CONNECTICUT SITING COUNCIL

In re:

Optasite Towers LLC and Omnipoint Communications, Inc. application for a certificate of Environmental Compatibility and Public Need for the construction, maintenance and operation of a telecommunications facility located at 52 Stadley Rough Road, Danbury, Connecticut. Request for Comment; § 16-50o(c).	:	**Docket No. 366** November 24, 2008

MOTION IN SUPPORT OF PROTECTIVE ORDER TO NOT DISCLOSE THE AMOUNT OF MONTHLY RENT IN A LEASE AGREEMENT FOR A WIRELESS TELECOMMUNICATIONS FACILITY

Brown Rudnick LLP, as legal counsel who routinely represent wirelessly carriers before the Connecticut Siting Council (Council), respectfully submit this brief, upon invitation of the Council, in support of Optasite's Motion for a Protective Order ("Motion") pursuant to Connecticut General Statutes § 4-178a.

I. The Statutory Language of Connecticut General Statute § 16-50o(c) does not require disclosure of exact monthly rent

A. Connecticut General Statute § 16-50o(c) is unambiguous

The plain meaning of Connecticut General Statute § 16-50o(c) does not require disclosure of the exact amount of rent in a lease agreement between a telecommunications company and a site host. The specific language of the section mandates a "statement" of consideration.

> "The applicant shall submit into the record the full text of the terms of any agreement, and a *statement* of any consideration therefor, if not contained in such agreement, entered into by the applicant and any party to the certification proceeding, or any third party, in connection with the construction or operation of the facility. This provision shall not require the public disclosure of proprietary information or trade secrets." [*Emphasis added*]. C.G.S. § 16-50o(c).

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Other sections of the Connecticut General Statutes explicitly use the term "amount" when describing compensation mandates. For example, the term "amount of consideration" is utilized in three other Connecticut statutory provisions. Therefore, if the Connecticut Legislature ("Legislature") intended for "consideration" to mean "amount of consideration", specific statutory language was available to address such an intention. See C.G.S. § 36a-105(d), § 36b-63(b)(15), § 38a-67a(c)(1)(F).

Contrary to the City of Danbury's (the "City") argument, C.G.S. § 8-129 is an example of the Legislature specifically requesting the "amount" of compensation to be disclosed. See City's Objection to Motion p. 2. The statute states in part;

> "The redevelopment agency shall file a *statement of compensation, containing a* description of the property to be taken and the names of all persons having a record interest therein and setting forth the *amount of such compensation*, and a deposit as provided in section 8-130, with the clerk of the superior court for the judicial district in which the property affected is located." [*Emphasis added*] C.G.S. § 8-129(a)(3).

Under this section a "statement of compensation" explicitly includes three different submissions. This provision illustrates that when the Legislature intends to require an amount within a statement of compensation, it is explicitly stated. The same analysis applies to a statement of consideration. If the Legislature intended for the amount of consideration to be included in such a statement, it would have stated that such information was required, as it did in C.G.S. § 8-129(a)(3). The current practice of disclosing the existence of consideration for the lease space squarely fits in the meaning of "statement".

B. <u>The legislative history also supports a finding that an exact amount of rent was not intended by the Legislature</u>

In the case that C.G.S. § 16-50o(c) is considered ambiguous and legislative history is examined pursuant to C.G.S. § 1-2z, the intent of the Legislature supports an interpretation that disclosure of the exact amount of rent in a lease is not required.

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Senator Gunther introduced the statutory language now found in C.G.S. § 16-50o(c). Upon introduction of that language, Senator Gunther described the applicability of the provision mandating disclosure of statements of consideration as follows: "*arrangements* ... made between the parties that are petitioning [the Council] and some of the people that were objecting, especially some of the major oyster men and the oyster growers up there.... This alone should be part of the record...." 44 H.R. Proc. 8, 2001 Sess., 002186-002187.

Senator Gunther's statement is evidence that the legislature did not intend for the exact amount of rent for a telecommunication tower site to be disclosed under this provision because the purpose was to focus on arrangements between utility companies and outside parties rather than site hosts. The objective of this provision was to make agreements, or "hush money" as Senator Gunther described it, between utility companies and project opponents public. 44 H.R. Proc. 8, 2001 Sess., 002187.

The legislative history does not indicate that the Legislature intended to apply this provision to require disclosure of the amount of rent in a lease. Therefore, the legislative history supports reading the section to apply to disclosing the existence of consideration, but not the exact amount of consideration.

C. Proprietary Information or Trade Secret

In the alternative, if C.G.S. § 16-50o(c) is construed to mean that the precise amount of rent in a lease is required to be disclosed under Connecticut law, then the exception regarding trade secrets or proprietary information would still prevent disclosure of the exact amount of rent included in the lease.

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1. Trade Secret

Pursuant to the definition provided by the Council's letter dated November 3, 2008, the exact monthly rent in a lease constitutes a trade secret. The definition as used by the Freedom of Information Act (FOIA) is defined as follows:

> "Trade secrets, which for purposes of the Freedom of Information Act, are defined as information, including formulas, patterns, compilations, programs, devices, methods, techniques, processes, drawings, cost data, or customer lists that (i) derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from their disclosure or use, and (ii) are the subject of efforts that are reasonable under the circumstances to maintain secrecy;...." C.G.S. § 1-210(b)(5)(A).

