BEFORE THE
PENNSYLVANIA PUBLIC UTILITIES COMMISSION
HARRISBURG, PA 17120

Review of Issues Relating to Commission Certification of Distributed Antenna System Providers in Pennsylvania	))))	Docket No. M-2016-2517831

OPPOSITION TO PETITIONS FOR RECONSIDERATION

Pursuant to Section 703 of the Public Utility Code, 66 Pa. C.S.A. §703, and Section 5.572 of the Public Utility Commission's ("Commission's) regulations, 52 Pa. Code §5.572, entitled "Petitions for Relief", the Pennsylvania State Association of Township Supervisors, the Pennsylvania Municipal League, the Pennsylvania State Association of Boroughs, and the Pennsylvania Association of Township Commissioners (collectively, the "Municipal Associations"), hereby file this Opposition to the Petitions for Reconsideration submitted by Crown Castle NG East LLC and Pennsylvania-CLEC LLC (jointly "Crown Castle") and ExteNet Systems, Inc. ("ExteNet").

A. Standard for Review and Summary of Argument

Section 703 (f) of the Public Utility Code, 66 Pa. C.S.A. §703(f), permits a party to a proceeding to petition for a rehearing within 15 days after service of an Order. Such petition does not stay or postpone the enforcement of the existing Order. In addition, Section 5.572(e) of the Commission's regulations permits answers to petitions for reconsideration to be filed and served within 10 days after service of the petition. Given that Crown Castle's and ExteNet's (jointly, the "Petitioners") Petitions were served on April 5, 2017, this Opposition to the Petitions is timely filed. On April 10, 2017, the Commission granted reconsideration; however, the Municipal

Associations nevertheless wish to respond to the assertions contained in the Petitions for Reconsideration in order to provide the Commission with our perspective on the issues contained therein.

The parties are in agreement as to the legal standard for review of petitions for reconsideration:

> A petition for reconsideration, under the provisions of 66 Pa. C.S. §703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or in part. In this regard we agree with the court in the Pennsylvania Railroad Company case wherein it was said stated that the **'parties...cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically considered and decided against them.' What we expect to see raised in such petitions are new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the Commission.**

Duick v. Pennsylvania Gas and Water Co., 56 Pa. P.U.C. 553,559 (1985) (emphasis added). The Commission adopted and underscored this standard in Pennsylvania Public Utility Commission v. PECO Energy Co., P.U.R. 4th M-00960820, Slip Opinion (1999), in which it held that, where petitioners failed to raise new or novel arguments not previously considered by the Commission in the petition for reconsideration, they did not meet the established standard to warrant that the Commission reopen the proceeding.

Applying this standard to the present Petitions for Reconsideration, every relevant argument presented by Crown Castle and ExteNet were fully briefed by the petitioners in the initial proceeding, were thoroughly considered and expressly addressed by the Commission in its Order of March 17, 2017, and were specifically decided against the petitioners. The petitioners simply seek another bite at the apple on the same issues before the same agency that considered the issues in the first place and decided against them. As such, the Petitions for Reconsideration do not meet the standard for the Commission to reopen the proceeding.

The only "new and novel" argument raised by either of the petitioners is the matter trumpeted by Crown Castle regarding a denial by Haverford Township of one out of four of Crown Castle's wireless facility applications (the other three were approved). Crown Castle's description of the denial is misleading as to the facts and contradictory as to the law. Even if Crown Castle's characterization of the Haverford Township case was accurate, which it is not, Crown Castle fails to demonstrate that a single, isolated case of 1 out of 2,563 municipalities in Pennsylvania does a trend create. Indeed, contrary to the impression created by Crown Castle, nearly all of the affected municipalities in Pennsylvania have approved applications for the installation of DAS facilities in the public rights-of-way.

