

**STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL**

PETITION OF EXTENET SYSTEMS, INC.)
FOR A DECLARATORY RULING OF NO JURISDICTION)
OR IN THE ALTERNATIVE THAT NO CERTIFICATE) **PETITION NO. 809**
OF ENVIRONMENTAL COMPATIBILITY AND)
PUBLIC NEED IS REQUIRED AS THE PROPOSED PROJECT)
WILL NOT HAVE A SUBSTANTIAL)
ADVERSE ENVIRONMENTAL EFFECT)

**PRE-HEARING BRIEF BY NEW CINGULAR WIRELESS PCS, LLC ("AT&T")
TO ADDRESS CERTAIN THRESHOLD LEGAL QUESTIONS
PRESENTED IN THIS PETITION**

A. Introduction

New Cingular Wireless PCS, LLC ("AT&T") respectfully submits this pre-hearing brief in order to address certain threshold legal questions presented to the Council for a declaratory ruling in Petition No. 809 (the "Petition"). As noted in AT&T's request to intervene, this Petition presents the Council with factual and legal questions of first impression that are related to outdoor distributed antenna systems ("DAS") and regulation pursuant to the Public Utility Environmental Standards Act and associated Siting Council regulations. As such, this brief is submitted prior to the public hearing and is intended to assist the Council in addressing various jurisdictional and procedural questions associated with outdoor DAS networks in general and the Council's statutory and regulatory authority over same.

B. Factual Background

Outdoor DAS networks can differ in scope, size and type of infrastructure, but generally consist of a series of transmitting antenna sites ("antenna nodes") and radio frequency/optical equipment installed in base stations ("wireless equipment") which are connected via fiber optic cable. Outdoor DAS networks to the extent employed often utilize existing structures such as utility distribution poles and light stanchions and in

some cases require completely new structures to support antenna nodes. To complete a DAS network, existing or new fiber optic cable is used to connect remote wireless equipment of limited capacity and power to the antenna nodes thereby creating a distributed antenna system or outdoor DAS network. As such, any given outdoor DAS network often involves much more than the simple attachment of antennas to existing utility distribution poles, and some components are in fact regulated by the Siting Council as more fully set forth in this brief.

C. Legal Analysis

CPCN'S ISSUED BY THE DPUC DO NOT GRANT PROPOSED DEVELOPERS OF DAS NETWORKS ANY SPECIAL STANDING VIS-À-VIS OTHER REGULATORY AGENCIES SUCH AS THE SITING COUNCIL

A Certificate of Public Convenience and Necessity (“CPCN”) from the Connecticut Department of Public Utility Control (“DPUC”) is required for companies that intend to operate as facilities based providers of intrastate telecommunications services in Connecticut. C.G.S. § 16-247g. A CPCN issued by the DPUC is essentially a license allowing a company that is financially capable and whose plan is in furtherance of certain State telecommunications goals to provide such services in the State. A CPCN does not, however, give the holder thereof the legal right to modify an existing utility’s distribution network or do work in a public right-of-way until such time as it has entered into pole attachment agreements with pole owners, obtained approvals from the Connecticut State Department of Transportation (“DOT”) and received any other permits and approvals that may be required for a given project including DPUC approval of a specific plan pursuant Section 16-247h of the Connecticut General Statutes and Section 16-247c-5 of the DPUC’s regulations.

Of note, the DPUC’s jurisdiction over improvements in public rights-of-way is by no means exclusive pursuant to Section 16-247h and is rather concurrent with and subject to the unrelated jurisdiction of DOT and any other State or local agency jurisdiction to the

extent such agency's jurisdiction is relevant to a project proposed for construction in a public right-of-way. For an excellent summary of the DPUC's concurrent jurisdiction with other State agencies in this regard, the Council is referred to the DPUC's decision in Docket No. 00-03-09 noting DPUC, DOT, Connecticut Department of Public Safety and other agency jurisdiction over ground mounted backup generators installed by cable companies in public rights-of-way. See, DPUC Investigation into Coxcom, Decision No. 00-03-09, Feb. 7, 2001 (case law citations omitted).

**OUTDOOR DAS NETWORKS TO THE EXTENT EMPLOYED BY WIRELESS
CARRIERS WOULD BE "USED IN A CELLULAR SYSTEM"
FOR PURPOSES OF SECTION 16-50i(a)(6) OF THE
CONNECTICUT GENERAL STATUTES**

