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Part II

This part contains the
Pennsylvania Public Utility Commission's
Assumption of Commission Jurisdiction over
Pole Attachments from the Federal
Communications Commission Rulemaking



RULES AND REGULATIONS

Title 52—PUBLIC UTILITIES

PENNSYLVANIA PUBLIC UTILITY COMMISSION

[52 PA. CODE CH. 77]

[L-2018-3002672]

Assumption of Commission Jurisdiction Over Pole Attachments from the Federal Communications Commission

The Pennsylvania Public Utility Commission on August 29, 2019, adopted a final rulemaking to exercise reverse preemption by adopting and enforcing the pole attachment regulations as promulgated by the Federal Communications Commission (FCC) to assist Pennsylvania pole owners and those entities that seek to utilize pole attachments by providing a local forum for dispute resolution.

Executive Summary

Section 224(c) of the Telecommunications Act of 1996 provides that a state may exercise reverse preemption of Federal Communications Commission (FCC) jurisdiction over pole attachments if a state seeking such jurisdiction can exercise it in accordance with federal law. On September 3, 2019, the Commission entered a Final Rulemaking Order to exercise reverse preemption by adopting and enforcing pole attachment regulations as promulgated by the FCC at the time our regulation becomes effective and as may be amended by the FCC, while also retaining Commission authority to prevent future federal regulatory changes from going into effect for good cause shown.

The assumption of pole attachment jurisdiction will assist Pennsylvania pole owners and those entities that seek to utilize pole attachments by providing a local forum for dispute resolution. The Final Rulemaking, among other things, furthers Pennsylvania's interest in enhanced broadband deployment and establishes a pole attachment Working Group to ensure that the Commission is apprised of industry concerns, that federal amendments are properly vetted before becoming effective, and that dispute resolution processes are working efficiently. The Final Rulemaking also encourages voluntarily negotiated agreements between pole owners and attaching entities.

Public Meeting held
August 29, 2019

Commissioners Present: Gladys Brown Dutrieuille, Chairperson, Statement, Concurring in part and Dissenting in part; David W. Sweet, Vice Chairperson, Statement Dissenting; Norman J. Kennard, Statement; Andrew G. Place, Statement, Concurring in part and Dissenting in part; John F. Coleman, Jr.

Assumption of Commission Jurisdiction Over Pole Attachments from the Federal Communications Commission; L-2018-3002672

Final Rulemaking Order

By the Commission:

By Order entered July 13, 2018, the Pennsylvania Public Utility Commission (Commission) issued a Notice of Proposed Rulemaking (NPRM) to begin the assertion of Commission jurisdiction over pole attachments pursuant

to the Telecommunications Act of 1996 (TA-96).¹ TA-96 provides that the Federal Communications Commission (FCC) regulates pole attachments by default but contains procedures by which states may reverse preempt FCC jurisdiction over pole attachments. As the Commission stated in the opening of its NPRM, recent public demand for ubiquitous access to wireline and wireless data technology has increased the need for more streamlined pole attachment procedures in Pennsylvania.

This Rulemaking addresses network elements upon which all broadband deployment relies—essential physical infrastructure used to deliver these services to end user consumers. Notice of this proposed rulemaking was published in the *Pennsylvania Bulletin* on September 29, 2018, which included a request for comments on the proposed regulations.² Stakeholders have been given the opportunity to provide input about how the Commission lends its expertise and adjudicatory resources as these parties seek to address the challenges that accompany broadband deployment in Pennsylvania. The Commission is not required to consider expressly or at length each contention or argument raised by the parties.³ Comments and Reply Comments to the Commission's NPRM were filed by various interested parties. The Commission has reviewed those comments and issues this Final Rulemaking Order (FRM).

Background

At its June 14, 2018 Public Meeting, the Commission unanimously approved the Motion of Commissioner Norman J. Kennard to begin a rulemaking to assert Commission jurisdiction over pole attachments pursuant to TA-96.⁴ Stakeholders seeking enhanced broadband deployment opportunities have long advocated for pole attachment reform before the FCC. As early as 2005, attaching entities requested that the FCC provide more favorable pole attachment terms. In 2007, the FCC obliged with a forum to consider the requested relief.⁵ On March 16, 2010, the FCC released its National Broadband Plan that, in part, recognized that a lack of reliable, timely, and affordable access to utility poles is often a significant barrier to deploying wireline and wireless services.⁶ The National Broadband Plan recommended that enhanced pole attachment rights could promote broadband deployment and specifically recommended that:

(1) The FCC establish rental rates for pole attachments that are as low and close to uniform as possible, consistent with Section 224 of the Communications Act of 1934, as amended, to promote broadband deployment;

(2) The FCC implement rules that will lower the cost of the pole attachment "make-ready" process. For example, the FCC should authorize attachers to use space and

¹ The Pole Attachment Act (PAA) section of TA-96 may be found at 47 U.S.C. § 224, and the attendant FCC regulations pertaining to pole attachment complaint procedures may be found at 47 CFR Chapter I, Subchapter A, Part 1, Subpart J (Subpart J).
² 48 Pa.B. 6273.

³ *Consolidated Rail Corp. v. Pa. Public Utility Commission*, 625 A.2d 741 (Pa. Cmwlth. 1993); see also, generally, *University of Pennsylvania v. Pa. Public Utility Commission*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

⁴ The term "pole attachment" in the context of TA-96 is a term of art used to describe the physical facilities employed to support or protect cabling, transponders, or similar facilities used in outside communications plants. Federal law defines a "pole attachment" as any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit or right-of-way owned or controlled by a utility. 47 U.S.C. § 224(a)(4). The definition extends to utility structures above and below ground and encompasses utility property rights.

⁵ In re Implementation of Section 224 of the Act, 22 FCC Red. 20195, 20199 (F.C.C. 2007).

⁶ In re Implementation of Section 224 of the Act, 26 FCC Red. 5240, 5241 (F.C.C. Apr. 7, 2011) (April 2011 Order).

cost-saving techniques, such as boxing or extension arms, where practical and in a way that is consistent with pole owners' use of those techniques;

(3) The FCC establish a comprehensive timeline for each step of the Section 224 access process and reform the process used for resolving disputes regarding infrastructure access; and

(4) The FCC improve the collection and availability of information regarding the location and availability of poles, ducts, conduits and rights-of-way.⁷

The FCC later adopted these aspects of pole attachment reform as it worked to enhance access to broadband service throughout the nation.

The Commission's NPRM discussed the development of the FCC's pole attachment regulations at pages two through eight; we will not repeat that discussion here. That chronology illustrates the state and federal desire for enhanced broadband opportunities and the close relationship between pole attachments and broadband deployment. This FRM is a natural outgrowth of the goals of Chapter 30 of the Public Utility Code,⁸ which is intended to promote and encourage the provision of advanced telecommunications services and broadband deployment in the Commonwealth.

FCC's 2018 Third Report and Order and Declaratory Ruling

In the interim, between the Commission's NPRM and interested stakeholders filing Comments, the FCC issued a Third Report and Order and Declaratory Ruling (FCC 2018 Poles Order) that is significant to promoting broadband deployment by speeding the process and reducing the costs of attaching new facilities to utility poles.⁹ The requirements in the FCC 2018 Poles Order are applicable in only those states that chose not to regulate pole attachments, but rather defer, under Section 224 of the Pole Attachment Act (PAA), to FCC rules. States, however, can decide to assert jurisdiction to regulate pole attachments under the "reverse preemption" provisions of Section 224.

In the FCC 2018 Poles Order, the FCC most notably shifted the framework for the majority of attachments by adopting a new process that includes "one-touch make-ready" (OTMR) whereby a new attachers (i.e., the party with the strongest incentive to prepare the pole quickly) performs all of the work itself rather than spreading the work across multiple parties.¹⁰ The FCC excluded from OTMR new attachments that are more complicated or above the "communications space" of a pole because safety and reliability risks can be greater.¹¹

Additionally, the FCC: (1) codified and refined its existing precedent that requires utilities to allow

⁷ In re Implementation of Section 224 of the Act et al., 25 FCC Rcd. 11864, 11868 (F.C.C. 2010).

⁸ 66 Pa.C.S. §§ 3001 et seq.

⁹ In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84 (FCC, Rel. August 3, 2018); Verizon's Comments also reference another FCC Order, Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79 (FCC, Rel. September 27, 2018), to provide relevant background regarding potential barriers to infrastructure deployment and a framework for state and local laws to avoid being barriers. Verizon Comments at 6-7.

¹⁰ FCC 2018 Poles Order ¶ 2.

¹¹ Id. However, as a self-help measure, if utilities fail to meet make ready construction deadlines, attachers can hire utility-approved contractors to perform such work, not only in the communications space, but also in the electric space. The self-help remedy in the electric space does not apply to pole replacements. Allowing work above the communications space is a new step taken by the FCC to strengthen the self help remedy. See FCC 2018 Poles Order at ¶¶ 14, 87, 96–103; see also PECO Comments at 7.

"overlashing"¹² that helps maximize the usable space on the pole; (2) clarified that new attachers are not responsible for the costs associated with repairing preexisting violations of safety or other codes or utility construction standards discovered during the attachment process; and (3) eliminated outdated disparities between the pole attachment rates that incumbent local exchange carriers (ILECs) pay compared to other similarly-situated telecommunications attachers.¹³ The FCC also addressed two forms of state and local barriers to the deployment of wireline and wireless facilities by making clear that: (1) the FCC would preempt, on a case-by-case basis, state and local laws inhibiting the rebuilding or restoration of broadband infrastructure after a disaster; and (2) state and local moratoria on telecommunications services and facilities deployment are barred by Section 253(a) of TA-96 because such action prohibits the ability of any entity to provide any interstate or intrastate telecommunications service and deprives the public of better services and more broadband options. Id. at ¶ 4.

The FCC amendments to 47 CFR § 1.1411 (Timeline for access to utility poles), § 1.1412 (Contractors for survey and make-ready), and § 1.1415 (Overlashing) became effective on May 20, 2019.

Comments to the Notice of Proposed Rulemaking

The Commission's NPRM sought informed comments on its proposal to adopt 52 Pa. Code Chapter 77 and to begin regulating pole attachments pursuant to 47 U.S.C. § 224. The Commission recommended that it assert jurisdiction promptly, but cautiously, by adopting the FCC pole attachment regulations at 47 CFR §§ 1.1401–1.1425, as amended from time to time. The Commission proposed this turn-key approach to ensure the timely availability of the Commission's adjudicatory process to stakeholders.¹⁴

In the time since the Commission issued its NPRM, however, the FCC has released multiple orders, particularly the FCC 2018 Poles Order, materially altering federal pole attachment regulations. In part to accommodate that development, the Commission extended its reply comment deadline to ensure that stakeholders had the opportunity to comment on these recent developments.¹⁵

Comments to the Commission's NPRM were filed on or before October 29, 2018, by the Broadband Cable Association of Pennsylvania (BCAP), Central Bradford Progress Authority (CBPA), CenturyLink, Communications Workers of America (CWA), Crown Castle Fiber LLC, et al. (Crown Castle), CTIA—The Wireless Association (CTIA), Duquesne Light Company (DQE Communications), Duquesne Light Company (DLC), ExteNet Systems, Inc. (ExteNet), the FirstEnergy Companies, Full Service Network, LP (FSN), MAW Communications, Inc. (MAW), NetSpeed LLC, (NetSpeed), the Office of Consumer Advocate (OCA), PECO Energy Company (PECO), the Pennsylvania Rural Electric Association (PREA), the Pennsylvania Telephone Association (PTA), PPL Electric Utilities Corporation (PPL), Velocity.net Communications, Inc. (VNCI), and the Verizon Companies (Verizon).

¹² "Overlashing" occurs when a service provider physically ties its wiring to other wiring already secured to the pole. PECO's Comments provide that utilities: (1) can require 15-days' advanced notice for overlashing, but are restricted regarding the information they can require; (2) can perform post-overlash inspection and engineering, but must pay for it themselves; and (3) cannot prohibit overlashing when there are existing violations. PECO Comments at 9.

¹³ FCC 2018 Poles Order at ¶ 3.

¹⁴ NPRM at 10-11.

¹⁵ Reply Comments were initially due November 13, 2018; however, BCAP submitted a letter petition on November 1, 2018, requesting a seven-day extension. The Commission granted BCAP's request but extended the Reply Comment period to thirty days via Secretarial Letter dated November 7, 2018.

Reply Comments to the NPRM were filed on or before November 28, 2018, by BCAP, CenturyLink, Crown Castle, CTIA, FirstEnergy, MAW, NetSpeed, PECO, PREA, PPL, and Verizon. Also, letters from eight private citizens were received in reply to the Commission's NPRM.¹⁶

Subsequently, the Independent Regulatory Review Commission (IRRC) filed comments for the Commission's consideration on December 24, 2018.

A. Section 77.1. Statement of Purpose and Preemption Comments

The parties supporting the Commission's proposal agree that the Commission should, at least initially, adopt the FCC's regulations in turn-key fashion to quickly bring jurisdiction over pole attachments to the Commission. Only two parties, BCAP¹⁷ and Crown Castle,¹⁸ oppose the Commission's assertion of jurisdiction. Commentators generally fall into two distinct categories with respect to future changes to the federal rules: (1) those supporting the automatic adoption of FCC amendments (which would incorporate changes made via the FCC 2018 Poles Order) and ensuring ongoing uniformity and regulatory certainty; and (2) those opposed to automatically adopting future federal amendments and urging the Commission to utilize Pennsylvania's rulemaking process to promulgate changes. The Commission's disposition of these opposing views regarding automatic adoption of FCC amendments will be discussed below, in Section D of this Order.

While many comments fit into one of these categories, the OCA recommends that once the Commission assumes jurisdiction through an "initial turn-key adoption" of the FCC's regime, it subsequently consider adopting Pennsylvania-specific rates, terms and conditions governing pole attachments to replace the federal framework.¹⁹ FSN's comments focus on enabling the Commission to adjudicate pole attachment issues. VNCI similarly states that Commission jurisdiction over pole attachment disputes is sensible and practical, and will be more cost effective in allowing smaller carriers to pursue formal complaints.²⁰ PREA believes that if the Commission assumes jurisdiction over pole attachments, then it should proceed within the existing statutory and regulatory framework, which holds that electric cooperatives are expressly exempt from federal pole attachment regulations and from the Public Utility Code.²¹

In its comments, IRRC questions the need for the Commission's rulemaking as the FCC has amended its regulations twice since the Commission began this proceeding. With respect to changes to language, the Commission's proposed Section 77.1 and throughout Chapter 77, IRRC notes the reference to 47 CFR §§ 1.1401—

1.1425 and requests that the final-form rulemaking be clear and reference the correct FCC regulations; the reference has changed to Subpart J. IRRC expresses concern that: (1) the automatic adoption of all future, and consequently unknown, requirements may be an improper delegation of the Commission's statutory authority; and (2) new obligations may be imposed without members of the regulated community and other parties having the opportunity to comment publicly.

As stated in the NPRM, public demand for ubiquitous access to wireline and wireless data technology has increased the desire for more streamlined pole attachment procedures in Pennsylvania to address matters that arise in Pennsylvania more efficiently than the FCC. Comments submitted in response to the NPRM largely demonstrate consensus support of Commission jurisdiction over pole attachments. Numerous comments express the importance of the Commission being able to address Pennsylvania-specific pole attachment issues, using their expertise regarding Pennsylvania electric utilities and safety issues, and providing a local forum to resolve disputes.²² Stakeholders also commented on how the Commission might use its existing adjudicatory resources, as well as expedited dispute resolution processes, to address the challenges of broadband deployment efficiently.

The reasons for supporting the Commission claiming jurisdiction included, inter alia: (1) the availability of a local forum to resolve pole attachment disputes that is less expensive and faster than pursuing a complaint at the FCC; (2) the prospect of access to the Commission's mediation process or a similar procedure to facilitate dispute resolution in an efficient manner; and (3) the Commission's knowledge and expertise regarding telecommunications and electric distribution systems, which will allow it to balance statewide broadband goals against EDCs' concerns for safety and reliability of electric service and infrastructure.

Disposition: The Commission Asserts Jurisdiction Over Pole Attachments

As noted above, the Commission agrees with those comments urging that we assert jurisdiction over pole attachments to provide a local forum in Pennsylvania for the timely resolution of pole attachment disputes. The Commission's assertion of jurisdiction over pole attachments will assist Pennsylvania pole owners and those entities that seek to utilize pole attachments, including those entities seeking to deploy broadband network access elements across the Commonwealth. The Commission also will be able to address Pennsylvania-specific pole attachment issues, using its expertise regarding Pennsylvania telecommunications and electric utilities as well as safety issues. The Commission believes its assertion of jurisdiction over pole attachments will assist in spurring investment in, and access to, physical infrastructure used to deliver essential broadband access service to end-user customers by reducing the time and resources spent on disputes by resolving Pennsylvania-specific disputes in Pennsylvania as compared to the FCC. In addition, the Commission can provide a balanced approach to the competing needs and demands on pole infrastructure between pole owners, pole attachers, and the telecommunications, electric, and cable industries in a predictable manner using federal rules.

Prior to this determination today, the Commission provided an Annex to its NPRM to establish Chapter 77,

¹⁶ Private Citizen Letters were received from the following persons: David B. Hommel, Rosemarie Keen, David J. Kob, Charles Lardner, Carolyn Robbins, John B. Roose, Trevor P. Roy, and John Philip Siegrist.

¹⁷ "[T]he most prudent course at this stage would be for the Commission to postpone any decision concerning reverse preemption until after the dust settles surrounding the recent sweeping amendments to the FCC's pole attachment rules. . . . Postponing a decision on reverse preemption would give the Commission and relevant stakeholders the opportunity to determine whether recent federal reforms adequately advance the goals identified in the Notice for broadband providers and consumers in the Commonwealth." BCAP at 3-4. BCAP also refers to Amendment of Procedural Rules Governing Formal Complaint Proceedings Delegated to the Enforcement Bureau, EB Docket No. 17-245, Report and Order, FCC 18-96 (Rel. July 18, 2018), which established a 60 day accelerated complaint procedures, "shot clocks" governing FCC resolution of pole attachment complaints, and enhanced discovery rights for complainants and respondents. BCAP at 2; see also Crown Castle at 5; PECO at 6-7.

¹⁸ "[T]he FCC has significant institutional expertise on [pole attachment rules and disputes]. . . . has taken steps to expedite its review of pole attachment disputes. . . [and] regulatory certainty and uniformity of pole attachment rules and adjudication is important and useful for supporting deployment of advanced telecommunications." Crown Castle at 3.

¹⁹ OCA at 1, 6-7.

²⁰ VNCI at 6-7.

²¹ PREA at 2.

²² CBPA at 2; CWA at 2; CTIA at 2; DQE Communications at 3-4; ExteNet at 2; First Energy 5—8, 12; FSN at 3; and MAW at 1.

Pole Attachments, to Title 52 of the *Pennsylvania Code*. In our initial assertion of jurisdiction over pole attachments, the Commission will adopt, in whole, the FCC's regulatory regime for pole attachment complaint procedures at Subpart J as of the effective date of Chapter 77. This will avoid a multi-year delay in claiming jurisdiction and will uphold the status quo, which will avoid regulatory uncertainty and will promote broadband investment across Pennsylvania.

