



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

Confirmation Receipt

Docket Number:	17-09-37
On Behalf Of What Entity:	Communications Workers of America, CTIA, Frontier Communications of Connecticut and the New England Cable and Telecommunications Association
Contact Name:	Dianna Weeks
Telephone No.:	(860) 541-7737
E-mail Address:	dianna.weeks@lockelord.com
Submitter of Filing:	Locke Lord Llp
Pertains To What Entity:	Communications Workers of America, CTIA, Frontier Communications of Connecticut and the New England Cable and Telecommunications Association
Form Submitted:	MotionObjection
Date / Time:	10/24/2017 03:51:44 PM
# of Attachments:	2
Attachment Names:	Ltr. J. Gaudiosi re_ Joint Petitioners_ Reponse to CCM Motion (Docket No_ 17-09-37).DOCX, Response to CCM Motion (Docket No_ 17-09-37).DOCX

Do another "Add to a Current Docket Filing"

Goto PURA Web Filing - Start Page

PURA's Home Page

BETP's Home Page

October 24, 2017

VIA ELECTRONIC MAIL AND FIRST CLASS MAIL

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

**Re: Docket No: 17-09-37
Petition of the Communications Workers Of America, CTIA, Frontier
Communications Of Connecticut, and The New England Cable and
Telecommunications Association for a Declaratory Ruling Regarding Permissible
Use of the Municipal Gain by Connecticut Municipalities**

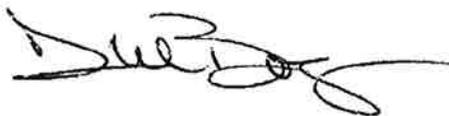
Dear Mr. Gaudiosi:

Enclosed please find the response of the Communications Workers Of America, CTIA, Frontier Communications Of Connecticut, and The New England Cable and Telecommunications Association (the "Joint Petitioners") to the Connecticut Conference of Municipalities' October 5, 2017 petition for party status and request that the Public Utilities Regulatory Authority deny the relief requested by the Joint Petitioners in the above-referenced proceeding (the "CCM Motion"). The Joint Petitioners also respond to the Office of Consumer Counsel's October 17, 2017 response to the CCM Motion.

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

I certify that a copy of this submission has been sent to all participants of record via First Class Mail, postage prepaid or via electronic mail, and has also been filed with the Authority as an electronic web filing and is complete.

Very truly yours,



David W. Bogan

Enclosure

cc: Service List, Docket No: 17-02-40
Burton B. Cohen, Esq. (counsel for CCM)

AM 67361344.1

STATE OF CONNECTICUT

PUBLIC UTILITIES REGULATORY AUTHORITY

PETITION OF THE COMMUNICATIONS	:	Docket No. 17-09-37
WORKERS OF AMERICA, CTIA, FRONTIER	:	
COMMUNICATIONS OF CONNECTICUT,	:	
AND THE NEW ENGLAND CABLE AND	:	
TELECOMMUNICATIONS ASSOCIATION	:	October 24, 2017
FOR A DECLARATORY RULING	:	
REGARDING PERMISSIBLE USE OF THE	:	
MUNICIPAL GAIN BY CONNECTICUT	:	
MUNICIPALITIES	:	

RESPONSE OF THE JOINT PETITIONERS TO CCM MOTION

On October 5, 2017, the Connecticut Conference of Municipalities (“CCM”) filed a motion (the “CCM Motion”) requesting to be designated a party in the above-referenced docket, and also requesting the Public Utilities Regulatory Authority (“PURA” or the “Authority”) “deny the Petition and close this Docket without further proceedings.” CCM Motion at 1. In this filing, the Communications Workers of America (“CWA”), 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 “Petitioners”) provide their response to CCM’s requests.¹ The Petitioners also respond herein to the Office of Consumer Counsel’s (“OCC”) October 17, 2017 response to the CCM Motion.

