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November 28, 2018

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, Filing Room
Harrisburg, PA 17120

RE: Assumption of Commission Jurisdiction Over Pole Attachments from
Federal Communications Commission; Docket No. L-2018-3002672;
REPLY COMMENTS OF CTIA

Dear Secretary Chiavetta:

Enclosed for electronic filing with the Commission are the Reply Comments of CTIA to the Notice of Proposed Rulemaking in the above-captioned matter.

Thank you for your attention to this matter. If you have any questions related to this filing, please do not hesitate to contact my office.

Very truly yours,

Todd S. Stewart
Counsel for the CTIA

TSS/jld

Enclosure

cc: Shaun A. Sparks, Commission Law Bureau Assistant Counsel (shsparks@pa.gov)
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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Assumption of Commission Jurisdiction :
Over Pole Attachments from the Federal : Docket No. L-2018-3002672
Communications Commission :

REPLY COMMENTS OF CTIA

CTIA respectfully submits its reply comments in response to comments filed in the Pennsylvania Public Utility Commission's ("Commission's") above-captioned docket regarding reverse preemption of pole attachment jurisdiction.

I. INTRODUCTION AND SUMMARY

On or about October 28, 2018, a number of interested parties submitted comments in response to the Commission's Notice of Proposed Rulemaking adopted July 12, 2018 in this proceeding (the "Notice"), with the vast majority of those commenting, including CTIA, expressing support for the Commission's effort to assert jurisdiction over utility pole attachments as provided in the Telecommunications Act of 1996.¹ CTIA provides these responses to some of the more critical points raised in those comments and renews its offer to assist the Commission in any way it can to allow the Commission to move forward with this initiative.

¹ See, e.g., Comments of CTIA on Notice of Proposed Rulemaking, Docket No. L-2018-3002672 (October 29, 2018) ("CTIA Comments").

II. THE COMMISSION SHOULD ASSERT JURISDICTION OVER POLE ATTACHMENTS AND ADOPT THE FCC'S POLE ATTACHMENT RULES

A. CTIA Agrees With the Vast Majority of Commenters That the Commission Should Assert Jurisdiction Over Pole Attachments and Adopt Current and Future FCC Rules

As a threshold matter, CTIA reiterates its support for the Commission asserting jurisdiction over the adjudication of pole attachment disputes. The vast majority of Commenters also supported this proposal, which CTIA believes will promote efficient broadband deployment.²

CTIA suggests that the Commission express its intention to adopt all Federal Communications Commission ("FCC") pole attachment regulations, including those recently promulgated, and to continue to do so into the future, subject to whatever rights interested parties have to request rulemakings to change them. However, some commenters voiced at least some level of concern with the Commission's proposed adoption of future FCC pole attachment rules. Suggestions in this vein included a proposal for a notice requirement that includes a right to request comments within 60 days of publication,³ and an assertion that it would constitute a denial of due process to adopt any future changes to the FCC regulations without engaging in the processes contained in the entirety of the *Commonwealth Documents Law*, 45 P.S. § 1102, *et seq.*, *The Commonwealth Attorneys Act*, 71 P.S. 732-101, *et seq.* and *The Regulatory Review Act*, 71 P.S. § 745.1, *et seq.*⁴

² See, e.g., CTIA Comments at 3. CTIA notes that Crown Castle expressed opposition to the reverse pre-emption proposal, and the Broadband Cable Association of Pennsylvania advocated for a "wait-and-see" approach and suggested that the Commission should delay any decision on the issue until after the FCC's newly promulgated regulations are effective. See Comments of Crown Castle, Docket No. L-2018-3002672 (October 29, 2018) ("Crown Castle Comments") at 3-7; Comments of the Broadband Cable Association of Pennsylvania, Inc., Docket No. L-2018-3002672 (October 29, 2018) ("BCAP Comments") at 1-3. Both parties did suggest, however, that if the Commission were to move ahead with its proposal, that it should adopt the FCC regulations and any future changes to those. See Crown Castle Comments at 8-9; BCAP Comments at 4.

³ See Comments of Communications Workers of America, Docket No. L-2018-3002672 (October 29, 2018) at 6.