In response to IRRC's suggested language change regarding the reference to the FCC's rules, and for reasons elaborated below, the Commission will amend 52 Pa. Code § 77.1 to reference Subpart J. This will allow the Commission's regulations to exist in parity with the FCC's regulations and will provide greater certainty to the public about the scope and application of the federal rules.

B. Section 77.2. Defining "Pole Attachment" and the Applicability of the PAA

Comments

The OCA's Comments recommend that the Commission include the federal definition of "pole attachments" set forth in Section 224(c) of the PAA and Section 1.1402 of the FCC's regulations.²³ The term pole attachment, according to those federal provisions, is "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit or right-of-way owned or controlled by a utility." As stated in the NPRM, the definition extends to utility structures above and below ground and encompasses utility property rights.²⁴

The OCA also suggests that the Commission clarify which federal definition and/or Public Utility Code (Code) definition applies for the term "public utility." While the Commission's Section 102 definition of "public utility" overlaps, in part, with the federal definition of "utility" in 47 CFR § 1.1402(a), the OCA notes that each definition may assist the Commission in exercising its jurisdiction.²⁵ DLC recommends that the Commission consider how it will address situations where it has jurisdiction over only one party to a pole attachment dispute and whether it will become entangled in contract disputes. DLC suggests that the Commission consider adopting a bright line rule in its regulations regarding adjudications involving entities not regulated by the Commission.²⁶

ExteNet comments that Section 102 of the Code grants the Commission authority over municipally-owned facilities, except those owned prior to 1937 and urges the Commission to expressly assert its regulation over pole attachments not only to publicly owned utilities, but also municipally-owned ones. Thus, ExteNet recommends that Section 77.2 be amended to read, "This chapter applies to all persons, entities, poles, ducts, conduits and rights-of-way under this Commission's jurisdiction including those subject to 47 U.S.C. § 224 and 47 CFR §§ 1.1401—1.1425 as those regulations may be amended."²⁷

The OCA also suggests that the Commission clarify whether the federal definition and/or Public Utility Code (Code) definition applies for the term "telecommunications carrier." Chapter 30 of the Code defines a telecommunications carrier as "any entity that provides telecommunications service subject to the jurisdiction of the commission." Meanwhile, the federal definition is "any provider of telecommunications services, except that the

term does not include aggregators of telecommunications services (as defined in 47 U.S.C. § 226) or [ILECs] (as defined in 47 U.S.C. § 251(h))."²⁸

The OCA notes that the Commission may need to consider how the Pennsylvania Wireless Broadband Collocation Act of 2012 (WBCA) will work with the adoption of the federal regulations since the WBCA designates the Court of Common Pleas as the venue for complaints against municipal governments but the FCC has, since the NPRM was issued, limited how much local authority exists over attachments and sitings.²⁹

Disposition: The Commission Will Add the Federal Definition of "Pole Attachments" to Section 77.2 and Clarify the Scope of where PAA Section 224 Applies

The Commission agrees with the OCA that the definition of "pole attachments" should be referenced in Chapter 77 and will amend Section 77.2 to include reference to the federal definition at Section 224(a) of the PAA. This will give clearer notice regarding above ground and below ground facilities encompassed therein.

The NPRM spoke to the importance of understanding where pole attachment law applies and where it does not. To aid in this endeavor, we amend Section 77.2 to clarify that Chapter 77 applies to utility poles, etc., as defined by the PAA, and we amend Section 77.2 to include the definition of "utility" at Section 224(a) of the PAA. The PAA expressly exempts cooperative utilities, railroads, and federal or state-owned utilities, including municipal utilities, from the definition of a "utility." The Commission does not intend to disrupt federal exemptions. Thus, even if the Code's definition of "public utility" at Section 102 applies, entities wishing to attach to the infrastructure of entities explicitly exempted by the federal rules must obtain private attachment agreements at negotiated rates and terms. However, absent an express federal exemption, the Commission's assertion of jurisdiction over pole attachments applies to all utilities and facilities regulated by the Code and within the scope of and subject to the PAA. To make this point clear, the Commission amends its proposed Section 77.2 to read as follows:

This chapter applies to *utility* poles, ducts, conduits and rights-of-way *under this Commission's jurisdiction* and subject to 47 U.S.C. § 224 and 47 CFR Chapter I, Subchapter A, Part 1, Subpart J (relating to pole attachment complaint procedures) as those regulations may be amended, *but excluding any person or entity expressly exempted by 47 U.S.C. § 224(a)(1) and 47 CFR 1.1402(a) (relating to definitions).*

(Emphasis added.) Even with the decision to reverse preempt the FCC, by employing the federal definition of "utility" and requiring that the relevant facilities be subject to our jurisdiction, Commission jurisdiction may not reach all facilities subject to attachment in the Commonwealth. With respect to exempted entities, the Commission will not act absent the requisite legal authority.³⁰

For purposes of uniformity in our turn-key adoption of the FCC's pole attachment regime and consistency with

²³ OCA at 5.

²⁴ OCA at 3.

²⁵ The CBPA submits that the General Assembly is uniquely positioned to provide targeted attention to Pennsylvania-specific concerns involving pole attachments, which statutory authority may include delegation of certain powers to the Commission that may augment the authority to be incorporated by reference to the FCC's regulatory framework. CBPA at 3. By the same token, the FCC also may change its regulatory framework, including for-bearing from or preempting state exemptions for some poles. If that occurs, it may subsequently warrant adjustments to our determination in this Final Rulemaking Order, consistent with applicable Pennsylvania and federal law.

²⁶ OCA at 2.

²⁷ NPRM at 8.

²⁸ OCA at 5.

²⁹ DLC at 3.

³⁰ ExteNet at 7.

federal law, the Commission will adopt the federal definition of “telecommunications carrier” for Chapter 77 and will require pole attachments by entities wishing to attach to exempted entities to be obtained via private agreement or in some other fashion beyond invoking the Commission’s authority arising under Section 224 and today’s determination.

The Commission declines to develop a bright line rule prohibiting the handling of disputes when only one party is generally regulated by the Commission. Before the dispute process has been given a chance to be utilized, such a rule may have a chilling effect that runs counter to the intent to provide a local and efficient forum for disputes where parties can avail themselves to the Commission’s complaint processes and mediation.

C. Section 77.3. Commission oversight

Statutory Authority

The PAA provides that a state may assume responsibility for pole attachments, and concurrently divest the FCC of that responsibility, if the state certifies that it regulates the rates, terms, and conditions of pole attachments and balances the needs of attaching entities, pole owners, and consumers of services provided by the former.³¹ To formally divest the FCC of jurisdiction and assume that jurisdiction itself, a state must certify to the FCC that it has established effective rules and regulations over pole attachments and provides for the prompt resolution of pole attachment complaints.³² That is, a state must certify to the FCC that it will assume responsibility for the enforcement of 47 U.S.C. § 224 in a manner like that of the FCC. The Commission restates these objectives in Section 77.3 of its proposed regulations.

Comments

Once again, ExteNet points out the FCC’s jurisdiction under Section 224 of the PAA over pole attachments owned by “any political subdivision, agency, of a State or instrumentality thereof” is limited. Noting the Commission’s authority under Section 102 of the Code, ExteNet recommends that Section 77.3(a) be amended to read as follows:

This chapter establishes the Commission’s regulatory authority over the rates, terms and conditions of access to and use of poles, ducts, conduits and rights-of-way to the full extent of this Commission’s jurisdiction and authority and as provided for in 47 U.S.C. § 224 for pole attachments as of sixty days after the effective date of this Chapter.³³

PECO, in its comments, states that the Commission’s proposed language is helpful to highlight Pennsylvania’s responsibility both to communications company subscribers and utility ratepayers. However, PECO notes the Commission’s responsibility towards ensuring the safety and reliability of the pole distribution systems operated and maintained by electric utilities and ILECs. Thus, PECO proposes a revision to Section 77.3(b), which would make the language more aligned to the Texas state pole attachment statute and would read as follows:

(b) The Commission has the authority to consider, and will consider, the interests of the subscribers of the services offered via pole attachments, as well as the interests of consumers of the utility services. In addition, in determining whether rates, terms, and conditions are just and reasonable, the Commission

will consider compliance with applicable safety standards and the maintenance and reliability of electric distribution, telecommunications and cable services.³⁴

Disposition: The Commission Clarifies the Scope of Jurisdiction Established by 47 U.S.C. § 224

After the Commission’s final form regulations asserting jurisdiction over pole attachments are reviewed by the General Assembly, IRRC, and the Pennsylvania Attorney General’s Office, the Commission will follow the course of other states who have adopted pole attachment jurisdiction. A letter will be sent to the FCC certifying that the Commission will regulate pole attachments pursuant to the dictates of 47 U.S.C. § 224(c)(2).

With respect to our proposed Section 77.3, the Commission will amend the language to clarify the scope of our regulatory oversight and authority. The Commission will respect the express federal exemptions regarding which entities come under the federal, and by extension, our pole attachment regulations. Thus, Section 77.3(a) will be changed as follows, which is consistent with the language in Section 77.2:

This chapter establishes the Commission’s regulatory authority over the rates, terms and conditions of access to and use of utility poles, ducts, conduits and rights-of-way to the full extent of this Commission’s jurisdiction and authority and as provided for in 47 U.S.C. § 224 for pole attachments *but excluding any person or entity expressly exempted by 47 U.S.C. § 224(a)(1) and 47 CFR 1.1402(a)(relating to definitions)* as of sixty days after the effective date of this chapter.³⁵

While the Commission appreciates PECO’s recognition of our directive to consider safety and service reliability within the context of pole attachments, we find the proposed language redundant. Section 224(c)(2) specifies the certifications that a state seeking to regulate pole attachments must make. Sections 224(c)(2)(A) and (B) require a certification that the state does consider the interests of the subscribers of the services as well as the interests of the consumers of the utility services. Safety considerations are not expressly mandated, even though they are integral to the Commission addressing the interests of the subscribers of the services as well as the interests of the consumers of the utility services. Given these realities and the Commission’s duty under Section 1501 of the Public Utility Code to ensure that public utility service is provided safely, the Commission sees no need to add such an express provision. Rather, safety is already an implicit consideration that operates as part of the certifications a state makes under Sections 224(c)(2)(A) and (B).

Moreover, the Commission considers the public interest in all proceedings before it, and we are keenly aware of our responsibility to ensure that public utility service is provided in a safe, adequate, and reliable manner. Where entities have specific concerns about electric distribution infrastructure, evidence can be submitted into the record of an individual proceeding for the Commission’s consideration. The Commission finds no compelling reason to add this directive explicitly into Section 77.3 because these standards are regularly considered and addressed.

D. Section 77.4. Adoption of FCC Regulations

Comments

Proposed Section 77.4 to the Commission’s regulations states “This chapter adopts the rates, terms and condi-

³¹ 47 U.S.C. § 224(c).

³² 47 U.S.C. § 224(c).

³³ ExteNet at 7.

³⁴ PECO at 3-4.

³⁵ ExteNet at 7 (emphasis added).

tions of access to and use of poles, ducts, conduits and rights-of-way to the full extent provided for in 47 U.S.C. § 224 and 47 CFR §§ 1.1401—1.1425, *inclusive of future changes as those regulations may be amended.*” (Emphasis added.)³⁶ With respect to the comments the Commission received about asserting jurisdiction over pole attachments, the prospect of automatic adoption of future FCC amendments to its pole attachment regulations is the most divisive topic.

As stated above in this Order, commentators generally fall into two distinct categories with respect to future changes to the federal rules: (1) those supporting the automatic adoption of FCC amendments (which would incorporate changes made via the FCC 2018 Poles Order) and ensuring ongoing uniformity and regulatory certainty;³⁷ and (2) those opposed to automatically adopting future federal amendments and urging the Commission to utilize Pennsylvania’s rulemaking process to promulgate changes.³⁸ Some parties from this latter category encourage the Commission to adopt only the FCC’s regulations that were applicable when we issued our NPRM.

Members of the communications industry largely support adopting the FCC rules in their entirety, along with future changes. This is the course the Commission proposed, at least in its initial turn-key adoption of the federal regulations, through Section 77.4 of the Annex to its NPRM. Parties in the communications industry primarily stress the importance of maintaining uniformity and regulatory certainty. CenturyLink notes that the FCC’s regulations have been fully vetted and consider diverse inputs and do not believe that deviating from those rules is advisable or prudent.³⁹ CTIA prefers this approach because parties are limited to one “bite at the apple” to contest a rule at the FCC, not a second chance at the state level.⁴⁰ DQE Communications believes that the changes the FCC made to its regulations in the August 2018 Order will encourage and speed the ability of companies to continue pushing broadband access in a more economical way.⁴¹

The PTA contends that if the Commission wishes to address recent pole attachment rule changes by the FCC, it should only do so once the industry and regulators have had time to review the success or failure in their implementation.⁴² CTIA references 58 P.S. § 801.302(b)(1) (Act 127), which contains an automatic adoption clause similar to the one the Commission proposes, but which provides that any changes in applicable federal regulations shall take effect in Pennsylvania 60 days after the effective date; CTIA believes 60 days to be a reasonable amount of time to provide notice to affected parties.⁴³ Verizon argues that if the Commission does not or cannot adopt the FCC rules quickly and in total, including automatic updates for future changes, then it should not reverse preempt the FCC.⁴⁴ Going further, Verizon states that the Commission should make clear that it will not entertain arguments for different rules.⁴⁵

If the Commission determines that it will assert jurisdiction over pole attachments, BCAP and Crown Castle

also support automatic adoption of future federal amendments.⁴⁶ Crown Castle correctly notes that the NPRM does not rule out the possibility of the Commission augmenting the FCC’s rules with new regulations and proffers that, going forward, the Commission may separately and independently interpret, apply and enforce any rules the FCC updates.⁴⁷

Meanwhile, some stakeholders advocate against automatic adoption of FCC amendments. These parties generally contend that such changes should pass through the Commission’s rulemaking procedures.⁴⁸ First Energy states that affected parties may not recognize that FCC rulemakings would apply automatically in Pennsylvania following the Commission’s assertion of jurisdiction.⁴⁹ MAW contends that the Commission must allow a comment period as part of conducting due diligence prior to adopting FCC amendments.⁵⁰ Amongst the myriad of reasons given, these parties contend that the Commission is in a better position to balance stakeholder needs regarding broadband access and the necessary infrastructure than the FCC.⁵¹

These commentators also contend that the Commission has primary responsibility to ensure the safety and reliability of the pole distribution systems operated and maintained by electric distribution companies (EDCs) and ILECs, which is different than the FCC’s responsibility.⁵² The CWA shares the opinion that the FCC’s modified regulations that were effectuated once the Commission’s NPRM was released are not consistent with providing safe facilities to the public or to utility employees.⁵³ First Energy opposes the FCC’s modification that would allow attachers to hire utility-approved contractors to perform make-ready work in the electric space if an electric utility fails to meet the new make-ready construction deadlines.⁵⁴ First Energy is concerned about the FCC’s lack of understanding around risks associated with overloading and urges the Commission to give deference to electric utility construction and engineering standards and practices as they relate to safety, reliability and cost recovery.⁵⁵

IRRC articulates concerns that the automatic adoption of all future, and consequently unknown, requirements may be an improper delegation of the Commission’s authority, and that new obligations may be imposed without members of the regulated community and other interested parties having the opportunity for public comment as provided in the Commonwealth Documents Law,⁵⁶ the Regulatory Review Act,⁵⁷ and the Commonwealth Attorneys Act⁵⁸ (collectively, Commonwealth Acts). IRRC requests that the Commission explain its rationale for automatically adopting changes to FCC pole attachment regulations that have not been vetted through the Commonwealth’s regulatory review process.

The CBPA recommends reconsidering Section 77.4 to favor a situation where FCC rules concerning pole attach-

³⁶ As a housekeeping matter and as described above, reference to Sections 1.1401—1.1425 will be amended to read “47 CFR Chapter I, Subchapter A, Part 1, Subpart J” to incorporate recent changes to the FCC’s regulations on pole attachment complaint procedures.

³⁷ Parties supporting reverse preemption with automatic adoption of future FCC rule changes include CenturyLink, CTIA, DQE Communications, PTA, and Verizon.

³⁸ Parties opposed to the automatic adoption of future FCC rules changes include CBPA, CWA, DLC, FirstEnergy, MAW, NetSpeed, and PPL.

³⁹ CenturyLink at 2, 4.

⁴⁰ CTIA at 4.

⁴¹ DQE Communications at 3.

⁴² PTA at 2.

⁴³ CTIA at 5.

⁴⁴ Verizon at 9.

⁴⁵ Verizon at 10.

⁴⁶ BCAP at 4-5; Crown Castle at 8-9.

⁴⁷ Crown Castle at 7-8.

⁴⁸ First Energy at 10; PPL at 3.

⁴⁹ First Energy at 10.

⁵⁰ MAW at 1; see also CWA at 11.

⁵¹ See PPL at 2; see also DLC at 2; NetSpeed at 2.

⁵² See PECO at 3; see also FirstEnergy at 8-9 (Broadband and wireless deployment should not jeopardize the safe and reliable operation of electric utilities or come at the expense of EDCs or their ratepayers.); DLC at 2; First Energy at 8-9.

⁵³ CWA at 2; see also First Energy at 6-7. The CWA also notes that while the FCC’s regulations have been promulgated, they are far from settled. The CWA continues that several utilities have petitioned the FCC to reconsider its 2018 Poles Order, a first step in what will likely be a lengthy appeal process. CWA at 4.

⁵⁴ First Energy at 6.

⁵⁵ First Energy at 7-9.

⁵⁶ 45 P.S. §§ 1102 et seq. and 1 Pa. Code §§ 7.1 et seq.

⁵⁷ 71 P.S. §§ 745.1 et seq.

⁵⁸ 71 P.S. §§ 732-101 et seq.

ments would undergo review by the Commission within months after the potential rules became effective at the federal level.⁵⁹ PPL suggests that the Commission adopt the FCC's regulations as they are on a particular date, but that it not automatically adopt future FCC amendments.⁶⁰ DLC inquires whether the Commission seeks to adopt each change promulgated at the FCC as quickly as it is adopted or whether the Commission seeks to control the pole attachment process as it existed at the time of NPRM, without disrupting existing business practices.⁶¹ First Energy contends that the Commission is unclear about whether it intended for FCC changes made once the Commission released its NPRM to become effective automatically in Pennsylvania; this appears to reference changes that have not yet become final.⁶² While PECO agrees that is appropriate for the Commission to use FCC and court interpretations for guidance, it advocates that the Commission should retain full discretion to form its own interpretations to benefit the Commonwealth.⁶³

ExteNet states that customization of the FCC's rules and regulations should be anticipated, as issues that are appropriate for nationwide implementation may not always fit the needs of Pennsylvanians. ExteNet believes the Commission should adopt a method to codify any variance from the FCC's rules and regulations specific to Pennsylvania and proposes adding a subsection (b) to Section 77.4 as follows:

Any party seeking a generally applicable deviation from those rates, terms and conditions of access to and use of poles, ducts, conduits and rights-of-way to the full extent provided for in 47 U.S.C. § 224 and 47 CFR §§ 1.1401—1.1425, may at any time petition the Commission for a rulemaking proceeding for such purpose pursuant to 52 Pa. Code §§ 1.5, 5.1, 5.11, and 5.211. The Commission shall, in its sole discretion, by formal vote of its members, determine whether to initiate such a rulemaking proceeding.⁶⁴

IRRC states that if the Commission determines that major amendments to this rulemaking are required, then it would be in the public interest to start with a new proposed rulemaking. Should the Commission move forward with the instant proposal, IRRC suggests an Advance Notice of Final Rulemaking before it delivers a final-form rulemaking.