CCM requests that the Authority “deny the Petition and close this Docket without further proceedings.” The Authority should deny the CCM Motion for several reasons. First, CCM’s request is inconsistent with both the Uniform Administrative Procedure Act (“UAPA”), specifically Conn. Gen. Stat. §4-176, as well as the Authority’s regulations for adjudication of

¹ The Petitioners do not believe that CCM satisfies the requirements for “party” status, as it has not alleged any right, duty or privilege at issue in this proceeding. To the extent PURA allows CCM to join this proceeding, the Petitioners would not object to CCM participating in this docket as an intervenor. This would allow CCM to participate as appropriate within the procedural schedule.

declaratory ruling petitions. The request is also counter-productive to the efficient administration of this docket and proper adjudication of the Petitioners' September 28, 2017 initial filing ("Petition").

I. The Authority Should Reject CCM's Request to Deny Petition and Close Docket

In asking the Authority to preemptively deny the Petition, CCM makes three claims, which are: (1) that the Petitioners lack standing to file the Petition (CCM Motion at 2-3); (2) that the Authority should not incorporate the record from Docket No. 17-02-40 because "there is no record upon which administrative notice may be taken" (CCM Motion at 4); and (3) that the Petition is not "ripe for adjudication" by the Authority (CCM Motion at 4). None of these claims are valid, and none provide a legal basis to immediately "deny" the Petition and close the docket without further proceedings.

First, in regard to the Petitioners' standing, in its Notice of Proceeding issued October 6, 2017 ("Notice") the Authority properly has designated each of the Petitioners as a party and stated it will issue a decision no later than March 27, 2018. The Notice effectively renders CCM's argument moot. The Notice indicates that 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 in which the Petitioners also were parties.² The Authority determined the Petitioners had standing in Docket 17-02-40, and the same result must apply here.³

² See Notice of Proceeding and Request for Written Comments, issued March 20, 2017 designating Frontier, NECTA and CWA as parties. Also see the Authority's letter of April 6, 2017 (Jeffrey R. Gaudiosi to David W. Bogan) designating CTIA as a Party (Docket No. 17-02-40 Motion No. 1). The Proposed Final Decision in Docket 17-02-40 dated June 1, 2017 discusses the positions of Frontier, NECTA, CTIA and CWA.

³ The Petitioners disagree with CCM's assertion that the Authority's grant of party status in Docket 17-02-40 was "imprudent" and "erroneous." CCM Motion to Dismiss at 2, n. 2, and 4.

CCM's claim ignores and is wholly inconsistent with Conn. Gen. Stat. §4-176, which states that “[a]ny person may petition an agency, or an agency may on its own motion initiate a proceeding, for a declaratory ruling as to the validity of any regulation, or the applicability to specified circumstances of a provision of the general statutes, a regulation, or a final decision on a matter within the jurisdiction of the agency.” Conn. Gen. Stat. §4-176(a) (emphasis added). Similarly, the Authority’s regulations state that “[a]ny interested person may at any time request an advisory ruling of the commissioners with respect to the applicability to such person of any statute, regulation or order enforced, administered, or promulgated by the commissioners.” R.C.S.A. §16-1-114 (emphasis added). In addition, the Petitioners’ filing stated the specified circumstances for the declaratory ruling (Petition at 2-5). The Authority is being asked to determine the applicability of Conn. Gen. Stat §16-233 as to (1) municipalities interested in using the gain space allowed pursuant to the statute (the “Municipal Gain” or the “Conn. Gen. Stat. §16-233 gain”) “for purposes of facilitating the provision of broadband services to residents and businesses therein, including through commercial arrangements with third parties,”⁴ and (2) the governmental usage of utility owned poles or utility owned underground duct systems for public usages “...without payment therefor,…” (Conn. Gen. Stat §16-233).⁵ The Petition fully conforms to the requirements of Conn. Gen. Stat. § 4-176(a).