B. Each Relevant Argument Raised by Petitioners Were Fully Briefed and Thoroughly Considered by the Commission in the Initial Proceeding

Crown Castle and ExteNet assert in their Petitions in that the Commission failed to consider their arguments or committed errors of law. Crown Castle states that, in addition to "new evidence not previously available," namely the Haverford Township case, "this Petition advances arguments on the basis of considerations that appear to have been overlooked or not addressed by the Commission, as well as on the basis of several apparent errors of law." (Crown Castle Petition, pg. 4).

As shown below, none of Crown Castle's or ExteNet's relevant arguments were "overlooked or not addressed by the Commission." Rather, they were fully considered and addressed by the Commission but decided against them. The true reason for the Petitions for Reconsideration is that Crown Castle and ExteNet disagree with the Commission's decision. That is their prerogative, but it does not entitle them to a brand new proceeding on the very same issues.

The petitioners point to two major areas in which the Commission allegedly failed to consider or address their arguments. Both of them involve the issue of whether DAS providers

fall within the exception to the definition of "public utility" contained in Section 102(2)(iv) of the Public Utility Code, 66 Pa. C.S.A. §102(2)(iv). The exception states that the term "public utility" does not include "any person or corporation, not otherwise a public utility, who or which furnishes mobile domestic cellular radio telecommunications service."

First, Crown Castle argues that DAS providers do not fall within this exception, because they do not provide a "mobile service." Crown Castle devotes several pages of the Petition to this issue (Petition, pgs. 9-12) and closes by stating that "[b]ecause the conclusion that companies that provide service via DAS network provide 'mobile service' is based on a false statement, the Commission should reconsider the Order..." Crown Castle Petition, pg. 12.

Second, Crown Castle attempts to distinguish between an entity that "operates equipment that 'furnishes mobile domestic cellular radio telecommunications service' and an entity that "furnishes" such services. Crown Castle Petition, pgs. 6-9. Crown Castle states:

> These are not the same thing; operating equipment that is used as part of a larger network that provides a service is not the same as actually furnishing that service. Crown Castle and other industry members demonstrated that providing wireline, point-to-point telecommunications service via a DAS network, which service and network then facilitates the provision of mobile service by CMRS providers, does not mean that Crown Castle is furnishing CMRS service.

Crown Castle Petition, pg. 8. It claims that the Commission overlooked the difference between the telecommunications services provided by Crown Castle through the DAS network and the commercial mobile radio service ("CMRS") provided by the wireless service providers. Id. at pg. 15.

Similarly, ExteNet asserts that DAS providers are not encompassed by the exception to the definition of "public utility" because, while DAS networks furnish CMRS service, DAS providers are not "persons or corporations" that own the networks that provide such service. ExteNet states:

> The Commission's error here should be plainly evident. The Commission repeatedly found that DAS facilities or networks are utilized to provide CMRS, and this is an accurate statement. But under the express language of Section 102(2)(v), the relevant inquiry for purposes of determining public utility status is not whether a person's network is utilized in providing CMRS, but rather whether the person or corporation that owns those networks or facilities is furnishing CMRS.

ExteNet Petition, pg. 7. (emphasis in original)

It would be redundant and superfluous to respond to these arguments here, because they were already fully presented by the petitioners, fully addressed and countered by the Municipal Associations, and fully considered and rejected by the Commission in the initial proceeding. Indeed, the issue and related sub-issues regarding whether DAS providers fall within the Section 102(2)(iv) exception was **the central issue of the last proceeding**. There is absolutely nothing "new or novel" in the petitioners' claims.

First, in both its original Initial Comments and its Reply Comments, Crown Castle made the same argument as in the Petition for Reconsideration that DAS providers do not provide a "mobile service." In its Initial Comments, Crown Castle dedicated several pages to this claim. Crown Castle Initial Comments, pgs. 6-11. It stated that "Crown Castle is not excluded from the definition of 'public utility' under Pennsylvania law, because it does not provide a 'mobile service.'" Crown Castle Initial Comments, pg. 7. It repeats the same claim in its Reply Comments: "As Crown Castle demonstrated in its initial comments, Crown Castle is not providing 'mobile service'." Crown Castle Reply Comments, pg. 6.