Disposition: The Automatic Adoption of Subsequent Modifications and Additions to the FCC's Pole Attachment Regulations Is Not an Improper Delegation of the Commission's Authority

IRRC's comment that automatically adopting future federal amendments may be an improper delegation of Commission authority is unfounded. We do not agree that our adoption of subsequent modifications to federal rules such as the federal pole attachment regulations constitutes an impermissible delegation of Commission authority back to the FCC, the source of the reverse preemption authority. Rather, the automatic adoption is a proper exercise of the Commission's authority to assert jurisdiction over pole attachments in accordance with both state and federal law, including Sections 313, 314, 501, 701, 1301, and 1501 of the Public Utility Code, 66 Pa.C.S. §§ 313, 314, 501, 701, 1301, and 1501, and Section 224(c) of the PAA, 47 U.S.C. § 224(c). Moreover, our adoption of

federal rules and their subsequent amendment is not without precedent at the Commission or IRRC.

Adoption clauses similar to that being proposed in Chapter 77 exist elsewhere in legislation impacting the Commission (e.g., Act 127), as well as in previously approved Commission regulations, and are not uncommon across state agencies. For example, as discussed in greater detail below, the Commission adopted a federal regulatory framework relating to the transportation of hazardous liquids by pipeline into its own regulations in 2012. Also, the Pennsylvania Department of Environmental Protection similarly adopted federal emission guidelines in 1997.

We note that the review mechanisms in place in the final form regulations will maintain an ongoing dialogue and review in which stakeholders may actively participate in how the federal pole attachments rules are applied and whether future amendments are adopted at all. This ongoing stakeholder review process, particularly on the establishment of a working group and a minimum 60-day review period for any future changes to the federal rules, helps ensure that Chapter 77 protects the affected regulated community and other interested parties against the harms that may result from improper delegation of authority.⁶⁵

As a part of our consideration of IRRC's concerns on this issue, the Commission will create safeguards to ensure that the Commission retains authority to make basic policy choices and to guide and ensure that the FCC rules to be incorporated have been appropriately vetted both at the FCC and here in Pennsylvania. As explained further herein, these safeguards include: (1) the creation of a working group to monitor, discuss, and advise on pole attachment issues; (2) the creation of a process that allows for the meaningful review of changes to federal pole attachment regulations before they become effective in Pennsylvania; and (3) Commission consideration of FCC orders promulgating or interpreting federal pole attachment rules as persuasive authority. The Commission believes that these safeguards ensure that the Commission is in compliance with the Commonwealth Acts.

Chapter 77 creates a working group to advise the Commission on pole attachments (Working Group). The Working Group is created, in part, to help address concerns about the automatic adoption of future changes to the FCC's rules. The Working Group will meet at least annually to address pole attachment issues and will have the opportunity to address future changes to the federal pole attachment rules prior to their taking effect. Specifically, under Section 77.4(c), a change to the federal pole attachment rules will take effect unless the Commission publishes a notice in the *Pennsylvania Bulletin* that the change may not take effect. We expect the Working Group to advise the Commission as to whether the Commission should make such a change within 60 days. If the Commission publishes a notice that the federal change may not take effect, this will trigger a 60-day consideration period during which the Commission will entertain public comments on the matter. Similarly, a Commission notice that a change may not take effect also may provide for public comment on the matter. Absent Commission action affirmatively declining to adopt the change for good cause shown, the change shall become effective 60

⁵⁹ CBPA at 4.

⁶⁰ PPL at 3.

⁶¹ DLC at 4.

⁶² First Energy at 3.

⁶³ PECO at 2-3.

⁶⁴ ExteNet at 7-8.

⁶⁵ See *Protz v. Workers' Compensation Appeal Board (Protz)*, 639 Pa. 645, 655 (2017); see also *Tosto v. Pa. Nursing Home Loan Agency*, 331 A.2d 198 (Pa. 1975), *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975) (plurality opinion), and *Phantom Fireworks Showrooms, LLC v. Wolf*, 198 A.3d 1205, 1227 (Pa. Cmwlth. 2018).

days after publication of the Commission notice in the *Pennsylvania Bulletin*. In any event, for any change in the federal rules that takes effect in Pennsylvania, the Commission will publish a notice of the effective date of the change in Pennsylvania in the *Pennsylvania Bulletin*.

As these safeguards show, the Commission will continuously review amendments to the FCC's rules to consider how proposed changes affect the public interest. Nevertheless, the Commission's decision to establish a process for input prior to changes to the federal rules taking effect should not be construed as an invitation for Pennsylvania utilities and other interested parties to regularly rehash or reargue determinations of the FCC. Rather, this process should be utilized to focus on the Pennsylvania-specific impacts of such changes. If the Commission does find it necessary to amend Chapter 77 to accommodate state-specific changes, the Commission will initiate an appropriate rulemaking, and the public will be notified and provided with appropriate opportunity to comment.

We also point out the reciprocal nature of pole attachments reverse preemption. 47 U.S.C. § 224(c)(3) and updated 47 CFR § 1.1405(f) provide that jurisdiction over pole attachments will revert back to the FCC if a state fails to meet the statutory deadline in any individual case, specifically rendering a decision within 180 days after a complaint is filed unless the state establishes a different time period which cannot exceed 360 days under Section 224(c)(3)(B)(ii). While the Commission does not anticipate losing jurisdiction over specific complaints in this manner, should it occur, parties will apply the same substantive rules in either venue. This is yet another reason why parity between the Pennsylvania and federal rules benefits stakeholders.

In addition, Commission application of the pole attachment rules to specific cases will come in the context of a formal adjudication, which further protects the affected regulated community and other interested parties against the harms that may result from improper delegation of authority. Chapter 77 establishes neutral and transparent operating procedures under which affected stakeholders can obtain a ready agency decision and judicial review from courts of competent jurisdiction with reasoned opinions to explain decisions. Thus, state judicial review of how the pole attachment rules are applied will be an integral aspect of Chapter 77 such that it will not result in ad hoc decision making. Because of this level of ongoing evaluation and judicial review, our exercise of authority based on federal law and the FCC's authority is both checked and restrained. The Commission will thus retain its core legislative prerogative to consider rules adopted by the FCC; each new amendment is subject to not only judicial review, but also rejection, alteration, reconsideration, or other scrutiny through a formal rulemaking as the Commission deems appropriate.⁶⁶

Example: Commission Regulation of Liquid Fuels and Hazardous Materials Pipelines

As previously mentioned, adoption clauses similar to that currently being proposed by the Commission in Chapter 77 exist and have been approved by IRRC. In 2012, the Commission issued a Final Rulemaking (2012 FRM) that set forth language for the regulation of liquid fuels and hazardous materials pipelines by incorporating the federal safety standards at 49 CFR Part 195 (relating to transportation of hazardous liquids by pipeline) into its regulations. Regarding any future federal amendments,

Section 59.33 establishes that they "shall take effect 60 days after the effective date of the Federal amendment or modification, unless the Commission publishes a notice in the *Pennsylvania Bulletin* stating that the amendment or modification may not take effect." 52 Pa. Code § 59.33(b). There, IRRC similarly questioned the Commission's proposed "future federal amendments to 49 CFR Parts 190—195, 198, and 199. . ." language and pointed out that "[i]f any agency wishes to incorporate subsequent amendments [of a code or regulation] the agency must explicitly do so by amendment of its existing rules. . . ."⁶⁷

In the 2012 FRM, the Commission noted that it was adding no new language to Section 59.33 regarding future federal changes, but merely added 49 CFR Part 195 to the Commission's then-existing regulation. The Commission cited federal funding for its natural gas pipeline safety program as the reason it was necessary to maintain language about future federal amendments. The Commission was concerned it would otherwise not be able to adequately participate in the Hazardous Liquid Pipeline Safety Grant Program.

While in the instant case there is no designated federal funding program to which Pennsylvania risks its eligibility to participate, Section 59.33 provides precedent of incorporating a federal regulatory framework into the Commission's regulations, which includes a mechanism for adopting future changes to the federal rules. Verizon and the CTIA reference this regulation, as well as Act 127,⁶⁸ to demonstrate that the automatic adoption of future federal amendments to pole attachment regulations is appropriate.

But even assuming otherwise, *arguendo*, multiple safeguards have been put in place to allow vetting of FCC amendments prior to their becoming effective in the Commonwealth. These safeguards include a 60-day review period prior to adopting changes to the federal rules during which the Commission can publish a notice in the *Pennsylvania Bulletin* informing that it may not adopt the change. Such notice will provide for public comment. In addition, the pole attachment Working Group, during this same 60-day review period, may advise the Commission as to whether we should adopt a change to the federal rules. Further, any interested party can make a filing with the Commission regarding such a change.

In any event, adopting the FCC's regulations provides certainty that Pennsylvania's pole attachment regulations conform to the base-line federal standards required to retain state authority over pole attachments. Adoption of the federal rules, including the proposed mechanism for adopting future changes to those rules, supports the cooperative state-federal goal of deployment of broadband across the Commonwealth, while also considering the safety, adequacy, and reliability of electric service in a manner that is consistent with due process. As stated throughout this FRM, the Commission believes that its proposed course allows for the Commission to assert jurisdiction quickly, while providing stability and uniformity for broadband investment in Pennsylvania, giving stakeholders a local forum to adjudicate disputes. Requiring the Commission to institute a separate, yet parallel, proceeding each time the FCC updates its rules in order to provide regulatory certainty would be an expensive, time-consuming allocation of resources that is unlikely to yield differing results in most instances. However, as we acknowledge, if the Commission deems it appropriate to

⁶⁶ See *Germantown Cab Co. v. Philadelphia Parking Authority*, 206 A.3d 1030, 1048 (Pa. 2019).

⁶⁷ Rulemaking re Liquid Fuels Pipeline Regulations, Docket No. L-2008-2034622 (Final Rulemaking Order entered March 1, 2012) at 3.
⁶⁸ 58 P.S. § 801.302(b)(1).

diverge from the federal regulations, it would initiate a rulemaking that would be subject to public comment.

Moreover, we note that interested parties will retain a meaningful opportunity to comment on prospective changes to the FCC's rules at the FCC. Automatically incorporating FCC changes, as opposed to amending the language of Chapter 77, is consistent with the expectation that state agencies engage in cooperative federalism to achieve state and national policy goals. This approach is consistent with the Commission and IRRC's approval of prior actions adopting FCC rules in toto in the past. This is particularly true regarding telecommunications regulation where even though policy is often set at the national level, there still is a process for considering the Pennsylvania[ad]specific impact. Maintaining agency discretion to implement a cooperative federal regulatory framework when it is within their delegated power is not only permissible, but also is desirable.

Although the Commission in this FRM adopts the FCC's pole attachment complaint procedures as the Commission's regulations, changes to the FCC's rules will not require changes to Chapter 77. Thus, the Commission, through this rulemaking, is acting in accordance with the requirements of the Commonwealth Acts. The Commission notes that only amendments to the text of Chapter 77 would trigger the necessity to initiate a new rulemaking proceeding in accordance with the Commonwealth Acts raised by IRRC and the CWA. Language changes to Chapter 77 without complying with the Commonwealth Acts would be instances where the Commission could upset or upend its proffered regulatory framework without giving appropriate opportunity for public comments.

Example: Pennsylvania Department of Environmental Protection Emission Guidelines

As another example, Pennsylvania Department of Environmental Protection (DEP) emission guidelines contain an adoption clause similar to that currently being proposed by the Commission in Chapter 77. In 1997, DEP amended 25 Pa. Code § 122.3 (relating to adoption of standards) to adopt in its entirety and incorporate by reference the federal Emission Guidelines promulgated in 40 CFR Part 60 by the U.S. Environmental Protection Agency (EPA) Administrator. DEP utilized the Emission Guidelines codified at 25 Pa. Code § 122.3 as the legal mechanism to implement new Emission Guidelines and standards for hospital/medical/infectious waste incinerators pursuant to the Clean Air Act (CAA) in 2014. DEP noted that the 1997 amendments to Section 122.3 were duly promulgated under applicable state law including the Air Pollution Control Act (35 P.S. §§ 4001 et seq.) and the Commonwealth Acts.

The Commission's current proposal to adopt, and incorporate by reference, Subpart J is directly on point with this example from DEP previously approved by IRRC. The Commission recommends using 52 Pa. Code Chapter 77 as the legal mechanism to implement future amendments adopted by the FCC regarding the PAA. Promulgating Chapter 77 in this way complies with the requirements of the Commonwealth Acts. Thus, the Commission is not recommending a regulatory framework that would either subvert the state's rulemaking process or constitute a violation of due process by denying any notice or an opportunity to be heard.

By the same token, however, the Commission should not be required, as a matter of course, to expend additional resources that duplicate the efforts undertaken by

the FCC. The FCC takes care to explore amendments, review comments from interested parties, and establish regulations. This is especially true under the proposed regulatory framework, where the Commission's new Chapter 77 will not see changes to its language when federal rules are amended. Instead, those amendments will be timely addressed using the review process set out above in which expending additional resources will be the exception and not the general rule.

The FRM envisions that prospective changes to Chapter 77 that the Commission decides to consider will likely be limited in scope with a record largely developed at the federal level and available for Commission review. As previously noted, the regulated community and other interested parties will retain a meaningful opportunity to comment on prospective changes at the FCC. Thus, it remains incumbent on pole owners and attachers, which are sophisticated entities and utilities, to remain diligent and aware of action being considered by the FCC regarding pole attachments. The regulated community and interested parties also are not precluded from petitioning the Commission to consider deviating from FCC rules as appropriate and necessary.

Example: Naylor v. Department of Public Welfare

The CWA erroneously claims that automatic adoption of future changes to the FCC's pole attachment rules violates the publication and review requirements of Pennsylvania law. Neither the Regulatory Review Act, which addresses IRRC's structure and review process, nor the Commonwealth Attorneys Act, which outlines the role of the Office of General Counsel, contain language addressing the automatic adoption of future amendments. The Commonwealth Documents Law, at 1 Pa. Code § 7.4, states in pertinent part:

An agency may omit or modify the procedures specified in §§ 7.1 and 7.2 (relating to notice of proposed rulemaking required; and adoption of regulations) if:

- (1) The administrative regulation or change relates to one of the following:

* * * * *

- (v) The interpretation of a self-executing statute or administrative regulation.

* * * * *

The inclusion of an automatic adoption clause means that the Commission's regulation regarding pole attachments can be self-executing; federal amendments could become effective without additional intervening or implementing action, although as previously stated, the Commission can reject a change in the federal rules for Pennsylvania. The Commonwealth Acts do not prohibit such action and, for the reasons stated above, this mechanism to adopt updates to the FCC's rules is practical and in the public interest to conserve unnecessary time and resources. Chapter 77 is therefore being promulgated in accordance with the Commonwealth Acts.

We note a commonwealth agency can change applicable standards via a notice process and not through a rulemaking, when the agency is acting pursuant to existing authority. By way of example, in *Naylor*,⁶⁹ the Commonwealth Court considered the Department of Welfare's (Department) 2010 reduction in "the amount of certain of its monthly State Supplementary Payments (SSP) to severely disabled, blind, and elderly indigent Pennsylvania residents," which was made simply by publishing

⁶⁹ *Naylor v. Com., Dept. of Public Welfare*, 54 A.3d 429, 431 (Pa. Cmwlth. 2012) (*Naylor*).

notice in the *Pennsylvania Bulletin*. The Petitioners contended that the Department failed to comply with statutorily required rulemaking procedures that were set forth in the Commonwealth Acts. For many years, the SSP had been fixed by regulation; however, the Department replaced that provision with a new chapter, which in part, provides that “revisions to the SSP payment levels will be published as a notice in the *Pennsylvania Bulletin*. . . .”⁷⁰ The Department claimed that it properly promulgated Section 299.37 of its regulations in accordance with the Commonwealth Acts and that the Governor’s Office of General Counsel, the Attorney General’s Office, and IRRC approved it, as did the legislative committees with oversight authority.

The Department further stated that its notice in the *Pennsylvania Bulletin* was published as part of an established regulatory framework; thus, it was immaterial and irrelevant whether notice of a reduction in SSP is a statement of policy or a binding norm. Notice was the vehicle authorized by regulation for revising SSP levels.⁷¹

Ultimately, the Court determined that the Department used, rather than circumvented, the rulemaking process to alter the prior practice it followed to announce changes in the amount of SSP.⁷² The Court held that when the Department issued its notice reducing the amount of SSP, it did not promulgate a new regulation or a regulatory amendment because it merely invoked the authority of Section 299.37. Thus, the Department was not required to comply again with the Commonwealth Acts.⁷³

The Court determined that Section 299.37 was valid by applying the *Rohrbaugh* test, which upholds agency regulations as binding on the courts only if they are: (1) within the agency’s granted power; (2) issued pursuant to proper procedure; and (3) reasonable.⁷⁴ The Court concluded that, given the clear language of the Public Welfare Code, the subject matter of Section 299.37 was within the Department’s delegated power. The Court also held that the Department properly promulgated Section 299.37 pursuant to the Commonwealth Acts.⁷⁵ Finally, in determining the reasonableness of Section 299.37, the Court noted that the Public Welfare Code did not require the Department to establish the amount of SSP through promulgation of a regulation.

Similar to *Naylor*, the subject matter of Chapter 77—pole attachments—clearly is within the Commission’s power to regulate, pursuant to both state law under the Public Utility Code and federal law under Section 224(c) of the PAA. The Commission has authority under state law to assert jurisdiction over pole attachments, as Section 501(a) provides broad authority for the Commission to act to enforce the Public Utility Code and “the full intent thereof.”⁷⁶ To assert jurisdiction over pole attachments, the Commission under federal law must certify to the FCC that: (1) it has issued and made effective rules and regulations implementing the state’s regulatory authority over pole attachments; and (2) with respect to any individual matter it will take final action on any matter within 180 days after the complaint is filed, absent

another time period which cannot exceed 360 days.⁷⁷ This FRM adopts effective rules and regulations for the Commission to exercise responsible jurisdiction over pole attachments, while also providing a 180-day period for a final action upon the filing of a complaint unless good cause is shown to have a decision at a later date not to exceed 270 days.⁷⁸

Similar to the Department’s claims in *Naylor* that Section 299.37 was issued pursuant to proper procedure, the Commission is properly promulgating Chapter 77 pursuant to the requirements of the Commonwealth Acts. The instant rulemaking has been an open process, which included publication of the proposed Chapter 77, solicited comments from stakeholders, interested parties, legislative oversight committees and IRRC, and the final-form regulations will be reviewed by those same oversight committees, IRRC, and the Attorney General’s Office. If approved, Chapter 77 outlines the regulatory framework for the scope of pole attachment regulation in Pennsylvania.

While notice in the *Pennsylvania Bulletin* was the vehicle authorized by regulation to revise SSP levels in *Naylor*, incorporation of Subpart J is the mechanism chosen by the Commission to revise pole attachment requirements. The Commission is clearly using the rulemaking process to assert jurisdiction granted to it under federal law and to implement regulations that comprehensively consider pole attachment issues in Pennsylvania. At the same time, the Commission also is establishing a process that allows for public input prior to the adoption of subsequent federal rule changes in Pennsylvania. Moreover, for any change in the federal rules that takes effect in Pennsylvania, the Commission will publish a notice of the effective date of the change in Pennsylvania in the *Pennsylvania Bulletin*.