⁴ See *id.* at 4-5.

CTIA disagrees. As suggested in CTIA's initial comments, there is precedent for the Commission to promulgate a rule that adopts current and future federal regulations as binding enforceable rules for Pennsylvania without the need to traverse the entire regulatory review process. Under this precedent, future changes to the regulations would require notice only if the federal change was not being adopted.⁵ One Pennsylvania statute already uses a similar system for pipeline safety standards, for example.⁶

Nonetheless, if the Commission reaches the conclusion that it cannot automatically adopt future changes to the FCC rules, the Commission could promulgate a rule requiring it to open a rulemaking to adopt new FCC rules within a time certain. If there are no objections, the proposed changes could become effective, and if there are objections, the ordinary rulemaking process could apply. It cannot be emphasized enough, however, that consistency with the FCC regulations is important to promote regulatory certainty and the efficiency that it creates.

Several commenters raised the question of whether the Commission intends to adopt recently published FCC regulations.⁷ Since the Commission's 5-0 vote to approve Commissioner Kennard's Motion, the FCC has issued at least two orders that touch on the subject of pole attachments, so the Commission may wish to provide clarification. The Commission's proposal is to adopt the FCC's current and future rules, and that would bring the FCC's recent orders within the ambit of the Commission's proposal.⁸ To maintain consistency, CTIA urges the Commission to adopt the FCC's currently effective regulations and any future pertinent regulations adopted by

⁵ See CTIA Comments at 5.

⁶ See 52 Pa. Code § 59.33(b) (applying automatic state adoption to federal pipeline safety amendments 60 days following their effective date unless otherwise specified).

⁷ See, e.g., BCAP Comments at 2.

⁸ See Fed. Comms. Comm'n, *In the Matter of Accelerating Wireline Broadband Deployment to Infrastructure Investment*, Third Report and Order, WC Docket No. 17-84 (released August 3, 2018), and Fed. Comms. Comm'n, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, WT Docket No. 17-79 (released September 27, 2018).

the FCC, including those contained in its recent orders. Such a practice will maintain the alignment that exists today with regard to what rules govern attachments in Pennsylvania, and it will continue that certainty into the future with any potential future rule changes at the FCC.

Some commenters also suggested that even if the Commission were to adopt the FCC's rules, it should nonetheless mitigate the binding nature of the precedent associated with those rules by expressly allowing itself the opportunity to deviate from precedent in interpreting and applying them.⁹ But the Commission appears to have already addressed this issue by expressly stating, at proposed 52 Pa. Code §77.5(c), that it will treat FCC and federal court interpretations of the FCC's rules as "persuasive authority."¹⁰ Even an unconditional rule adopting all current and future FCC regulations could be overridden, when necessary, by a subsequent rule. The PUC's inherent authority in this regard, as amplified by the proposed code provision cited above, means the Commission already has the leeway to deviate from FCC and court interpretations when it feels the need to do so. However, CTIA submits that the Commission should strive to ensure that its interpretation and enforcement of the FCC's pole attachment regulations remains aligned with the FCC's to the greatest extent possible, in an effort to promote efficiency.

B. The Commission Should Reject Proposals to Adopt the FCC's Rules With Suggested Amendments

In the same vein, CTIA opposes proposals to amend certain FCC's rules prior to adoption by the Commission. Such amendments will reduce consistency and efficiency by unnecessarily departing from the FCC's rules, which have proven effective, and would create their own issues and difficulties for the attachment process.

⁹ See, e.g., Comments of NetSpeed LLC, Docket No. L-2018-3002672 (October 12, 2018) at 3.

¹⁰ See Notice at 11, Annex p. 2.

One electric utility commenter suggested that the Commission should modify the proposed FCC regulations to eliminate “self-help” provisions.¹¹ The “self-help” provisions cited are those that allow attachers to hire qualified contractors to perform work when pole owners are unwilling or unable to do so, or when there is a dispute as to rates. CTIA submits that the best solution to the needs of pole attachers to obtain timely and legal access to facilities is not to take away a remedy provided by federal regulations that can sometimes serve as the most expedient means of ensuring broadband deployment. Eliminating an important tool unnecessarily hinders attachers in favor of pole owners, and consideration of this proposal at this stage is extremely premature.

