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STATE OF CONNECTICUT

PUBLIC UTILITIES REGULATORY AUTHORITY

RE:	**PETITION OF THE OFFICE OF CONSUMER COUNSEL FOR INVESTIGATION INTO FACILITATING THE USE OF THE MUNICIPAL GAIN FOR BROADBAND INTERNET SERVICES**	:	**DOCKET NO. 16-06-XX**
		:	**JUNE 21, 2016**

PETITION OF THE OFFICE OF CONSUMER COUNSEL FOR INVESTIGATION INTO FACILITATING THE USE OF THE MUNICIPAL GAIN FOR BROADBAND INTERNET SERVICES

The Office of Consumer Counsel, by and through Consumer Counsel Elin Swanson Katz ("OCC"), including the State Broadband Office within OCC ("SBO"), hereby respectfully petitions the Public Utilities Regulatory Authority ("PURA") to open one or more proceedings to develop rules to promote the fair and efficient use of the space or "gain" reserved on utility poles and underground conduits pursuant to General Statutes § 16-233, the "Municipal Gain Statute," and to investigate contractual, procedural, and economic barriers to the use by municipalities of the Municipal Gain.[1] In particular, OCC requests that PURA investigate, and develop appropriate rules to remove, barriers that limit municipalities' use of the Municipal Gain in order to promote access to broadband (a/k/a high-speed Internet) services for their residents, businesses, and municipal facilities in accordance with the universal broadband access policies of the State of Connecticut. The Municipal Gain Statute

[1] For the purposes of this Petition, unless the context requires otherwise, the term PURA includes its predecessor, the Department of Public Utility Control ("DPUC").

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is a unique regulatory structure that is a key asset for the state's municipalities. It could help municipalities attract many millions of dollars in private-sector investment to increase broadband access and speeds, but more clarity about the rules and processes for attaching new broadband infrastructure[2] in the Municipal Gain is needed. Successful resolution of these issues will spur more communities to use Connecticut's Municipal Gain to acquire access to affordable, high-capacity broadband services through a variety of strategies, including working with willing incumbents, entering into public-private partnerships with new entrants, developing networks themselves, or adopting other approaches that work for them. Recent years have seen the development of state and municipal public policy goals that embrace all of these strategies.

Affordable access to advanced communications networks is essential to Connecticut's competitiveness in the emerging knowledge-based global economy, as such networks can drive and support simultaneous progress in just about every area of modern life. This includes economic development, education, public safety, health care, transportation, energy, environmental protection, financial services, insurance, government services, democratic discourse, entertainment, and much more. In particular, the OCC has targeted three inter-related areas that are crucial to Connecticut's success today and in the years ahead. First, all businesses must have access to affordable, high-speed broadband service that does not cost tens of thousands of dollars to install and thousands per month in fees. Second, any areas of the state that are unserved or significantly underserved because of a lack of broadband

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2 For the purposes of this Petition, the term "broadband infrastructure" refers to ultra-high-speed optic networks that are capable of transmitting information at speeds of at least a gigabit per second ("a gig") – that is, at the rate of one billion bits per second or one thousand megabits per second ("Mbps").

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access, such as the Northwest corner and certain urban areas of the state, should have access to Internet services that at least meet the evolving federal definition of broadband – currently 25 Mbps download speed and 3 Mbps upload speed. Third, we must find a way to address the needs of many low-income residents, rural and urban, who cannot afford access to even a basic level of broadband.[3] The lack of access to broadband is known as the "digital divide," and it impedes policy progress in school achievement, employment, health, public safety, and numerous other fields where access to timely information is vital. Based on OCC's experience and research, these three issues are inter-related and must be dealt with collectively. While every state faces these challenges, the municipal gain is a unique regulatory asset that municipalities can leverage to make Connecticut a national leader in ultra-high-speed broadband deployment.

In Part I of this Petition, OCC shows that PURA not only has the requisite statutory authority, but also the unique knowledge and experience with the complex technical and policy issues involved to be able to give prompt effect to the legislature's intent with respect to the Municipal Gain. In Part II, OCC identifies several issues that require PURA's investigation and resolution. These include undefined key terms in Section 16-233; unclear or incomplete make-ready rules concerning the engineering and technical issues, as well as

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[3] For example, OCC's outreach to the community in the northern part of Main Street in Hartford revealed problems with the availability and cost of broadband services needed by area businesses, a lack of infrastructure, and affordability challenges among low-income residents of that area. CTC Technology & Energy, "A Brief Overview of Broadband Deficiencies in Connecticut" (March 2016), http://goo.gl/dyx0Mo. Frontier has recently announced that it will seek to address these problems. Steven Singer, "Frontier To Bring High-Speed Internet to Hartford's North End," *Hartford Courant*, April 29, 2016, http://goo.gl/R9pTrp.

