In the absence of a plain and unambiguous meaning apparent on the face of the statute, the Authority must look beyond the text of Conn. Gen. Stat. §16-233 to interpret the meaning of the statute. *Webster Bank v. Oakley* (2003) 830 A.2d 139, 265 Conn. 539, certiorari denied 124 S.Ct. 1603 (legislative history and other tools of interpretation may be relied upon if terms of statute are ambiguous). In doing so, the Authority is guided by the "bedrock principle of statutory construction ... that courts indulge in every presumption in favor of a statute's constitutionality. Thus, in choosing between two constructions of a statute, one valid and one constitutionally precarious, we will search for an effective and constitutional construction that reasonably accords with the legislature's underlying intent." *State v. Lutters*, 270 Conn. 198, 217 (2004) (internal citations and quotations omitted.)

At the federal level, §224(f)(1) of the Communications Act of 1934, as amended (Communications Act), requires that cable television systems and telecommunications carriers be provided with nondiscriminatory access to utility poles. 47 U.S.C. §224(f)(1). Section 224(f)(2) further provides that a pole owner may deny such cable television systems and telecommunications carriers access only where there is insufficient capacity or countervailing safety, reliability, and engineering reasons for doing so. Additionally, §224(e)(1) requires utilities to charge just, reasonable, and nondiscriminatory rates for such pole attachments. 47 USC §224(e)(1). Section 224(g) requires a utility that provides telecommunications services or cable services to impute to its costs of providing such services, and charge any affiliate, subsidiary, or associate company engaged in the provision of such services, an amount equal to the pole attachment rate. 47 U.S.C. §224(g). In setting forth these requirements, it is apparent that Congress intended to foster competition among telecommunications providers and prevent disparate treatment of one provider over another. In its Report 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, the FCC affirmed its commitment to ensuring that access to poles be provided on a nondiscriminatory basis, and acknowledged "the important role of states in ensuring that utilities provide access to poles, ducts, conduits and rights-of-way in a manner consistent with the statute."

¹⁶ Commenters include: State Representative Tim Ackert; State Representative Josh Elliott; Senator Beth Bye and Mark Seifert.

Additionally, pursuant to §253(a) of the Communications Act, state and local authorities are prohibited from instituting legal requirements that would inhibit any entity from providing any interstate or intrastate telecommunications service. 47 U.S.C. §253(a). Similarly, §253(b) provides that a state may impose requirements to preserve and advance universal service, but only on a non-discriminatory basis. Additionally, §253(d) requires the FCC to preempt any state- or local government-imposed statute, regulation, or other legal requirement that violates these provisions.

Providing municipal entities free access to the communications gain for the purpose of offering competitive telecommunications services as the CCM and others suggest appears to be inconsistent with these principles and other aspects of federal law. The Authority is concerned that permitting the use of the free Municipal Gain for the provisions of competitive broadband services would create a discriminatory scheme under which a municipality or its assignee is entitled to free, preferential access to the gain, to the detriment of other carriers. This scenario also appears to create an uneven playing field and dampens competition in violation of the non-discriminatory provisions of the Communications Act cited herein.¹⁷

The interpretation advocated by the CCM, the OCC and commenters opposing the Petition would also conflict with state law requiring the promotion of robust competition among telecommunications carriers. The Authority is required, pursuant to Conn. Gen. Stat. §16-247a(a)(2), to promote the development of effective competition as the means to provide customers with the widest possible choices of services. As with the Communications Act, adoption of the CCM, the OCC, and commenters' interpretation would provide municipalities or their assignees with preferential access to utility poles for the provision of competitive broadband services to their residents and businesses, and would therefore contradict the requirements of Conn. Gen. Stat. §16-247a(a)(2).

In light of the apparent conflict between federal and state laws intended to foster non-discrimination and robust competition and the interpretation advanced by the CCM, the OCC and commenters opposing the Petition, the Authority finds that Conn. Gen. Stat. §16-233 must be read as providing a town, city, borough, fire district or the Department of Transportation with the right to occupy and use the Municipal Gain for any purpose of its own, and does not allow for the public or other third-parties to physically connect to a municipal broadband network erected in the municipal gain, nor does it permit the assignment of the right to locate facilities in the municipal gain.¹⁸ Accordingly, a municipality is not permitted to use its free gain to provide broadband services to its residents and businesses, whether for public hire or for free, and

¹⁷ Having determined that Conn. Gen. Stat. §16-233 must be interpreted in a manner consistent with the Communications Act and state law, the Authority finds that it need not address the takings arguments raised by several parties, and therefore declines to address the merits of those arguments.

¹⁸ This determination is consistent with the DPUC's determination in the Manchester Decision. In that case, the DPUC was asked to determine whether the term "signal wires" in the then-effective version of Conn. Gen. Stat. §16-233 was limited to traffic and fire signaling. The DPUC determined that it was not and that "signal wires" could be interpreted to reasonably encompass provision of private telecommunications services for the town's own use based on its understanding that the town would not use the gain to provide services for public hire. Manchester Decision, p. 6.

regardless of whether such service is being provided directly by the municipality or through commercial arrangements with third parties. The Authority does not in this Decision address the ability of a municipality to offer telecommunications or broadband services under circumstances not involving the municipal gain.

V. CONCLUSION

Conn. Gen. Stat. §16-233 authorizes certain municipal entities or the DOT to use for free one communications gain on utility poles or in each underground communications duct system installed by a public service company. However, providing municipal entities free access to the communications gain for the purpose of offering competitive telecommunications services appears inconsistent with federal and state laws intended to foster non-discrimination and robust competition in the telecommunications industry. The Authority therefore determines that Conn. Gen. Stat. §16-233 must be interpreted to provide the right to occupy and use the gain only to the town, city, borough, fire district or the Department of Transportation for which the gain is reserved, for any purpose of its own, and does not allow for the public or other third-parties to physically connect to a municipal broadband network erected in the municipal gain, nor does it permit the assignment to a third party of the right to locate facilities in the municipal gain. Accordingly, the Authority holds that a municipality is not permitted to use its free gain to provide broadband services to its residents and businesses, regardless of whether such service is being provided directly by the municipality or through commercial arrangements with third parties.

Attach 1

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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

This Decision is adopted by the following Commissioners:

Michael A. Caron

Katherine S. Dykes

John W. Betkoski, III

CERTIFICATE OF SERVICE

The foregoing is a true and correct copy of the Decision issued by the Public Utilities Regulatory Authority, State of Connecticut, and was forwarded by Certified Mail to all parties of record in this proceeding on the date indicated.



Jeffrey R. Gaudiosi, Esq.
Executive Secretary
Public Utilities Regulatory Authority

May 9, 2018

Date