STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL

IN RE:

APPLICATION OF OPTASITE TOWERS LLC AND OMNIPOINT COMMUNICATIONS, INC. FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED FOR THE CONSTRUCTION, MAINTENANCE AND OPERATION OF A TELECOMMUNICATIONS FACILITY AT 52 STADLEY ROUGH ROAD, DANBURY, CONNECTICUT	DOCKET NO. 366 November 25, 2008

BRIEF IN FURTHER SUPPORT FOR A PROTECTIVE ORDER
RELATED TO DISCLOSURE
OF THE EXACT MONTHLY RENT IN THE
LEASE AGREEMENT BETWEEN OPTASITE AND CHRIST THE SHEPPARD CHURCH

On behalf of Optasite Towers, LLC ("Optasite"), we respectfully submit this brief in furtherance of Optasite's motion for a protective order pursuant to Section 4-178a of the Connecticut General Statutes to preclude any disclosure of the exact financial terms of a lease agreement between Optasite and Christ the Sheppard Church and T-Mobile. Subsequent to the October 28th public hearing on this motion, the Siting Council issued a request for comment. Specifically, the Siting Council requested comments on the following issues:

(1) Does the plain language of C.G.S. §16-50o(c) require disclosure of the rent amount contained in telecommunication tower lease agreements?

(2) Does the rent amount contained in telecommunication tower lease agreements meet the definition of "proprietary information" or a "trade secret"?

Based on the information presented herein, in Optasite's October 6, 2008 Motion and at the October 28th hearing, we respectfully submit that the plain language of §16-50o(c) does not require disclosure of the rent amount contained in telecommunication tower lease agreements or, in the alternative, that the rent amount contained in such agreements are protected as proprietary information and trade secrets.

I. DOES THE PLAIN LANGUAGE OF C.G.S. §16-50o(c) REQUIRE THE DISCLOSURE OF THE RENT AMOUNT CONTAINED IN TELECOMMUNICATION TOWER LEASE AGREEMENTS?

No. Section 16-50o(c) of the Connecticut General Statutes sets forth the following submission requirement in all certification proceedings:

> (c) 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.

As fully set forth in Optasite's October 6th Motion, the Statute, as written, only requires a statement of consideration, not the exact amount of the consideration.

There simply is no specific requirement in the language of the Statute requiring submission of the exact amount of consideration. The Statute does not contain the words "amount", "compensation", "financial terms", or "rent". Further, a statement of consideration in such agreements does not necessarily include monetary compensation. Consideration is defined in Black's Law Dictionary as "something of value, such as an act, a forbearance, or a return promise received by a promisor from a promisee." Parties to such agreements may bargain for an exchange that does not include the payment of rent. As such, the requirement of §16-50o(c) that a statement of consideration be submitted in a certificate proceeding does not require disclosure of the exact rent.

It is clear from a review of the redacted lease agreement between Optasite and Christ the Sheppard Church that the consideration for the agreement is monthly rent paid in dollars for use of a portion of the Church's property for the installation and operation of the proposed facility. Clearly, the Council and any parties to the proceeding have sufficient information related to Optasite's agreement to adequately inquire into matters relevant to this Docket. Accordingly, we respectfully submit that the exact rent to be paid by Optasite is not required to be disclosed by the very terms of the Statute itself.

II. DOES THE RENT AMOUNT CONTAINED IN TELECOMMUNICATION TOWER LEASE AGREEMENTS MEET THE DEFINITION OF "PROPRIETARY INFORMATION" OR A "TRADE SECRET"?

Yes. It is respectfully submitted that the exact rent amount contained in telecommunication tower lease agreements would constitute proprietary information and as such should be considered trade secret information.