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cost-allocation issues, surrounding the use of the Municipal Gain; template pole attachment agreements that appear to violate Section 16-233; uncertain dispute-resolution processes; and the absence of any rules or other guidance concerning underground communications duct systems.

I. PURA'S ROLE IN REGULATING THE MUNICIPAL GAIN

A. The Municipal Gain Statute, Section 16-233

Section 16-233, as amended in 2013 (Public Act 13-247), states in full as follows:

> 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.

Pursuant to this statute, public service companies (including The Southern New England Telephone Company d/b/a Frontier Communications of Connecticut ("Frontier"), Verizon New York, Inc. ("Verizon"), The Connecticut Light and Power Company d/b/a Eversource Energy ("CL&P") and The United Illuminating Company ("UI")) must provide or reserve to municipalities (and/or fire districts and the Department of Transportation ("DOT")) space on each utility pole or in each underground communications duct system, often referred to as the "Municipal Gain." The explicit requirement to *reserve* a gain for municipal use has existed since 1994, when Public Act 94-188 added the last sentence of the statute (among other changes).

In 2013, Public Act 13-247 amended Section 16-233 to the present version by replacing the language stating that municipalities could use the Municipal Gain for

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"municipal and state signal wires" with language clarifying that municipalities could use the Municipal Gain "for any purpose."

Section 16-233 authorizes PURA to regulate the terms, conditions, and costs of access to the Municipal Gain. PURA has itself recognized this. For example, in its *City of Manchester* decision in 2000, PURA ruled that the term "municipal and state signal wires" should not be interpreted restrictively, as Southern New England Telephone Company ("SNET") had insisted, but "can be interpreted to reasonably encompass the array of telecommunications services detailed in Manchester's pilot project to carry out municipal functions with economic efficiency."[4] In that decision, PURA also addressed various safety and make-ready issues, including the allocation of make-ready costs.[5]

B. PURA's Responsibility to Exercise its Authority Over Pole Attachments to Advance the State's Broadband Policies and Goals

1. PURA's Pole Attachment Decisions

In its decision of October 8, 2014, in the Single Pole Administrator ("SPA") Docket,[6] PURA "recognized the changing Connecticut telecommunications market" and "that one of

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4 DPUC Decision, Docket No. 99-03-25, Application of The Southern New England Telephone Company for a Declaratory Ruling Regarding Municipal Use of Poles and Conduits (January 19, 2000) at 11-12, 2000 WL 36271427 (Conn. D.P.U.C.) ("*Manchester Decision*").

5 PURA found that "[i]t is only equitable that these [make-ready] costs be recovered from those entities responsible for incurring the cost." *Id.* In affirming this imposition of make-ready costs on the City of Manchester, the Superior Court noted that "[t]he 109 poles in the town at issue here were all put in use before 1994, so there was no duty on the companies to leave a space for the gain, unless asked by the town." *Manchester v. State of Connecticut*, 29 Conn. L. Rptr. 571, 2001 Conn. Super. LEXIS 1330, 2001 WL 590033, at *4 (J. D. New Britain, May 10, 2001) (Cohn, J.).

6 PURA Decision, Docket No. 11-03-07, *DPUC Investigation into the Appointment of a Third Party Statewide Utility Pole Administrator for the State of Connecticut* (October 8, 2014) ("*SPA Decision*"). Because of the significant overlap between

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the avenues of effective competition is equitable access to the PROW [public rights of way]." (*SPA Decision* at 19) In furtherance of this purpose, PURA reviewed and ultimately endeavored to streamline the pole attachment and make-ready processes. (*See SPA Decision* at 1, 19) The *SPA Decision* resolved numerous issues, including establishing the Electric Distribution Companies ("EDCs") as the SPAs in their respective territories, requiring all attachers to use the NOTIFY system, and reserving to telephone companies a substantial role in the make-ready process in the communications space.[7] PURA also reaffirmed the 90-day timeframe for make-ready that it had adopted in its *Make Ready Decision* of April 30, 2008.[8] Recognizing that various other issues remained in dispute, PURA referred them to a working group for further discussion.

Based on additional developments since the *SPA Decision*, this Petition respectfully seeks that PURA go the remaining distance to ensure that municipalities can truly use the Municipal Gain effectively in furtherance of State policies, including the crucial goal of universal access to broadband service.

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issues discussed here and issues in the SPA Decision, it is possible that PURA may want to deal with some or all of the topics discussed here as a reopener to the *SPA Decision.*

7 NOTIFY is a web-based, database software system used for the receipt and processing of wireline third-party attachment applications, data collection, attacher notification, and communication functions.