Similar to *Naylor*, the Commission’s approach to asserting jurisdiction over pole attachments is reasonable. As previously stated, the Commission seeks to assert jurisdiction over pole attachments to provide a local forum in Pennsylvania for the timely resolution of pole attachment disputes. Among other things, the Commission’s assertion of jurisdiction will assist Pennsylvania pole owners and those entities that seek to utilize pole attachments, including those entities seeking to deploy much-needed broadband network access elements across the Commonwealth. To assert jurisdiction both promptly and cautiously, the Commission’s approach for Pennsylvania is to adopt the FCC’s pole attachment regulations at Subpart J, as amended from time to time. Such an approach is entirely consistent with the Commission’s authority under state law, and this turn-key approach will ensure the timely availability of the Commission’s adjudicatory process to stakeholders for the prompt resolution of pole attachment disputes.

Multiple commentators noted the precedent across state agencies of adopting a federal framework, by reference, in place of crafting a state-specific regime. As the Commission has noted, an entirely new state-specific regime with detailed Pennsylvania-specific rules, regulations, processes, and procedures is likely to yield only incremental benefits to Pennsylvania residents while being a time-consuming, costly endeavor that will create regulatory uncertainty at the outset, as well as every time the Commission initiates a new rulemaking to modify its rules. That is particularly the case, given that matters of

⁷⁰ 55 Pa. Code § 299.37.

⁷¹ *Naylor* at 433.

⁷² *Naylor* at 435-436.

⁷³ *Naylor* at 436.

⁷⁴ *Naylor* at 434-435; see also *Rohrbaugh v. Pa. Public Utility Comm’n*, 727 A.2d 1080, 1085 (Pa. 1999).

⁷⁵ *Naylor* at 435.

⁷⁶ Commission authority may be found at 66 Pa.C.S. §§ 313 (authority concurrent with United States); 314 (enforcement of federal rates and service); 501 (enforce the full intent of Public Utility Code, including as it relates to federal law); 701 (ability of affected persons to file complaints with the Commission); 1301 (authority over jurisdictional rates); 1501 (authority over jurisdictional services).

⁷⁷ 47 U.S.C. § 224(c).

⁷⁸ We anticipate that the presiding Administrative Law Judge would make a ruling on any request to extend the deadline for final Commission action in a case, which may be subject to review by the Commission.

pole attachments are critical to deploying broadband in Pennsylvania and are the subject of considerably detailed national rules to date. Given these considerations, the Commission prefers to keep parity with the FCC's rules.

At the same time, despite some commentators disagreeing with the Commission's decision to adopt future federal amendments, no parties cited any evidence that the Commission is prohibited from incorporating the federal regulations as its framework. We note that the automatic adoption of future federal pole attachment rule changes as proposed in this FRM does not preclude the Commission from considering petitions from Pennsylvania entities to reconsider specific federal changes or from initiating a rulemaking proceeding to address Pennsylvania-specific needs or regulations that appear to conflict with the public interest. We further note that automatic adoption of future federal rule changes as proposed in this FRM also does not prohibit or constrain the Commission's ability to diverge from FCC regulations. Thus, the Commission has provided a plethora of reasons to support its decision and to illustrate the reasonableness of its approach, especially to initially assert jurisdiction.

The Commission reserves its authority to balance the needs of pole owners, pole attachers, and the public need for access to reasonable and adequate telecommunications services. As shared previously, the Commission agrees with the PTA that the Commission should act, in most instances, to address pole attachment rule changes at the federal level only after the industry and regulators have had time to review the success or failure of the implementation of such changes. Indeed, the review process adopted today applicable to future changes to the federal rules does just that in response to those concerns and comments. Parties including PECO and Verizon acknowledge that the Commission has authority to convene a rulemaking after automatic adoption to examine and reconsider any changes that become effective after 60 days.⁷⁹

We will discuss in greater detail below the formation of a Working Group on pole attachment issues, but at this juncture it is important to state that the Commission will keep open lines of communication with pole attachment stakeholders to stay apprised of concerns from those in the industry. The Commission anticipates that this Working Group, comprised of pole owners (including those exempt from Commission regulation) and attachers and Commission staff, will be well-positioned to advise and share on the effectiveness of federal rule changes and their impacts on Pennsylvania consumers.

Against this regulatory landscape, the Commission believes that the appropriate time for pole owners to raise concerns against attachers about safety, adequacy, and reliability is through the formal complaint process after an application to attach is disputed or after a dispute is raised about the rates, terms, and conditions of an attachment. Moreover, whether prior to or after the filing of a formal complaint, pole owners can pursue Commission alternative dispute resolution in the form of mediation if the parties choose to use what may prove to be a more cost-effective way to address their dispute.

Disposition: The Commission Will Adopt the FCC's Regulations in Existence When Chapter 77 Becomes Effective and Will Automatically Adopt Future Changes Subject to Certain Exceptions

Based on our review and evaluation of stakeholders' comments, the Commission will adopt the FCC's pole

attachment complaint procedure regulations at Subpart J, as they exist at the time of our adoption of 52 Pa. Code Chapter 77. Also, the Commission will automatically adopt future federal changes, which will take effect in Pennsylvania 60 days after their effective date by the FCC, unless the Commission publishes a notice in the *Pennsylvania Bulletin* that such changes may not take effect. In any event, the Commission reserves authority, pursuant to its general authority under the Code, to deviate from the FCC's rules if Pennsylvania-specific needs arise, or to consider, at a future time, adoption of a new regulatory regime with Pennsylvania-specific rates, terms and conditions for pole attachments. Such a determination to diverge from the federal regulations would require the Commission to initiate a rulemaking proceeding.

At this time, however, the Commission is resolute in the necessity, especially at first and going forward, to proceed with a turn-key adoption of the FCC's pole attachment regulations. As noted in our NPRM, Pennsylvania-specific regulations would be unlikely to provide anything more than incremental improvement above what are well-established installation practices.⁸⁰ This approach will meet the needs of Pennsylvania's regulated community in a timely manner. The Commission believes it is well-positioned to balance stakeholder and constituent needs regarding broadband access and physical infrastructure deployment, particularly with opportunity to receive input from the interested public and stakeholders on future changes to the FCC's rules during the 60-day review process established in Chapter 77.

The Commission is amenable to the recommendations advocated by the CBPA, whereby FCC rules concerning attachments would undergo review by the Commission within months of the rules becoming effective at the federal level, and of the PTA, to address rule changes after the industry and regulators have had time to review the success or failure of their implementation. We are unwilling to embrace Verizon's position that we make clear the Commission will not entertain arguments for different rules. At the same time, we will not presently commit to considering the adoption of wholly separate Pennsylvania rates, terms and conditions to replace the federal framework that governs pole attachments, which was advocated for by the OCA.

The Commission reiterates that the most effective means of resolving all these concerns is with an automatic adoption clause coupled with the Chapter 77 review process established in this FRM. As explained previously, the Commission will utilize an automatic adoption process for future changes to the federal pole attachment rules that provides the Commission the opportunity to address such changes prior their taking effect. The Commission will also consider advice it receives from the Working Group. The Commission rejects the suggestion of the CWA to adopt the FCC's rules as they existed on the date our NPRM was released, July 12, 2018, and to ignore the OTMR regime, updated "shot clocks," and self-help allowances subsequently implemented by the FCC.⁸¹ First, even as stakeholders await the Commission's FRM regarding pole attachments, they are implementing the new regime and making appropriate adjustments to their operations. Second, the rules are effective notwithstanding the pending appeals because those rules have not been stayed. Moreover, interested parties were given an opportunity to file comments with the FCC to express their positions and concerns. Thus, these parties

⁷⁹ PECO at 2-3; PTA at 6; Verizon Reply Comments at 9.

⁸⁰ NPRM at 11.

⁸¹ CWA at 5.

will be in no worse position by the Commission’s automatic adoption than if the Commission did not assume jurisdiction.

The Commission also disagrees with First Energy that the Commission was unclear in its intention about newly adopted or future changes to the FCC’s regulations.⁸² While our NPRM specifically adopted the federal provisions in place in July 2018, Section 77.4 was clear that the Commission intended future changes to become effective as amendments were approved, as occurred through the FCC 2018 Poles Order. The Commission also is not inclined to wait until petitions for reconsideration or any appeals of these recent federal changes are settled. If reversed on appeal, then, of course, the Commission would obey that outcome. In this way, the Commission’s rules will consistently mirror those of the FCC. The Commission acknowledges how critical it is to provide regulatory certainty rather than additional burdens and expenses where broadband investment is contemplated and desired.

The Commission agrees with the CTIA that automatic adoption of federal regulations is neither new nor novel to our regulations. The Commission believes that federal amendments taking effect in Pennsylvania 60 days after the FCC’s effective date is appropriate to allow affected parties to make necessary adjustments and for the Commission to provide notice to Pennsylvania entities as it deems necessary. Section 77.4 will be amended as follows:

(a) This chapter adopts the rates, terms and conditions of access to and use of utility poles, ducts, conduits and rights-of-way to the full extent provided for in 47 U.S.C. § 224 and 47 CFR Chapter I, Subchapter A, Part 1, Subpart J (relating to pole attachment complaint procedures), inclusive of future changes as those regulations may be amended.

* * * * *

(c) Notwithstanding paragraph (b), an amendment or modification under paragraph (a) shall take effect 60 days after the effective date of the Federal change unless the Commission publishes a notice in the *Pennsylvania Bulletin* stating that the amendment or modification may not take effect.

* * * * *

The Commission will continue to monitor pole attachment activity at the FCC diligently. This approach will help ensure that the Commission flags changes to the federal pole attachment rules as they occur. However, the Working Group also shall be expected to monitor diligently the FCC’s pole attachment regulations and should alert Commission staff of federal regulatory changes that may have Pennsylvania-specific impacts and may need to be investigated further before becoming effective in the Commonwealth. Based on recommendations from the Working Group, the Commission may delay the effective date of federal amendments in Pennsylvania. Additionally, individual parties may petition the Commission for the postponement of FCC amendments, as provided in Chapter 77 of the Commission’s regulations even following their adoption.

The Commission finds it unnecessary to add ExteNet’s proposed subsection (b) to Section 77.4. No parties will be precluded, through the Commission’s adoption of Chapter 77, from petitioning the Commission to initiate a rulemaking to deviate from the federal rules. The Commission is not compelled to include this explicitly in its regulations or to specify how it will address or dispose of

such petitions. Parties are always free under the Public Utility Code to petition the Commission for relief on any matter they deem appropriate and within the Commission’s jurisdiction.

As the Commission makes no large or sweeping amendments to its proposed rulemaking, but rather maintains the status quo and clarifies certain provisions in response to stakeholder comments, it is unnecessary to begin a new proposed rulemaking at this time simply to account for FCC reforms. Pole owners, attachers, and other interested parties had an opportunity to place their positions on the record at the FCC prior to the FCC’s adoption of its new regime. Parties with Pennsylvania-specific interests have now been given the chance to comment on the Commission’s proposals and have provided thoughtful insights about the federal changes for our consideration. Moreover, with future changes to the federal rules, the Commission is establishing a review process that provides notice and opportunity to be heard prior to such changes taking effect in Pennsylvania.

Changes to our pole attachment regulations in the future that deviate from the FCC’s rules will come to our attention likely through the efforts of the Working Group and from petitions filed by pole owners and attachers as perceived needs for amendments arise. The Commission is not improperly delegating its authority by incorporating the federal regulations and no parties have provided evidence or cited cases that preclude the Commission from adopting this regulatory framework. Moreover, IRRC has previously approved state agency adoption in toto of federal rules, including the automatic adoption of future changes to the federal rules.

Had the Commission decided to deviate from the proposals in its NPRM, which recommend adopting the FCC’s rules inclusive of future changes, we may be more inclined to issue an Advance Notice of Final Rulemaking. However, these final-form regulations are a logical, practical outgrowth of our NPRM. The revisions made in this Final Rulemaking Order from our earlier NPRM are responsive to the issues raised in comments and are not material; stakeholders will not be unexpecting of its conclusions.

E. Section 77.5. Resolution of disputes

Comments

The Commission’s proposed Section 77.5 addresses the resolution of disputes by making its mediation, formal complaint and adjudicative procedures under 52 Pa. Code Chapters 1, 3 and 5 available to stakeholders in pole attachment disputes. Several parties support a dispute process that will reach prompt resolutions of pole attachment issues.⁸³ The Commission will apply, at least in its initial assertion of jurisdiction, existing FCC regulations concerning rates, terms and conditions of pole attachments.

Regarding dispute resolution, CBPA believes that the Commission could incorporate various aspects of its mediation processes; however, CBPA states that whatever alternative dispute resolution process is chosen, it should allow for prompt resolution and involve Commission staff knowledgeable about pole attachment issues.⁸⁴ The PTA adds that an expedited dispute resolution process would be less cumbersome, time-consuming, and expensive than the Commission’s formal complaint process.⁸⁵

In 2004, the New York Public Service Commission (NY PSC) adopted an order that addressed dispute resolution

⁸³ CenturyLink at 2; PTA at 2.

⁸⁴ CBPA at 6.

⁸⁵ PTA at 3.

⁸² First Energy at 3. See also DLC at 4.

of pole attachment issues.⁸⁶ In his Statement to the instant rulemaking, Commissioner Norman J. Kennard sought comment on the value of adopting an expedited dispute resolution process similar to the one adopted by the NY PSC. CenturyLink, MAW, and NetSpeed each comment that they would support a similar expedited process.⁸⁷ Under that NY PSC process, a pole attachment dispute is discussed at the intermediate level at a company for ten days before going to a “Company Ombudsman” for consideration for an additional twelve days. After this occurs, the dispute may be taken to the NY PSC for expedited resolution.⁸⁸ NetSpeed envisions an expedited resolution at the Commission as a substantive decision rendered by Commission staff with significant knowledge of outside plant and the legal provisions pertaining to pole access. Such a process, according to NetSpeed, should be appealable to the full Commission through a formal complaint.⁸⁹ CTIA supports an enhanced, expedited process that involves the Commission’s technical staff, but notes that if litigation is unavoidable, Maine’s expedited docket process may be a useful model.⁹⁰

Crown Castle shares its concern that, unlike the FCC which decides many issues “on paper,” the Commission does not currently have a formal complaint adjudication process that omits trial-type hearings before presiding officers in the OALJ, which can be lengthy and costly.⁹¹

DQE Communications welcomes the opportunity to avail itself to the Commission’s adjudicatory process and notes the difficulty of hiring expensive Washington D.C.-based counsel to obtain results that often prove meaningless due to the time that lapses before a decision is rendered by the FCC. DQE states that rules, processes, and the reconciliation of differences between pole owners and attachers are best handled at the local level, a sentiment shared by many commentators.⁹²

ExteNet draws the Commission’s attention to Congress only allowing states to exercise jurisdiction over pole attachment rates, terms and conditions when a state has procedures in place to take action on a complaint within 180 days of the complaint being filed. ExteNet acknowledges the Commission’s inclusion of Chapter 3 of the Commission’s regulations, which allows for emergency relief, in its proposed Section 77.5; however, ExteNet offers more explicit language by proposing a subsection (d):

A final action on any proceeding brought under this chapter shall be issued within 180 days of the filing of a complaint with the Commission. The assigned presiding officer shall have discretion to accordingly adjust responsive timelines provided for under 52 Pa. Code Chapters 1, 3 and 5 to meet this timeframe for resolution.⁹³

Verizon cites 47 U.S.C. § 224(c)(3) and updated 47 CFR § 1.1405(f) to remind the Commission that jurisdiction reverts to the FCC if the state does not meet the

statutory deadline in any individual case, 180 days after a complaint is filed with the state.⁹⁴ At a minimum, Verizon believes the Commission should comply with the FCC’s 180-day shot clock to decide complaints alleging denial of access and the FCC’s 270-day shot clock that applies to complaints that allege unjust and unreasonable rates, terms, and conditions.⁹⁵ Verizon notes that the Commission could make mediation available and provide assistance and incentives for negotiated settlement of disputes.⁹⁶

First Energy claims that the use of “may” in proposed Section 77.5(a) raises the question whether the Commission’s dispute resolution procedures are conclusively to be applied or whether parties or the Commission may choose to apply, in the alternative, the FCC dispute procedures.⁹⁷ First Energy also notes that, while the Commission’s procedures could be lengthier than the FCC’s 270-day “shot clock,” which was part of the July 2018 Order, such procedures could allow for a more fully-developed evidentiary record on which to base decisions.⁹⁸

FSN advocates for the Commission to make clear that parties can use the Commission’s abbreviated dispute resolution process (ADRP),⁹⁹ which was specifically developed for a limited number of interconnection-type disputes between telecommunications carriers to create a more level playing field for competitors to avail themselves of the Commission’s dispute process and to receive a more timely resolution of disputes with incumbent public utilities.¹⁰⁰ Under this process, the presiding Administrative Law Judge is required to issue an Initial Decision resolving a dispute within 30 calendar days of the filing of the Dispute Resolution Petition. Upon the filing of exceptions and replies, a final Commission order is then due 45 days from the due date for the replies. It is important to note that the ADRP referenced by FSN is a process to obtain an expedited decision from the Commission, which is different than the Commission’s mediation process where no such expedited decision is part of that process.

Subsection (b) states that “Parties before the Commission under [federal law] shall employ the procedural requirements therein except where silent or in cases of conflict where 52 Pa. Code Chapters 1, 3 and 5 will control.” PPL contends that the FCC regulations differ from the Commission’s informal and formal complaint procedure and requests clarification about which regulation will control if there is a conflict.¹⁰¹ PPL believes that the existing FCC adjudicatory and dispute resolution processes are a starting point on which the Commission can build, but states that Pennsylvania would benefit from a holistic state level perspective that balances the safety and reliability of the electric distribution system, adequate cost recovery for attachments, and the need for timely access to utility infrastructure.¹⁰²

Following concerns expressed by a commentator that it will be difficult for parties to determine federal sections that are silent or that do not control, IRRC requests that the Commission explain how it will implement subsection (b) in the final-form regulation. DLC states that is

⁸⁶ Proceeding Motion of the Commission Concerning Certain Pole Attachment Issues, NY Pub. Serv. Comm’n Case 03-M-0432, Order adopting Policy Statement on Pole Attachments (Aug. 6, 2004).

⁸⁷ CenturyLink at 6; MAW at 3; NetSpeed at 3.

⁸⁸ NetSpeed at 3.

⁸⁹ Id.

⁹⁰ CTIA at 7 (See Investigation into Practices and Acts Regarding Access to Utility Poles, State of Maine Public Utilities Commission, Docket No. 201–371 (Order entered July 12, 2011)).

⁹¹ Crown Castle at 6.

⁹² DQE Communications at 3-4; see also CTIA at 2, First Energy at 2; PECO at 2; PTA at 2 (“While the FCC has recently taken strides to improve the situation...the agency has proven not to be an effective venue for adjudicating grievances which [PTA members] may have with pole owners for a variety of reasons; most notably the costs associated with the time and effort required to achieve a resolution.”).