Section 1-210(b)(5)(A) of the Freedom of Information Act (FOIA) defines "trade secret" as:

> 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, customer lists, film or television scripts or detailed production budgets 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;

"Proprietary information" is not defined in Section 16-50o, or within the FOIA statutes. However, Blacks Law Dictionary provides the following definition of proprietary information:

"Information in which the owner has a protectable interest"

In addition to these definitions, case law further identifies the type of information that constitutes trade secrets. We learn in *Department of Public Utilities of City of Norwich v. Freedom of Information Com'n*[1] that 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 use of improper means. In *Director, Dept. of Information Technology of Town of Greenwich v. Freedom of Information Com'n*[2] the Supreme Court of Connecticut sets forth a threshold test for trade secrets - that the information is not generally ascertainable by others. In *Department of Public Utilities of City of Norwich v. Freedom of Information Com'n*, the Appellate Court also held that "absolute secrecy is not essential" and the secret is not abandoned by delivery of the information to another for a "restrictive purpose." Similarly, New York courts have recognized that due to highly competitive nature of the power industry, disclosure of terms of power purchase agreements would be useful to competitors and would injure utility's competitive position and were therefore protected from disclosure. See *Glens Falls Newspapers, Inc. v. Counties of Warren and Washington Development Agency*[3].

As the Siting Council is aware, the wireless industry is a highly competitive business and the specific financial terms of lease agreements are cautiously guarded against revelation from competitors and future landlords. Competitors and future landlords could use the specific financial terms to their economic advantage and as such, this information derives independent economic value from not being generally known. Disclosure of the specific rental amount of telecommunication lease agreements would cause substantial injury to each companies competitive position. Clearly, the specific rental amounts are well protected from competitors and are not contained in any public records. This information is not readily ascertained and a substantial element of secrecy exists regarding this information as evidenced by the submission of leases with financial data redacted.

Other State statutory provisions lend credence to this exact point. Specifically, Section 1-210(b)(5)(B) of FOIA excludes from disclosure any "commercial or financial information given in confidence, not required by statute". The relevant statute, Section 47-19 in Land Titles, does not require disclosure of rent and allows leases over a year in duration to be evidenced by recording of a memorandum of lease that excludes this information from public review. Section 12-63(b) of the Property Tax Assessment Statute even provides that:

"any such information related to actual rental and rental-related income and operating expenses and not already a matter of public record which is submitted

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[1] 55 Conn.App. 527, 739 A.2d 328 (1999)
[2] 274 Conn. 179, 874 A.2d 785 (2005)
[3] 257 A.D.2d 948; 684 N.Y.S.2d 321 (3d Dept. 1999)

or made available to the assessor shall not be subject to the provisions of section 1-210."

Nothing in the State's real property, tax assessment or freedom of information laws compels the disclosure of the actual rent negotiated between private parties to a lease transaction. Based on all the foregoing, it is respectfully submitted that the exact rent amount contained in telecommunication leases constitutes trade secret information as defined in Section 1-210(b)(5)(A) of FOIA and relevant case law and is also proprietary information that is statutorily protected from disclosure.

III. CONCLUSION

As discussed in Optasite's October 6th Motion and at the October 28th hearing, the purpose of Section 16-50o(c) was not to require the wholesale disclosure of the exact consideration in each and every applicants agreements with property owners in Dockets. Rather it was an effort to obtain disclosure of certain third party agreements and the overall terms and conditions of such agreements as is evidenced by the legislative history itself. Since passage of Section 16-50o(c) over 5 years ago, the exact rent contained in lease agreements has not been disclosed in the numerous Dockets that have been considered. Given the potential injury to competitive position by disclosure of exact rent, wireless and tower companies have an interest in protecting this financial information from disclosure. This information constitutes proprietary information and qualifies as a trade secret. The City of Danbury is seeking the public disclosure of information that is clearly exempt and irrelevant to matters before the Council. In order to provide for an efficient and orderly usage of time at the continued public hearing in this Docket, we respectfully renew Optasite's motion for a protective order in advance of the December 8th continuation for the reasons set forth above.

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CERTIFICATE OF SERVICE

I hereby certify that on this day, an original and twenty copies of Optasite's brief in further support of its motion for a protective order were served on the Connecticut Siting Council by overnight mail with an electronic copy sent via email and copy served via overnight mail and email to:

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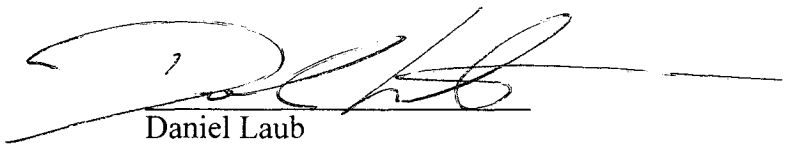

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