8 DPUC Decision, Docket No. 07-02-13, *DPUC Review of the State's Public Service Company Utility Pole* Make-*Ready Procedures – Phase I,* (April 30, 2008) ("*Make Ready Decision*") at 18-20. In this matter, the former DPUC "determined that a 90-day time interval should be the objective for the pole attachment process," including a 45-day time period for the estimation process and a 45-day process to complete the make-ready work.

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2. PURA's Role in Furthering State Broadband Policies

As agencies of the State of Connecticut, both OCC and PURA have a duty to advance the State's broadband policies within their specific areas of responsibility.[9] As discussed in this section, OCC and PURA share a common purpose in removing barriers to the prompt and effective use of the Municipal Gain.

In OCC's case, Public Act 15-5 (Special Session) amended OCC's enabling statute, General Statutes § 16-2a, to include new section (c), establishing an Office of State Broadband (referred to as the State Broadband Office or "SBO") within OCC and setting forth the goals that SBO is tasked with accomplishing:

> (c) There shall be established an Office of State Broadband within the Office of Consumer Counsel. **The Office of State Broadband shall work to facilitate the availability of broadband access to every state citizen and to increase access to and the adoption of ultra-high-speed gigabit capable broadband networks. The Office of Consumer Counsel may work in collaboration with public and nonprofit entities and state agencies, and may provide advisory assistance to municipalities, local authorities and private corporations for the purpose of maximizing opportunities for the expansion of broadband access in the state and fostering innovative approaches to broadband in the state**, including the procurement of grants for such purpose. The Office of State Broadband shall include a Broadband Policy Coordinator and such

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9 PURA arguably also has a duty under federal law to remove barriers to broadband investment and promote broadband competition. See Section 706(a) of the Telecommunications Act of 1996, as codified and amended in 47 U.S.C. § 1302(a), which provides as follows (with our emphasis added):

> **(a) In general**
> The Commission *and each State commission* with regulatory jurisdiction over telecommunications services *shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans* (including, in particular, elementary and secondary schools and classrooms) *by utilizing*, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, *measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.*

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> other staff as the Consumer Counsel deems necessary to perform the duties of the Office of State Broadband.

(Emphasis added) Through this language, the Legislature authorized SBO to work with other state agencies, including PURA, to strive to achieve the legislative goal of universal broadband access, a goal which has proven stubbornly elusive.

In PURA's case, over seven years ago, PURA – at the time DPUC – launched an extensive investigation in Docket 08-05-07 and issued a report detailing the pro-active steps that it believed the State should take "to make competitive Internet broadband services universally available throughout the state for every individual, home, business, non-profit agency, and civic institution," "to avoid Connecticut from losing economic opportunity to competing states," and "to close the digital divide so that (Internet-enabled) computer ownership is beyond no one's means and the training necessary to access the Internet is met for all."[10]

Among DPUC's many trenchant findings was that the lack of universal broadband access was a key issue facing the State:

> More importantly, Connecticut has some areas with no wireline broadband service (northeast and northwest corners). In those areas, there is limited Internet service from both satellite and wireless service providers. It appears that most of Connecticut residents and businesses have a choice between DSL service and the local cable company's cable modem service[,] making the Connecticut market a broadband duopoly.[11]

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10 DPUC Decision, Docket No. 08-05-17, *DPUC Investigation into the Deployment of High* Speed *Broadband Access Facilities in Connecticut* (December 24, 2008), at 1 ("*2008 Broadband Decision*").

11 *Id.*, at 8. (Internal citations and references omitted)

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Unfortunately, this situation still persists in Connecticut, notwithstanding the pace of global advances in broadband technology and access. There are still sizable areas within the northeast and northwest corners of the State that have no broadband access but only lower speed DSL Internet service, along with pockets of such areas in certain Connecticut cities as indicated in the Pre-Filed Testimony of Andrew Afflerbach ("Afflerbach PFT" or "PFT," attached hereto as Attachment A) at 6:108-7:113. Moreover, for most Connecticut residents and businesses, the duopoly situation described in the *2008 Broadband Decision* remains, though at somewhat higher speeds, with customers limited to a choice between their cable company and Frontier. (PFT 7:124, *et seq.*) As a result, few Connecticut customers are likely to have affordable access to competitive gigabit services and capabilities any time soon.

DPUC's *2008 Broadband Decision*, in addition to identifying what have turned out to be persistent broadband shortcomings in certain areas of the State and the lack of robust competition, included numerous recommendations that remain valid today, and are now both more achievable and more urgently necessary. As a "floor" definition, DPUC proposed that "universal broadband service provide for upload speeds of 10 Mbps and download speeds of 100 Mbps with the understanding that as technologies and competition advances, these minimum target speeds may increase." (*2008 Broadband Decision* at 22) Actual average speeds in Connecticut remain at a small fraction of that "minimum target speed" over seven years later as the average connect speeds in the State are only about 1/10th of the target speed. (*See* PFT 5:82-5:84). For many in Connecticut, reaching 10 Mbps for download would still be a vast improvement. Ultimately, DPUC recommended that Connecticut, in order to compete globally and nationally, take measures that:

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1. Provide universal broadband service throughout the entire state.