Second, CCM’s assertion that the Petitioners lack standing because they allegedly do not “fall within the scope of the rights set forth in Section 16-233” (CCM Motion at 2) also is puzzling and patently incorrect. Conn. Gen. Stat. §4-176(a) clearly states that “any person may petition an agency, or an agency may on its own motion initiate a proceeding, for a declaratory ruling as to the validity of any regulation, or the applicability to specified circumstances of a

⁴ Petition at 1-2.

⁵ Petition at 2, 5; *See also*, Notice of Proceeding and Request for Written Comments, April 13, 2017, Docket 17-02-40.

provision of the general statutes, a regulation, or a final decision on a matter within the jurisdiction of the agency.” CCM’s response completely ignores this statutory right, and CCM’s claim regarding standing is therefore baseless.

Third, CCM mischaracterizes the Petition as seeking a ruling based solely on the record in Docket 17-02-40.⁶ The Petition reasonably noted that all potentially interested parties had a full opportunity to participate in that very recent docket, including the filing of comments and reply comments, and that there are no changed factual circumstances necessitating a hearing or other substantial process. The Petitioners’ request was merely designed to allow for an efficient review of the Petition, recognizing the substantial record that was developed in the prior docket. The Petitioners’ request is therefore totally appropriate because it will facilitate an efficient process for review of the Petition. Despite the opportunity to do so, CCM chose not to participate in either of the prior dockets⁷ related to the issue of municipal use of the Conn. Gen. Stat. § 16-233 gain in the manner described in the prior OCC petition. Accordingly, CCM may not be aware of the substantial time and effort invested by the Authority and the parties to those dockets that resulted in a fully developed record on this precise legal issue. However, the instant Petition also pointed out that if the Authority finds it prudent or necessary to receive further briefing on this Petition, such briefing could be allowed, but should be narrow in light of the fully developed arguments in the two prior dockets.

CCM’s argument that there is no record from Docket 17-02-40 also makes no sense.⁸ The record in Docket 17-02-40 was not erased or expunged simply because the Authority did not

⁶ CCM Motion to Dismiss at par. 6, p. 2.

⁷ As referenced in the Petition, Docket No: 17-02-40 was preceded by Docket No: 16-06-35, filed in June of 2016, and in which the OCC made its initial request for declaratory ruling regarding permissible use of the municipal gain. Despite the fact that 16-06-35 was pending for eight months before the filing in 17-02-40, CCM never sought to intervene. See, Petition of the Office of Consumer Counsel for Investigation into Facilitating the Use of the Municipal Gain for Broadband Internet Services, June 21, 2016.

⁸ CCM Motion to Dismiss at 4.

issue a decision within 180 days. In fact, the Authority has taken administrative notice of previous records in similar circumstances; for example, see Docket No. 14-12-19 – *Petition of Maplewood at Strawberry Hill, LLC for A Declaratory Ruling* and Docket No. 15-07-01 – *Declaratory Ruling to Determine if The Connecticut Light and Power Company d/b/a Eversource Energy Must Serve Maplewood At Strawberry Hill, LLC*. In the latter docket, PURA took administrative notice of items in the record of the former proceeding, in which it expressly declined to exercise its jurisdiction under statutes including Conn. Gen. Stat. §4-176. The Petitioners and other parties are on record in the prior docket considering the precise legal question that is presented in the Petition, and it is simply administratively inefficient to act as though the prior docket did not occur.