⁹³ ExteNet at 8-9.

⁹⁴ Verizon at 12-13. Verizon does not address the Section 224(c)(3)(B)(ii) option to establish a decision timeline other than 180 days so long as it does not exceed 360 days.

⁹⁵ Verizon at 13.

⁹⁶ Id.

⁹⁷ First Energy at 5.

⁹⁸ First Energy at 12.

⁹⁹ Interim Guidelines for Abbreviated Dispute Resolution Process, Docket No. M-00021685, Final Order entered August 31, 2005.

¹⁰⁰ FSN at 3-4.

¹⁰¹ PPL at 3.

¹⁰² PPL at 5.

unclear whether the Commission expects parties to use the *Pennsylvania Code* or the Code of Federal Regulations in preparing complaints and for dismissals. DLC recommends that the Commission decline to adopt Sections 1.1404—1.1408 (as they were in place in July 2018) and instead utilize 52 Pa. Code Chapters 1, 3 and 5 to adjudicate any disputes.¹⁰³

Regarding the NPRM's proposed Section 77.5(c), IRRC seeks clarification about whether the Commission's adjudicatory functions and processes will look to FCC decisions and precedent to resolve disputes or if the Commission will develop separate precedent as it adjudicates pole attachment matters. This inquiry stems from the Commission's response to Question # 10 on the completed Regulatory Analysis Form (RAF) which stated that "[i]f adopted, Chapter 77 will provide stakeholders with the opportunity to access the [PUC's] adjudicatory resources and to develop precedent relevant to the challenges of broadband deployment in Pennsylvania." IRRC looks to have this statement reconciled with Section 77.5(c), which states that the Commission will consider FCC orders promulgating and interpreting federal pole attachment rules and federal court decisions as persuasive authority in construing 47 U.S.C. § 224 and 47 CFR §§ 1.1401—1.1425.

PECO claims it is unaware of any complaints that the Commission's current dispute resolution process is too slow and does not believe changes to streamline the process are necessary.¹⁰⁴ PECO also proposes to revise Section 77.5(c) to add a new clause to the end, as follows:

...the Commission will consider [FCC] orders promulgating and interpreting federal pole attachment rules and federal court decisions...as persuasive authority in construing the provisions of 47 U.S.C. § 224 and 47 CFR §§ 1.1401—1.1425, *but may deviate from those rulings to make its own determinations of whether rates, terms, and conditions of pole attachments are just and reasonable.*¹⁰⁵

The CBPA suggests that Section 77.5 be amended to state that FCC orders and federal court decisions be treated as "persuasive, but not presumptive, authority in construing provisions of 47 U.S.C. § 224 and 47 CFR §§ 1.1401—1.1425."¹⁰⁶ NetSpeed is uncomfortable with the language in Section 77.5(c) that provides that the Commission "will consider FCC orders...persuasive authority in construing the provisions of 47 U.S.C. § 224 and 47 CFR §§ 1.1401—1.1425." NetSpeed argues that certain FCC interpretations are unfavorable, could be improved, and then encourages the Commission to be open to deviating from the federal standards as it encounters real-life disputes.¹⁰⁷ Thus, NetSpeed proffers language similar to that used by the NY PSC, which reads:

Our new approach to pole attachments will adhere to the FCC's methods and practices *unless we find a compelling reason to depart from them.*¹⁰⁸

(Emphasis added).

Meanwhile, CenturyLink supports using Section 77.5(c) as proposed in the NPRM to use FCC requirements as persuasive in construing federal law and FCC regulations.¹⁰⁹

Disposition: The Commission Will Permit Parties to Pole Attachment Disputes to Use the Commission's Formal and Mediation Processes to Readily Dispose of Conflicts

The Commission will make available to parties to pole attachment disputes both its formal complaint process, pursuant to Chapters 1, 3 and 5 of Title 52 of the *Pennsylvania Code* and Title 66 Pa.C.S. (related to the Public Utility Code), as well as its mediation process outlined at 52 Pa. Code §§ 69.391—69.396. These processes will allow for prompt resolution of disputes and utilize staff knowledgeable about pole attachment issues. We agree with the position expressed by several commentators that allowing parties to these disputes to avail themselves to the Commission's processes will result in less time-consuming and expensive resolutions.

As DQE Communications noted, and we agree, the Commission's assertion of jurisdiction will benefit those who often struggle with defending themselves in FCC proceedings. Similarly, we agree with VNCI that the local forum disputes to be adjudicated will allow smaller carriers and companies to pursue formal complaints in a more cost-effective manner.

The Commission disagrees with the assertion of Crown Castle that the Commission does not presently have a formal complaint process that omits trial-type hearings. We note that the Commission's procedural rules allow for the possible resolution of a formal complaint at the pleadings stage prior to any evidentiary, trial-type hearing. Moreover, an evidentiary, trial-type hearing is not always required, as a paper hearing may suffice when only questions of law or policy are involved. The Commission also points out that its mediation process can be utilized as a reasonable alternative that the parties may choose or that the Commission may assign, pursuant to Section 69.392(e) of our regulations. In fact, a party may request mediation prior to the commencement of a proceeding pursuant to Section 69.392(b) of our regulations. We note that when the parties seek mediation following the filing of a formal complaint, the request to seek mediation often acts as a stay upon any statutory or regulatory deadline governing the formal proceeding.

At this juncture, the Commission does not outline an additional expedited dispute process other than noting that the Commission's existing formal process includes a mediation process before or during a formal proceeding. Consequently, the Commission will take a "wait and see" approach on whether such an expedited decision-making process is necessary, depending on what issues arise in adjudicating pole attachment disputes. In the future, the Commission could adopt policies similar to those existing in New York to handle disputes more promptly and meet needs in the public's interest. At present, we will decline from expressly naming the ADRP option in Chapter 77.

Below, the Commission will discuss the creation of a working group which will be convened following adoption of this FRM. One task of the Working Group will be to evaluate the dispute resolution process and how it can be improved to more efficiently meet parties' needs and expectations regarding pole attachments. The Commission believes this will be an appropriate forum for discussion on whether to implement expedited dispute resolution procedures.

Verizon and ExteNet claim that the Commission's jurisdiction reverts to the FCC in any individual case if the state does not meet the statutory deadline and take action within 180 days. 47 U.S.C. § 224(c)(3)(B)(ii) and the updated 47 CFR § 1.1405(f)(2) also allow for the

¹⁰³ DLC at 5.

¹⁰⁴ PECO at 14.

¹⁰⁵ PECO at 3.

¹⁰⁶ CBPA at 4.

¹⁰⁷ NetSpeed at 3.

¹⁰⁸ NetSpeed at 3.

¹⁰⁹ CenturyLink at 2.

Commission to retain jurisdiction if Pennsylvania's rules and regulations for final action do not extend beyond 360 days after the filing of a complaint. Against the backdrop of these two provisions, the Commission rejects ExteNet's proposed language for a new subsection to Section 77.5. However, the Commission recognizes the necessity that pole attachment adjudications be completed within 180 days as the Commission's rules do not otherwise prescribe that action must be taken within 360 days. Therefore, we propose to add a new Section 77.5(d) codifying that the Commission will issue a decision within 180 days of the filing of a formal complaint initiating a pole attachment dispute unless good cause is shown for additional time beyond 180 days. If good cause is shown, the Commission will issue its decision within 270 days of the filing of the complaint. This timeline for a decision in a pole attachment dispute is entirely consistent with Section 224(c)(3)(B)(ii) of the PAA. The Commission's OALJ will be mindful of this deadline and dispose of pole attachment disputes accordingly.

First Energy comments that the word "may" in Section 77.5(a) leaves open the question of whether the Commission's dispute resolution processes are to be applied or the FCC's procedures. The Commission takes this opportunity to clarify that Section 77.5(a) merely enables parties to pole attachment disputes to avail themselves of Commission process and have those disputes disposed of by the Commission's OALJ using the formal complaint and/or mediation processes.

In Section 77.5(b), the Commission makes clear that its procedural rules will generally be followed. When Commission regulations are silent, the FCC's procedural regulations found at 47 CFR §§ 1.720—1.740 will control so long as they do not conflict with the Public Utility Code. This disposes of PPL's concern about which procedural regulations control. The Commission does agree with PPL's assessment that Pennsylvania would benefit from a state-level perspective and believes this is precisely the kind of balancing that the Commission can offer to the dispute resolution process that may be less available at the FCC. Moreover, reliance on the Commission's rules of procedure is more efficient and cost-effective than attempts to resolve a Pennsylvania-specific proceeding using federal rules that differ.

The Commission believes that applying its procedural rules in the Public Utility Code and Chapters 1, 3, and 5 of the *Pennsylvania Code* will address the concerns represented by IRRRC. In the instance where the Commission's procedural rules and related precedent are silent, the presiding officers in the OALJ are well-equipped to handle issues raised by parties about federal procedures. In this instance, complaining and responding parties should look to the FCC's streamlined pole attachment procedural regulations found at 47 CFR §§ 1.720—1.740. To the extent that a party believes that these rules fail to provide the same due process protections afforded by our procedural rules, the offended party may raise those arguments in pleadings.

The Commission maintains in its final-form regulations that FCC and court decisions and precedent will be persuasive, and not controlling precedent. IRRRC expresses confusion about this language as compared to our response to Question # 10 on our previously submitted RAF which leaves room for the Commission to develop precedent relevant to broadband deployment across the Commonwealth. The Commission would acknowledge the wisdom of long-standing FCC practice and experience to interpret its pole attachment rules. At the same time, the

Commission anticipates challenges to the federal rules that may come to the Commission for resolution, which have not yet been adjudicated on the federal level once we assume jurisdiction. Similarly, we can envision instances where an interpretation by the FCC, which is charged with developing a nationwide scheme, may not align with Pennsylvania interests.

For reasons like this, the Commission agrees with commentators who state that FCC interpretations should not be presumptive and that, occasionally, reasons may exist to deviate from the FCC's interpretation. Thus, our language in Section 77.5(c) does not preclude the Commission from using its discretion to form separate interpretations to benefit the Commonwealth. FCC orders are persuasive, meaning that they do not establish binding precedent that the Commission would follow regardless of whether any particular application would be rational under a set of given circumstances.

PECO, NetSpeed, and the CBPA propose language to allow the Commission to exercise its discretion in interpreting FCC rules and court decisions. Section 77.5(c) adequately addresses these concerns by clarifying that the Commission will consider FCC orders promulgating and interpreting federal pole attachment rules as persuasive authority.

F. *ExteNet's Proposed Transparency Provision*

ExteNet contends that it, and other attachers, have no way of knowing whether they are being treated in a nondiscriminatory manner because most, if not all, pole attachment agreements are not public documents and the FCC's formula for setting pole attachment rates is based on complex information known only to the utility setting such rates. To remedy this claimed shortcoming in the FCC's rules, ExteNet proposes a Section 77.6 to the Commission's regulations titled *Transparency*:

(a) Within 30 days of the effective date of this Chapter, all utilities under the jurisdiction of this Chapter shall file with the Commission, in a docket established for such purpose, any existing pole attachment agreements between that utility and attachers. Utilities shall file all future pole attachment agreements within 14 days of such agreement's execution.

(b) Within 90 days of the effective date of this Chapter, all utilities under the jurisdiction of this Chapter shall file with the Commission, in a docket established for such purpose, any pole attachment and conduit rates and the basis therefore. If a utility enters into an agreement for a rate not previously provided in said docket, such rate and the basis therefore shall be filed with the Commission within 14 days.

Disposition: ExteNet's Proposed Transparency Provision

The Commission declines to adopt ExteNet's proposed remedy that would require public utilities to file existing pole attachment agreements with the Commission. The Commission does not believe that these documents should be introduced to the public sphere or that the Commission should be custodians of this information. Unless such transparency becomes required due to complaints by pole attachers that they are being treated in a discriminatory fashion, this is not an issue that the FCC has addressed, or that the Commission is inclined to address, in this rulemaking. However, Commission adjudications and rulings on pole attachments agreements and disputes will, upon completion, become public record. Thus, going forward, there should be a far greater degree of transpar-

ency available to stakeholders and the interested public. Moreover, this may be a good topic for the Working Group to consider.

G. Private Citizen Letters

Mr. David Hommel supports the service he receives from MAW as well as the Commission's exercise of reverse preemption over pole attachments because he believes it will ensure that competition for other services requiring use of utility poles is free and fair. He expresses concerns that, if private companies can set attachment rates, a "landscape littered with utility poles" will result. He has concerns that private companies that are also public utilities are able to place poles on public and private lands without leasing land because "poles provide a public service."

Ms. Rosemarie Keen supports the regulation of pole attachments, states that PPL should not ask for such high fees, and expresses appreciation for the Lancaster City Connect program.

Mr. David Kob expresses concerns of collusion stating that PPL is refusing to provide MAW access to its poles but is allowing access to Comcast.

Mr. Charles Lardner supports the Commission regulating pole attachments but does not support government regulation where avoidable. He also expresses concerns that PPL is imposing fees to prevent cities from providing services via pole attachments that may be usury or a violation of monopoly or anti-trust laws. He supports the use of a working group or committee to ensure needs of both owners and attachers are incorporated in agreements.

Ms. Carolyn Robbins supports MAW bringing fiber optic internet service to Lancaster. She expresses concerns that PPL is refusing MAW's efforts to submit data for service drop attachments and is removing attachments for "no proven violation." She supports MAW's (1) right to see regulations regarding service drop attachment requirements, (2) offer to pay for "PPL's computer glitch" that required them to reposition attachments, and (3) "expectation to pay a fair price for" make-ready and engineering fees.

Mr. John Roose supports the Commission assuming jurisdiction over pole attachments, rates, and conditions and providing for the timely resolution of disputes. He supports the November 15, 2018 comments from NetSpeed and the October 29, 2018 comments from MAW Communications, specifically regarding expediting the dispute resolution process. He also specifically supports the section of MAW's comments regarding funding to support new commission responsibilities. He expresses concerns regarding the "impasse" between MAW Communications and PPL and that his service may be terminated without further notice. Mr. Roose comments, "[W]e observe a classic David vs. Goliath situation: Big corporations enjoying use of public rights-of-way vs. entities competitively expanding internet services who much depend on access to facilities of the Big Corporations."

Mr. Trevor Roy comments that he is concerned over the "LanCity Connect" project in Lancaster, PA, and is unhappy with what he has read about PPL's behavior regarding poles access. He believes that PPL is not serving the best interests of the public, is not negotiating in good faith, and that competition is needed. He specifically alleges that PPL is "price gouging" engineering costs for pole attachments.

Mr. John Siegrist asks the Commission to create a rule that will not interrupt the internet service provided by

MAW Communications. He agrees with the comments submitted by MAW which state that lengthy disputes are a burden on subscribers who are waiting for high speed broadband service. He also notes that he is satisfied with the services he has received from MAW and that they helped increase competition in the city of Lancaster.

Commissioners' Statements And Inquiries

Working Group

Comments responding to the Commissioners' specific questions, as presented through their separate statements, focused on the creation of a pole attachments working group. Parties amenable to such a group expressed the need for the scope of the potential working group's existence to be clearly defined.¹¹⁰

PPL believes there is great value in establishing a pole attachment working group and looks forward to participating if one is created.¹¹¹ The CBPA recommended that the Commission would benefit from a state-specific advisory committee having broad membership comprised of individuals from the Commission's technical personnel, regulated utilities, ILECs, current and potential attachers, and governmental entities. Recommendations regarding engineering and cost recovery issues could be amongst the pole attachment matters discussed.¹¹² Crown Castle sees merit to the establishment of a working group that bridges private and public entities regarding pole attachment issues.¹¹³ First Energy suggests that a working group could help clarify how the Commission intends to address new, yet-to-be promulgated FCC regulations and contribute to discussions about whether the Commission's dispute resolution processes are mandatory or whether the FCC procedures may be used.¹¹⁴

DQE Communications, DLC and Verizon see no value in establishing a working group at this time.¹¹⁵

Disposition: Creation of a Pole Attachment Working Group

The Commission proposes to add Section 77.7, which will institute a pole attachment Working Group consisting of industry, Commission staff, and the Statutory Advocates. The Law Bureau, in coordination with the Bureau of Technical Utility Services and the Office of Special Assistants, shall be responsible for convening a stakeholder working group that pole owners (including those exempt from commission regulation), attachers, the Statutory Advocates, and main interest groups will be invited to join. The Working Group will be established within 30 days of the effective date of Chapter 77.

The Working Group shall be charged with monitoring and advising the Commission on federal and state pole attachment issues, providing an ongoing forum for parties to discuss issues and ideas regarding pole attachment regulations, and evaluating the effectiveness and efficiency of Commission complaint, mediation, and dispute resolution processes. The Working Group shall convene at least annually, but also may convene upon stakeholder request to address specific issues that may arise. Moreover, as previously discussed, the Working Group may advise the Commission that it believes a future change to the federal pole attachment rules should not apply in Pennsylvania.

¹¹⁰ CenturyLink at 6-7 ("If the Commission wants to undertake a workshop, it should be limited in scope—i.e., limited to how best to implement the FCC requirements and the[Commission's] process for handling disputes."); see also CTIA at 8; PECCO at 16.

¹¹¹ PPL at 4.

¹¹² CBPA at 4.

¹¹³ Crown Castle at 10; see also MAW at 2; PREA at 3.

¹¹⁴ First Energy at 13.

¹¹⁵ DQE Communications at 4; DLC at 7; Verizon at 17.

The Law Bureau shall be responsible for presenting the Commission with issues the Working Group identifies as requiring attention or amendment. The Law Bureau shall annually report its findings to the Commission regarding issues developed in the stakeholder working group along with any recommended Commission action as appropriate. This Working Group will provide a forum in which interested stakeholders can discuss issues that have arisen and ideas for more effective regulation of pole attachments. As several commentators requested that such a working group include pole owners exempt from regulation for their insight, the Working Group will include these stakeholders. As a preview, the Commission specifically identifies one prospective topic that such a working group might be asked to address: expedited and abbreviated dispute resolution processes.

This Working Group will continue dialogue between pole owners and pole attachers as well as provide a forum for all stakeholders to influence policy and recommend changes to benefit Pennsylvanians. The Commission believes that an ongoing working group to discuss pole attachment concerns will ensure that the Commission remains apprised of industry concerns and will aid in resolving disputes efficiently and deploying broadband across the state while being mindful of electric safety and reliability.

Comprehensive Registry of Poles and Pole Attachments

CBPA supports a centralized, comprehensive registry that (1) is accessible by current and future pole attachers; (2) is free of cost to access; (3) includes what is attached and in which space an attachment is located; (4) is updated frequently to insure accurate information; and (5) contains industry-accepted measurement data.¹¹⁶ MAW also supports the concept of a comprehensive registry to accelerate broadband deployment, assist in expediting disputes, and decrease costly repeated surveying of poles.¹¹⁷

CenturyLink and PECO opine that a registry of poles and attachment is problematic in terms of maintenance and would be an expensive endeavor.¹¹⁸ DLC adds that there is little necessity and limited benefit to ratepayers in creating such a registry.¹¹⁹ Pole owners often consider such information proprietary and collection and disclosure could create national security concerns and cybersecurity vulnerabilities.¹²⁰ PECO also notes that, consistent with current FCC policy, many utilities provide maps on a confidential basis to attaching entities that request and pay for this information.¹²¹

The OCA suggests that the Commission should consider compiling information from facility owners such as the rates charged (and supporting documents), how they track/manage pole and conduit investments, and specific characteristics of the facilities, as well as any “photographic inventory of poles and manhole access to conduits.” OCA states that such information may help the Commission meet the commitment set out in Section 224(c) that it “consider the interests of the subscribers of the services offered via such attachments, as well as the interests of the consumers of the utility services.”¹²²

Disposition: Comprehensive Registry of Poles and Pole Attachments

While the Commission understands the benefits that pole attachers might receive from the creation of such a registry, these benefits are outweighed by the concerns expressed by the parties opposing such a registry, as has been decided in other jurisdictions. The cost to build, maintain, and update such a registry are likely prohibitive considering the limited value to the public of such a registry. Additionally, the Commission believes in being vigilant against threats to national security, in protecting critical infrastructure, and in avoiding cybersecurity vulnerabilities. Such a registry could pose a threat in all three areas.