2. Ensure that broadband service in the state is supported by a world-class communications infrastructure capable of being globally competitive with broadband speeds to meet the needs of commerce, education, health services, and other social requirements.

3. Close the digital divide of broadband services throughout the state that does not disadvantage potential users of broadband services or denies them access/ownership to Internet ready PCs and/or high-speed access.

4. Adopt the Internet for Everyone principles which provide for:

   a. Every home, business and civic institution in America having access to a high-speed, world-class communications infrastructure.

   b. Every Internet user being able to enjoy real competition in lawful online content among high-speed Internet providers in order to achieve lower prices and higher speeds.

   c. Every Internet user should have the right to freedom of speech and commerce online in an open market without gatekeepers or discrimination.

   d. The Internet to continue to create good jobs, foster entrepreneurship, spread new ideas and serves as a leading engine of economic growth.

5. Encourage and support strategic partnerships of public, private, nonprofit, and community-based groups in the continued growth and development of high-speed Internet services that state residents and businesses civic organizations can enjoy.

6. Consider the tasks, directives, working groups, partnerships, reporting requirements, protective and other measures recommended in this Decision as possible specific mandates in drafting broadband initiative legislation and/or executive actions where appropriate.

7. Adopt legislative or executive actions identifying what lead agencies should be tasked, what appointments may be necessary, what Working Groups should be established, what tasks should be accomplished, and what other actions may be necessary for a sustainable broadband initiative.

(*2008 Broadband Decision* at 33-34)

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OCC, both before and since the formation of the SBO, has worked to achieve these longstanding PURA recommendations. Among other things, OCC issued a Request for Qualifications to determine interest among private-sector service providers and financiers. Forty-six municipalities participated and, as a result, multiple discussions continue among municipalities and a diverse range of potential fiber network investors and developers. (PFT 8:147, *et seq.*) This is exactly the sort of strategic partnership between public and private entities contemplated in PURA Recommendation # 5, above, and would advance the State toward achievement of the ultimate, primary goals described in PURA Recommendation ## 1-4 – i.e., universal broadband access in Connecticut at globally competitive speeds and at competitive, affordable prices.

PURA's recommendations and OCC's actions to implement them are also consistent with the report and recommendations that the Connecticut Academy of Science and Engineering ("CASE") issued in December 2011, at the behest of OCC, PURA, and other State offices.[12] For example, CASE noted at pages 9-11 that broadband access enables advancements in health care, public safety, energy, government performance, education, economic development, workforce development, and transportation. CASE also observed that citizens "will continually demand broadband access at higher speeds with greater reliability, reduced latency and enhanced security," that "[i]mprovements in broadband capacity frequently require the deployment of new infrastructure," and that "the state regulatory system has not kept pace with the changes." (*Id.* at 55) Of particular relevance here, CASE recommended that Connecticut "[d]evelop a streamlined process for pole access

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12 Connecticut Academy of Society and Engineering, *Guidelines for Development of a Strategic Plan for Accessibility to Broadband Services in Connecticut* (December 2011), available online at http://goo.gl/NcBFPE.

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to allow Connecticut to be seen as a business friendly state with a competitive broadband market." (*Id.* at 56)

In summary, as PURA found in its *2008 Broadband Decision*, Connecticut needs an aggressive broadband strategy in order to "[c]ompete globally" and to "[c]ompete nationally with other states that have their own broadband initiatives." (*Id.* at 32) And, as CASE found in its report, streamlining the pole-attachment process is a key component of such a strategy.

These considerations are particularly important today. For example, our neighboring states, Massachusetts and New York, both recently announced major investments in broadband networks. (PFT 5:87, *et seq.*) In February 2015, the Massachusetts Governor pledged $50 million to expand broadband in Western Massachusetts. (*Id.*) In spring 2015, the New York Governor's Office launched a $500 million broadband grant that matches private sector funds for broadband networks capable of at least 100 Mbps. (PFT 6:96, *et seq.*) As OCC has also learned from potential investors in broadband in Connecticut, the way Connecticut handles the Municipal Gain and related issues will have an important impact on their perception of the State as a business-friendly environment. As previously noted, the OCC's RFQ attracted significant interest among private sector service providers and financiers in developing advanced broadband infrastructure in Connecticut. (PFT 8:147, *et seq.*) To convert this initial interest into completed projects that finally achieve Connecticut's broadband goals, Connecticut needs additional clarity about pole attachment processes, agreements, and make-ready costs. (PFT 10:188-11:210)

