

NEWS ALERT

MUNICIPAL/TELECOMMUNICATIONS



Municipalities Are Now Included In PURA Small Cell Cases Before Public Utilities Regulatory Authority

By Burt Cohen and Bridget D'Angelo | June 22, 2017

In its final decision in Docket No. 17-02-49 adopted on June 2, 2017, the Public Utilities Regulatory Authority (“PURA”) incorporated nearly all of the recommendations made by the Connecticut Conference of Municipalities for all new proceedings where small cell facilities are proposed to be constructed on utility poles. The proceeding was named PURA Formalization Of Small Cell Antenna Applicant Processes And Procedures To Construct Facilities In Connecticut’s Public Rights-Of-Way. The decision was the culmination of a range of activism by CCM, along with many municipalities, including the City of West Haven, the City of Danbury, the Town of Greenwich; many concerned residents of those communities; and the involvement of State Legislators and Municipal Leaders.

The bottom line is that the chief elected official or his/her designee will receive at least 30 days notice prior to the filing of any “small cell” application with PURA, along with a request for a municipal consultation. In the notification letter or during the municipal consultation, the provider is required to identify a company representative who is familiar with the proposed construction in that community to work with the municipality. The host municipality will be designated as a participant in any PURA small cell proceeding, and, if an objection is filed by an adjoining property owner, the municipality will automatically be elevated from participant to intervenor status in PURA proceedings.

Key municipal issues resolved in the Decision include the following:

NOTIFICATION TO AND CONSULTATION WITH MUNICIPAL OFFICIALS IS NOW REQUIRED.

The wireless service provider must provide the notice of planned construction and a request for a Municipal Consultation of any planned small cell construction to the Chief Elected Official, or any Designee, at the same time the provider notifies adjoining property owners (i.e., a minimum of 30 days prior to the filing of the small cell construction application with PURA). In the event a provider determines that other office-holders in a municipality should be notified, it should notify them as well. Unlike the processes required for municipal consultations prior to submission of an application for approval of telecommunications



“The wireless networks of the future will look very different. Instead of tall towers you can see from a mile away, there will be small cells—wireless access points you might not even see and/or could hold in your hands. With this “densification” of so-called 5G networks, we’ll need to deploy millions of small cells in order to realize the promise of multi-gigabit connectivity through millimeter-wave technology.”
- FCC Chair Ajit Pai

towers under the statutes that govern the Connecticut Siting Council, the PURA process does not specify the content of documents to be provided to the municipality by the wireless provider, other than requiring that it must use PURA's "Guide to Public Hearings for Antenna Utility Pole Attachments" when reviewing the proposed construction with abutting property owners and affected municipalities during the 30 day advanced notification and the 30 day post filing period.

The decision also provides for nearly automatic participation of the municipality in the docket in which the small cell antenna or distributed antenna system is proposed to be sited. Upon the submission of a small cell construction application to the PURA for approval and the release of PURA's Notice of Proceeding, the affected municipality will be designated a Participant to that proceeding. As a Participant, the municipality will be kept apprised of the docket's progress as it relates to the proposed construction with the ability to submit written comments, but otherwise has no formal role in the proceeding before PURA. If an adjoining property owner objects to a proposed application, the municipality will be elevated from participant to intervenor status, without any need for the municipality to request a formal change in status, and will be afforded all of the rights to participate more fully which are associated with intervention in a PURA proceeding. In cases where the municipality is an adjoining property owner, it will be designated a Party upon expressing an objection to the installation.

PREMATURE REPLACEMENT OF UTILITY POLES IS NOT PREVENTED

PURA has been reticent about any agency involvement when wireless providers order the replacement of an existing utility pole for a taller one in order to accommodate its small cell facility. While asserting in other proceedings that such replacement poles should be considered telecommunications towers under the jurisdiction of the Connecticut Siting Council, in this docket, CCM focused concerns about the current process involving Verizon Wireless small cell applications in which replacement pole construction was performed before the application was even filed with PURA or a final decision was rendered. CCM's position was that this practice undermined public confidence in PURA and its process. For instance, in a docket involving a small cell application in the City of West Haven, PURA issued its first draft decision ruling against the proposed application of Verizon Wireless, but declined to issue an order to restore the pole to its original height, when the replacement was done nearly five months prior to the hearing in that proceeding. Proposed Final Decision, Docket No. 16-04-02, *Application of Cellco Partnership d/b/a Verizon Wireless for Approval of a Construction Plan to Install Wireless Facilities With Certain Rights-of-Way – Woodmont SC 3 CT* (Feb. 10, 2017) and Supplement in response to Motion No. 8, Docket No. 16-04-02 (Feb. 23, 2017) (referred to as "the West Haven Proceeding"). PURA's position is that pole replacement may occur for any number of reasons and that it is not within the wireless provider's control to determine whether a replacement pole is required. This position, however, is not backed up by any evidentiary record, and in virtually all such cases the taller replacement pole would not be needed but for the application of the wireless provider to the owner of the pole. Unfortunately, PURA is not on board with this reasoning and declined to issue a blanket order against premature pole replacement. The decision did admonish the wireless service attachers, pole owners and the single pole administrator to work closely to avoid premature replacement of utility poles, if the sole reason for replacement is the attachment of a small cell antenna facility.