Moreover, PECO’s reference to FCC policy that requires many utilities to keep up-to-date maps that can be made available on a confidential basis to attaching entities also undermines the need for a comprehensive registry. Finally, the scarce resources devoted to designing, implementing, and updating a Pennsylvania-specific database for all poles in the Commonwealth are better allocated to investment in broadband infrastructure, including the attachments that will be needed to expand broadband.

Standardized Agreements and Tariffs

State-wide standardized agreements and tariffs were largely rejected as commentators prefer to negotiate or to use their own standardized agreements and enjoy the flexibility of agreements specific to the owner and attaching party.¹²³

While acknowledging that the Commission may wish to standardize formulae and terms for pole attachment agreements in the future, CBPA does not believe this should be a priority as the Commission asserts jurisdiction over attachments.¹²⁴ Crown Castle noted that standardized agreement terms that comport with the FCC’s rules may be useful in creating efficiencies and could reduce conflict and delay; however, Crown Castle does not support a tariff approach to attachments.¹²⁵

CenturyLink argues that pole attachment agreements should be negotiated and that the Commission should only become involved if negotiations fail between parties.¹²⁶ Similarly, PECO has a standardized agreement that attaching entities negotiate by adding changes and believes its system does not require change.¹²⁷ CTIA believes that requiring tariffs or standardized agreements is an extra layer of process that may cause conflict with the FCC’s requirements and that is unnecessary.¹²⁸ Verizon notes that the FCC does not require pole owners to maintain standardized agreements or tariffs and sees no need for a state-specific requirement in Pennsylvania.¹²⁹

MAW supports such agreements and believes a working group could be empowered to generate a state-wide standardized pole attachment agreement that meets the needs of pole owners and attachers while enabling safe but expedited broadband deployment.¹³⁰

Disposition: Standardized Agreements and Tariffs

Based on the varied comments that the Commission received regarding standardized agreements, the Commission is not persuaded to pursue this matter. The Commis-

¹¹⁶ CBPA at 6.
¹¹⁷ MAW at 2.
¹¹⁸ CenturyLink at 6; PECO at 15; Verizon at 16-17.
¹¹⁹ DLC at 6; see also PPL at 6.
¹²⁰ CenturyLink at 6; see also CTIA at 8; DLC at 6 (The Company maintains a database of its poles but has serious concerns regarding making that database accessible to others outside the Company); First Energy at 13; PECO at 15; Verizon at 17.
¹²¹ PECO at 15.
¹²² OCA at 7.

¹²³ First Energy at 13; PPL at 6.
¹²⁴ CBPA at 6; see also DLC at 6 and NetSpeed at 4.
¹²⁵ Crown Castle at 10.
¹²⁶ CenturyLink at 6.
¹²⁷ PECO at 15.
¹²⁸ CTIA at 8.
¹²⁹ Verizon at 17.
¹³⁰ MAW at 2.

sion agrees with the CBPA, DLC and NetSpeed that such agreements need not be prioritized presently. The Commission will allow our final-form regulations to become effective and may choose to revisit standardized agreements at a time in the future if it becomes evident that these might create efficiencies or lessen the number of disputes between pole owners and attachers. This would be a good topic for the Working Group to consider, including the development of a “best practices” model agreement for use as well.

Potential Lack of Consensus Between Parties about Pole Attachment Agreements

The CBPA believes that consensus may not be possible considering the varied positions of pole owners, existing and potential attachers and service providers, and the public. The CBPA comments that attempts to find such common ground would delay broadband development to the detriment of consumers and attachers.¹³¹ CenturyLink contends that, by adopting the proposed regulation at Section 77.5(c), the Commission’s rules are broad and flexible to handle regulatory changes made by the FCC or courts.¹³² CTIA contends that it is most efficient to resolve differences under a single set of rules, the FCC’s rules, rather than multiple regimes.¹³³

PECO proposes a new section to Chapter 77 with respect to voluntarily negotiated agreements, which is currently used in Arkansas:

Section 77.6. Voluntarily Negotiated Agreements. Nothing in these Rules prevents or limits the ability of a pole owner and an attaching entity to enter into a voluntarily negotiated written agreement regarding the rates, terms, and conditions for pole attachment access. Voluntarily negotiated agreements are preferred and encouraged by the Commission. Nothing in these rules shall be interpreted to supersede or modify any lawful rate, term, or condition of a voluntarily negotiated written agreement.

According to PECO, this will protect existing and newly-negotiated agreements and will preserve Commission resources.¹³⁴

Disposition: Lack of Consensus Between Parties about Pole Attachment Agreements

The Commission prefers and encourages parties to voluntarily negotiate and develop reasonable pole attachment agreements. This policy goal leads the Commission to adopt PECO’s proposed Section 77.6, Voluntarily Negotiated Agreements, which will recognize the rates, terms, and conditions for pole attachment access upon which pole owners and attaching entities mutually agree.

Effect of Broadband Deployment Advisory Committee (BDAC)

CBPA and Verizon state that the influence of the BDAC will only be felt based on any rules or regulations that the FCC adopts that originate from that group. Attempts to address what the BDAC’s deliberations may result in would be speculative.¹³⁵ CenturyLink asserts that the FCC appears to have considered BDAC input in its 2018 Poles Order.¹³⁶

Disposition: Effect of BDAC

As the Commission reviews FCC pole attachment rules, BDAC recommendations will be incorporated to the extent adopted and made effective by the FCC.

Commission Ratemaking Requirements

CTIA does not believe the interplay between Commission ratemaking requirements and the FCC’s pole attachment regulations will be problematic as the FCC’s rate methodology for pole attachments has withstood judicial review.¹³⁷ First Energy notes that the expansion of broadband access may involve issues unique to Pennsylvania’s geography, demographics, and the corporate structures of EDCs, ILECs, CLECs and cable television companies (CATV).¹³⁸ The PTA notes that if the Commission would want to assume jurisdiction over entities exempt from the PAA, statutory changes would be required.¹³⁹

Disposition: Commission Ratemaking Requirements

The Commission agrees with the PTA’s assessment that statutory changes by the General Assembly would need to occur for the Commission to assert jurisdiction over entities exempt from the PAA. Moreover, the rate formulas and procedures used to derive rates under FCC rules have been established and govern rates to this date. We see no reason to deviate from FCC-based rates or ratemaking procedures.

Interaction Between Future Pennsylvania Statutes Addressing Pole Attachments and the Incorporated FCC Framework

First Energy responds that the Commission should acknowledge that EDCs may adopt construction standards above the minimum safety standards issued by NESC or OSHA and that restoring electric services due to storms or other outages must be prioritized over the speed of broadband deployment.¹⁴⁰ PECO mentions House Bill No. 2564, which would apply only to decisions by municipalities over wireless carrier access to municipal rights-of-way and municipal role, but contends that FCC pole attachment regulations apply only to poles owned or controlled by EDCs and ILECs, meaning the Bill would have no effect on the regulations adopted by the Commission.¹⁴¹

Disposition: Interaction Between Future Pennsylvania Statutes Addressing Pole Attachments and the Incorporated FCC Framework

The Commission agrees that restoration of electric service due to storms or other outages should be prioritized over the speed of broadband deployment but finds that EDCs must exist within the federal framework, now adopted as the state’s regime, to allow construction and pole attachments.

Forecasting Disputes and Additional Caseload and Demands

Questions were raised regarding the impact of our pole attachment NPRM on Commission resources, the potential cost to the Commission of this undertaking, and potential new revenue sources, and they were directed to be explored and answered in this process.¹⁴² Parties were largely unable to forecast the number of disputes expected or the additional caseload and resources the Commission would need to expend to assert jurisdiction over pole attachments.

¹³¹ CBPA at 2-3.

¹³² CenturyLink at 3-4.

¹³³ CTIA at 3.

¹³⁴ PECO at 4-5.

¹³⁵ CBPA at 3.

¹³⁶ CenturyLink at 3; see also CTIA at 4; PECO at 10.

¹³⁷ CTIA at 5.

¹³⁸ First Energy at 11.

¹³⁹ PTA at 5.

¹⁴⁰ First Energy at 10.

¹⁴¹ PECO at 10.

¹⁴² See July 12, 2018 Statement of Vice Chairperson, then Commissioner, David W. Sweet.

CBPA offers, anecdotally, that the time and cost of litigating disputes before the FCC may be depressing the number of actual disputes that exist regarding pole attachments. Still, CBPA expresses that any cost to the Commission is appropriate given the shared goal of expanding broadband across Pennsylvania. CBPA also suggests that it would be appropriate to impose a modest fee upon complainants.¹⁴³

CenturyLink states that pole owners and attachers often try to address disputes on a business-to-business basis, which should limit the escalation of disputes.¹⁴⁴ Crown Castle is concerned about the Commission's ability to handle the increased workload to resolve disputes.¹⁴⁵

CTIA alleges that it has no data that would allow it to provide a fact-based response; any attempt at quantification would be speculation.¹⁴⁶ CTIA notes that the Commission's jurisdiction may not extend to many attachers in Pennsylvania, limiting the Commission's ability to raise additional revenue and placing such attachers in a similar category to customers filing a formal complaint at the Commission. According to CTIA, neither the Public Utility Code nor federal law, rule or regulation, including the FCC's pole attachment regulations, appear to authorize such an assessment, meaning that the Commission would be limited to raising additional revenue from entities subject to its jurisdiction.¹⁴⁷ MAW proposes that pole owners and attachers, which both have responsibility to customers to resolve disputes, share equally the expenses associated with the Commission undertaking this jurisdiction.¹⁴⁸

DQE Communications states that it would avail itself of the Commission's process to adjudicate disputes but is unable to estimate how often it might pursue this course. DQE Communications also opines that disputes may be resolved more amicably now that both parties to an issue know that the Commission's process is readily available.¹⁴⁹ First Energy shares that their affiliates' experiences in other states do not predict a prohibitive expansion of formal complaints.¹⁵⁰

MAW cannot estimate the number of disputes the Commission might expect, but opines that standardized attachment agreements would lessen the overall number of disputes.¹⁵¹ PECO states that it cannot predict the future and has not had disputes with attachers in recent memory; the company hopes that the Commission's assumption of jurisdiction would not encourage attaching entities to be more aggressive and claims that its proposal to protect existing and newly-negotiated agreements is intended to combat any such aggression.¹⁵² The PTA also expresses the difficulty in attempting to forecast how many disputes may come to the Commission or the potential increased burden on Commission personnel.¹⁵³ Verizon is unable to forecast the caseload the Commission might expect, notes two open pole attachment complaint proceedings at the FCC that both involve Pennsylvania utilities, and states that it has no open FCC pole attachment complaints.¹⁵⁴

Verizon suggests that the Commission consider excluding pending FCC proceedings from reverse preemption to

prevent delay or additional expense. Verizon at 14. However, federal law requires the FCC to forward to the Commission any pending case affected by our assertion of jurisdiction over pole attachments, to notify the parties involved, and to give public notice thereof.¹⁵⁵ The Commission cannot modify this rule as it relates to actions taken by the FCC. Regarding cases transferred to the Commission by the FCC, the Commission will take final action within 180 days unless good cause is shown. If such cause is shown, the Commission will issue a final order no later than 270 days from the transfer.

Disposition: Forecasting Disputes and Additional Caseload and Demands

Based on the comments received to this rulemaking, forecasting the number of disputes that may come to the Commission or the additional caseload and resources needed, will not be predictable until the Commission's regulations are in force. Still, stakeholders agree that the Commission's assertion of jurisdiction outweighs the costs and trust the expertise at the Commission to adjudicate disputes.

Unauthorized Attachments

CBPA simply states that the Commission will have to consider whether additional, specific procedures are necessary to address unauthorized attachments.¹⁵⁶ CenturyLink comments that it would support an expedited process similar to New York's to address unauthorized attachments and shares that the Commission could use its existing adjudicatory process to address liability or to impose fines.¹⁵⁷ CTIA shares that its preferred method for addressing unauthorized attachments is through contracts it enters.¹⁵⁸ DLC can envision a situation whereby unauthorized attachments could be brought before the Commission via formal complaint, enabling parties to obtain timely relief.¹⁵⁹ First Energy submits that the FCC provides a bifurcated avenue (i.e., liability and damages) for unauthorized attachments, but that the Commission could uphold suspension of new attachments as a penalty for nonpayment of unauthorized attachment fees, make-ready construction costs, and annual rental payments.¹⁶⁰

In correlation with its recommendation that a comprehensive registry be developed with a mandatory three-year update policy, MAW believes that a fee totaling no more than three times the annual pole attachment rate is sufficient. MAW notes that, in its experience, removals largely affect subscribers of removed networks and, therefore, does not believe that removing unauthorized attachments should be permissible. A pole owner should be enabled to bring unauthorized attachments into compliance with the attacher being held financially responsible and receiving a standardized fine per attachment.¹⁶¹

PECO proposes a flat fee of \$200 per unauthorized wireline attachment and a significantly more severe penalty of \$2,500 per unauthorized wireless attachment. PECO believes that unauthorized wireless attachments will become much more commonplace with the rollout of wireless 5G antennas on utility poles, which will be installed on top of electric utility poles in the electric space. PECO contends that a meaningful deterrent is

¹⁴³ CBPA at 5.
¹⁴⁴ CenturyLink at 5.
¹⁴⁵ Crown Castle at 6.
¹⁴⁶ CTIA at 6.
¹⁴⁷ CTIA at 9.
¹⁴⁸ MAW at 4.
¹⁴⁹ DQE Communications at 4.
¹⁵⁰ First Energy at 11.
¹⁵¹ MAW at 4.
¹⁵² PECO at 13.
¹⁵³ PTA at 3.
¹⁵⁴ Verizon at 14.

¹⁵⁵ 47 CFR § 1.1405(d).
¹⁵⁶ CBPA at 5.
¹⁵⁷ CenturyLink at 5.
¹⁵⁸ CTIA at 6.
¹⁵⁹ DLC at 7.
¹⁶⁰ First Energy at 11-12.
¹⁶¹ MAW at 3.

required due to such attachments being potentially life-threatening and hazardous to the electric system.¹⁶²

The PTA advises that no additional mechanisms are necessary at this juncture because the FCC provides a means for pole owners to address unauthorized attachments. Once the Commission asserts jurisdiction, if a proven need arises for enforcement action around unauthorized attachments, the PTA states that Commission action could benefit pole owners.¹⁶³ PPL agrees that no additional enforcement mechanism is currently necessary and states that pole owners are currently required to enforce the terms of their pole attachment agreements, which prohibit unauthorized attachments.¹⁶⁴ Verizon agrees that no action is needed.¹⁶⁵

Disposition: Unauthorized Attachments

The Commission believes that, as we adopt these regulations in the first instance, the handling of unauthorized attachments will be addressed privately through contracts entered by pole owners and attachers and, where needed, by the adjudication of unauthorized attachment disputes filed with the Commission based upon the existing FCC rules. We note that the Commission typically does not favor telecommunications public utilities engaging in “self-help” to resolve disputes. As disputes come before us, the Commission recognizes that an updated approach to unauthorized attachments may become necessary, particularly as FCC orders promulgate or interpret pole attachment rules.

NY PSC Expedited Dispute Resolution

CTIA has no experience with the New York process because the New York PSC has not promulgated rules giving wireless carriers the right to attach to utility poles.¹⁶⁶ First Energy has no experience with the New York procedures.¹⁶⁷

MAW, NetSpeed and the PTA support an expedited resolution process similar to the NY PSC’s 2004 Order.¹⁶⁸ The PTA asserts that New York’s expedited process may be beneficial in allowing its members to meet deadlines and provide certainty to alert customers when broadband services may be available.¹⁶⁹

PECO contends no changes are necessary.¹⁷⁰ Verizon agrees, adding that it is not necessary to look at other states’ processes because the Commission’s own rules provide sufficient flexibility.¹⁷¹

Disposition: NY PSC Expedited Dispute Resolution

As shared above, while the Commission does not presently adopt a form of expedited dispute resolution, we are aware of the support for a process that resembles New York’s. This is an avenue the Commission may explore at a later time. Nevertheless, we note that parties to a pole attachment dispute will have access to the Commission’s mediation process outlined at 52 Pa. Code §§ 69.391–69.396.

¹⁶² PECO at 14. PECO references the April 2011 Order which permits an unauthorized attachment fee of five times the current annual rental fee per pole if the pole occupant does not have a permit and the violation is self-reported or discovered through a joint inspection, with an additional sanction of \$100 per pole if the violation is found by the pole owner in an inspection in which the pole occupant declines to participate. PECO at 13-14.

¹⁶³ PTA at 3.

¹⁶⁴ PPL at 4.

¹⁶⁵ Verizon at 16.

¹⁶⁶ CTIA at 7.

¹⁶⁷ First Energy at 12.

¹⁶⁸ MAW at 3; NetSpeed at 3.

¹⁶⁹ PTA at 3.

¹⁷⁰ PECO at 14.

¹⁷¹ Verizon at 16.

IRRC’S Remaining Comments

IRRC reminds the Commission that a quantification of the potential fiscal impact of a proposed rulemaking is required and requests that the RAF attached to the final-form rulemaking identify the number of pole attachment adjudications it expects, the costs associated with adjudication for both parties to a dispute, and the costs to adjudicate a dispute for the Commission. IRRC seeks additional information related to how this rulemaking compares to other states that have exercised reverse preemption under TA96. Finally, IRRC asks the Commission to identify the type and number of small businesses that will be affected in the RAF.

The Commission will attempt to satisfy IRRC’s request to quantify the fiscal impact of asserting jurisdiction over pole attachment and the number of adjudications the Commission expects, but believes this will be difficult to answer with accuracy until the regulation is finalized and the Commission begins making formal complaint proceedings and mediation available to the regulated community. Moreover, the Commission notes that parties such as DQE Communications urged the Commission to act, in part, because the costs to litigate and secure resolution to a conflict at the FCC required DC-based local counsel with results that were often outdated. This process was apparently devoid of the mediation option this Commission provides here, involved considerable expense for outdated results from counsel which, as has been noted, can be daunting. The parties who supported the assertion of jurisdiction based on this cost-benefit analysis, however, failed to submit any detailed cost information in the record sufficient to quantify the anticipated savings. The Commission will respond more fully to how other states have exercised reverse preemption under TA96 as well as how its rulemaking will affect small businesses when it submits its RAF.