Lastly, CCM’s argument that the Authority should deny the Petition and close the docket because the Petition does not cite a specific project proposed by a municipality is equally flawed. As noted above, the Petition seeks a declaratory ruling addressing whether Conn. Gen. Stat §16-233 permits “to use the Municipal Gain for purposes of facilitating the provision of broadband services to residents and businesses therein, including through commercial arrangements with third parties.” The OCC’s Petition in Docket 17-02-40 sought resolution of this threshold question, and was filed without mention of a “specific project” proposing to use the Municipal Gain as proposed by the OCC. Yet, the Authority proceeded to consider that Petition. That is the very purpose of the declaratory ruling statute – to obtain a prior understanding of how a statute will apply to particular circumstances. The prospect of specific projects using the Municipal Gain will depend on the guidance provided by Authority as to the scope of a municipality’s rights under the statute. That is why the OCC filed its Petition in Docket 17-02-

40, and it is why the Authority has opened a proceeding to consider the issue. Entities should not have to wait until a specific project is proposed to know whether it is legally allowed.⁹

For well over two years and in two prior dockets, the Authority and the parties have engaged in a legal review of the OCC's broadband deployment model, which turns on the scope of a municipality's rights to use the Municipal Gain. The "specified circumstances" are stated in the Petition, and are not dependent upon a "specific project proposed by a municipality." In fact, the Petition explains that there is disagreement as to the correct interpretation of the statute, and that it is important that the Authority grant the Petition as soon as possible to erase any lingering misunderstanding due to the OCC's position in the recent past docket, and to avoid a similar future petition or actual action taken by a municipality based on an interpretation of the statute that the Authority clearly intended to reject.

II. The OCC's Assertions Are Not Supported By Either Fact Or Law

On October 17, 2017, the OCC filed a response expressing its support for the CCM Motion. OCC alleges, inter alia, because Docket No. 17-02-40 was closed pursuant to the provisions of Conn. Gen. Stat. §4-176 due to the passage of time, the better course for the Petitioners is to seek recourse in the Superior Court pursuant to Conn. Gen. Stat. §4-175(a). The OCC's suggestion misstates the relevant law and ignores the facts that led to the OCC's filing alleging the effect of Conn. Gen. Stat. §4-176 on the prior proceeding.

First, Conn. Gen. Stat. §4-175(a) does not provide a right to anyone to seek redress in Superior Court upon an agency's failure to issue a decision within 180 days. Instead, the statute provides that "the *petitioner* may seek in the Superior Court a declaratory judgment..."¹⁰ None

⁹ The Petitioners note that the Town of East Hartford has entered into a Broadband Development Agreement with SiFi Networks. See <https://www.easthartfordct.gov/home/news/east-hartford-enters-into-broadband-development-agreement-with-sifi-networks>.

¹⁰ Conn. Gen. Stat. §4-175(a).

of the instant Petitioners were a petitioner in Docket No. 17-02-40, unlike the OCC. Accordingly, the right to seek relief in Superior Court is not one yet available to the Petitioners.

Furthermore, while it may be true that the Authority did not issue a decision in Docket No. 17-02-40 within the 180 day period, that outcome was at least in part due to the actions of the OCC. 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 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.”¹¹ 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 that 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. The Authority issued a Notice on June 8, 2017 granting that extension. 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 Cellco 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.¹² On June 30, 2017, the Authority issued a Notice of Suspension of Procedural Schedule, which suspended the schedule in order for the Authority to fully consider the OCC’s Motion to Withdraw. The Notice further

¹¹ Docket No. 17-02-40, Proposed Final Decision at 1.

¹² OCC Motion, June 21, 2017, at 1.

stated that the Authority would notify the Parties when the procedural schedule was to resume. On July 25, 2017, the Authority issued a Notice of Rescheduled Oral Argument, which scheduled oral argument on the OCC's Motion to Withdraw on August 3, 2017. The Notice did not state that the remainder of the schedule had resumed. Other docket participants filed written objections to the motion and participated in oral arguments on August 3, 2017, asserting that the factual circumstances involved in the Verizon Wireless case render the proceeding distinguishable and the disposition one that should not serve as precedent.¹³

However, on August 23, 2017, while the Authority was still considering the OCC's Motion to Withdraw and the various docket participants¹⁴ 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, and noted that 182 days had passed since the filing of the petition. The OCC had stated that because it "never agreed to an extension of nor waived the 180-day deadline ... PURA is deemed to have decided not to issue a declaratory ruling...."¹⁵

As such, but for the very actions of the OCC, the Authority would have rendered a final decision on July 5, 2017, based on the fully developed record in the proceeding. It is that fully-

¹³ See NECTA Objection to OCC Motion to Withdraw Petition for Declaratory Ruling, July 21, 2017, at 1.