AT&T and other wireless carriers are licensed by the Federal Communications Commission ("FCC") to construct and operate a personal wireless services system in various areas of the State of Connecticut in order to provide PCS and cellular services to the public. As the Council is aware, these wireless carriers require communications infrastructure throughout the State of Connecticut to provide their services to the public, much of which falls under the Siting Council's jurisdiction, i.e. towers and modifications thereto. While outdoor DAS networks have not been employed by wireless carriers to date in Connecticut, there is no question that the infrastructure itself would be primarily "used in a cellular system". As such, any outdoor DAS network intended for the provision of personal wireless services to the public would unquestionably be for use "in a cellular system" as that term has been previously interpreted for purposes of Section 16-50i(a)(6) of the Connecticut General Statutes. See generally, Sprint Spectrum, L.P. v. Connecticut Siting Council, 274 F.3d 674 (2d Cir. 2001)(applying definition and holding that the towers and other associated equipment used in delivering PCS frequencies to the public were "used in a cellular system" and within the Council's jurisdiction). Accordingly, the question presented is what, if any, aspect of an outdoor DAS network's

infrastructure qualifies as a “tower” or modification thereto for purposes of Siting Council jurisdiction.

**THE SITING COUNCIL HAS JURISDICTION OVER “TOWERS” AND
“ASSOCIATED EQUIPMENT” USED IN A CELLULAR SYSTEM WHICH
INCLUDES ANY TOWERS USED IN A DAS NETWORK**

The Siting Council has exclusive jurisdiction over the siting of telecommunications “towers” and “associated equipment” “used in a cellular system” as set forth in Sections 16-50i(a)(6) and 16-50x of the Connecticut General Statutes. The Siting Council’s regulations define a “tower” and “associated equipment” as:

“Tower” means a structure, whether free standing or attached to a building or another structure, that has a height greater than its diameter and that is high relative to its surroundings, or that is used to support antennas for sending or receiving signals to or from satellites, which is or is to be:

(1) used principally to support one or more antennas for receiving or sending radio frequency signals and

(2) owned or operated by the state or a public service company as defined in 16-1 of the General Statutes, or used for public cellular radio communications service as defined in section 16-50i of the General Statutes of Connecticut; and

“Associated Equipment” means any building, structure, antenna, satellite dish, or technological equipment, including equipment intended for sending or receiving signals to or from satellites, that is an integral part of the operation of a community antenna television tower or telecommunications tower.

Interestingly enough, Merriam-Webster’s dictionary similarly defines a “tower” as something “typically higher than its diameter and high relative to its surroundings”.

Merriam-Webster’s Dictionary (Online ed. 2006). As such, the Council in passing its first set of regulations probably just incorporated relevant parts of dictionary definitions at the time of its rules promulgation for ease of reference and use.

There is obviously no special meaning in the Council’s definition of a “tower”, a term that generally speaks for itself and really requires no declaratory ruling to interpret in this proceeding. Whether made of wood or steel, a pole structure 40’ to 50’ in height that

will solely support cellular antennas and which is not needed for the utility distribution network is simply a “tower” for Siting Council purposes. See e.g., Petition No. 626T/Docket No. 247 involving in part a 55’ wood pole with flush mounted panel antennas. Indeed, even where carriers have replaced a private utility distribution pole with a taller wood pole to support flush mounted antennas, the Council has determined that to be a tower under its jurisdiction. See, Petition No. 633T involving expansion of a private utility pole to 70’ in height where no DPUC or DOT jurisdiction was involved.

Like many things, “you know it when you see it” without it needing to be defined. The Council has consistently recognized what a “tower” is...something that is not a building, that is taller than it is wide, and will principally support communications antennas. Indeed, the Council has recognized what a tower structure is irregardless of whether or not the structure itself is taller or shorter than other structures or trees in the area, a fact which generally goes to visual impacts; one of the many factors that go into ruling on petitions and determining whether or not a proposed tower will have the potential for substantial adverse environmental effects that need to be studied in an application for a Certificate of Environmental Compatibility and Public Need (“Certificate”). As such, based on its own prior rulings and precedent, the Council must find that whether proposed as part of a DAS network or as a standalone cell site, a 40’ to 50’ wood pole solely used for cellular antennas is a “tower” and is regulated as a “facility” pursuant to Section 16-50i(a)(6) of the Connecticut General Statutes.

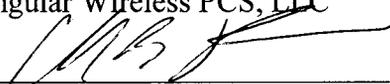
D. Conclusion

There really is no question that the Siting Council has jurisdiction over towers used in a DAS network which simply have to be construed as part of a “cellular system” for purposes of the Connecticut Public Utility Environmental Standards Act. Indeed, new or taller replacement wood poles resembling those used in utility distribution networks which are intended to serve as cellular antenna sites have been previously deemed to be “towers” by the Siting Council itself. As such, construction of wood poles of 40’ to 50’

in height with antennas attached to them that are wholly unrelated to the distribution network are towers under the Siting Council's jurisdiction, whether they are constructed by the developer of a DAS network or a wireless carrier.

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CERTIFICATE OF SERVICE

I hereby certify that on this day, an original and twenty one copies were served on the Siting Council by first class mail with a copy served on the following:

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