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Commonwealth Court Reaffirms Status Quo - Distributed Antenna System Developers are Public Utilities

On June 7, 2018, the Commonwealth Court of Pennsylvania reclassified Distributed Antenna Systems ("DAS") developers as public utilities, relying on the statutory scheme set out in 66 Pa.C.S. § 102(1)(vi), which permits such classification for *facilities* that "convey or transmit messages or communications." This decision upends a March 2018 decision by the Pennsylvania Public Utility Commission ("Commission") which had reinterpreted the statute to exempt DAS providers and physical infrastructure as public utilities. The Commonwealth Court's reclassification reverts back to the previously held interpretation of the statute. DAS providers and related infrastructure had been classified as public utilities since 2005.

The Commission's (mis)interpretation came after a 2016 investigation as to whether the networks had been properly classified as public utilities. The Commission determined that the networks fell under Section 102(2)(iv), which excludes corporations that furnish the *telecommunications themselves* from public utility status. The Commission's overly broad interpretation found that the networks' equipment used to furnish telecommunications for the customers of for-profit mobile services fell outside of the scope of public utility status. Consequently, the decision stripped the Commission's jurisdiction over the development of the physical networks (construction and installation of tower sites, for example) and was no longer authorized to issue developers certificates of public convenience. The certificates are often necessary to install antennas on municipal and public utility rights-of-way. After a petition for reconsideration was denied, citing a lack of new arguments, Crown Castle filed a Petition for Review. The Petition called attention to the misinterpretation of the Code's definition of a public utility and its conflict with the treatment of networks in other jurisdictions.

Re-examining Section 102 of the Code, the Court found that the Commission's new interpretation of Section 102(2)(iv) was not supported by the statutory language. The Court drew a contrast between the *service* provided by the networks and the actual *telecommunications* the wireless service providers transmit through those networks on behalf of their retail customers.

The Court noted that although the agency is entitled to change the interpretation of a statute, it cannot expect that such an overbroad interpretation will be entitled to much deference. Because the Code itself had not changed, the Court did not see reason to defer to the Commission's reinterpretation.

In returning to the status quo, the Court further recognized the importance, and continued public need, of allowing neutral-host DAS networks that do not work exclusively with any particular wireless service provider to continue to operate as public utilities. This allows any wireless service provider to expand their coverage in any area where the network is located.

The case is cited as *Crown Castle NG E. LLC & Pa.-CLE LLC v. Pa. Pub. Util. Commission*, 2018 Pa. Commw. LEXIS 217 (June 7, 2018).

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