Conclusion

This order sets forth final-form regulations regarding the Commission claiming jurisdiction over pole attachments from the FCC pursuant to 47 U.S.C. § 224. This order addresses physical infrastructure relied upon to deliver broadband services to end-user customers across the Commonwealth. Our decision allows the Commission to lend its expertise and adjudicatory resources, as well as provides a local forum, for disputes between pole owners and attaching entities to be resolved.

The Commission will implement the FCC’s regulations in turn-key fashion as they are in effect on the date this regulation is adopted. We assert jurisdiction over all utilities and facilities regulated by the Pennsylvania Public Utility Code but will not infringe on express federal exemptions regarding which entities come under our pole attachment regulations. Our final-form regulations include a mechanism to provide for the automatic adoption of future changes to the FCC’s pole attachment complaint procedure regulations at 47 CFR Chapter I, Subchapter A, Part 1, Subpart J.

The Commission, through the Law Bureau, which will coordinate with the Bureau of Technical Utility Services and the Office of Special Assistants, will create a Working Group to monitor, discuss, and advise the Commission on pole attachment issues both locally and federally. This Working Group will be comprised of public utilities, interest groups, and other stakeholders, including those entities exempt from the Commission’s regulation. This Working Group will be created no later than 30 days from the effective date of this FRM.

The Commission will permit parties to pole attachment disputes to avail themselves of our formal complaint and mediation processes, as well as the abbreviated dispute resolution with the FCC rules controlling only if the Commission’s rules are silent.

Accordingly, under sections 313, 314, 501, 701, 1301, and 1501 of the Public Utility Code (66 Pa.C.S. §§ 313, 314, 501, 701, 1301, and 1501); sections 201 and 202 of the act of July 31, 1968 (P.L. 769 No. 240) (45 P.S. §§ 1201 and 1202) and the regulations promulgated thereunder at 1 Pa. Code §§ 7.1, 7.2 and 7.5; section 204(b) of the Commonwealth Attorneys Act (71 P.S. § 732.204(b)); section 745.5 of the Regulatory Review Act (71 P.S. § 745.5); and section 612 of The Administrative Code of 1929 (71 P.S. § 232), and the regulations promulgated thereunder at 4 Pa. Code §§ 7.231—7.234, we seek to finalize the regulations set forth in Annex A, attached hereto; *Therefore,*

It Is Ordered That:

1. The Commission hereby adopts the revised final regulations set forth in Annex A.
2. The Law Bureau shall submit this Order and Annex A for review by the Legislative Standing Committees, and for review and approval by the Independent Regulatory Review Commission.
3. The Law Bureau shall submit this Order and Annex A to the Office of Attorney General for review as to form and legality and to the Governor’s Budget Office for review of fiscal impact.
4. The Law Bureau shall deposit this Order and Annex A with the Legislative Reference Bureau to be published in the *Pennsylvania Bulletin*.
5. The final regulations embodied in Annex A shall become effective upon publication in the *Pennsylvania Bulletin*.
6. The Law Bureau, in coordination with the Bureau of Technical Utility Services and the Office of Special Assistants, shall establish a stakeholder working group within 30 days of the effective date of Chapter 77.
7. Active cases transferred from the FCC pursuant to 47 CFR § 1.1405(d) will be decided by the Commission within the time prescribed by Chapter 77; the time of filing of the complaint will be measured from the date of receipt of the transfer by the Public Utility Commission.
8. The Law Bureau shall annually report its findings regarding issues developed in the stakeholder working group along with any recommended Commission action as appropriate.
9. The Secretary shall serve a copy of this Order and Annex A upon all jurisdictional fixed utility service providers, the Pennsylvania Telephone Association, the Broadband Cable Association of Pennsylvania, the Energy Association of Pennsylvania, The Pennsylvania Wireless Association, all jurisdictional Competitive Access Providers, the Office of Consumer Advocate, the Office of Small Business Advocate, the Commission’s Bureau of Investigation and Enforcement, and all other parties that filed comments at Docket No. L-2018-3002672, Assumption of Commission Jurisdiction Over Pole Attachments from the Federal Communications Commission.
10. A copy of this Order and Annex A shall be posted on the Commission’s website at the Electricity and Telecommunications web pages.
11. The contact persons for this Final Rulemaking are Colin W. Scott, Assistant Counsel, (717) 787-5959 and

Shaun A. Sparks, Deputy Chief Counsel, (717) 787-5000. Alternate formats of this document are available to persons with disabilities and may be obtained by contacting Laura Griffin, Regulatory Review Assistant, Law Bureau, (717) 772-4597.

ROSEMARY CHIAVETTA,
Secretary

(*Editor’s Note:* See 49 Pa.B. 7256 (December 7, 2019) for IRRC’s approval order.)

Fiscal Note: Fiscal Note 57-323 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 52. PUBLIC UTILITIES

PART I. PUBLIC UTILITY COMMISSION

Subpart C. FIXED SERVICE UTILITIES

CHAPTER 77. POLE ATTACHMENTS

§ 77.1. Statement of purpose and preemption.

This chapter exercises reverse preemption of the jurisdiction of the Federal Communications Commission over pole attachments under section 224(c) of the pole attachments act (47 U.S.C. § 224(c)) to improve the ability of persons and entities to utilize pole attachments within this Commonwealth and subject to regulation under 47 U.S.C. § 224 and the regulations promulgated thereunder at 47 CFR Chapter I, Subchapter A, Part 1, Subpart J (relating to pole attachment complaint procedures).

§ 77.2. Applicability.

(a) This chapter applies to all utility poles, ducts, conduits and rights-of-way under this Commission’s jurisdiction and subject to 47 U.S.C. § 224 and 47 CFR Chapter I, Subchapter A, Part 1, Subpart J (relating to pole attachment complaint procedures) as those regulations may be amended, but excluding any person or entity expressly exempted by 47 U.S.C. § 224(a)(1) and 47 CFR 1.1402(a) (relating to definitions).

(b) For the purposes of this chapter, the Commission will apply the definition of “pole attachments” as codified in section 224(a)(4) of the pole attachments act (47 U.S.C. § 224(a)(4)), the definition of “utility” as codified in 47 U.S.C. § 224(a)(1), and the definition of “telecommunications carrier” as codified in 47 CFR 1.1402(h).

§ 77.3. Commission oversight.

(a) This chapter establishes the Commission’s regulatory authority over the rates, terms and conditions of access to and use of utility poles, ducts, conduits and rights-of-way to the full extent of this Commission’s jurisdiction and authority and as provided for in 47 U.S.C. § 224 for pole attachments but excluding any person or entity expressly exempted by 47 U.S.C. § 224(a)(1) and 47 CFR 1.1402(a) (relating to definitions) as of 60 days after the effective date of this chapter.

(b) The Commission has the authority to consider the interests of the subscribers of the services offered by means of pole attachments, as well as the interests of the consumers of the utility services.

§ 77.4. Adoption of Federal Communications Commission regulations.

(a) This chapter adopts the rates, terms and conditions of access to and use of utility poles, ducts, conduits and rights-of-way to the full extent provided for in 47 U.S.C. § 224 and 47 CFR Chapter I, Subchapter A, Part 1,

Subpart J (relating to pole attachment complaint procedures), inclusive of future changes as those regulations may be amended.

(b) For an amendment or modification under paragraph (a) that takes effect in Pennsylvania by operation of law under paragraph (c) or (e), the Commission will publish notice of the effective date in Pennsylvania in the *Pennsylvania Bulletin*.

(c) Notwithstanding paragraph (b), an amendment or modification under paragraph (a) shall take effect 60 days after the effective date of the Federal change unless the Commission publishes a notice in the *Pennsylvania Bulletin* stating that the amendment or modification may not take effect.

(d) A Commission notice issued under paragraph (c) will provide an opportunity for public comment on the Federal change. Comments may be filed with the Commission no later than 15 days following publication of the Commission notice in the *Pennsylvania Bulletin*.

(e) An amendment or modification under paragraph (a) that is the subject of a Commission notice pursuant to paragraph (c) shall become effective 60 days after publication of the notice in the *Pennsylvania Bulletin* unless the Commission determines otherwise for good cause shown.

§ 77.5. Resolution of disputes.

(a) Persons and entities subject to this chapter may utilize the mediation, formal complaint and adjudicative procedures under 52 Pa. Code Chapters 1, 3 and 5 (relating to rules of administrative practice and procedure; special provisions; and formal proceedings) of the Commission's regulations to resolve disputes or terminate controversies.

(b) Parties before the Commission under this chapter shall employ the procedural requirements in 52 Pa. Code Chapters 1, 3 and 5, Title 66 Pa.C.S. (relating to the public utility code), and related Commission precedent except where silent, in which case 47 U.S.C. § 224 or 47 CFR Chapter I, Subchapter A, Part 1, Subpart J (relating to pole attachment complaint procedures) will control.

(c) When exercising authority under this chapter the Commission will consider Federal Communications Commission orders promulgating and interpreting Federal pole attachment rules and Federal court decisions reviewing those rules and interpretations as persuasive authority in construing the provisions of 47 U.S.C. § 224 and 47 CFR Chapter I, Subchapter A, Part 1, Subpart J.

(d) The Commission will take final action consisting of an order that will issue within 180 days of the filing of a formal complaint initiating a pole attachment dispute as required by 47 U.S.C. § 224(c)(3)(b)(i) except for good cause shown. If the Commission determines that a final action will not issue within 180 days, the Commission will issue a final action consisting of an order no later than 270 days from the filing of the formal complaint as permitted by 47 U.S.C. § 224(c)(3)(b)(ii).

§ 77.6. Voluntarily negotiated agreements.

(a) This chapter does not prevent or limit the ability of a pole owner and an attaching entity to enter into a voluntarily negotiated written agreement regarding the rates, terms and conditions for pole attachment access.

(b) Voluntarily negotiated agreements are preferred and encouraged by the Commission.

(c) This chapter does not supersede or modify any lawful rate, term or condition of a voluntarily negotiated written agreement.

§ 77.7. Working Group.

(a) *Purpose.* The Commission will establish a pole attachment working group to ensure that the Commission remains apprised of industry concerns, that Federal amendments are properly vetted before becoming effective in this Commonwealth and that dispute resolution processes are efficient and effective.

(b) *Creation of Working Group.* The Commission's Law Bureau will establish the Working Group, in coordination with the Commission's Bureau of Technical Utility Services and the Office of Special Assistants, no later than 30 days from the effective date of this chapter.

(c) *Membership.* The Commission will invite persons and entities that it determines to be in the public interest to participate in the Working Group including, but not limited to, the following:

- (1) Commission staff from the Law Bureau, technical utility services, and the office of special assistants.
- (2) Pole owners.
- (3) Pole attachers.
- (4) The statutory advocates.
- (5) Interest groups, including the Pennsylvania Telephone Association, the Broadband Cable Association of Pennsylvania, and the Pennsylvania Office of Broadband Initiatives or their respective successor persons or entities.

(d) *Meeting Frequency.* The Working Group shall convene at least once annually but may convene at other times, as the Working Group deems necessary or at the direction of the Commission.

(e) *Duties.* The Working Group shall:

- (1) Monitor and advise the Commission on Federal and State pole attachment issues, including advising the Commission on whether to adopt any future change to the FCC's pole attachment rules.
- (2) Provide an ongoing forum for stakeholders, pole owners and pole attachers to discuss issues and ideas regarding effective pole attachment regulations.
- (3) Evaluate the effectiveness and efficiency of Commission complaint, mediation and dispute resolution processes.

(f) *Reporting.* The Law Bureau will annually report its findings on issues developed in the pole attachment Working Group along with any recommended Commission action as appropriate.

Statement of Chairperson Gladys Brown Dutrieuille

I support asserting Commission jurisdiction over pole attachment disputes when doing so is consistent with federal law. With today's action, this Commission gains the authority to resolve disputes about pole attachments, meaning that our utilities and telecommunication providers will not have to resolve their disputes at the Federal Communications Commission (FCC). I believe that our Commission can streamline the dispute resolution process. Having an accessible and efficient dispute resolution

process in place is important because pole attachment disputes have long been considered a major barrier to broadband deployment.¹⁷²

Today's action also allows non-jurisdictional entities without a Pennsylvania certificate of public convenience to have disputes decided by the Commission. In the absence of a cost recovery mechanism to cover the Commission's administrative costs incurred during the dispute resolution process, other jurisdictional entities will likely pay more. The Public Utility Commission funds operations by assessing our regulated utilities or, in the case of non-regulated entities such as competitive service providers, charging fees to cover at least a portion of our administrative costs.¹⁷³

The ensuing cost-shifting is also disturbing given that current federal rules allow a \$295 fee for pole attachment disputes. The Parties addressed this issue on the record, in fact, the Central Bradford Authority even proposed a larger \$500 fee.¹⁷⁴ It is anomalous and inconsistent to not address costs in a final decision that claims to adopt all federal regulations on the one hand yet, on the other hand, does not consider the application fee already allowed by the FCC rules.

I support mirroring the \$295 enforcement pole attachment fee currently in the FCC rules.¹⁷⁵ Costs incurred by this Commission for providing the public good of a forum for dispute resolution should be paid by all participating entities. Because we are not certain how many entities will utilize our dispute resolution process or how complex the issues will be, setting the fee at the current federal level until we have better data would be a reasonable way to address concerns expressed in the comments. It would be more efficient to tackle the cost issue today instead of putting it off to a later date. It will have to be addressed at some point in the future since the Commission is constrained to fund its operations and must do so in an equitable manner.

For these reasons, I wish to be recorded as voting no on the failure to address a pole attachment fee but yes on the final regulation.

Statement of Vice Chairperson David W. Sweet

Thirteen months ago we opened a notice of proposed rulemaking to consider reverse preemption of jurisdiction over pole attachment disputes by adopting the Federal Communications Commission (FCC) substantive rules and using our procedural rules except where they are silent on an issue. The objective was to make available our presumably more efficient, lower cost dispute resolution process to facilitate broadband deployment.

I supported moving expeditiously because, where our jurisdiction allows, I have consistently engaged in Commission initiatives to facilitate deployment, especially in rural areas lacking modern speeds. However, I also made clear the need to address the impact of this undertaking on our resources, which for telecommunications are al-

ready strained. I questioned "the additional caseload and demands on this Commission's resources" assuming federal jurisdiction may impose, particularly "when the impact on our resources had not been quantified" and we had not "identified new revenue sources. . .that will provide this Commission the revenues necessary to address these new responsibilities." I concluded "[t]hese questions need to be fully explored and answered in this process."¹⁷⁶

I am compelled to dissent from today's action because these concerns are not addressed, and the impact on our resources must be explored before we assume this substantial federal obligation not after.

I. Fiscal Analysis

Our action today entirely avoids the fundamental issue of the fiscal impact on our own agency.

In the regulatory analysis that accompanied our proposed rulemaking, we identified that approximately 1,000 entities could avail themselves of our resources. Some of those entities are public utilities under the Public Utility Code and, as such, contribute to the costs of operations utilizing our resources through the Section 510 assessment process. However, some are subject only to the regulatory jurisdiction of the FCC. These include Internet Service Providers, various wireless entities, and cable television systems, many of which qualify as telecommunications carriers under relevant federal regulations and may avail themselves of the FCC's existing process. These entities will benefit from use of our resources but will not contribute to those resources. That burden will fall unevenly, and discriminatorily, only on providers, and their customers, defined as public utilities under the Public Utility Code.

The regulatory analysis form also requested an estimate of the costs and/or savings to state government associated with implementation of this regulation. We responded that "[r]ailroads, cooperatives, federal entities, and entities owned by the state are not subject to pole attachment regulation [thus those entities should] not experience any compliance costs." Assumption of this federal obligation most impacts this Commission, yet on this point our analysis and proposed final regulations are silent.

There are other states that have reverse preempted pole attachment jurisdiction, but this submission fails to analyze those commissions' resources or means of funding. The New York dispute process for pole attachments is mentioned, but not the fact that New York proceeded cautiously, taking over 20 years to fully expand its process to include wireless carriers.¹⁷⁷ And we rely on our adoption of the federal Pipeline and Hazardous Materials Safety Administration regulations to support this proposal, but ignore the fact that annually the Commission receives millions of dollars in federal funding from the U.S. Department of Transportation in exchange for our assuming that obligation. We could and should do better.

II. Stakeholder Comments

Most commenting parties support use of the Commission's local dispute resolution resources as a more efficient, lower cost forum than the FCC. Despite four

¹⁷² See e.g., In re: National Broadband Plan, Docket No. 09-51 (March 16, 2010) and, more recently, In re: Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84 (August 3, 2018); In re: Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79 (August 3, 2018).

¹⁷³ 66 Pa.C.S. §§ 317 and 510(b).

¹⁷⁴ See, Comments of BCAP at p. 4 (October 29, 2018) (stating that the Commission, if it does act, should adopt the FCC rules wholesale); and Comments of Central Bradford Progress Authority and Rural Net at p. 5 (October 29, 2019) (While the exact cost to the Commission is unknown, it would be appropriate to impose a modest fee upon complainants. For example, a flat filing fee (say, \$500.00), plus an additional fee for each implicated pole for which a pole attachment dispute exists (e.g. \$1.00 per pole), may be appropriate.)

¹⁷⁵ 47 CFR § 1.1106—Schedule of charges for a pole attachment complaint. The pole attachment complaint fee was increased from \$250 to \$295 by notice dated August 3, 2018 and effective September 4, 2018. See 83 FR 38049.

¹⁷⁶ July 12, 2019 Statement at this docket. Any suggestion that addressing this issue now raises it for the first time in a final rulemaking ignores the fact that many issues not in our proposed regulations directly were raised in Commissioner statements and subject to comments, like the impact on our resources and the working group.

¹⁷⁷ CTIA Comments at 7 (the New York commission declined to promulgate rules that reflect the wireless carriers' right to attach to utility poles); But cf. Petition of CTIA—The Wireless Association to Initiate a Proceeding to Update and Clarify Wireless Pole Attachment Protections, Case 16-M-0330 (Order Issued March 14, 2019) (taking steps to provide wireless providers access to utility pole infrastructure).

decades' experience at the FCC, however, few provided information about past experiences to aide in our review. While this Commission regularly uses past experience to inform predictive judgment, these parties instead profess their inability to predict the future.¹⁷⁸

Some, however, did acknowledge that an even-handed approach to addressing this concern now is both feasible and appropriate. MAW Communications recognizes that since "both the pole owners and attachers have a responsibility to [their] customers to resolve disputes in a mutually beneficial [manner] that ensures accelerated deployment of necessary infrastructure to service Pennsylvanians[,] the expenses [should be] shared equally by both disputing parties," allowing for a normalized expense level to be determined annually by the Commission.¹⁷⁹

Central Bradford Progress Authority states that it is "widely understood" that resolution of pole attachment disputes at the FCC requires substantial time and money, thus the known level of disputes may be depressed. Given the shared objective of expanding broadband deployment while also recognizing the impact on our resources, however, Central Bradford concludes "it would be appropriate to impose a modest fee" on parties, such as a flat filing fee of \$500 plus a \$1.00 for each affected, sufficing initially if even with "a short-term potential for incomplete dollar-for-dollar cost coverage by the Commission."¹⁸⁰

Other parties are less sanguine. Crown Castle comments that the FCC draws on forty years "of experience dealing with the complexities surrounding pole attachments[,] which] continue[] to change at a rapid pace. . . .Adjudication [at the Commission] will require the Commission to take on and train additional staff on an ongoing basis to manage the increased caseload and ensure disputes are resolved in a timely fashion."¹⁸¹ Similarly, the Broadband Cable Association of Pennsylvania comments that the Commission's caseload can increase dramatically.¹⁸²

Commentators raise other issues that substantiate my concerns. The FirstEnergy Companies comment that some pole attachment applications "have recently increased dramatically," and "the sheer volume of new requests" led to an affiliated electric utility's having to outsource part of the application review process. Because costs related to the pole attachment process are passed on to the regulated electric utility's electric customers, inad-

¹⁷⁸ For example, commentators could have provided information on their number of disputed attachment applications, the extent of their and the FCC resources implicated including time and staff, the ensuing resolution, and the fiscal support they provide at the FCC, including regulatory or other fees paid to the FCC that contribute to that agency's costs of operations.