The Commission heard this argument loud and clear and yet rejected it based on the fact that mobile facilities are a critical part of a DAS network and the network transmits signals to the end users' mobile devices:

> The commenting DAS operators resist application of the term 'mobile' on the grounds that they only provide 'transport service over fiber optic lines between

> *stationary* hubs and *stationary* nodes' and deny providing 'a service between the Node and any consumer's mobile device.' This is a continuation of the position that a DAS network is exclusively using landline facilities to stream the WSP signal that the FCC expressly rejected in its *Wireless Infrastructure Order* and with which this Order concurs. This logic turns all definitions on their head. The large dishes on the macro towers are stationary also, but no one argues that these are part of a fixed, not mobile, service.

PUC Order, pg. 22. (emphasis in original) On the issue of whether or not DAS providers offer a "mobile service," Crown Castle makes the very same claim in its Petition which was specifically considered and decided against it. The company fails to raise any new or novel arguments not previously considered by the Commission.

The second major issue that Crown Castle raises in its Petition is that it does not fall within the Section 102(2)(iv) exception to "public utility" because, while it operates equipment that furnishes mobile domestic cellular radio telecommunications service, it does not actually "furnish" such services. Again, Crown Castle made precisely the same argument in the original proceeding. It attempted to distinguish between the antennae and equipment that transmit wireless telecommunications signals and the companies that provide wireless telecommunications services.

In its Initial Comments, Crown Castle asserted the following: "Furthermore, Crown Castle's mere ownership and physical maintenance of antennae capable of transmitting radio communications as part of its DAS network, which have no radio transmission until a third party provides them, does not satisfy the definition of 'radio communication.'" Crown Castle Initial Comments, pg. 8. In its Reply Comments, it stated: "Consistent with Crown Castle's initial comments, comments from CTIA, PCIA, and ExteNet demonstrate that companies are providing telecommunications services via DAS networks, and those companies are not engaged in the provision of CMRS or other wireless service." Crown Castle Reply Comments, pg. 2.

Similarly, ExteNet in its comments in the original proceeding distinguished between DAS providers that build the wireless networks and the companies that provide the wireless services: "While the statute does exclude from the definition of 'public utility' providers of mobile domestic cellular radio telecommunications, ExteNet and other similarly-situated telecommunications carriers *do not offer a mobile domestic cellular radio telecommunications service.*" ExteNet Reply Comments, pg. 5 (emphasis in original)

In its Order, the Commission specifically and deliberately weighed Crown Castle's and ExteNet's arguments and then ruled against them. The Commission was not persuaded that there is a meaningful difference for the purposes of the public utility exception between the DAS equipment operator and the wireless service provider (WSP). It stated:

> The DAS operator is operating equipment that plays a vital and active role in a wireless session by providing an antenna that directly interfaces with the end-user's wireless device—both sending and receiving radio signals…The fact that the retail WSP holds title to the spectrum license or may generate the signal for the DAS network to carry does not diminish the active collection, conversion, and distribution of the wireless signal by the DAS network.

PUC Order, pg. 17.

The Commission methodically reviewed, addressed, and rejected the industry's arguments, which are the same arguments that Crown Castle and ExteNet attempt to re-argue in their Petitions for Reconsideration. In its Petition, Crown Castle states that it "advances arguments on the basis of considerations that appear to have been overlooked or not addressed by the Commission…" Crown Castle Petition, pg. 4. In fact, the arguments advanced in Crown Castle's and ExteNet's Petitions were directly addressed by the Commission. Try as they may to recast their arguments as "new and novel," the fact is that they are same arguments that were presented in the original proceeding over a year ago. As such, they do not warrant the reopening of the proceeding.