II. ISSUES WARRANTING INVESTIGATION

In this section, OCC discusses various issues that pose barriers to the timely and efficient use of the Municipal Gain. OCC recommends that PURA open (or reopen) one or

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more dockets to investigate and remove these barriers, as well as any other barriers that may come to its attention. OCC anticipates that other parties, including incumbent service providers, municipalities, and potential investors, will intervene to give their perspectives on the issues discussed below and may raise additional issues impacting broadband infrastructure development. For example, the current effort before the Single Pole Administration Working Group to reach a consensus on the ability of attachers to efficiently conduct overlashing in the communications gain may potentially impact overlashing standards that would need to be developed for the municipal gain. Thus, the discussion and iteration of issues below is not intended to be exhaustive.

A. Preliminary Statement

Before turning to the specifics, OCC believes it important to raise two overarching issues. First, as PURA knows, attachments to poles and communications duct systems pose complex issues, including legal questions, engineering and safety requirements, reasonable timetables, cost-accounting principles, competition policy, and other matters. Over the years, PURA has addressed dozens of these issues, but it has not yet resolved all of them, and new ones are constantly emerging. The Municipal Gain Statute adds a layer of additional issues on top of those present in "ordinary" pole or conduit matters. To encourage the timely and effective use of the Municipal Gain, OCC recommends that PURA develop a single comprehensive set of rules applicable to the Municipal Gain, including both rules that apply uniquely to the Municipal Gain and rules that apply to all attaching entities. This may be easier than it sounds at first, as PURA may well be able to incorporate into the Municipal Gain rules many of the decisions it has already made in other contexts. Developing a single

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set of rules for the Municipal Gain may also result in collateral benefits for pole attachments generally.

Second, no matter what rules PURA may ultimately adopt for the Municipal Gain, each individual case will inevitably involve its own facts and will require the exercise of reasonable judgment. As a result, OCC recommends that PURA explicitly adopt the general principle that pole and communications duct system owners must authorize the fastest and least expensive attachments that the National Electric Safety Code and other applicable engineering and safety standards allow under the facts at issue.

In the following sections, we address pole attachments in Sections B and C and underground communications duct systems in Section D.

B. All Concerned Would Benefit From PURA's Promulgation of Rules That Clarify the Municipal Gain Process

Greater certainty about the Municipal Gain would benefit all concerned. This includes the statute's intended municipal beneficiaries; pole and duct system owners; Single Pole Administrators; potential private-sector partners of municipalities; investors; and everyone else in Connecticut for whom quicker and cheaper access to competitive, high-capacity broadband would provide opportunities for a better future. PURA would itself benefit from clarifying rules, as they would result in fewer disputes requiring time-consuming and costly PURA intervention. In fact, in at least some respects, Section 16-233 expressly *requires* PURA to issue clarifying rules. For example, it says that "The location or relocation of any such gain shall be prescribed by the Public Utilities Regulatory Authority."

Substantial uncertainty exists today for three reasons: (1) Section 16-233 does not define certain key terms; (2) PURA has not yet issued interpretative rules or other guidance specific to the Municipal Gain; and (3) PURA's attachment rules and decisions of general

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applicability do not cover some of the key issues that arise in the context of the Municipal Gain.

1. PURA should define the key terms in Section 16-233

While the term "gain" is widely understood in New England to mean space on a pole, and the communications industry typically understands each pole attachment to be entitled to 12 inches of clearance from other attachments, neither Section 16-233 nor any PURA rule sheds light on the precise meaning of this critical term. Nor does Section 16-233 or any PURA rule specify where or how the Municipal Gain should be located or relocated – in the communications space (and, if so, where), in the electric space, in the safety space, on the pole owner's strand via overlashing, etc. In fact, as indicated above, Section 16-233 explicitly *mandates* that PURA address such issues -- "The location or relocation of any such gain shall be prescribed by the Public Utilities Regulatory Authority."

2. PURA should clarify the make-ready rules that apply to the Municipal Gain

PURA should – and arguably must (see concluding sentence of the last section) – promulgate rules that spell out the make-ready processes that apply to the Municipal Gain. Such rules should address separately the two main categories of issues – (1) engineering, technical, and other physical issues, and (2) cost-allocation issues. To these we now turn.

a. Engineering, technical, and other physical issues

PURA has made numerous decisions that could have a substantial impact on the make-ready process with respect to the Municipal Gain. These decisions discuss the make-ready process in some depth, but they do not specifically address make ready in the context of the Municipal Gain. In fact, these decisions do not clearly lay out make-ready standards and processes of general applicability from which parties concerned with the Municipal Gain

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can readily borrow. The lack of clarity on these essential matters is a serious impediment to the use of the Municipal Gain, and only PURA is capable of fixing it in a timely and efficient manner.