¹⁷⁹ MAW Communications Comments at 4.
¹⁸⁰ Central Bradford Comments at 5. The suggested \$500/\$1 filing fee finds analogous support in the FCC's recent determination that a nonrecurring \$500 application fee with up to an additional nonrecurring \$1,000 fee for a new pole attachment (plus additional annual recurring fees) is reasonable and not likely to run afoul of Sections 253 and 332 of the Telecommunications Act of 1996 prohibiting barriers to entry. See *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Dockets 17-79, 17-85 (Declaratory Ruling and Third Report and Order released September 27, 2018) at ¶¶ 11, 78–80.

¹⁸¹ Crown Castle Comments at 4, 6.

¹⁸² BCAP Comments at 3 ("assumption of jurisdiction would cause significant administrative upheaval and substantially increase the demands on the Commission's resources"). See also CenturyLink Comments at 5 ("Commissioner [Sweet] raises a very fair question regarding Commission resources."); Duquesne Light Company Comments at 6 (while impossible to estimate with certainty how many parties will access the Commission's process, "[w]ith the opportunity to file a formal complaint before the Commission utilizing in-house counsel, more companies may be inclined to seek redress."); DQE Communications Comments at 3-4 (while current FCC process is complex and costly, with access to the PUC's process, the Company "would certainly avail itself of the process if necessary."); Pennsylvania Telephone Association Comments at 3 (While difficult to forecast the number of disputes, "the Companies recognize that there exists the potential for an increased burden on PUC personnel if it assumes jurisdiction[.]"); PECO Comments at 16 ("PECO understands [Commissioner Sweet's] concerns about regulatory burdens.").

equate cost recovery "would force electric customers to subsidize telecommunication providers."¹⁸³ Duquesne Light Company, as a regulated electric distribution company and pole owner, questioned the Commission's entry into dispute resolution when it may have jurisdiction over only one party to the fray and suggested that distinction be considered in its proposed regulations.¹⁸⁴ And though not addressing *existing* resources, Verizon offers that the Commission "can monitor its caseload" but not act now because the Commission's caseload for retail, wireline-related issues has declined, and "there may not be a material *net* increase in caseload[.]"¹⁸⁵

On the other side of this challenge, CTIA—the Wireless Association, avers that a fact-based response would be speculation, and we must satisfy ourselves with collecting our regulatory costs of operations from our regulated public utilities.¹⁸⁶ Eager to access the Commission's dispute resolution process, CTIA asserts that we should not "get[] into the minutiae of jurisdiction and procedure,"¹⁸⁷ and welcomes any process, even New York's. This is despite, as CTIA admits, "[l]acking access to utility poles in New York, CTIA's members have no experience with the New York process[.]" the "effectiveness of which in resolving issues pertaining to wireless attachments is entirely unknown."¹⁸⁸

III. Fiscal Concerns

A. Subsidization by Existing Customers of Regulated Public Utilities

The FirstEnergy Companies' concern that without adequate cost recovery their customers subsidize telecommunications carriers and customers is the same discriminatory impact we place on those customers if we open our process to nonjurisdictional entities without receiving any contribution to our costs of operations. In the regulated ratemaking process, utilities pay our Section 510 assessment, and those regulatory costs are recovered from their customers as a legitimate expense recovered through the regulated utilities' customers' rates. Cable companies and wireless carriers currently contribute to the FCC's fiscal resources through regulatory fees.¹⁸⁹ In addition, the FCC imposes equally on all affected entities an application processing fee for pole attachment complaints.¹⁹⁰ Assumption of pole attachment jurisdiction does not have to come without any financial consideration on nonjurisdictional entities. While we cannot assess nonjurisdictional entities, we can adopt the FCC's regulation addressing its pole attachment fee structure. Otherwise we assume this jurisdiction at the expense of our regulated service customers.

CTIA analogizes the invocation of our dispute resolution process to that of a "consumer complainant" that does not pay expenses generated by its complaint. However, that analogy bears no weight. These are not "consumer complaints." Pole attachments involve commercial negotiations between large sophisticated entities. While disputes may be generically referred to as "complaints," the FCC itself considers them "not ordinary customer complaints" but rather applications to be processed and

¹⁸³ FirstEnergy Companies' Replies to Comments at 10.

¹⁸⁴ Duquesne Light Company Comments at 3.

¹⁸⁵ Verizon Comments at 17 (emphasis added).

¹⁸⁶ CTIA Comments at 6, 9.

¹⁸⁷ CTIA Replies to Comments at 7-8.

¹⁸⁸ CTIA Comments at 7.

¹⁸⁹ See, e.g., <https://docs.fcc.gov/public/attachments/DOC-353886A1.pdf> (regulatory fees applicable to cable television systems) and <https://docs.fcc.gov/public/attachments/DOC-353888A1.pdf> (regulatory fees applicable to commercial wireless services).

¹⁹⁰ <https://docs.fcc.gov/public/attachments/DOC-353915A1.pdf> (FCC charges an "application processing fee" for complaints involving pole attachments and publishing an application fee of \$295 per complaint); <https://www.law.cornell.edu/cfr/text/47/1.1106> (application processing fee for pole attachment complaints).

enforced.¹⁹¹ Explosive changes in technology have caused the number of entities that provide “telecommunications” services today to expand well beyond the ability of our regulatory resources to keep pace. Through the ratemaking process customers of traditional utilities compensate the Commission for access to our process. Wireless and cable companies and their customers neither currently do, nor will they in the future under the final rulemaking, contribute to the costs of our operations.¹⁹²

B. Current Restraints on Telecommunications Resources

A concern as important as the proper allocation and recovery of our regulatory costs of operations is consideration of our existing telecommunications resources. Our regulatory assessments are sized generally on the basis of our operations devoted to our regulated utilities.¹⁹³ As Verizon noted, our role over wireline services is shrinking. However, our assessments from regulated telecommunications services are also shrinking.¹⁹⁴ Along with fewer financial resources from which to assume this obligation, we also have fewer staff. As traditionally regulated wireline services have decreased, so, too, has the Commission’s telecommunications staff, which over time has seen wireline telecommunications staff reassigned and vacancies unfilled. Also because we have no jurisdiction over wireless, cable and other entities that provide “telecommunications services” under federal but not state law, and we have only limited jurisdiction over broadband, we have no staff assigned to these nonwireline issues. Thus any increase in telecommunications caseload negatively affects our resources.

In transferring this obligation to the state level, we hold nonjurisdictional entities entirely unaccountable while allowing the burden of our assumption of the FCC’s pole attachment dispute process to fall squarely, unreasonably, and discriminatorily on the customers of traditionally regulated public utilities. This is neither appropriate nor necessary.

IV. Timely Remedy to Address Fiscal Impact

There is no reason to ignore this issue before we adopt final regulations. The majority vote today implements a discrete, self-contained chapter of state regulations on an entirely new subject. This is precisely the time to address the impact on our resources. The issue was raised and vetted. Resolution at some indeterminate time in some indeterminate manner in the future, if at all, insufficiently addresses the impact on our resources, which will be immediate.¹⁹⁵

Use of a fee-based application is well supported in the federal jurisdictional practice that we are reverse preempting today. All entities, including those nonjurisdictional to our process, are currently required to support the operations of the FCC through regulatory fees, a

fiscal resource unavailable to the Commission as non-regulated entities in Pennsylvania, as well as application filing fees, a fiscal resource that could be made available to the Commission in this rulemaking.

A timely remedy could be accomplished in this rulemaking through minimal modification of existing language in Section 77.5 of our proposed final regulations in one of either two ways: (1) Adopt the FCC regulation at 47 C.F.R. § 1.1106, which imposes an application processing fee on pole attachment “complaints”; or (2) Require the filing of an application for pole attachment permit accompanied by an application fee with the Secretary’s Bureau in order to invoke our resources.

A. Modification of Section 77.5(b) of the Proposed Final Regulations

Adoption of the FCC’s regulation imposing an application processing fee through adoption of Section 1.1106 is entirely consistent with the concept we adopt today: reverse preemption of an existing federal obligation through adoption of federal pole attachment regulations, including FCC process rules where ours are silent. While our procedural rules are silent on the subject of pole attachment dispute filing fees, the FCC’s rules are not and subject all entities to a \$295 “application processing fee.” No logical or legal impediment precludes our adopting this existing FCC regulation governing pole attachment disputes to recover some contribution towards the cost of our operations. In fact, doing so ensures some measure of fiscal responsibility in our actions today.

This could be readily accomplished as follows:

Section 77.5 * * *

(b) Parties before the Commission under this chapter shall employ the procedural requirements in 52 PA. Code Chapters 1, 3 and 5, Title 66 PA.C.S. (relating to the public utility code), and related Commission precedent except where silent, in which case 47 U.S.C. § 224 or 47 CFR Chapter I, Subchapter A, Part 1, Subpart J, OR SUBPART G, SECTION 1.1106, REGARDING THE APPLICATION PROCESSING FEE APPLICABLE TO POLE ATTACHMENT COMPLAINTS, will control.¹⁹⁶

B. Modification of Section 77.5(a) of the Proposed Final Regulations

Alternatively, an application enforcement fee is independently supported because the pole attachment process is initiated by an attacher’s “filing an application with the pole owner” seeking permission to attach.¹⁹⁷ Upon dispute, it is the application that is subject to dispute resolution. It is entirely consistent with existing state law and the federal practice we are assuming to require the filing of an application for pole attachment permit with our Secretary’s Bureau and the imposition of a filing fee under Sections 317 and 501 of the Public Utility Code.

This, too, could be readily accomplished as follows:

Section 77.5

(a) UPON APPLICATION FILED WITH THE SECRETARY’S BUREAU, persons and entities subject to this Chapter may utilize the mediation, formal complaint and adjudicative procedures under 52 Pa. Code

¹⁹¹ See <https://www.fcc.gov/licensing-databases/fees> (FCC fees applicable to pole attachment disputes “not ordinary complaints”); note 15, supra.

¹⁹² Unlike jurisdictional service providers that fund our operations through fees that are passed on to their customers, nothing in the pole attachment fee that attachers pay to owners contributes to our resources.

¹⁹³ In other instances involving our assumption of work not covered through our traditional Section 510 regulatory assessments, additional financial resources have been assigned to contribute to the recovery of our costs of operations. See, e.g., Act 50 of 2017 (Pennsylvania Underground Utility Line Protection Act, also known as “One Call”); Act 127 of 2011 (levy on pipeline operators under the Gas and Hazardous Liquids Pipelines Act to fund the Commission’s establishment and ongoing administration of a pipeline operator registry and enforcement of pipeline safety laws).

¹⁹⁴ In the general utility assessment order we adopt today, reported revenues from regulated telecommunications providers have decreased by over \$40 million compared to last year’s assessment, resulting in a reduction in assessment revenues we will receive from these utilities, whereas revenues reported from other utilities has increased, which in turn will produce an increased assessment. See General Assessment Upon Public Utilities, BP8-3012136.

¹⁹⁵ The FirstEnergy Companies state already have a pending FCC action that would likely come before the Commission. FirstEnergy Comments at 11.

¹⁹⁶ The argument exists that adoption of a filing fee to process a disputed pole attachment application is already implicit in our action since our regulations are silent on the subject.

¹⁹⁷ Comments of Velocity.Net Communications, Inc. at 3; See also In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Dockets 17-84, 17-79 (Third Report and Order and Declaratory Ruling released August 3, 2018) at ¶¶ 7, 64.

Chapters 1, 3 and 5 (relating to rules of administrative practice and procedure; special provisions; and formal proceedings) of the Commission's regulations to resolve disputes or terminate controversies. IF NOT RESOLVED BY MEDIATION, THE COMMISSION'S RESOLUTION OF THE MATTER WILL BE SET FORTH IN AN ADJUDICATION ORDER THAT GRANTS, MODIFIES OR DENIES THE POLE ATTACHMENT PERMIT TERMS AND CONDITIONS REQUESTED OR DISPUTED.

V. Conclusion

Having wholly avoided a fiscal analysis while options are readily available to mitigate the impact on our resources by adopting the FCC's regulatory fee-based process while we assume a substantial, new regulatory responsibility from the FCC is both fiscally unsound and entirely unnecessary. In adopting the FCC's pole attachment regulations, we should also adopt the FCC's regulation for an application fee through either of the two means identified above.¹⁹⁸ This would ensure that the interests of all stakeholders, including those of the Commission specifically and the Commonwealth generally, are properly considered and served.

I am not satisfied that the inchoate regulatory action taken today satisfies the fiscal impact analysis required under the regulatory review process. Assumption of jurisdiction without addressing the impact on our resources is in neither the immediate nor the long-term interests of the Commonwealth.

For these reasons, I respectfully dissent.

Statement of Commissioner Andrew G. Place Concurring in Part and Dissenting in Part

Before us is a recommendation for the adoption of a Final Rulemaking Order and final form regulations that will enable this Commission to assert jurisdiction over pole attachment matters in Pennsylvania through the adoption of germane Federal Communications Commission (FCC) rules. I am cognizant that the assertion of this jurisdiction will entail the timely accomplishment of new tasks to enforce this federal regulatory regime, however this assertion of jurisdiction will also provide an available adjudication forum for the timely resolution of pole attachment disputes. The resolution of such disputes through the enforcement of applicable federal rules and the use of the Commission's administrative adjudication procedures will facilitate the continuous deployment of wireline and wireless telecommunications and communications network facilities throughout the Commonwealth, thus increasing the availability of broadband access services for the citizens of Pennsylvania. Applicable statutes make such a deployment a joint responsibility between this Commission and the FCC.¹⁹⁹ For these reasons, I am supporting the assumption of this Commission's jurisdiction over pole attachments.

It is self-evident that the adjudications of pole attachment issues and complaints are inherently complex.²⁰⁰ The recommended adoption of the FCC rules provides a

¹⁹⁸ Other options, though less attractive from the adoption process approved today, are to apply the suggestion of Central Bradford or refer the level of the fee immediately to the proposed Working Group for consideration, report, and Commission action.

¹⁹⁹ See, e.g., 66 Pa.C.S. §§ 3011(1) ("... a balance between mandated deployment and market-driven deployment of broadband facilities and advanced services throughout this Commonwealth. . ."); 47 U.S.C. § 1302(a) ("The Commission [FCC] and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans. . .").

²⁰⁰ See, e.g., In re MAW Communications, Inc., *Complainant v. PPL Electric Utilities Corporation, Defendant*, EB Docket No. 19-29, File No. EB-19-MD-001 (FCC Enforcement Bur., Rel. Aug. 12, 2019), slip op. DA 19-771.

basic framework for asserting Commission jurisdiction. However, there is a pending federal appeal involving the FCC's 2018 rules on one-touch make-ready activities regarding pole attachments which engenders a certain degree of uncertainty.²⁰¹ The adoption of the present Final Rulemaking Order and final form regulations cannot possibly account for all future contingencies involving the Commission's enforcement of the FCC's pole attachment rules and related dispute resolution or adjudication. For these various reasons, I would have preferred a constructive dialogue engagement between our Staff and interested stakeholders after the receipt of the formal initial and reply comments to the Commission's proposed rules and prior to the submission of the recommendation that is before us today. It is my sincere hope that the function of the contemplated Working Group will provide the future opportunity for this constructive dialogue as the Commission proceeds with the assertion of its jurisdiction and the implementation of the final form regulations on pole attachments.

I believe that the filing of pre-existing pole attachment agreements with the Commission—or the summaries of their respective essential terms, conditions, and rates—even on a protected and proprietary basis could have assisted our agency in its future tasks of asserting jurisdiction in this area and potentially discerning the existence of any discriminatory patterns.²⁰² The filing of such pre-existing pole attachment agreements could have taken place on a one-time basis.²⁰³ It is my hope that the Working Group will more comprehensively examine this issue in the near future. I note that wholesale interconnection agreements between incumbent local exchange carrier telephone companies and competitive telecommunications carriers, as well as the amendments to such agreements, are often, and publicly, submitted for this Commission's review and approval.²⁰⁴

For the above-referenced reasons, I will be concurring in part and dissenting in part in the recommended adoption of the Final Rulemaking Order and the final form regulations while supporting the overall assertion of Commission jurisdiction over pole attachments and the adoption of the corresponding FCC regulations.

Statement of Commissioner Norman J. Kennard

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Final Rulemaking Order which asserts Commission jurisdiction over pole attachments and adopts the Federal Communications Commission's (FCC) regulations over pole attachments in totality.

The Commission's action today marks a pivotal step in promoting broadband deployment throughout the Commonwealth. Asserting Commission jurisdiction over pole attachments will make our adjudicatory and enforcement processes available to expeditiously resolve disputes that arise for both pole owners and pole attachers. Just and timely resolution of these pole attachments disputes before the Commission will facilitate the installation of broadband for all the residents of the Commonwealth.

²⁰¹ Broadband Cable Association of Pennsylvania (BCAP) Comments at 2-3 (citations omitted); BCAP Reply Comments at 3-4 (citations omitted). See also Telecommunications Reports Daily, "FCC Defends Pole Attachment Order from Utilities' Challenge," August 23, 2019; Brief for Respondents, *American Electric Power Service Corp., et al. v. FCC*, (9th Cir.) (Nos. 18-72689(L), 19-70490), submitted August 22, 2019.

²⁰² ExteNet Systems, Inc. Comments at 10 (Transparency and Equity).

²⁰³ In Re: Implementation of the Telecommunications Act of 1996, Docket No. M-00960799, Order entered June 3, 1996, at 36-40, and Ordering Paragraph No. 5 at 51 (TA-96 Implementation Order) (submission and review of interconnection agreements existing before the enactment of the federal Telecommunications Act of 1996).

²⁰⁴ 47 U.S.C. § 252(e)(1); TA-96 Implementation Order at 24-34, and Ordering Paragraph No. 4 at 51.

The comments received in this matter underscore and accentuate the need for Commission jurisdiction over these pole attachment disputes. It is clear that the current system of FCC oversight of these disputes is inadequate because there is no ready or efficient means to enforce pole attachment rules. Providing a local dispute forum at the Commission will allow for prompt resolution of these matters and result in broadband expansion for of our residents, schools, and hospitals, particularly those located in more rural and remote portions of the Commonwealth.

I thank all of parties who participated in the rule-

making process by providing meaningful comments in this matter. I also commend the Commission's Law Bureau, specifically Shaun Sparks, Colin Scott, Christian McDowell, and Laura Griffin, for creating an exemplary work product. Finally, I thank all of the industry stakeholders, legislative leaders, and the Governor's Office for their continued commitment to initiatives dedicated to the expansion of broadband access across the Commonwealth.

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