¹⁴ 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.

¹⁵ *Id.* at 2. As of this date, the Authority has not closed the docket in 17-02-40 nor has it addressed the legal status of that proceeding in light of the passage of time. In fact, the Authority could very well find that the schedule in Docket No. 17-02-40 remains suspended because the OCC's Motion to Withdraw has not yet been fully considered, and, therefore, the 180 day clock has not run. The Authority also might determine that OCC's filing of the Motion to Withdraw and its silence regarding the suspension of the schedule, constitute an agreement to extend is a waiver of the 180 day period. Therefore, the Authority would be in a position to expedite this matter if it were to issue the final decision in Docket No. 17-02-40. Moreover, even if the Authority were deemed to have declined to issue a declaratory ruling, the statutory scheme suggests that it only serves to provide OCC with a right to submit the issue to Superior Court, and does not remove the PURA's Authority to issue a ruling if it so chooses.

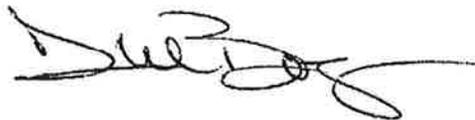
developed record that the Petitioners seek to be incorporated or administratively noticed in this proceeding. The Petitioners do not seek to have the Authority “rush to judgment,” as alleged by the OCC.¹⁶ Rather, the Petitioners merely seek to avoid the need to create a record anew when a sufficient record already exists, and it is one upon which the Authority was poised to render a decision. The Petitioners respectfully defer to the Authority as to any further process that it believes may be appropriate under the circumstances.

III. Conclusion

For all of the foregoing reasons, the Petitioners respectfully request the Authority deny the CCM Motion.

COMMUNICATIONS WORKERS OF
AMERICA

CTIA-THE WIRELESS ASSOCIATION®



By _____
Joseph Donahue, Esq.
Preti Flaherty Beliveau & Pachios, LLP
P.O. Box 1058
Augusta, ME 04332-1058
Phone: (207) 623-5300
Fax: (207) 623-2914

By _____
David W. Bogan, Esq.
Locke Lord LLP
20 Church Street
Hartford, CT 06103
Main: (860) 525-5065
Direct: (860) 541-7711
Fax: (86) 527-4198

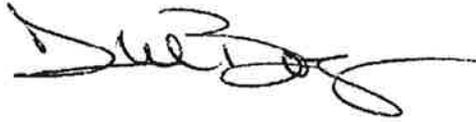
Its Attorneys

Its Attorneys

¹⁶ See OCC October 17, 2017 Response at 3.

NEW ENGLAND CABLE AND
TELECOMMUNICATIONS ASSOCIATION

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



By _____

David W. Bogan, Esq.
Locke Lord LLP
20 Church Street
Hartford, CT 06103
Main: (860) 525-5065
Direct: (860) 541-7711
Fax: (86) 527-4198

Its Attorneys

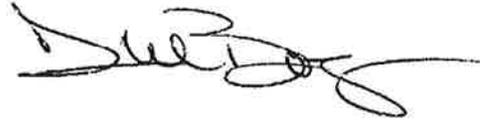


By _____

Michael J. Cicchetti
Frontier Communications
Director, Government and External
Affairs
310 Orange Street
New Haven, Connecticut 06510
Office: (203) 771-6191
Mobile: (203) 584-3104
Email: michael.cicchetti@ftr.com

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 24th day of October, 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 "David W. Bogan", written over a horizontal line.

David W. Bogan Esq.