In addition to reviewing its own prior decisions in codifying a set of rules that apply to the Municipal Gain, PURA should also consider the Federal Communications Commission's ("FCC") massive order issued on April 7, 2011.[13] In this order, the FCC sought to speed up and lower the costs of make-ready in multiple ways, addressing many of the same issues that are present here. While the FCC's rulings and orders are not binding on PURA, they are at the very least useful in the relevant issues and the regulatory options available to PURA.

In addition, several important new developments have occurred since PURA last focused in detail on make-ready issues. In particular, with Google Fiber and various other entities now seeking to build out fiber networks as rapidly as possible, widespread interest has emerged in processes that can substantially streamline traditional make-ready procedures. One such process, which has come to be known as the "One Touch" process, would enable a single qualified entity, in a single truck roll, to do all necessary new attachments and rearrangements of existing attachments in the communications space, as long as rearrangements of existing attachments do not require cutting or splicing. The "One Touch" principle can save all concerned substantial time and money, as it eliminates the need for successive truck rolls by each individual attaching entity. PURA should consider how the

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13 FCC, *In the Matter of Implementation of Section 224 of the Act, Report and Order and Report on Reconsideration*, 26 FCC Rcd. 5240, 2011 WL 1341351 (F.C.C.) (rel. April 7, 2011).

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"One Touch" principle can be given effect in Connecticut, whether through the SPA process or otherwise.[14]

As it develops rules for the Municipal Gain, PURA should also consider the potential role overlashing can play, particularly in situations in which poles are filled to capacity and costly replacements would be necessary to accommodate a municipality's right to its Municipal Gain.

The examples given in this section are only illustrative. OCC anticipates that once PURA opens or reopens one or more dockets to address the Municipal Gain, other examples will emerge.

b. Make-Ready Cost-Allocation Issues

In the *Manchester* decision, DPUC held that while Section 16-233 enables municipalities to occupy space on a pole without payment of annual fees, the statute does not exempt municipalities from paying make-ready costs. (*Id.* at 12) More specifically, DPUC

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14 The "game-changing" benefits of the "One Touch" principle are discussed at length in the March 2015 white paper by OCC's consultant, CTC Technology & Energy, Broadband in Connecticut: Opportunities for the State and Localities to Enable World-Class Broadband, pp. 22-27. A copy of this white paper is attached hereto as Attachment B. A November 2015 whitepaper issued by the Fiber to the Home Council, entitled "Role of State and Local Governments in Simplifying the Make-Ready Process for Pole Attachments," also describes the benefits of one touch make ready policies in facilitating competition by reducing cost, disruption, and delays in the pole attachment process. A copy of this whitepaper is attached hereto as Attachment C. *See also* "'One Touch' Make-Ready Policies: The 'Dig Once' of Pole Attachments," *NextCenturyCities.org.* Next Century Cities, January 6, 2016 ("FiberNet… remarked that 'the most significant obstacle to the deployment of fiber transport is FiberNet's inability to obtain access to pole attachments in a timely manner'"); "Standing With Louisville," *Googlefiberblog.blogspot.com.* Google Fiber, February 26, 2016 ("[Dig Once] policies reduce cost, disruption, and delay, by allowing the work needed to prepare a utility pole for new fiber to be attached in as little as a single visit—which means more safety for drivers and the neighborhood").

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noted that "[i]t is only equitable that these costs be recovered from those entities responsible for incurring the cost." (*Id.*) In affirming the imposition of make-ready costs on the City of Manchester, the Superior Court noted that "[t]he 109 poles in the town at issue here were all put in use before 1994, so there was no duty on the companies to leave a space for the gain, unless asked by the town."[15] This statement implies that a municipality causes the costs in question if a pole owner otherwise had no duty to reserve space for municipality. Conversely, once that duty existed, the responsibility arguably shifted to the pole owner to create and leave space on newly installed poles to accommodate requests for access to the Municipal Gain.

Since October 1, 1994 (Public Act 94-188, Section 14[16]), there has been an express requirement to reserve the space on public utility poles for the Municipal Gain. (§ 16-233, last sentence). Given this fact, any costs created by the *failure* of a public service company to reserve a reasonably-sized space for the Municipal Gain on a pole installed on or after October 1, 1994, should not necessarily be considered to have been caused by a contemporary request for access to the poles by a municipality.[17] OCC respectfully

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15 DPUC Decision, Docket No. 99-03-25, Application *of The Southern New England Telephone Company for a Declaratory Ruling Regarding Municipal Use of Poles and Conduits* (January 19, 2000) ("Manchester Decision") at 11-12.