Two electric distribution company commenters seek amendments to the proposed regulations that would provide a level of deference to electric utilities and their safety concerns – particularly with regard to storm restoration, seeking to minimize attachers’ rights and concerns.¹² These same entities also suggest that the Commission consider modification to the FCC rules in the area of penalties for unauthorized attachments, with one going so far as to suggest vastly increased penalties for unauthorized attachments made by wireless providers.¹³

CTIA certainly understands that resources are not unlimited and utilities must not be thwarted from safely maintaining and restoring their systems. CTIA also recognizes that during periods of storm restoration, close coordination between attachers and pole owners is required for a variety of reasons, and deployment during such times may need to be delayed until infrastructure is repaired and safe, and orderly attachment can be ensured. On the other hand, and more globally,

¹¹ See Comments of PPL Electric Utilities Corporation, Docket No. L-2018-3002672 (October 29, 2018) at 5.

¹² See Comments of PECO Energy Company to the Notice of Proposed Rulemaking, Docket No. L-2018-3002672 (October 29, 2018) (“PECO Comments”) at 3; Comments of the FirstEnergy Companies, Docket No. L-2018-3002672 (October 29, 2018) (“FirstEnergy Comments”) at 6-8, 9.

¹³ See PECO Comments at 14 (proposing unauthorized wireless attachment penalties 25 times higher than the FCC’s present penalties).

when utilities themselves are not available to work on wireless attachments, wireless companies must be entitled to use contractors that are licensed and authorized to work in the utility space.

With regard to the suggestion that the Commission should impose increased or enhanced penalties for unauthorized attachments, CTIA again expresses its support for the FCC's approach of relying on private contractual arrangements to resolve issues relative to unauthorized attachments. CTIA does take issue with the suggestion that wireless carriers should be singled out for remedies that are inconsistent with those applied to other attachers. A consistent approach to all attachers is equitable and necessary.

Some commenters also expressed support for the notion of standardized contracts, with at least one commenter going so far as to suggest that the Commission should create a database of contracts and other rate and investment information that the Commission could review.¹⁴ CTIA does not believe standardized contracts are needed. Standardized contracts are not required under the FCC's rules or regime, so CTIA suggests the Commission refrain from requiring them in Pennsylvania. CTIA also does not believe it is necessary for the Commission to review contracts, absent a dispute, and would not support such a proposal.

One commenter suggested that it is vital to "protect" voluntary agreements, *i.e.*, allow parties to negotiate rates and terms that differ from those derived using the FCC rate methodology.¹⁵ CTIA submits that a fundamental tenet of the regulation of pole attachments is that utility poles are monopoly facilities subject to monopoly power.¹⁶ In that context, the notion

¹⁴ See Initial Comments of ExteNet Systems, Inc., Docket No. L-2018-3002672 (October 29, 2018) at 10.

¹⁵ See PECO Comments at 4-5.

¹⁶ See, e.g., *TCA Mgmt. Co. v. Sw. Pub. Serv. Co.*, 10 FCC Rcd 11832, 11838 (1995) ("In enacting Section 224, Congress recognized the utilities' superior bargaining power in pole attachment matters. To remedy the effects of that superior bargaining power, Congress gave [the FCC] jurisdiction to hear and resolve complaints regarding pole attachment rates."); *Southern Co. v. FCC*, 293 F.3d 1338, 1341 (11th Cir. 2002) ("As a practical matter, cable companies have had little choice but to" attach "their distribution cables to utility poles owned and maintained by power and telephone companies.")

of “voluntary” agreements becomes constrained. It certainly is possible that an attachers may desire “extras” that go beyond the simple ability to attach to a utilities’ facilities at rates determined via the FCC rate methodology. These “extras” could include, for instance, faster turnaround on make-ready or expedited processing of applications. An attachers probably would expect to pay more for those services, and that is acceptable. But the FCC’s rules, including the FCC rate methodology, constitute a baseline from which attachers cannot be compelled to deviate in the ordinary context. Poles are monopoly facilities, and rates for attachments must be regulated. Utilities should not be permitted to use negotiation of “voluntary” agreements to impede the ability of attachers to deploy their facilities. Further, the FCC’s rules do not contemplate the suggestion regarding “voluntary” agreements.