LIMITATIONS ARE IMPOSED ON SCOPE OF SMALL CELL PROCEEDINGS

In response to requests from the wireless industry, under the decision wireless providers are now required to inform municipalities and adjoining property owners that PURA "has no jurisdiction nor statutory authority to address the health effects associated with RF (radio frequency) emissions for any installations that comply with the FCC standards. Nor does PURA have the statutory authority to address the effects that the proposed antenna attachment would have on existing property values and aesthetics." In the West Haven Proceeding, evidence was presented about the quantity of traffic accidents, including those involving utility poles, in the vicinity of the utility pole on which the small cell facility was to be placed, in conjunction with the close proximity of the pole to an adjoining property owner's home. Thus, safety issues involving vehicular accidents should continue to be within the scope of issues available to be raised by municipalities in small cell proceedings. Municipalities are allowed to suggest alternative locations and to request designs to be more compatible with the surroundings.

RECOMMENDATIONS TO MUNICIPALITIES

1. Be vigilant when receiving written communications from any telecommunications services provider, PURA or the Connecticut Siting Council.
2. Designate a point person or persons who will take the lead in meeting with wireless providers and evaluating the proposed small cell site.
3. Note that under FCC rules, there is a possibility that a proposed utility pole may be further increased in height to accommodate another small cell facility, often without any formal regulatory proceeding.
4. Whether or not the municipality has any specific concerns about the proposed site, send a letter to PURA in each small cell docket indicating the the municipality's position on the proposed small cell application.
5. Maintain communications with residents who are receiving notices of the application from the applicant about the proposed small cell site.
6. If there is a concern about the proposed small cell site, consult with an attorney experienced in these issues and PURA proceedings.
7. Contact CCM and legislators if there are multiple wireless providers seeking to construct small cell facilities in your community. The proliferation of small cell facilities and the physical and aesthetic impact on utility poles is one that should be addressed more on a State-wide basis.
8. If a utility pole is being replaced in your community, check with the utility doing the change-out and ensure that the pole replacement is not being performed for small cell facility installation prior to any approval by PURA.
9. If a small cell facility is being installed, make sure that the necessary safety measures are being utilized to ensure vehicular traffic safety.
10. There is no need to update or revise municipal ordinances or zoning codes for small cell facilities as PURA will not entertain them as it relies on its statutory jurisdiction over utility poles. Although the Connecticut Siting Council does at least require the submission of municipal zoning codes for new telecommunications tower proceedings by the applicant, PURA will not consider them as pertinent to its consideration of small cell applications.

If you have questions regarding this Client Alert or any small cell or telecommunications tower applications before the PURA or Connecticut Siting Council, contact Attorney Burt Cohen at 203-772-7714 or bcohen@murthalaw.com.

Attorney Cohen represented the Connecticut Conference of Municipalities in Dockets No. 16-06-38 and 17-02-49; CCM, the City of Danbury, the Town of Greenwich, and the Coalition of Small Towns in their administrative appeal of the decision of the PURA's decision in Docket No. 16-06-38 concerning the PURA's statutory authority to site small cell facilities in public rights-of-way without municipal approval; and the City of West Haven in Docket No. 16-04-02. On these small cell issues, Attorney Cohen expressly acknowledges the efforts of Joseph DeLong and Donna Hamzy of CCM, Deputy Majority Leader and State Senator Gayle Slossberg, Mayor Ed O'Brien of the City of West Haven, Deputy Corporation Counsel Laszlo "Les" Pinter of the City of Danbury, Director of Planning and Zoning Katie Deluca of the Town of Greenwich, and countless other concerned citizens of the State of Connecticut who have participated in these small cell proceedings.

With more than 100 attorneys in six offices throughout Connecticut, Massachusetts and New York, Murtha Cullina LLP offers a full range of legal services to meet the local, regional and national needs of our clients. Our practice encompasses litigation, regulatory and transactional representation of businesses, governmental units, non-profit organizations and individuals.

For more information, please contact:

Kari L. Olson
Co-Chair, Municipal Law Group
860.240.6085
kolson@murthalaw.com

Alfred E. Smith, Jr.
Co-Chair, Municipal Law Group
203.772.7722
asmith@murthalaw.com

Burt Cohen
Chair, Communications Law Group
203.772.7714
bcohen@murthalaw.com

Bridget M. D'Angelo
860.240.6015
bdangelo@murthalaw.com