C. Petitioners' Nit Picks of the Commission's Order Are Not Relevant to the Merits of the Proceeding

At several points in both of the Petitions for Reconsiderations, the petitioners allege that the Commission engaged in "incorrect findings" that justify a reconsideration of its Order. It is highly questionable whether the findings by the Commission are in fact incorrect; however, even more important, the so-called "incorrect findings" are minor inconsequential and not germane to the merits of the proceeding. Rather than address each and every such "incorrect finding" here, the following example is representative.

In its Petition, ExteNet faults the Commission for its "incorrect finding" pertaining to the FCC's Wireless Infrastructure Order and the Pennsylvania Wireless Broadband Collocation Act ("Act 191"). ExteNet Petition, pgs. 12-14. It alleges that the Commission dismissed the DAS operators' concerns that the loss of utility status would jeopardize their access to the public rights-of-way by stating that the Wireless Infrastructure Order and Act 191 would alleviate their concerns: "The Commission's sole response to these very real consequences of loss of public utility status was to note that the Wireless Infrastructure Order and Act 191 should alleviate these concerns." Id. At 13.

ExteNet then proceeds to claim that the Commission misinterpreted these statutes as "applying to all wireless network deployments, when in fact they only apply in situations where an underlying support structure has already been approved for a wireless attachment." ExteNet Petition, pgs. 12-13. Because of this alleged misinterpretation, ExteNet concludes that the Commission should reconsider its Order. Id. At 14.

There are multiple fallacies inherent in this argument. First, it distorts the Commission's holding with respect to right-of-way occupancy by DAS providers. In its Order, the Commission

discusses five statutes and regulations that promote wireless facility installations in the public rights-of-way, not merely the FCC's Wireless Infrastructure Order and PA Act 191. Commission Order, pgs. 27-29. The Commission notes that 15 Pa. C.S. 1511(e) "does not preclude non-certificated entities from also occupying the public rights-of-way..." Id. At 27. It further instructs that Section 253 of the Telecommunications Act of 1996, 47 U.S.C. §253, requires that no state or local government may "prohibit or have the effect of prohibiting" telecommunications services or discriminate among telecommunications providers, including those that wish to occupy the public rights-of-way. Id. At 27-28.

Finally, it cites two FCC Orders and Act 191 as "three recent developments that have granted greater and better defined public right-of-way access to wireless facilities, including DAS network facilities"—the FCC's 2009 "Shot Clock" Ruling, the FCC's Wireless Infrastructure Order of 2014, and PA Act 191. Id. at 28. Hence, it is not true as ExteNet alleges that "the Commission's sole response...was to note that the Wireless Infrastructure Order and Act 191 should alleviate these concerns."

Moreover, ExteNet's accusation that the Commission misinterpreted the Wireless Infrastructure Order and Act 191 as "applying to all wireless network deployments" is flat-out false. Nowhere in its Order does the Commission make such a statement, and even if it did, it would have no bearing on the merits of this proceeding. It would make no difference whatsoever to the Commission's holding if it stated in this section that the Wireless Infrastructure Order and Act 191 apply in situations where an underlying support structure has been approved for a wireless attachment.

ExteNet is splitting hairs in an attempt to find a Commission error. In fact, there was no error and the subject of the alleged error would not change the Commission's fundamental point

that DAS providers have ample access to the public rights-of-way by means of multiple federal and state statutes and regulations that have expressly promoted such access for wireless providers. The Commission is absolutely correct that the five statutes and rulings it cited have "facilitated the deployment of wireless facilities" in the public rights-of-way. Id. at 28. Among many other restrictions on local governments, those statutes and rulings have:

- Prescribed that local governments may not "prohibit or have the effect of prohibiting" wireless facilities, including facilities in the public rights-of-way (Telecommunications Act of 1996)

- Shortened the time frames for local consideration of towers and antennae (FCC "Shot Clock" Ruling)

- Imposed a "deemed approved" requirement on local governments that do not meet the time frames (FCC "Shot Clock" Ruling)

- Required that any denial of a wireless facilities application must be in writing and supported by "substantial evidence" (FCC "Shot Clock" Ruling)