The information at issue falls under sub-section (A) of the above statute. Pursuant to sub-section (A) the exact amount of the rent in a lease is "cost data ... that dervive[s] independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from their disclosure or use...." C.G.S. § 1-210(b)(5)(A). The exact amount of rent paid in a lease for a proposed telecommunications site provides wireless competitors and other potential owners of future host sites with information that could affect economic value.

The exact rent amount is a substantial secret. If not for this argument regarding disclosure of the amount of rent in the lease, the information at issue would not be generally known or readily ascertainable in the market place. (See *Director Department of Information Technology of Town of Greenwich v. Freedom of Information Commission,* 247 Conn. 179, 194 (2005) ("In order to qualify for a trade secret exemption under § 1-210(b)(5)(A) a substantial element of secrecy must exist, to the extent that there would be difficulty in acquiring the information except by the use of improper means.")

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Absolute secrecy is not required in order for information to be deemed a trade secret; therefore the reality that both parties have this information available to them does not affect its status as a trade secret. See *Public Utilities of City of Norwich v. Freedom of Information Commissio*n, 55 Conn.App. 527, 532 (1999) *citing to Plastic & Metal Fabricators, Inc. v. R*oy, 163 Conn.257, 265, 268 (1972) ("However, absolute secrecy is not essential and the plaintiff does not abandon his secret by delivering it or a copy to another for a restrictive purpose, nor by a limited publication.")

In *Town of Greenwich v. Freedom of Information* the Court held that information from the town's Geographic Information System (GIS) was readily available and therefore did not constitute a trade secret. 247 Conn. 179 (2005). The information at issue in this case is distinguishable because it is not readily available. Rather, the amount of rent contained in the lease would only be available to the parties. See Land Lease Agreement, paragraph 22 attached to Optasite's Motion for Protective Order. (The Notice of Lease, which does not contain the rental amount, is the lease document recorded with the appropriate recording office and therefore available to the public.)

Conn. Gen. Stat. § 47-19 requires that leases exceeding one year record a notice of lease. Of note, pursuant to C.G.S. § 47-19, the amount of rent is not required to be recorded in the notice of lease. The absence of a requirement to publicly disclose the specific amount of rent in a notice of lease strongly implies that the Legislature did not intend for the specific amount of rent in a lease to be public information.

2. Proprietary Information

The exact amount of rent for the lease constitutes proprietary information. As defined by the Council's letter dated November 3, 2008, proprietary information is defined as follows:

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"Information in which the owner has a protectable interest" (Black's Law Dictionary). The amount of rent in a lease for a telecommunications site is proprietary information.

As discussed above, if the information at issue were released to the general market place it would place telecommunications companies in a precarious position in regard to the amount of money required to secure a proposed telecommunications site in the future. Telecommunications companies have a protectable interest in the amount of rent paid to a site owner. The telecommunications companies have an interest in protecting this information from disclosure to their competitors and future site hosts.

II. The exact amount of rent is not relevant for Council review

The Council reviews applications as they are presented to the body and is principally concerned with public need balanced with environmental compatibility and in the case of telecommunication towers, the non-proliferation of towers. See generally C.G.S. § 16-50p. Consideration of the exact amount of rent paid, market rent forces, and possible rents are not factors in the Council's decision making process.

Conn. Gen. Stat. 16-50(g) permits the Council to consider the applicant's interest, or lack thereof, in a proposed telecommunication tower site. However, that section does not grant the Council power to require the submission of the specific *amount* of rent in a lease for a telecommunication tower site. In *Corcoran v. Connecticut Siting Council,* 284 Conn. 455 (2007) the Connecticut Supreme Court held that pursuant to C.G.S. § 16-50(g) the Council has authority to consider the availability of a specific site in regard to the deliberation of a certificate. However, in this case the City is requesting Council analysis of a specific amount of rent contained in a lease in order determine the market price for telecommunications towers and determine whether the applicant was influenced by such market price.

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The request at hand is distinguishable from the holding in *Corcoran* because this case concerns a specific amount and *Corcoran* dealt with an overall interest. Contrary to the City's analysis, the *Corcoran* decision does not stand for the broad proposition that the Council may consider the specific amount of rent in a lease to determine whether the applicant properly analyzed alternative sites. See City's Objection to Motion p.4. Rather, *Corcoran* established that the Council, may, at its discretion in making its decision regarding a certificate, consider whether the applicant has secured the proposed site.

III. Conclusion

Pursuant to the plain meaning of C.G.S. § 16-50o(c) the exact monetary terms of a lease for a proposed telecommunications site are not required to be disclosed. C.G.S. § 16-50o(c) requires a statement of consideration and not an amount of consideration.

Even if such information is interpreted as required by C.G.S. § 16-50o(c) it is exempted because it is a trade secret/proprietary information. There is independent economic value in the specific amount of rent in a lease for a telecommunications tower remaining undisclosed. The specific amount of rent in a lease for a tower is not otherwise available and if such information became generally known market competitors as well as future site hosts would gain an economic value. Finally, such information is not relevant to Council proceedings.

Brown Rudnick respectfully requests that the Motion for a Protective Order be granted for the reasons set forth above.

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Respectfully submitted,
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Certificate of Service

On November 24, 2008, a copy of Brown Rudnick's Motion in Support of a Protective Order to not disclose the amount of monthly rent in a lease agreement for a wireless telecommunications facility was sent via Email and first class mail to:

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