16 Section 30 of P.A. 94-188 set the effective date of Section 14 as October 1, 1994.)

17 In fact, draft language for CL&P's municipal pole attachment agreement attempted to create a workable solution to determine when municipalities were responsible for make-ready costs. "CL&P Connecticut Municipal Agreement" Draft (Jan. 6, 2011) ("Notwithstanding the foregoing provisions, if a Pole replacement or Make-Ready work is necessary to accommodate Municipality's proposed Attachment, Overlashing and/or Facilities to a Pole, then Municipality shall not be charged for the Make-Ready cost associated with such Pole replacement if, and only if, each of the following three conditions are satisfied: (i) Owner owns the Pole or is the designated custodian of said Pole per Owner's agreement with an Other Owner, (ii) the Pole onto which

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recommends that PURA examine this issue to determine (i) whether utility poles installed since 1994 typically have reserved space for the Municipal Gain; (ii) the degree to which municipalities are today being charged make-ready costs, including for replacement poles, where space was not reserved for the gain (particularly on poles installed since 1994); and (iii) how to refund amounts that pole custodians have improperly charged municipalities for make-ready costs that would not have been necessary had the custodian properly reserved space for the Municipal Gain.

If PURA decides that a municipality should pay for at least some of the make-ready costs – e.g., for poles installed before 1994 – PURA should also establish a standard for determining whether and to what extent the municipality should receive a discount from the full costs involved to account for the benefits that make ready bestows on the pole owner and other attaching entities. This is particularly so for poles that are several decades old and are nearing or beyond their useful lives of 30 to 40 years.[18] In other words, the question is whether the increased value created by the brand new pole for the public service company and other attachers, including the value of increased reliability, should be monetized and subtracted from the gross cost of the replacement pole, such that the municipality would only be charged the net cost of the replacement pole under the cost causation principle. If this sort of analysis is not done, then the other attachers and the public service company would

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Municipality wants to attach its Attachment, Overlashing or Facilities was installed by Owner after October 1, 1994 (which is the effective date of an amendment to Conn. Gen. Stat. Section 16-233 that provides Municipality with access to one 12-inch gain on a Pole) (iii) when such Pole was installed by Owner after October 1, 1994 one 12-inch gain space on the Pole was not reserved for the Municipality.").

18 See, e.g., North America Wood Pole Council, "Technical Bulletin: Estimated Useful Life of Wood Poles" (2008), http://goo.gl/4Es60u.

arguably receive "free rider" benefits from replacing aged and frail poles with brand new poles at the municipality's expense.[19] (PFT 11:205, *et seq.*) OCC is not suggesting, of course, that there needs to be a rate case for every pole replacement, but presumably some sort of allocation scheme could be developed for sharing of costs to avoid overcharging the municipality for what is essentially a routine utility infrastructure upgrade.

In short, OCC believes that a holistic approach to make-ready costs—involving a consideration of all parties that stand to benefit from the make ready—would be the best approach to make-ready costs.

3. Some Pole Attachment Agreements May Violate the Current Statute Outright.

In the *SPA Decision*, which designated the EDCs as the SPAs in their respective territories, PURA, in order to promote consistent pole attachment processes, required that –

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[19] Though not applicable in Connecticut, the FCC's treatment of the cost-causer principle is instructive. Since 1996, the FCC has consistently stated that attaching entities that take advantage of an upgrade must pay an equitable share of the costs of the upgrade. For example, in its first pole attachment order under the Telecommunications Act of 1996, the FCC stated:

> *As a general approach, requiring that modification costs be paid only by entities for whose benefit the modification is made simplifies the modification process. For these purposes, however, if an entity uses a proposed modification as an opportunity to adjust its preexisting attachment, the "piggybacking" entity should share in the overall cost of the modification to reflect its contribution to the resulting structural change.* A utility or other party that uses a modification as an opportunity to bring its facilities into compliance with applicable safety or other requirements will be deemed to be sharing in the modification and will be responsible for its share of the modification cost. *This will discourage parties from postponing necessary repairs in an effort to avoid the associated costs.*

Report and Order, In The Matter of Implementation *of the Local Competition Provisions in the Telecommunications Act of 1996*, at ¶ 1212, 11 FCC Rcd. 15499, 1996 WL 452885 (F.C.C.) (rel. August 8, 1996) (emphasis added).

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> . . . pole owners (UI, Verizon and AT&T) seek input from their attachers and update their pole attachment agreements, both municipal and non-municipal, similar to that of CL&P approved in the CL&P Rate Case Decision. In particular, the Authority will require UI, Verizon and AT&T to incorporate the requirements of the Make-Ready Decision and the safeguards agreed to by the pole owners in Working Group discussions.