- Excluded from National Historic Preservation Act (NHPA) review collocations that meet certain guidelines. (FCC Wireless Infrastructure Order)

- Excluded from National Environmental Preservation Act (NEPA) review collocations that meet certain guidelines. (FCC Wireless Infrastructure Order)

- Exempted from public notice and comment certain temporary wireless towers meeting certain criteria. (FCC Wireless Infrastructure Order)

- Required that local governments must approve wireless collocations, modifications, and replacements that do not "substantially change" the physical dimensions of the support structure. (PA Act 191)

- Limited local governments to requiring no more than a building permit for such collocations, modifications, and replacements. (PA Act 191)

Given the multiple federal and state protections granted to wireless providers, including DAS contractors, with respect to municipal approvals, ExteNet's claim that the "loss of public utility

status would jeopardize access to municipal rights-of-way" rings hollow indeed. ExteNet Petition, pg. 12.

D. Crown Castle's Discussion of the Haverford Township Case is Misleading and Does Not Warrant a Reopening of this Proceeding

In its Petition, Crown Castle attempts to project the decision of a single municipality in a unique case involving extenuating circumstances to encompass all local governments in Pennsylvania. In doing so, Crown Castle misleads the Commission regarding the facts and law of the case. It also ignores the fact that nearly all applications for wireless facilities in the public rights-of-way are approved by Pennsylvania municipalities.

Crown Castle begins its analysis of the Haverford Township case by stating that, "immediately following the (Commission's) Order, **local governments** have already revealed that the Commission's understanding was wrong." Crown Castle Petition, pg. 13 (emphasis added). It further states that, even though the Commission found that Crown Castle would still be able to deploy its facilities in the public rights-of-way, "**local governments** have immediately demonstrated that the Commission's assumption was wrong." Petition at 14 (emphasis added). Note that Crown Castle repeatedly uses the plural—local governments—when the only example it provides is one local government, Haverford Township. There are 2,563 municipalities in Pennsylvania.[1] A single case by a single municipality does not enable Crown Castle to make a general statement about all Pennsylvania municipalities.[2]

---

[1] Pennsylvania Local Fact Sheet, Governor's Center for Local Government Services.

[2] Crown Castle states in its Petition that "during the comment period, Crown Castle and other parties provided numerous examples of difficulties with local governments regarding access to the public rights-of-way." Crown Castle Petition at 13. It footnotes its Initial Comments at pgs. 15-16 and its Reply Comments at pgs. 20-25. A review of those pages reveals that Crown Castle provided no examples of such "difficulties." The only municipalities that are cited at all are in its Comments, where it notes that the Borough of State College requires "[a] copy of the applicant's use agreement, franchise, license, or other legal authorization or order" from the PUC or other state or federal agency and that the City of Lancaster distinguishes in its Right-of-Way Ordinance between "PUC regulated" and "non-PUC regulated" companies. Neither of these requirements appear to be "difficulties" and neither of the municipalities are

Now let's turn to the Haverford Township case. In its Petition, Crown Castle states that, "shortly after the Commission's Order was adopted, the Township denied a pending application by Crown Castle pursuant to Section 6409 of the federal Spectrum Act to replace existing facilities at several locations in the Township." It concluded that "the Township's sole ground for denial was the Commission's Order." Crown Castle Petition, pg. 13.

This characterization of the facts is misleading. First, Crown Castle submitted four applications, not one, proposing new wireless facilities in Haverford Township to collocate a second wireless carrier at each of four locations—706 Merion Avenue, 2202 Olcott Avenue, 413 Pembroke Road., and 1443 Delmont Drive. The Township approved three out of four of these applications and issued Road Occupancy Certificates for the Merion Avenue, Olcott Avenue, and Pembroke Road sites. *See* Crown Castle Proposal Letter of November 14, 2016 and three Road Occupancy Certificates, attached hereto as Exhibit A.