Accordingly, the suggested deviations from the FCC’s rules suggested by commenters should be rejected.

III. THE COMMISSION SHOULD ADOPT A NONDISCRIMINATORY, EFFICIENT COMPLAINT PROCESS

Several commenters queried the Commission’s intention regarding the application of complaint and dispute resolution tools available in the Commission’s regulations found at 52 Pa. Code Chapters 1, 3 & 5, and 52 Pa. Code § 69.391, *et seq.*, arguing that those regulations would not apply to non-public utilities.¹⁷ CTIA suggests that all parties to Commission proceedings need not be subject to the Commission’s general jurisdiction in order for the Commission’s Rules of Practice and Procedure to apply. For example, a complainant before the Commission that is not subject to the Commission’s general jurisdiction still must abide by the Commission’s procedural rules. While pole attachers, such as wireless carriers, may not be public utilities, failure to participate in complaint and dispute resolution proceedings before the agency vested with

¹⁷ See, e.g., Comments of Duquesne Light Company, Docket No. L-2018-3002672 (October 29, 2018) at 4-6.

jurisdiction over the very facilities to which they seek access would be imprudent. Regardless, without getting into the minutiae of jurisdiction and procedure, CTIA submits that the more important question is what rules the Commission feels are more certain to promote efficiency, certainty, and fairness in the most expedited and practical manner. Whether the Commission adopts its existing regulations, the FCC process, Maine's process, New York's process, or some new approach, so long as that process promotes the appropriate goals, CTIA is generally not concerned with the exact process chosen.¹⁸

IV. THE COMMISSION SHOULD NOT REQUIRE DEVELOPMENT OF A STATEWIDE POLE REGISTRY

Even though some commenters expressed support for Commissioner Kennard's suggestion that the Commission develop a statewide registry of poles, ducts, conduits, pole attachments, and duct/conduit occupants, CTIA agrees with the majority of those indicating that there is not a need for a statewide pole registry. CTIA's members have had success working with utilities, and in the wireless industry's experience, utilities have processes in place to keep track of equipment on their poles that are more than adequate for the task. A statewide database simply is not needed. Creating a statewide registry would also involve countless hours and a significant dedication of resources to produce a database that would add one more significant point of vulnerability to cyberattack or other such breach of confidentiality. Further, such a database could present significant competitive concerns, giving companies insight into where individual carriers are building and have built their networks, the degree of the buildout, and possibly even the types of technology being utilized, which could be used improperly by a competitor to tailor its own business plan. If competitors or

¹⁸ One commenter even suggests that the Commission should expressly adopt the abbreviated dispute resolution process that was established for inter-carrier disputes as a part of the Global Order Settlement (Docket No. M-00021685). *See* Comments of Full Service Network, LP, Docket No. L-2018-3002672 (October 29, 2018) at 3-5. Again, CTIA is concerned primarily with efficient, consistent, and fair resolution of disputes in an expedited manner and the particulars of the process are not as important as attaining those goals.

new market entrants had such information regarding other carriers' networks, it might inform them of the advantages or disadvantages of deploying network facilities in specific geographic regions. Access to this highly sensitive information could create an environment where competitors would be able to adjust their businesses to market conditions using information that ordinarily is proprietary and non-public. This could lead to unfair competitive advantages for late entrants as well as other undesirable and unforeseen consequences.

Accordingly, the Commission must take such issues of security and competition into account during the consideration of any database that would house confidential, critical infrastructure information.

V. CONCLUSION

CTIA recommends the Commission adopt "its proposal to exercise reverse-preemption of FCC pole attachment jurisdiction and [] its proposal to adopt the FCC pole attachment regulatory regime without modification...."¹⁹ CTIA fully supports those proposals and believes that, if adopted without modification, that regime will promote broadband deployment efficiency and a fair pole attachment marketplace.

Respectfully submitted,



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DATED: November 28, 2018

¹⁹ Notice at 2.