(*SPA Decision* at 16) Frontier's form agreement is inconsistent with the 2013 amendment to Section 16-233 and appears to be intended to dissuade municipalities from exercising their statutory right to use the Municipal Gain "for any purpose."[20]

Section 1.3 of Frontier's template pole attachment agreement states that

> Municipality's right to occupy and use space on a Pole is limited to the signal wires constructed for Municipality's internal purposes and must be a Private Telecommunications Service.

This provision is inconsistent with the present version of Section 16-233 in three ways. First, the reference to "signal wires" apparently refers to language in the pre-2013 version of the statute that was replaced with language clarifying that municipalities can use the Municipal Gain "for any purpose." Second, the limitation in Frontier's form to the "Municipality's *internal* purposes" is also inconsistent with the "any purpose" language in the updated statute. Third, the reference to a "private telecommunication service" is yet another limitation that is inconsistent with the current "any purpose" language in the statute. It is presumably a reference to a part of the *Manchester* Decision from 2000 interpreting the prior version of the statute. Any effort by a municipality to promote broadband service for its citizens would not be considered a "private telecommunications service" as defined in Section 2.24 of Frontier's form agreement and Conn. General Statutes § 16-247a(b)(5)

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[20] Frontier is apparently using the "Pole Attachment Agreement between Southern New England Telephone Company and _____," filed on March 31, 2015, in Docket No. 11-03-07, a copy of which is attached hereto as Attachment D.

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because a private telecommunication service is solely to meet the "needs of the person that controls such service and any subsidiary or affiliate thereof" and cannot be used to serve the public. Thus, the "private telecommunication service" language in Frontier's form agreement may mislead municipalities into believing that their rights are restricted in ways that are inconsistent with Section 16-233. (PFT 9:176-10:184)

Several municipalities have complained to OCC/SBO about the Frontier form pole attachment agreement and Frontier's unwillingness to delete the limitations therein that are invalidly based on a previous version of the Municipal Gain Statute. It is important for PURA to find inconsistencies between Frontier's agreement and current law impermissible. Indeed, Section 14.1 of Frontier's agreement already provides that "any Law will automatically supersede any conflicting provision in this agreement." The same section requires that in "any conflict between the terms of this Agreement and Connecticut General Statute 16-233, the latter will control," and that "Municipality's execution of this Agreement will not constitute a waiver or release of Municipality's rights under Connecticut General Statute 16-233." Given this language, PURA should resolve any confusion created by Frontier's agreement in accordance with the plain language of revised Section 16-233, which allows use of the Municipal Gain *for any purpose*. Frontier may disagree with the clearly-stated public policy enacted by the Connecticut General Assembly revision to the Municipal Gain Statute in 2013, but it does not possess the authority to undercut or vitiate the mandate of the Connecticut legislature through its attachment agreement.

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C. PURA Should Clarify the Dispute Resolution Process

Currently, municipalities that have disagreements with pole owners, existing attaching entities, or other parties affected by the Municipal Gain Statute, are uncertain about where and how to resolve these disagreements. OCC recommends that PURA develop rules that spell out the dispute resolution process for the Municipal Gain, including the roles of the various participants; filing, briefing, and hearing procedures; appeals, etc. Given the need for speedy resolution of disputes concerning the Municipal Gain, OCC urges PURA to develop procedures for expedited dispute resolution.

D. PURA Should Develop Appropriate Rules for Use of the Municipal Gain in Underground Communications Duct Systems

The Municipal Gain Statute also reserves space for municipal attachments in "underground communications duct systems." PURA and the courts have addressed pole attachments on multiple occasions, but they have thus far paid scant, if any, attention to underground communications duct systems. It is important that PURA do so now, particularly because access to duct systems will become increasingly significant over the next few years as utility undergrounding initiatives proliferate. OCC suggests that PURA go through the same process for underground communications duct systems as OCC has recommended in the previous Section B for poles. In particular, OCC recommends clarifying relevant definitions and establishing a process for attachments in the communications duct systems.

III. CONCLUSION

OCC has filed this Petition with PURA with confidence that PURA is best situated to remove the regulatory uncertainty that surrounds the Municipal Gain. OCC therefore respectfully recommends that PURA develop a set of readily accessible, comprehensive, and

integrated rules, guidelines, and best practices that can materially advance the Connecticut's goal of becoming the first state to extend high-capacity broadband connectivity from border to border.

Respectfully submitted,

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Joseph A. Rosenthal, Esq.

STATE BROADBAND OFFICE

By: _____
William L. Vallee, Jr.
State Broadband Policy and
Programs Coordinator

I hereby certify that a copy of the foregoing has been mailed, electronically sent and/or hand-delivered to all known parties and intervenors of record this 21st day of June, 2016

_____
Joseph A. Rosenthal
Commissioner of Superior Court

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