With respect to the Delmont Drive site, there were extenuating circumstances involved. The site was in close proximity to a house occupied by a family of a child with cancer and several neighbors testified against the site at the public hearing.[3] After the hearing, Crown Castle asked permission to submit additional documentation and to enter discussions to attempt to reach resolution with the Township. The Township agreed. While discussions between the Township and Crown Castle were ongoing, an attorney for Crown Castle sent a letter to the Township Solicitor stating that the application was "deemed approved" in accordance with the FCC Wireless Infrastructure Order of 2014. *See* Letter of Attorney for Crown Castle, James Laskey, dated March

cited for denying any wireless facility applications. Indeed, the City of Lancaster has a separate Wireless Facilities Ordinance that does not distinguish between PUC regulated and non-PUC regulated companies.

[3] Interviews with Assistant Manager and Solicitor of Haverford Township, April 13, 2017.

7, 2017 and responsive Letter of Township Solicitor James Byrne, Jr. dated March 10, 2017, attached hereto as Exhibit B.

As a result of the letter from James Laskey, which forced the Township's hand, the Township issued Findings of Fact and Conclusions of Law denying the application for the Delmont Drive site. While Crown Castle is correct that one of the legal conclusions was that the Commission decided that DAS providers were no longer public utilities, this was not the sole ground for denial. The Township also concluded that the proposed modifications to the utility pole at that site "constitute a 'substantial change' per the Haverford Township Zoning Code and the same is therefore denied." *See* Proposed Findings of Fact and Conclusions of Law of Haverford Township Property Committee of the Board of Commissioners, attached hereto as Exhibit C.

Clearly, the Haverford Township case involved extenuating circumstances which were being discussed between the parties until a Crown Castle attorney stated in writing that the collocation was deemed approved. Moreover, Crown Castle cannot in one forum—Haverford Township—state that the collocation was deemed approved (Exhibit B), while stating in another forum—the Public Utility Commission—that the collocation was denied. Crown Castle Petition at 12-14.

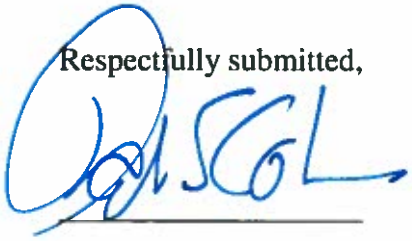
From a statewide perspective, the Haverford Township case is an aberration both with respect to the facts and the law. The vast majority of Pennsylvania municipalities approve applications from DAS providers for wireless facilities. Our law firm represents over 100 Pennsylvania municipalities with respect to wireless facilities regulation and very few, if any, that have received applications from wireless contractors, including DAS providers, have denied those applications. Indeed, Crown Castle stated in its Comments in this proceeding that it "has deployed

DAS networks in more than 35 communities in Pennsylvania, with more in active development." Crown Castle Initial Comments, pg. 2. Given that its Comments were submitted a year ago, Crown Castle has certainly received many more municipal approvals since that time. In short, the Haverford Township case is unique among Pennsylvania municipalities and cannot be relied upon to compel a reconsideration of the Commission's Order.

E. CONCLUSION

For the reasons stated above, the Pennsylvania State Association of Township Supervisors, the Pennsylvania Municipal League, the Pennsylvania State Association of Boroughs, and the Pennsylvania Association of Township Commissioners hereby request that the Commission deny the Petitions of Crown Castle and ExteNet for reconsideration of the Commission's March 17, 2017 Order regarding the certification of DAS operators in Pennsylvania.

Respectfully submitted,



Daniel S. Cohen
Natausha M. Horton
Cohen Law Group
413 S. Main St., 3rd Floor
Pittsburgh, PA 15215
(412) 447-0130

Counsel for the Pennsylvania State Association of Township Supervisors, the Pennsylvania Municipal League, the Pennsylvania State Association of Boroughs, and the Pennsylvania State Association of Township Commissioners

April 17, 2017